BURMA LAW REPORTS

(1948) B.L.R

Containing cases determined by the

Supreme Court of the Union of

Burma and of the High Court, Burma





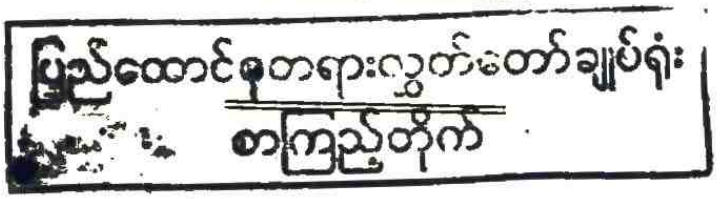
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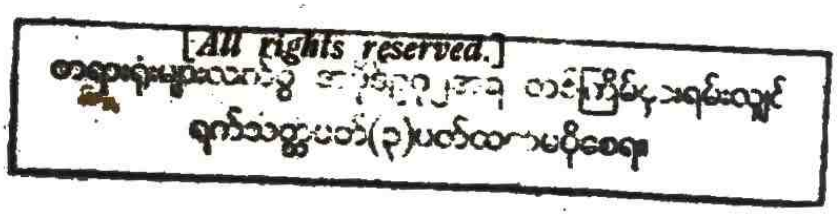
Containing cases determined by the Supreme Court of the Union of Burma and of the High Court, Burma.

Rai Bahadur P. K. BASU (*Advocate*), EDITOR.
U BA SEIN (*Advocate*), REPORTER.



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NAMES OF THE JUDGES AND LAW OFFICERS OF THE UNION.

SUPREME COURT.

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

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ERRATUM.

1. At page 373 in the first line *for the word* " Bench " the word " Court " *should be substituted.*

2. At page 425 in the fifth line of the head-note " gravity " is a misprint for " gravely."

3. At page 527 at the end of the first paragraph of the head-note " what was over " *should read* " what was taken over."

4. At page 737 in the catch words of the head-note *for the words* " Writ of *certiorari* " the words " Writ of *habeas corpus* " *should be substituted.*

5. At page 743 *for the words* " San Sein (Government-Advocate), " *read* " Ba Sein (Government Advocate)."

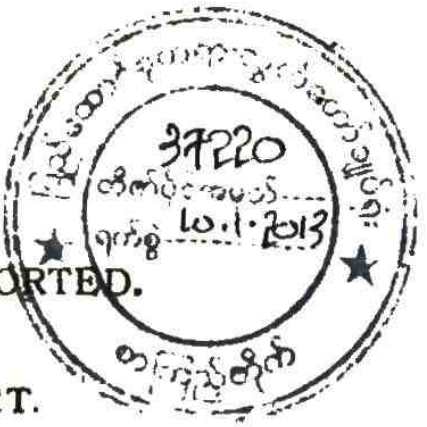


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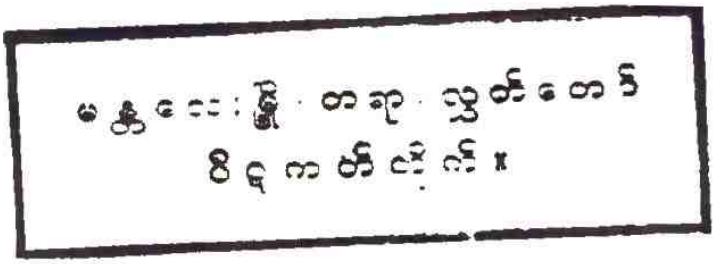


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FULL BENCH (APPELLATE CIVIL).

Before Sir Ba U, Acting Chief Justice, Mr. Justice E Maung and Mr. Justice Kyaw Myint.

MAUNG SAN BWINT AND ONE (APPELLANTS)

v.

MA THAN SEIN (RESPONDENT).*

1947

Nov. 3.

Burmese Buddhist Law—Divorce by mutual consent—One of the parties previously married—The other not previously married—Atetpa *property of the former—If divisible.*

Held by the Full Bench : That on divorce by mutual consent between a Burmese Buddhist couple, one of whom was previously married and the other had not been so married, the *atetpa* property of the party previously married, should be divided on the principle of ***nissaya*** and ***nissita*** provided that no property had been acquired by the couple after their marriage.

Ma E Nyun v. *Maung Tok Pyu*, 2 U.B.R. (1897—1901) (Civ.) 39 ; *Ma Ngwe Hnit* v. *Maung Po Hmu*, 11 L.B.R. 52, followed.

C.T.P.V. Chetty Firm v. *Ma Tha Hlaing*, I.L.R. 3 Ran. 322 ; *Maung Hme* v. *Ma Sein*, 9 L.B.R. 191 ; *N.A.V.K. Cheltyar Firm* v. *Maung Than Daing*, I.L.R. 9 Ran. 524 at p. 539 ; *West Ham Union* v. *Edmonton Union*, L.R. (1908) A.C. 6 ; *Stourbridge Union* v. *Droitwich Union*, L.R. 6 Q.B. 769, 774 ; *Ma Dun Mai* v. *Maung San Tun*, (1938) R.L.R. 229 ; *U Sin* v. *Ma Ma Lay*, (1941) R.L.R. 14, referred to.

Per E MAUNG, J.—The rule should not be extended to a divorce which is not in fact by mutual consent but which for the purposes of partition on divorce is by a legal fiction deemed to have been as if by mutual consent.

The following order of reference was made by Mr. Justice E Maung on the 10th July 1947 :

E MAUNG, J.—This appeal arises out of a suit instituted by the plaintiff-respondent for recovery of a piece of land, a house and a granary with the sites on which they stand, one bullock and a cart. Though the plaintiff-respondent indignantly disclaims all

* Civil Reference No. 6 of 1947 of the High Court of Judicature at Rangoon arising out of Civil 2nd Appeal No. 27 of 1947.

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relationship with the 1st defendant-appellant it is clear that the 1st defendant-appellant's case that at some time previous, he and the plaintiff-respondent had been husband and wife according to the Burmese Buddhist Law is fully established.

There is indisputable evidence on the record that almost immediately following the death of U Po Ye, the 1st husband of the plaintiff-respondent, she eloped with the 1st defendant-appellant and that they lived together as husband and wife for about five years treating each other and being treated by the neighbours in the village as such. There is clear evidence of reputation necessary for a valid marriage.

The 1st defendant-appellant before he eloped with the plaintiff-respondent was for several years an employee of the 1st husband U Po Ye and the plaintiff-respondent. Before the plaintiff and the defendant became husband and wife, the defendant was a bachelor. He did not bring any property to the marriage. All the property brought to the marriage was the " Atetpa " property of the plaintiff such property being inherited by her from her 1st husband.

About the end of 1944 or the beginning of 1945, the parties seemed to have disagreed for some reason or other. The 1st defendant claimed that the differences between them arose from his discovery of the fact that the wife had contracted an illicit liaison with one Maung Po Chein (D.W. 7). The wife who throughout the proceedings repudiated the allegation of marriage between herself and the 1st defendant-appellant naturally did not give her version of how the disagreement arose. But it is clear that whatever the cause of the disagreement may have been there was, in January 1945, a separation by mutual consent followed by the 1st defendant-appellant taking to himself the 2nd defendant-appellant as his wife and the respondent taking to herself Maung Tun (P.W. 5) as her husband. The separation of the parties being by mutual consent out of Court it is not material for the purposes of this appeal to determine the question whether the origin of the quarrel was the respondent entering into illicit relations with Maung Po Chein or not. The decisions of this Court in *Ma Me Hla* v. *Maung Po Thon* (1), *Ma Dun Mai* v. *Maung San Tun* (2) and *U Sin* v. *Ma Ma Lay* (3), are quite clear on the point. Still it would not be out of place for me to say

(1) I.L.R. 7 Ran. 98. (2) (1938) R.L.R. 229.
(3) (1941) R.L.R. 14.

that on materials on the record the view taken by the lower Appellate Court that the allegation of adultery with Maung Po Chein has not been satisfactorily established appears justified.

Following the separation by mutual consent which had been accepted by both the husband and the wife as affecting a dissolution of the marriage, there was what the 1st appellant claimed to be a partition of the joint estate by free consent of the parties. The respondent, however, claims that the transaction relied upon by the 1st appellant was nothing but an act of arbitrary and high handed disposition by a Japanese military officer then residing in the area. I should have said that this took place just on the eve of the Japanese evacuation of the area which had been in enemy occupation. This Japanese officer, it is clear on the evidence, was on friendly terms with the 1st appellant and that it was by exercise of coercion and abuse of his authority that he managed to impose on the parties what had been described by the 1st appellant as a partition of the property of the marriage. I am in full agreement with the lower Appellate Court in accepting the plaintiff's version of this matter in dispute. The evidence of Tun Shein (D.W. 6) who acted as the interpreter to this Japanese military officer clearly supports the finding arrived at by the lower Appellate Court.

The result is that on the facts I must hold that in 1940 the plaintiff, a widow and the 1st defendant, a bachelor became husband and wife under the Burmese Buddhist Law ; that to that marriage the husband brought nothing ; and that the wife brought to it " Atetpa " property which she had inherited from her 1st husband who had died very shortly before her re-marriage ; that early in 1945 they effected a divorce by mutual consent ; and that there has not been a partition of property between the erstwhile husband and wife at the date of the suit now under appeal. It is on these facts that the question arises if the plaintiff is entitled to sue for the suit properties taken away by the 1st defendant as a consequence of the act of interference by the Japanese military officer. In this form the case neatly raises the question whether, where an *eindaunggyi* marries a bachelor or a spinster as the case may be, the bachelor or the spinster on a divorce by mutual consent is entitled to a share in the " Atetpa " of the *eindaunggyi* husband or wife. The earliest case on this point is that of *Ma E Nyun* v. *Maung Tok Pyu* (1). The decision

(1) 2 U.B.R. (1897—1901) (Civ.) 39.

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in this case was followed in the later case of *Ma Ngwe Hnit* v. *Maung Po Hmu and others* (1). These two cases were referred to by the two learned Judges of this Court in *C.T.P.V. Chetty Firm and others* v. *Maung Tha Hlaing and others* (2). At page 328 of the Report in the *Chetty Firm*'s case (2), Maung Gyi J. after referring to the two previous cases and without any further consideration of the point at issue merely said, "This is, I think, settled law." Carr J., on the other hand, at pages 346-347 of the Report after a short discussion of the point, stated that he was not satisfied with the law as laid down in the two cases above referred to.

In *Ma E Nyun*'s case (3) the husband who was an *eindaunggyi* at the time of the marriage executed a deed whereby he bound himself to abstain from drinking and gambling and made over all his property to the spinster wife as "kanwin." The deed, however, was not registered and it was on this ground only that the disposition of the property as "kanwin" could not be proved and what was clearly intended to be made "kanwin" remained the husband's "Atetpa." The husband after the marriage ill-treated the wife and relapsed into his former bad habits as a drunkard and gambler. It was on these facts that Thirkell White, Judicial Commissioner, took the view that "it would obviously be inequitable that a wife driven to seek a divorce by her husband's ill-treatment, should be entitled merely to a bare divorce because there happen to be no jointly acquired property." In the course of his judgment, the Judicial Commissioner further stated the proposition which formed also the basis of the decision in *Ma Ngwe Hnit*'s case (1) that "it is certainly unjust to give the husband the benefit of his previous marriage and to deprive the wife of the benefit of her previous maidenhood." From these considerations the learned Judicial Commissioner deduced the rule: "It may, however, be laid down with certainty that the decision is within the law, that the rules regulating the divorce of a husband and wife not previously married should be applied to cases in which one of the parties to the marriage has been previously married and the other has not been married before."

In *Ma Ngwe Hnit*'s case again (1), when negotiations for a marriage between U Ma La, an old man of 70 years of age, who had been previously married and Ma Ngwe Hnit, a spinster,

(1) 11 L.B.R. 52. (2) I.L.R. 3 Ran. 322.
(3) 2 U.B.R. (1897—1901) (Civ.) 39.

aged 38, were in progress, it appeared to have been agreed that a substantial " kanwin " should be settled on the wife. On the day of the marriage, however, the original promise to give 40 acres of paddy land was not implemented and U Ma La merely sent over Rs. 450. On this the bride objected and the elders who arranged the marriage went to U Ma La and obtained from him a document purporting to transfer about 44 acres of paddy land to the bride in consequence of which the marriage took place. This document, however, was not registered and it was held in the case that the wife could not rely on this document for any purpose. It was against this background that when subsequently following a divorce on mutual consent, the wife claimed a share in the " Atetpa " of the husband a Bench of the late Chief Court of Lower Burma, adopting the principle enunciated by Thirkell White, Judicial Commissioner, in *Ma E Nyun*'s case (1) allowed the wife a share in the " Atetpa " of the husband on the basis of the rule of *nissaya* and *nissita*. In both these cases the learned Judges took the view that the *Dhammathats* did not provide for partition on divorce between the parties to a marriage one of whom had been previously married and the other has not been so previously married.

In *C.T.P.V. Chetty*'s case (2) Carr J., again on page 346 of the Report, assumed that " the intermediate case in which one has been married before and the other has not, is not dealt with in the *Dhammathats*." He went on to say that " where the rule in the two extreme cases is the same, there is no difficulty in holding that it applies also to the middle case." The learned Judge then proceeds,

> " I wish to say that I am not satisfied that where the rules differ the one to be applied to the intermediate case is that for the case where neither party has been previously married. That has been held in *Ma E Nyun* v. *Maung Tok Pyu* (1), but the reasoning of Sir H. Thirkell White in that case seems to me to be based on a misconception of the reason for the differences in the rules. This decision was followed in *Ma Ngwe Hnit* v. *Maung Po Hmu* (3), but there were special circumstances in that case which rendered the decision at least equitable."

(1) 2 U.B.R. (1897—1901) (Civ.) 39. (2) I.L.R. 3 Ran. 322.
(3) 11 L.B.R. 52.

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Earlier in the same case, Carr J. at page 343 said in respect of the rules in the *Dhammathats* relating to partition,

> " They thus disclose a very strong community of interest in the case of a first marriage and indicate that all property is joint, though the respective interests may vary in amount. This is entirely in accord with present day Burmese sentiment, which regards the union of a couple neither of whom has been married before (*nge lin nge maya*) as much more perfect and intimate than any other marriage."

Later, at pages 345-346 the learned Judge distinguished the case of a previously married couple from that of a previously unmarried couple and assigned reasons which, if I might be permitted to say so, are very cogent :

> " It is to be noticed that these rules indicate a much lower degree of community of interest than in the case of a previously unmarried couple. This may be accounted for in part by the sentiment already mentioned, but there are other obvious reasons for the difference. In the case of a first marriage there are no interests to be considered other than those of the husband and wife and of their children. But when either or both has been married before, it is likely that there will be children of the first marriage and their interest also have to be considered. That is a very good reason for not giving to each spouse the same rights in the *payin* property of the other as are given on a first marriage."

The actual decisions in *Ma E Nyun*'s and *Ma Ngwe Hnit*'s cases [(1) and (2)] may have been on the special facts equitable. The representation by a wealthy *eindaunggyi* bride-groom to the impecunious maiden bride that he would give her a part of his " Atetpa " property as " kanwin " and the failure to implement the representation by a registered document coupled in *Ma E Nyun*'s case (1) with the fact that because of cruelty which forced the wife to seek relief in a divorce may be justification for denying the husband a share of the " Atetpa " but the further principle deduced from the hard facts that the rules of division applicable to a virgin couple also apply to the intermediate case is, in my

(1) 2 U.B.R. (1897—1901) (Civ.) 39. (2) 11 L.B.R. 52.

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opinion, not justified. Whilst at the bar I had occasion to appear in a suit where an impecunious adventurer who had been married before got himself married to an elderly spinster of some wealth and the husband by taking another wife against the will of his wealthy wife and supporting that new wife out of the funds provided by his senior wife—forced the wife to sue for a divorce. The divorce in such a case would be as laid down in the case of *Maung Hme* v. *Ma Sein* (1) on the basis of one by mutual consent. To accept therefore the rule in *Ma E Nyun's* case (2) or *Ma Ngwe Hnit's* case (3) would be to allow the husband to have the benefit of the wife's previous maidenhood.

On the text it appears to me that sections 261 and 262 of Kinwun Mingyi's Digest, Volume II, contain clear provisions for the intermediate case in so far as the division of the "Atetpa" of the *eindaunggyi* husband or wife is concerned. In the official translations of the texts, in section 267 I consider that the words "to repudiate" is not quite a proper translation of the corresponding Burmese terms. It is quite clear from the Burmese version of the Digest that in sections 261 and 262 the *Dhammathat* texts were dealing with divorce. It appears to me clearly deducible from these texts that in the intermediate case of a couple, one of whom only had been married previously, the "Atetpa" of the *eindaunggyi* should not be partitioned but that if there had not been any *letletpwa* property of the marriage an obligation is imposed on the *eindaunggyi* to give a reasonable portion to the other spouse.

In this state of authorities, it seems to me that an authoritative decision is desirable. I therefore refer to a Bench or Full Bench as my Lord the Chief Justice may direct the following question :

> "On divorce by mutual consent between a Burmese Buddhist couple one of whom had been previously married and the other has not been so married, is the 'Atetpa' property of the party previously married divisible and, if so, in what proportion ?"

Kyaw Thoung for the appellants.

Respondent was not represented.

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(1) 9 L.B.R. 191. (2) 2 U.B.R. (1897—1901) (Civ.) 39.
(3) 11 L.B.R. 52.

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BA U, A.C.J.—The question referred to this Bench is :

" On divorce by mutual consent between a Burmese Buddhist couple one of whom had been previously married and the other had not been so married, is the 'Atetpa' property of the party previously married divisible and, if so, in what proportion ?"

This is not the first time that this question arose for solution. Over 47 years ago this question arose for consideration in Upper Burma in the case of *Ma E Nyun v. Maung Tok Pyu* (1) before Sir Herbert Thirkell White and the learned Judicial Commissioner made the following observations :

" Again, there is a fair amount of authority as to the case in which a previously married man, not long after his marriage with a maiden, divorces her before any property has been acquired. According to section 396 of the *Attathankepa*, the wife is entitled to compensation and similar rules are to be found in section 261 of the Digest. In the case of such a marriage, it would obviously be inequitable that a wife driven to seek divorce by her husband's ill-treatment, should be entitled merely to a bare divorce because there happen to be no jointly acquired property.

It would, I think, be an equitable rule and in accordance with the spirit of the law to allow the wife, in a case of this kind, somewhat more favourable terms than in the case where either party has been married before. It is certainly unjust to give the husband the benefit of his previous marriage and to deprive the wife of the benefit of her previous maidenhood. Nor is there any warrant for so doing. But, without assuming the province of the Legislature, it is not possible for this Court to say what more favourable terms should be conceded to the wife in this case. It may, however, be laid down with certainty that the decision is within the law, that the rules regulating the divorce of a husband and wife not previously married should be applied to cases in which one of the parties to the marriage has been previously married and the other has not been married before."

(1) 2 U.B.R. (1897—1901) (Civ.) 39.

About 20 years later, a similar question arose in Lower Burma in the case of *Ma Ngwe Hnit* v. *Maung Po Hmu and others* (1) and the learned Judges, Sir Sydney Robinson C.J. and Sir Benjamin Heald J., who dealt with the case, accepted the law as laid down by Sir Herbert Thirkell White as good law. Sir Sydney Robinson who wrote the main judgment gave the following additional reasons why that law should be followed :

"It appears to me that there is considerable force in the suggestion of Sir George Shaw that the rule laid down in the *Manukye* as regards persons both of whom had been previously married was based on the assumption that both brought property to the marriage. Further, there seems to be no justification for applying a different rule where the relation of *nissaya* and *nissita* existed in the case of a woman who had not been married before because the husband had been previously married. Under section 261 of the Digest a provision is made for the case of a man who had previously married marrying a spinster and divorcing her not long after the marriage and before there was time for any property to have been jointly acquired by them. It allows the wife compensation, and it appears to me that all these provisions point to a recognition of the necessity of making a husband, who is able to do so, provide for a wife who comes to the marriage with nothing."

Three years after the establishment of this Court, a similar question arose indirectly for discussion in the case of *C.T.P.V. Chetty Firm and others* v. *Maung Tha Hlaing* (2). In that case Maung Gyi J., with whom Sir Sydney Robinson C.J. agreed, accepted the law as laid down in the cases cited above as good law but Carr J. struck a discordant note. The learned Judge said :

"The intermediate case, in which one has been married before and the other has not, is not dealt with in the *Dhammathats* ;

(1) 11 L.B.R. 52. (2) I.L.R. 3 Ran. 322.

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but where the rule in the two extreme cases is the same, there is no difficulty in holding that it applies also to the middle case. It is not necessary, therefore, to decide which of two different rules is to be followed, but I wish to say that I am not satisfied that where the rules differ the one to be applied to the intermediate case is that for the case where neither party has been previously married. That has been held in *Ma E Nyun* v. *Maung Tok Pyu* [U.B.R. (1897—1901) (Divorce) 1939], but the reasoning of Sir H. Thirkell White in that case seems to me to be based on a misconception of the reason for the differences in the rules. This decision was followed in *Ma Ngwe Hnit* v. *Maung Po Hmu* (11 L.B.R. 52), but there were special circumstances in that case which rendered the decision at least equitable."

Because of the doubt thus thrown by Carr J. over the correctness of the decisions given in the Upper Burma case of *Ma E Nyun* (1) and the Lower Burma case of *Ma Ngwe Hnit* (2), this case was referred to this Bench.

In spite of Carr J.'s doubt, the law as laid down in the above-mentioned two cases is still good law and it has stood the test of time for nearly half a century in Upper Burma and nearly 30 years in Lower Burma. People know and understand it. To change it now, without having strong and compelling reasons for doing so, would be to introduce chaos and uncertainty into the family, social and commercial life of the Burmese people. Are there now strong and compelling reasons to change the law ? Carr J. said " . . . I wish to say that I am not satisfied that where the rules differ the one to be applied to the intermediate case is that for the case where neither party has been previously married." In the absence of any rule applicable to the intermediate case, what rule is then to be applied if the rule applicable to the case where neither party has been previously married is not to be applied ? The only rule left to be applied is the rule applicable to the

(1) 2 U.B.R. (1897—1901) (Civ.) 39. (2) 11 L.B.R. 52.

case where both the parties had been previously married. If such a rule applies, then the position would be that on divorce by mutual consent the parties would take back his or her *atetpa* property, if there be any, on the division of property ; but, then Carr J. did not say so. On the contrary, what he said with regard to the decision given in the Lower Burma case of *Ma Ngwe Hnit* (1) was that the decision applying the rule relating to the case where neither party had been married before was an equitable decision. Why it was equitable, according to the learned Judge, was because of the special circumstances of the case. The special circumstances were that an old widower of 70 years of age asked a spinster, young enough to be his daughter, to marry him promising that he would give her 40 acres of land as *kanwin* property. The promise was never kept and he made the life of the young wife somewhat unhappy. The wife was subsequently granted a divorce and one-third share of the *payin* property. Now, interpreting the remarks of the learned Judge in the light of these circumstances what appears to me, with great respect to the learned Judge I say it, is that in hard cases the rule applicable to the divorce of a virgin couple should be applied but in others the rule applicable to the case of *eindaunggyis* should be applied. This would make the confusion, again I say with great respect to the learned Judge, worse confounded.

Burmese Buddhist Law is to be found in the *Dhammathats* and these *Dhammathats* were compiled some hundreds of years ago. Even the most authoritative of the *Dhammathats*, the *Manukye*, was compiled some 200 years ago. They were framed and compiled in accordance with the customs and habits of the people then prevailing in those days ; but the customs

(1) 11 L.B.R. 52.

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and the habits of the people have been through the process of change almost everyday. The Burmese Buddhist Law has accordingly to be moulded and adapted to suit the changing conditions of Burmese society, keeping the fundamental principles as enunciated in the *Dhammathats* intact. This was well recognized by some of the European Judges who had made a special study of Burmese Buddhist Law and the customs, habits and manners of the Burmese people. Sir John Jardine says : " We cannot apply the principle or practice of the *Dhammathats* to the changed society without modification ; and in the moulding of the law, it is of great importance that the Judges should modify the old rules in the line of present customs and opinion than in that of a bygone day." *See* May Oung's Buddhist Law, page 102.

Rigg J. in a Full Bench case of *Maung Hme* v. *Ma Sein* (1) said : " The law to be administered is the Burmese Buddhist Law as laid down in the *Dhammathats* unless such law has been clearly modified by custom or is repugnant to equity, justice and good conscience." In the case of *N.A.V.R. Chettyar Firm* v. *Maung Than Daing* (2) Page C.J. made the following most pertinent and, if I may say so, wise remarks :

" 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 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

(1) 9 L.B.R. 191. (2) I.L.R. 9 Ran. 524 at p. 539.

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."

That is exactly what the learned Judges did in deciding the cases of *Ma E Nyun* and *Ma Ngwe Hnit*. They knew of the existence of the rule relating to the intermediate case in sections 261 and 262 of U Gaung's Digest but the rule propounded therein was so obsolete and archaic that it could not be applied to the modern conditions of life. For instance, the *Rajabala*, one of the *Dhammathats* cited in section 261 states, *inter alia*, as follows :

"A previously married man marries a spinster, and before any property is yet acquired and without any cause of complaint against her, desires to divorce her. If he is inferior (in rank) to her, he shall give her a pair of earrings, because her parents gave her to him notwithstanding their knowledge of his position and circumstances. If they are equal in rank, he shall give her the slaves who accompanied the marriage procession, the sedan chair, elephants, ponies, etc., used in the ceremony, and the clothes and ornaments worn at the time of marriage. If there is no such property, he shall give her a male slave. If she is pregnant, he shall give her sufficient money to defray the expenses of her accouchement and a female slave to serve as nurse. If they are related by blood to each other, he shall give her a male and a female slave whether she is pregnant or not.

If, on the other hand, the wife says, that she desires to repudiate the husband although he is in no way blameworthy, she shall give him a suit of man's clothes consisting of a *paso*, coat and turban, and a male slave attendant. If they have no property, let them separate as if they had each been married previous to the present union."

Other *Dhammathats* cited therein laid down the law more or less in a similar strain. Now such a rule of law as pointed out above cannot be applied to the

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modern condition of life. Therefore it must be moulded so as to make it conform thereto. How is it to be moulded? As what the *Dhammathats* intended to provide against was that if before any property had been acquired by the couple the party who had not been married before were to be driven out of the house, without any fault on his or her part, he or she—as the case may be—should not be driven out without having any means provided for his or her maintenance. The Judges who dealt with the aforesaid two cases knew this intention of the *Dhammathats* and moulded the law accordingly. In so moulding it they followed the most fair and equitable method of dividing the *atetpa* property by applying the rule of *nissaya* and *nissita*.

This method of division was also attacked indirectly by Carr J. by making the following observations :

> " It is to be noticed that these rules indicate a much lower degree of community of interest than in the case of a previously unmarried couple. This may be accounted for in part by the sentiment already mentioned, but there are other obvious reasons for the difference. In the case of a first marriage there are no interests to be considered other than those of the husband and wife and of their children. But when either or both has been married before, it is likely that there will be children of the first marriage and their interests also have to be considered. That is a very good reason for not giving to each spouse the same rights in the *payin* property of the other as are given on a first marriage."

In making these observations the learned Judge, with due respect to him, has, in my opinion, gone entirely wrong in overlooking the vested rights of *atetpa* children. If an *eindaunggyi* who has children by his previous marriage marries a spinster then his children acquired a vested right in the property acquired by their father and deceased mother on the remarriage of

their father. Therefore their share will not be subject to partition on the division of the *atetpa* property between their father and his wife, their step-mother, on divorce by mutual consent. If the *eindaunggyi* has no children by his previous marriage then the whole of his *atetpa* property will be subject to partition. The same rule applies in the case of an *eindaunggyi* marrying a bachelor. Therefore I am strongly of opinion that without taking into account hard and exceptional cases, the law as laid down in *Ma E Nyun*'s case and *Ma Ngwe Hnit*'s case is still good law ; but it requires a slight modification. The learned Judges who decided those cases gave a clear indication of when and under what circumstances the *atetpa* property of an *eindaunggyi* should be divided. They said that if no property had been acquired after marriage by an *eindaunggyi* and his or her spouse who had not been previously married the *atetpa* property of the *eindaunggyi* should be divided on the principle of *nissaya* and *nissita*. This is exactly what sections 261 and 262 of U Gaung's Digest and section 396 of the *Attasankhepa* say.

For all these reasons I would give the following answer to the question propounded :

"On divorce by mutual consent between a Burmese Buddhist couple, one of whom had been previously married and the other had not been so married, the *atetpa* property of the party previously married should be divided on the principle of *nissaya* and *nissita*, provided that no property had been acquired by the couple after their marriage."

E MAUNG, J.—In the order of reference in Civil 2nd Appeal No. 27 of 1947, I have given an indication of the views tentatively held by me on the point referred to the Full Bench. I have since heard U Kyaw Thoung on behalf of the applicant and also have had the advantage of reading the judgment which has just been delivered by my Lord.

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With great respect, I must say that if the matter had been *res integra* I would have had no difficulty in coming to the conclusion that where an *eindaunggyi* married a bachelor or a spinster the *payin* of either does not form part of the joint property of the marriage and that such *payin* is not divisible on a divorce between the couple.

The scheme of the *Dhammathats* on the subject of division of property on divorce seems to me to be clear and consistent. Where neither the husband nor the wife had been married before property brought by either to the marriage or acquired subsequently by either or both form the joint property of the marriage. As such these properties are all divisible on dissolution of the marriage. The shares falling to each spouse may vary according to the origin or the nature of the property and the circumstances under which the dissolution of the marriage was brought about.

Where both the husband and the wife are *eindaunggyis* the *payin* of neither goes into the joint property of the marriage. The *payin* even of a wife found guilty of adultery, the supreme matrimonial fault for a wife, is not forfeited and the wife in default takes it back.

It is against this background that the provisions in sections 261 and 262 of Kinwun Mingyi's Digest, Volume II, deserve to be studied. The texts deal with the extreme case of a divorce at caprice where the party desiring the divorce cannot point to any fault on the part of the unwilling party. Instead of divesting the party desiring the divorce of all his, or her, interest in the *payin* as would have happen if the couple had been a virgin couple and also instead of allowing that party to take back his, or her, *payin* unimpaired as would have happened in the case of an *eindaunggyi* couple,

the *Dhammathats* sought a *via media* which is perfectly intelligible and logical.

I have, however, to remember, as my Lord has pointed out in his judgment, that *Ma E Nyun*'s case (1) was decided over 47 years ago and that the decisions of the Courts in Burma to this day had been in the same sense on this particular point : *Communis error facit jus.*

The Earl of Halsbury in the case of *West Ham Union* v. *Edmonton Union* (2) has said :

"The only difficulty is that one has to consider a decision of as long ago as the year 1842. I do not think that is an absolute reason against a reversal of that decision, but undoubtedly it is an undesirable thing to upset any canon of construction or principle of law which has been settled for so long that people may be supposed to have acted according to it for a considerable time."

The Lord Chancellor in the same case has enunciated the same principle in a slightly different form :

"Great importance is to be attached to old authorities, on the strength of which many transactions may have been adjusted and rights determined. But where they are plainly wrong and especially where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which they were based and practical injustice in the consequences that must flow from them, I consider it is the duty of this House to overrule them, if it has not lost the right to do so by itself expressly affirming them."

Lord Blackburn in *Stourbridge Union* v. *Droitwich Union* (3) expressed himself as follows :

"The case is governed by a long series of decisions from *Reg* v. *Tipton* (3 Q.B. 215) to *Reg* v. *St. Martin, New Sarum* (9 Q.B. 241). Looking at the reasons for those decisions, I think they were founded on a mistake, but we ought not lightly to overrule them."

(1) 2 U.B.R. (1897—1901) (Civ.) 39. (2) L.R. (1908) A.C. 6.
(3) L.R. 6 Q.B. 769, 774.

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Applying these tests it seems to me that though, in my opinion, the rule enunciated in *Ma E Nyun*'s case (1) was founded in error, I would not be justified in differing from the rule enunciated. This decision has been acted upon for nearly half a century and upon the basis of the rule rights have been regulated and arrangements as to property made.

I am not satisfied that I can bring this case within the exception contemplated by the Lord Chancellor in *West Ham Union* v. *Edmonton Union* (2). It does seem to me that the earlier decisions were based on faulty reasoning but I cannot say that "practical injustice in the consequences that must flow" from them is such as to counterbalance the dislocation that will be caused by the law being enunciated in a different sense after a passage of 50 years.

I must, however, enter a caveat. The rule in *Ma E Nyun*'s case and the later cases which followed it are in terms enunciated in respect of a partition where the divorce had been in fact by mutual consent. The rule cannot and should not be extended to a divorce which is not in fact by mutual consent but which for the purposes of partition on divorce is by a legal fiction deemed to have been as if by mutual consent.

With this reservation I am content to accept the answer propounded by my Lord.

KYAW MYINT, J.—I have had the advantage of reading the drafts of the judgments intended to be delivered by my Lord the Acting Chief Justice and my learned brother E Maung J. I have nothing to add to their observations and agree that the answer to the question referred should be as propounded by my Lord.

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(1) 2 U.B.R. (1897—1901) (Civ.) 39. (2) L.R. (1908) A.C. 6.

APPELLATE CIVIL.

Before Mr. Justice Ba U and Mr. Justice E Maung.

MA PU (APPELLANT)

v.

DAW AYE MYA AND OTHERS (RESPONDENTS).*

1947

Sept. 16.

Burmese Buddhist Law—Adoption—Proof—Document admittedly signed by natural parents of the child—Its admissibility—Cancellation of adoption.

Held: That where *kittima* adoption is established, adoptive parents cannot disown the *kittima* adopted child for eloping with and marrying a person whom the adoptive parents do not approve. In any case one of the adoptive parents alone cannot cancel the adoption.

Ma Kyin Sein v. *Maung Kyin Htain*, (1940) R.L.R. 783, followed.

Held per BA, U, J.—Where an unregistered deed of adoption † is proved to have been signed by the natural parents of the adopted child but the alleged signatures of adoptive parents are not proved to have been made, at that time, the document is still admissible for a collateral purpose, *viz.* for proving the reliability and trustworthiness of witnesses to prove a course of conduct and notoriety of the relationship of the adopted child with the adoptive parents.

Parbati Charan Mukherjee v. *A. N. Bhattacharjee*, I.L.R. 53 Cal. 418, followed.

Per E MAUNG, J.—The document of adoption having been proved to have been executed in presence of several persons would be sufficient to establish *kittima* status of the girl adopted.

Ma Mu v. *U Nyun*, I.L.R. 12 Ran. 634, followed.

Chan Htoon for the appellant.

Dr. Thein for the respondents.

BA U, J.—We must allow this appeal. It appears to us that the learned District Judge has allowed his judgment to be unduly influenced by Exhibit 2. If he

* Civil 1st Appeal No. 9 of 1947 against the decree of the District Court of Magwe in Civil Regular No. 1 of 1946, dated the 19th November 1946.

† The Registration of *Kittima* Adoption Act, 1941, was not applicable in the present case.

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had viewed Exhibit 2 in its true perspective in its relation to Exhibit A, we are sure that he would have come to a correct decision in this case.

The facts are these. U Chit Tha and Daw Min Myaing *alias* Daw Myaing, who were Burman Buddhists, were husband and wife. They lived permanently in Myenekin Quarter, Yenangyaung. During the time of the war they moved to a small village called Thabyebin and lived there. While living there they died one after the other at an interval of seven days. U Chit Tha died on the 5th January, while his wife died on the 13th January 1945. They left surviving them no natural issue of their own. But U Chit Tha left one younger sister, Ma Aye Mya, surviving him, while Daw Min Myaing left two younger brothers, U Ba Din and U Ba Ye, surviving her. The fight now for the possession of the estate of the deceased couple is between Daw Min Myaing's younger brother, U Ba Ye, and her niece, Ma Pu, who is the natural daughter of U Ba Din. Ma Pu alleges that she is the *kittima* daughter of the deceased couple, U Chit Tha and Daw Min Myaing, and, as such, she is the only person entitled to inherit their estate. She accordingly applies for letters to administer their estate. U Ba Ye denies the alleged adoption of Ma Pu by U Chit Tha and Daw Min Myaing and claims letters for himself. Ma Pu's natural father U Ba Din supports the claim of Ma Pu, but in the case of Daw Aye Mya, she opposes the claims of both Ma Pu and U Ba Ye and says that as she was the younger sister of U Chit Tha, she is the only person entitled to inherit them. She does not, however, apply for letters. The whole question for decision in this case is whether Ma Pu is able to prove her adoption as a *kittima* child by the deceased couple satisfactorily or not. If she is able to do it, she must get letters.

To prove her adoption by the deceased couple, Ma Pu relies on the following :

(1) A specific act and occasion when she was given by her natural parents and taken in adoption by the deceased couple ;

(2) The declarations made by the deceased couple to their friends and relations ;

(3) The course of conduct of the deceased couple towards her ; and

(4) The notoriety of her relationship with the deceased couple.

As regards the first point, Ma Pu relies on the evidence of some people alleged to be present at the time of the adoption and mention of the execution of the document, Exhibit A.

Before we examine the evidence of the witnesses alleged to be present on the occasion in question, we should, in my opinion, examine the legal effect of the document, Exhibit A.

The document is in the following terms :

"On the 7th waxing of *Nattaw* 1283 B.E. Ma Pu Gyi, daughter of Ko Ba Din and Ma Tha Me of Myenikhin Village, is given to elder brother Ko Chit Tha and elder sister Ma Myaing for the purpose of adopting Ma Pu Gyi as daughter of father Ko Chit Tha and mother Ma Myaing with right to inherit from them for good or bad. Agreeing to the terms of the said document, Ko Ba Din and Ma Tha Me sign the document in the presence of the witnesses and give daughter Ma Pu Gyi to Ko Chit Tha and Ma Myaing outright as their daughter.

(Sd.) MAUNG CHIT THA.
(Sd.) MA MYAING.
(Sd.) MAUNG BA DIN.
× mark of Ma Tha Me."

Witnesses—
(Sd.) (Undecipherable.)
(Sd.) MAUNG SEIN.
Written by—
(Sd.) MAUNG PO HTAIK.

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Now, if the document is accepted as genuine, and if admissible in evidence, the adoption of the plaintiff-appellant Ma Pu must be held to be proved.

Of the two witnesses who signed the document, the name of one witness alone is decipherable and the name is Maung Sein. He is a witness in the case. The other witness, according to Maung Sein and others, is U Chit. U Chit is a witness. The writer, U Po Htaik, is also a witness. All these three witnesses agree that the document, Exhibit A, was executed by U Ba Din and his wife and also U Chit Tha and his wife. They are related to both parties more or less in the same degree and so they have no reason to side with the one as against the other.

But the learned trial Judge has rejected their evidence on the strength of what the deceased Ma Myaing said in the deed, Exhibit 2. This deed (Exhibit 2) was signed by Ma Myaing and attested by her husband. By this deed Ma Myaing gave away her half share in the oil-wells owned by her and her husband to her younger brother U Ba Ye, respondent. The deed recites *inter alia*: "Whereas I, the donor Ma Myaing, having no heir, *i.e.* son and daughter, and whereas I, donor, having had love and affection as my own child for Maung Ba Ye, my own youngest brother, do hereby convey out and out half of the oil-well site, etc.".

The learned trial Judge made much of the above-mentioned statement and said that if Ma Pu had really been adopted, Ma Myaing would not have said what she had, that is to say, Ma Myaing would not have said that she had no son or daughter to inherit her property. This finding is in effect a finding that the two attesting witnesses, Maung Chit and Maung Sein, and the writer, U Po Htaik, are perjured witnesses. Why these witnesses should have purposely perjured themselves for the sake of Ma Pu, the learned trial Judge has not

explained satisfactorily. The learned advocate for U Ba Ye has not even ventured to suggest this, but what he submits is that the signatures of Maung Chit Tha and Ma Myaing have been put in very recently and that, therefore, the document, Exhibit A, is inadmissible. We have examined the document carefully and we are not satisfied that the names of U Chit Tha and Ma Myaing were put in only recently. It is true that the ink with which these two names were written is somewhat darker than the ink with which the names of other executants and attesting witnesses were written. Because of the difference in colour of the ink alone we cannot hold that the names of the deceased couple were recently put in. The stamp-paper on which the document was written is an old stamp-paper and it has all the signs of age. Even assuming for the sake of argument that the names of the deceased couple were put in recently, it does not render the document inadmissible for the purpose of proving a collateral fact.* For instance, it is in my opinion admissible for the purpose of proving the reliability and trustworthiness of witnesses called to prove the course of conduct between the deceased couple and the present claimant Ma Pu and the notoriety of their relationship. The law on this point is fully explained in *Parbati Charan Mukherjee* v. *A. N. Bhattacharjee* (1) and the cases cited therein.

Now, take the evidence of the witnesses called to prove the admissions made by both or either of the deceased couple that they had adopted Ma Pu as their adopted *kittima* child. I would first deal with the evidence of two witnesses, namely, U Ardeiksa and U Kethaya (P.Ws. 3 and 4).

* It was admitted that signature and cross mark of natural parents of Ma Pu, *i.e.* of U Ba Din and Ma Tha Me were genuine—*Ed.*

(1) I.L.R. 53 Cal. 418.

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U Ardeiksa says :

"About 20 or 25 years ago on the invitation of U Chit Tha and Daw Min Myaing I had meals in their house at Myenekin about three or four times. On those occasions I have seen the plaintiff Ma Pu in their house. On one of those occasions I was invited by them to give a sermon at night in their house and I went to their house and gave a sermon. After the sermon was over, Daw Min Myaing told me thus : 'I have adopted a daughter of my brother Ba Din with a view to inherit. She is Ma Pu Gyi,' * * * * * At that time there were several people present * * * * * Daw Min Myaing told me on that morning when she invited me for breakfast that she wanted me to give a sermon in her house that evening for two reasons, namely, to avert evil things and also to publicly announce the adoption by them of Ma Pu Gyi as their own daughter."

In the case of U Kethaya, he says :

"Whenever Daw Min Myaing visited the monastery to keep sabbath, the plaintiff used to come along with her. One day, I think about 20 years ago, U Chit Tha and Daw Min Myaing together with Ma Pu came to our monastery to keep sabbath. Seeing the plaintiff always with them when they came to the monastery, I asked them who she was, and they told me that they had adopted her with a view to inherit."

If the evidence of these two witnesses is believed, then it is clear that the deceased couple admitted at least on two occasions that they had adopted Ma Pu as their *kittima* daughter. There is no reason why the evidence of these two witnesses should not be believed, seeing that both of them are members of the order of *Sangha*. One is 64 and a presiding monk, and the other is 46. If further evidence is needed on this point, I might refer to the evidence of Saya Phe (P.W. 5). Saya Phe says :

"My house was about 600 feet from that of U Chit Tha and Daw Min Myaing at Myenekin. I used to visit their house once or twice in a month. About I think 20 years ago when I visited

their house, U Chit Tha and Daw Min Myaing told me that they had adopted Ma Pu Gyi as their daughter with a view to inherit. No one was present then. I used to see her in their house whenever I go (went) there. She was treated like their own."

This witness, Saya Phe, is a *twinza* and aged 70. He is not related to either party and evidently held in respect by the people of the quarter. Therefore, we cannot expect to get a more independent and impartial witness than Saya Phe.

Again, there is the evidence of U Ko Ko Gyi (P.W. 11) to consider. U Ko Ko Gyi is now a Sub-Inspector of Police, but before he joined the Police Force he was a teacher in the B.O.C. School at Yenangyaung and while he was there, Ma Pu was a pupil in his class. He says that he always looked upon Ma Pu as the natural daughter of U Chit Tha and Daw Min Myaing in view of the way they treated her. He came to know that she was not their natural daughter but only an adopted daughter when she eloped with her present husband.

Next, there is the evidence of U Ba Din (P.W. 1) to consider. He says that he and his wife gave their daughter Ma Pu in adoption to U Chit Tha and Daw Min Myaing.

Now, that is where the document, Exhibit A, comes into play. Assuming, as contended by the learned counsel for the respondent U Ba Ye, that the names of U Chit Tha and Daw Min Myaing were put in only recently, though we do not agree with him on this point, the said document is admissible to corroborate U Ba Din's evidence, as pointed out above. If so believed and there is no reason why we should not accept U Ba Din's evidence, what becomes clear is that the giving of Ma Pu by her natural parents to U Chit Tha and Ma Myaing becomes established

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beyond any controversy. As a corollary, the taking of Ma Pu in adoption by the deceased must be held to be proved. In fact, it must be held to be proved by the evidence cited above.

The learned trial Judge has not considered this aspect of the case ; nor has he gone into the question of the trustworthiness or reliability of the witnesses of the plaintiff-appellant. He relies on document, Exhibit 1, but if the document, Exhibit 1, is considered in the light of the above circumstances, what Daw Myaing meant by saying therein that she had no heir, *i.e.* son or daughter, becomes quite clear. She meant to disown Ma Pu as her *kitlima* adopted daughter. She did so because she was angry with Ma Pu as the latter eloped with her present husband who in the opinion of Ma Myaing was not a good match for Ma Pu. This is quite clear from the evidence on the record.

There is no authority which we know of, which allows an adoptive parent to disown a *kittima* adopted child under such circumstances as are obtaining in the present case. Nor do we know of any law which allows one adoptive parent alone to cancel the adoption.

For all these reasons I would allow this appeal, set aside the judgment and decree of the lower Court and direct the issue of letters to Ma Pu on her paying the Court-fees as prescribed by law and on furnishing security in the sum of Rs. 30,000 within one month from the date of the receipt of this order by the trial Court. The respondent shall pay the costs of this suit both in this Court and the lower Court.

E MAUNG, J.—Once the genuineness of the document, Exhibit A, is established there is an end of the case *Ma Mu* v. *U Nyun* (1) is definite authority that the execution of a document of adoption in the

(1) I.L.R. 12 Ran. 634.

presence of several persons would be sufficient to establish the status of a *kittima* child. I agree with my Lord that there can be no reason to doubt the genuineness of the document, Exhibit A. It purports to be executed on the 7th waxing of *Nadaw* 1283 B.E. This corresponds, though not so specified in the document, to the 6th December 1921. The stamp sheet on which it is written bears an endorsement by the stamp vendor, indicating that the stamp sheet was issued by him to the purchaser on the 20th August 1921.

U Chit (P.W. 2), Maung Sein (P.W. 6) and U Po Htaik (P.W. 7), whose signatures appear on the face of this document, Exhibit A, have testified to the due execution of it by U Ba Din (P.W. 1) and his deceased wife Daw Tha Me as well as by U Chit Tha and Daw Min Myaing. U Ba Din also has spoken to having executed the document.

If the document had been a recent fabrication, it is not at all likely that it would have borne the Burmese date only on it or that the date given according to the Burmese era would have followed so closely the date of the issue of the stamp sheet by the stamp vendor. As my Lord has pointed out, there is nothing on the record to suggest that U Chit, Maung Sein and U Po Htaik have perjured themselves or that they or any of them had any reason to perjure themselves in support of the appellant's case. What purports to be the signatures of U Chit Tha and Daw Min Myaing on Exhibit A have been compared by me with the admitted signatures of these two persons appearing on Exhibit 2. I do not claim to be an expert in handwriting but I have not been able to see any indication which would enable me to say that the signatures on Exhibit A of these two persons are forgeries. In fact my impression is to the contrary.

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The suggestion that Ba Din, being the natural father of the appellant Ma Pu would support her overlooks the consideration that Ba Din's interest in the matter of the estate of Daw Min Myaing runs counter to that of the appellant. U Chit Tha died on the 5th January 1945 and Daw Min Myaing died nine days thereafter. Accordingly, the exceptional rule of joint disaster could not apply and U Chit Tha's brothers and sisters, if any, would be excluded by Daw Min Myaing's brothers and sisters if the couple had not been survived by a child, natural born or adopted. I cannot conceive of Ba Din falsely giving evidence in favour of Ma Pu when Ma Pu, if she had succeeded in this litigation, would have taken the whole estate, whereas if Ma Pu had failed, Ba Din and his brother Ba Ye would have divided the estate in equal shares. Ma Pu successful might at most make to Ba Din *ex gratia* payment which I cannot conceive of anything exceeding half the estate of Daw Min Myaing; whereas with Ma Pu defeated, Ba Din would have *ex debito justitiæ* a half interest in that estate.

It is not necessary for the purposes of this case to embark on an enquiry why in Exhibit 2 Daw Min Myaing is purported to have declared that she had no child living. Several explanations are possible. It is no part of the case for the respondents that if Ma Pu had been adopted the adoption had been subsequently cancelled, either unilaterally by the adoptive parents or by the adoptive parents with Ma Pu's consent. The law relating to the termination of the *kittima* relationship, once created, has been fully discussed by a Bench of this Court in *Ma Kyin Sein* v. *Maung Kyin Htain* (1). I have no reason whatsoever to think that the law as laid down in that case requires further

(1) (1940) R.L.R. 783.

consideration. Tested by that case there can be no question of Ma Pu having lost the *kiltima* status which she acquired as a result of the document of adoption, Exhibit A, since the 6th December 1921.

I agree with the order proposed by my Lord.

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APPELLATE CIVIL.

Before Mr. Justice Sharpe and Mr. Justice Gledhill.

1947
Dec. 10.

IN THE MATTER OF U KHANT, *Ex*-HIGHER GRADE PLEADER OF KYAUKSÈ (APPLICANT).*

Legal Practitioners Act, s. 13—Pleader struck off the Rolls for appearing in drunken condition in Court—Application for reinstatement in the roll—Principles applicable.

Held : That the High Court has inherent power to reinstate a legal practitioner if it is satisfied that the delinquent has reformed his character and has for a sufficiently long period acted in such a way that he can be entrusted notwithstanding his previous delinquency, with affairs of clients and admitted to an honourable profession without the profession suffering degradation. But where there is no repentance or regret for his past conduct and the evidence of his good conduct after his dismissal from practice, is meagre, he should not be reinstated.

In re Abruddin Ahmed, 38 Cal. 309 ; *In the matter of Mathura Prasad*, 1 Pat. 684 ; *Mohammad Yusuf Husain Khan* v. *Emperor*, A.I.R. (1934) Oudh 140 ; *In re Pyke*, 34 L.J. Q.B. 220, followed.

GLEDHILL, J.—This is an application by U Khant of Kyauksè for reinstatement as a Higher Grade Pleader.

In his application, the applicant, who is now 66 years of age, says that he passed the Lower Grade Pleadership Examination in 1910 and was promoted as a Higher Grade Pleader in 1915.

The second paragraph of his application I will reproduce in full ; it runs as follows :

" 2. That while I was practising thus as a Higher Grade Pleader, the Sessions Judge (Gilliat) without making any special enquiry took back my licence on the written report made by *Akunwun* U Maung Maung Gyi in the year 1927 that I appeared before him drunk and so I am very much aggrieved."

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* Civil Misc. Application No. 46 of 1947—application for reinstatement in the Roll of the Higher Grade Pleaders.

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IN THE MATTER OF U KHANT, *Ex*-HIGHER GRADE PLEADER OF KYAUKSÈ.

GLEDHILL, J.

Various difficulties arise in this case. The first is that we have not before us the records of the proceedings in the course of which the applicant was dismissed or suspended from practice. However, it does not appear into which class the records of proceedings against a Pleader for misconduct, under the Legal Practitioners Act, would be categorized by Order LIV of the Civil Procedure Code. There is no residuary class, and cases of this kind do not come within any of the kinds of cases referred to under the several classes. I think that probably what would have happened in a District Court would have been that the Record-keeper would have marked the case as "Class III", and in that case the record would have been destroyed after 12 years, *i.e.* in 1939.

I do not think, however, that there is any reasonable doubt, on the records before us, that the applicant was either dismissed or suspended for appearing in a drunken condition before the *Akunwun* at Kyauksè or Mandalay, and this order could only have been passed, under section 13 of the Legal Practitioners Act, by the High Court.

Another difficulty is that the only Pleader on the Rolls of this Court who might conceivably be identical with the applicant is Serial No. 502 on the Roll of Second Grade Pleaders, but the Pleader there referred to is "Maung Po Kan *alias* Maung Kan", whereas the applicant calls himself U Khant, and it appears that he was admitted as a Second Grade Pleader in the year 1923, whereas, according to the first paragraph of his own application, he was promoted to be a Higher Grade Pleader in 1915. However, the Registrar of the District Court at Kyauksè has held an enquiry and examined witnesses, from which I think that there can be no reasonable doubt that the individual whose entry on the Roll I have referred to above is identical with the

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applicant, and that he was struck off the Roll in the year 1927.

The next question we have to consider is whether we have the power, assuming that the applicant has been dismissed (and I think we must make this assumption, because, had he merely been suspended, he would not have waited twenty years to apply for reinstatement), to reverse a decision dismissing a Pleader under section 13 of the Act.

I have not been able to find any case in which it has been held that this Court has not got the power which it is to the applicant's interest to urge that it has, but there seems to me to be ample authority for the view that this Court has the power to reinstate a Pleader who has been dismissed under section 13.

I would first cite the case of *In re Abiruddin Ahmed* (1). This is a Bench decision, in which Mr. Justice Mookerjee (as he then was) went thoroughly into this question, citing a very large number of English, American and Indian authorities for the view that a legal practitioner whose name had been removed from the Rolls might, at the discretion of the Court, be re-admitted if the High Court was satisfied that, during the interval, he had borne an unimpeachable character, and might, with propriety, be allowed to return to the practice of an honourable profession.

I also wish to refer to the case of *In the matter of Mathura Prasad* (2), in which *In re Abiruddin Ahmed* (1) was referred to, where it was held that the High Court had inherent power to reinstate a legal practitioner who had been dismissed from the profession.

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(1) 38 Cal. 309.

(2) 1 Pat. 684.

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IN THE MATTER OF U KHANT, *Ex*-HIGHER GRADE PLEADER OF KYAUKSE.

GLEDHILL, J.

I also wish to refer to a decision of a Special Bench before the Oudh Chief Court [*Mohammad Yusuf Husain Khan* v. *Emperor* (1)]. This was a case under section 41 of the Indian Legal Practitioners Act, but in which precisely the same considerations apply as in a case coming under section 13 of the Burma Act, inasmuch as there is no provision in either of the Legal Practitioners Acts comparable to the provisions of section 12 (*6*) of the Bar Councils Act.

In the case last cited, reliance was not so much placed upon the inherent powers of the Court as upon the provisions of section 21 of the General Clauses Act. Now, that section in the Burma Act runs as follows :

"21. Where by any Act a power to issue notifications, orders, rules, or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any notifications, orders, or bye-laws so issued."

With great respect, I have doubts as to whether an order directing a Pleader's name to be struck off the Rolls is the kind of order referred to in section 21. It seems to me that the word " orders " there must be *sui generis* with " notifications, rules and bye-laws. "

However, it seems to me to be quite clear that there is ample authority for the proposition in *In re Abiruddin Ahmed* (2) that the Court has inherent power to permit, in a proper case, a Pleader who has been struck off the Roll to return to practice.

Lastly comes the question whether we should be justified, on the materials before us, in exercising our discretion in this matter in the way in which the applicant hopes we would exercise it.

In this connection, I would refer to what Cockburn C.J. said in *In re Pyke* (3) that the test is whether the

(1) A.I.R. (1934) Oudh 140. (2) 38 Cal. 309.
(3) 34 L.J. Q.B. 220.

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sentence of exclusion has had the salutary effect of awakening in the delinquent a higher sense of honour and duty, and whether, in the interval, his conduct had been so irreproachable that, notwithstanding a delinquency in early life, he might be safely entrusted with the affairs of clients and admitted to an honourable profession without that profession suffering degradation.

In the same connection, I wish to reproduce the following extract from the head-note in *Mathura Prasad*'s case (1), already referred to above :

" Before exercising such power the Court must be convinced not by mere protestations of repentance or regret, but by actual facts, that the delinquent has reformed his character and has for a sufficiently long period acted in such a way that he can be trusted to act in future as a worthy member of his profession."

Now, if these tests are applied to the application before us, I am of the opinion that the application must fail.

There do not appear to me to be even protestations of repentance or regret ; there is a reluctant admission that a complaint was made that the applicant was drunk, and the suggestion in the second paragraph of the application which I have reproduced above, is that the enquiry was not properly held, that the applicant was summarily deprived of his licence and there was no fair finding on the merits.

That the applicant has a regrettable past seems quite clear from the two certificates which he has filed in support of his application. One is by an Honorary Magistrate and the other by the Headquarters Magistrate of Kyaukse. The former says that he has known the applicant for many years ; he has often seen him taking sabbath at the *pongyi kyaung* ; " In short he is well behaving now." The Headquarters Magistrate's

(1) 1 Pat. 684.

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certificate is similar; he merely says that he has known the applicant for three years, has often seen him taking sabbath, and "In short he is well behaving now." It is difficult to decide from this for what period the applicant has been behaving well, and it would be quite impossible to say, on these certificates, that we are satisfied that the applicant, in the interval between his removal from the Rolls and the filing of his present application, had displayed irreproachable conduct, nor, from the application itself, would I be prepared to say that I am satisfied that the fact of his having been struck off the Rolls has had the salutary effect of awakening in the applicant a higher sense of honour and duty.

In my opinion, therefore, this application must be dismissed.

SHARPE, J.—I have had the benefit of reading the judgment which is about to be delivered by my learned brother and propose to content myself with saying that I agree not only with the conclusion which he has reached, but also with the reasons which led him to his decision.

I will, however, just add this. There cannot, to my mind, be any hardship whatever to the applicant as a result of our refusing to take the course he has urged us to do. At 66 years of age, he is well past the time when professional men in this country normally retire, let alone commence to practice. In any event, to attempt to start up again in practice after the lapse of twenty years would, even at a younger age, be to embark upon a most hazardous enterprise which would have little or no prospect of success. Accordingly I cannot bring myself to think that the applicant ever really wanted to resume his practice in the Courts; he is not, therefore, going to suffer as a result of our decision.

APPELLATE CRIMINAL.

Before Sir Ba U, Acting Chief Justice.

1947
Sept. 18.

MAUNG PE (APPELLANT)

v.

THE KING (RESPONDENT).*

Penal Code, ss. 300, 302—Difference between the first three clauses of s. 300 and 4th clause—Intention whether essential ingredient under clause 4.

Held: That intention is mentioned as an essential ingredient in the first three clauses of s. 300, Penal Code, but not under clause 4. If a person does a rash or reckless act without any excuse and he knows that the act is so imminently dangerous to human life that in all probability it would cause death then the act comes within this clause. The view is made quite plain by illustration (*d*) to s. 300, Penal Code.

Held further: That conviction should have been under clause 3 of s. 300 and not clause 4.

Shwe Ein v. *King-Emperor*, 3 L.B.R. 122; *Nga Na Ban* v. *King-Emperor*, Vol. I (Cr.) (1904—06) U.B.R. 33; *Manindra Lal Das* v. *The Emperor*, I.L.R 41 Cal. 1187, followed.

Choon Foung (Government Advocate) for the Crown.

BA U, A.C.J.—Appellant Maung Pe is a Chin; so was the deceased Po Sawt. They were members of an armed guard employed by the Bombay-Burma Trading Corporation, Limited, at Ywamaton, Thayetmyo District. On the morning of the 28th January 1947 they were detailed for sentry duty. They were given an American rifle and 25 rounds of ammunition. The appellant was to be on duty from 6 a.m. to 12 noon and the deceased from 12 noon to 6 p.m. At about 9 a.m. the appellant and the deceased indulged in horse-play by tickling and pulling each other about. Then the appellant aimed his rifle at the deceased. The deceased

* Criminal Appeal No. 1200 of 1947 being appeal from the order of the 1st Special Judge of Thayetmyo, dated the 30th April 1947, in Criminal Regular Trial No. 26 of 1947.

asked him not to do it and turned his back on the appellant. At that moment the rifle went off, the bullet going through the left and right thighs and injuring part of the scrotum. The wound at the tip of the left hip bone was, according to the medical evidence, necessarily fatal.

These facts are, in my opinion, conclusively proved, and on these facts the learned Special Judge held that the case fell within the 4th clause of section 300 of the Penal Code and sentenced the appellant to transportation for life.

The learned trial Judge did not apparently understand the purport and meaning of the said clause. If we examine section 300 of the Penal Code we shall find that intention is an essential ingredient in so far as the first three clauses are concerned, namely,

(i) an intention to cause the death of a certain person,

(ii) an intention to cause such bodily injury to a certain person which the offender knows to be likely to cause the death of the person injured, and

(iii) an intention to cause to a certain person such an injury as is sufficient in the ordinary course of nature to cause death ;

and in all these cases death ensues. Now, if we turn to the 4th clause we find that intention is not mentioned therein. In so far as this clause is concerned, intention is not an essential ingredient. We shall also find that it is not mentioned therein who the injured person is to be. Where and how this clause applies is this : a person does a rash or reckless act, without having any excuse for doing it, and he knows, though he has no intention of causing the death of any person, that the act is so imminently dangerous to human life that in all probability it must cause death,

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BA U, A.C.J.

and death in fact ensues, the act so committed constitutes an offence within the meaning of this clause. This is made quite plain by illustration (*d*) to section 300, Penal Code. The same view was held by Fox J. (as he then was) in *Shwe Ein* v. *King-Emperor* (1) where the learned Judge said :

"I accept the learned Judge's view as correct in every detail, but would add that the cases stated in section 299 and section 300 in which 'knowledge' is made the determining constituent of the offence, appear to me to refer to cases in which the doer of the act constituting the crime had no intention of injuring any one in particular, but in which he has caused death by doing a reckless or rash act, which he must have known would either in all probability endanger human life, or would be likely to endanger human life. The 4th clause of section 300 must, I think, be read as a whole, and the last words of it, *viz.* 'and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid,' appear to me to show that that clause was intended for a case of the nature I have referred to above."

This view was accepted by Shaw, Judicial Commissioner, in the case of *Nga Na Ban v. King-Emperor* (2). The Calcutta High Court in the case of *Mantndra Lal Das* v. *The Emperor* (3) took the same view. In that case the learned Judges observed :

"The fourth part of section 300, I.P.C., applies only to cases where the person committing the act has no intention of causing injury to any particular individual."

Viewing the facts of the present case in the light of the law thus explained, I have no doubt in my mind that the case comes within the purview of the 3rd clause of section 300 of the Penal Code and not within the purview of the 4th clause as held by the learned trial Judge.

(1) 3 L.B.R. 122. (2) Vol. I (Cr.) (1904—06) U.B.R. 33.
(3) I.L.R. 41 Cal. 1187.

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As the appellant was correctly convicted under section 302 of the Penal Code and as, in the circumstances of the case, he has been given the appropriate sentence, I do not propose to interfere.

The appeal is dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Ba U.

1947

Dec. 22.

HWE EYE HAIN AND ONE (APPELLANTS)

v.

THE KING (RESPONDENT).*

Penal Code, s. 193—S 476 of Criminal Procedure Code—Principles on which complaint should be filed.

Held: Where there has been inordinate delay in making application for action under s. 476 of the Criminal Procedure Code the Court should not entertain such an application. Complaint should not be filed unless there is a reasonable probability of conviction.

Maung Shwe Phe and five others v. *Ma Me Hmoke*, I.L.R. 3 Ran. 48; *Rahimadulla Sahib* v. *Emperor*, I.L.R. 31 Mad. 140; *Begu Singh* v. *Emperor*, I.L.R. 34 Cal. 551; *Bahadur* v. *Eradatullah Mallick*, I.L.R. 37 Cal. 642, followed.

Jadu Nandan Singh v. *Emperor*, I.L.R. 37 Cal. 250, referred to.

Foy for the appellants.

Ba Han for the respondent.

BA U, J.—This is an appeal from a complaint laid by the 1st Additional Magistrate, Rangoon, under section 193 of the Penal Code against the two appellants.

The facts, reduced to essentials, are these. On the 4th September 1940, the 1st appellant, Hwe Eye Hain, as the managing partner of the firm of War Cheong Lone had leased the firm's rice mill situated in Dalla and 11 paddy gigs to one Sei Sheng. The gigs were numbered serially from 1 to 13, leaving out two numbers, 3 and 5. When the war broke out Hwe Eye Hain left for China. Sei Sheng also left for China in or about the same time as Hwe Eye Hain, leaving the mill and the gigs in charge of nobody.

* Criminal Appeal No. 2021 of 1947 from the order of U San Dun, 1st Additional Special Power Magistrate of Rangoon, dated the 22nd September 1947, passed in Criminal Misc. No. 81 of 1947.

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When the Japanese occupied Rangoon, Hwe Ngwe Chew who for the sake of convenience may be called the respondent took possession of the mill and five paddy gigs. In 1945 Hwe Eye Hain returned from China and found the respondent still in possession. The respondent apparently to legalize his possession took a lease of the mill from the 1st appellant. On the expiry of the lease the 1st appellant tried to get possession of the mill but he apparently failed; whereupon he filed a complaint against the respondent for misappropriating a paddy gig which belonged to his firm by selling it to one Po Thaw. The complaint was sent to the police for enquiry and report. On receipt of the report the complaint was dismissed under section 203 of the Criminal Procedure Code. When the District Magistrate was moved in revision, the order of the Magistrate was set aside and the case was sent to the 1st Additional Magistrate for further enquiry. In the course of his evidence given before the 1st Additional Magistrate the 1st appellant said :

"On return to Rangoon that day I met Ah Hein and he told me 'Hui Ngwe Htui sold one cargo boat and some coils of belts of the mill.' Lye Khy Sein also told me 'Hui Ngwe Htui (Chew) sold one cargo boat.' I found on enquiry that U Po Thaw of Tadaywa bought that cargo boat."

In the course of cross-examination he said :

"Ah Wain and Ah Hein told me it was No. 5 that was sold after the number being altered to No. 6. I did not go to U Po Taw (should be Thaw) to satisfy myself that the boat sold to him was originally No. 5."

In the case of the 2nd appellant, Ah Wain, who was cited as a witness by the 1st appellant, he said :

"The Chinese characters on the cargo boats were 'C1 War Chan Lone.' I do not know that it was Kaung Tat's duties to

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keep a register of those cargo boats. * * * After the accused took possession he removed the Chinese characters and altered them to 'Ko Kyu C1, Ko Kyu C2, Ko Kyu C3, Ko Kyu C4, Ko Kyu C5, Ko Kyu C6.' He altered them shortly after he took possession. I altered No. 5 to No. 6. I asked accused why he was altering the number and he replied 'Not your business.'"

He added : "I told the police officer about my repainting of the cargo boat and altering its number and the sale of it to U Po Thaw but he had not recorded the same."

There was plenty of evidence to prove that the respondent did sell one cargo boat to U Po Thaw while he was in possession of the mill. But the case of the respondent was that the cargo boat which he sold to U Po Thaw was his own and not the property of the mill.

On these facts the Magistrate recorded the following finding :

"The disposal of the cargo boat seems to be a matter for civil action if Hwe Ngwe Chew was no more a partner ; and, if he is still a partner, for him to account for to the other partners under the terms of the deed of partnership."

The Magistrate accordingly discharged the respondent by an order dated the 4th November 1946. When the case was taken up to the learned Sessions Judge on revision praying for further enquiry, the learned Judge said, though not in so many words, that the sale of a cargo boat by the respondent to Po Thaw was proved but it was not proved that the boat sold was No. 5 as alleged. The learned Sessions Judge passed the order on the 10th February 1947. The matter rested till 12th September 1947 when the respondent moved the learned 1st Additional Magistrate to prosecute the appellants under section 193 of the Penal Code in that they made false statements

that he, respondent, sold cargo boat No. 5 when they knew full well that cargo boat No. 5 was not one of the 11 cargo boats leased to Sei Sheng and that therefore he, respondent, was never and, in fact, could never be in possession of cargo boat No. 5. In support of his application the respondent filed a certified copy of the lease deed executed by Sei Sheng in favour of War Cheong Lone. In the deed, as pointed out at the beginning of the judgment, only 11 cargo boats were leased to Sei Sheng and they were numbered serially from 1 to 13 but the numbers 3 and 5 were not there. The Magistrate was evidently impressed by this fact and he accordingly laid a complaint.

Now, the first point that will be noticed was the inordinate delay in making the complaint. Section 476, Criminal Procedure Code, does not fix any time limit within which a complaint should be made but the tenor and the spirit of the language of the section indicate clearly that prosecution for any of the offences set out in section 195, Criminal Procedure Code, should be made at the termination of the proceeding in which the offence alleged has been committed or soon after the termination of the said proceedings. This is the opinion of this Court and some of the High Courts in India.

In *Maung Shwe Phe and five* v. *Ma Me Hmoke* (1) Carr J. said :

"On the question of delay there has not in my opinion been any undue delay in filing the application in this case. It was filed in little over a fortnight and that it was in the first instance misconceived, was the fault of the pleader."

Maung Gyi J. said in the same case :

"I should like to note, however, that in such cases applications should be made promptly."

(1) I.L.R. 3 Ran. 48.

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In a Full Bench case of *Rahimadulla Sahib* v. *Emperor* (1) Sir Arnold White C.J. said :

"The conclusion at which I have arrived is that it was the intention of the Legislature that an order under the section (section 476) should be made either at the close of the proceeding or so shortly thereafter that it may be reasonably said that the order is part of the proceeding."

In the case of *Begu Singh* v. *Emperor* (2) a Full Bench of the Calcutta High Court expressed the same opinion as in the above two cases. This opinion was repeated by another Full Bench in the case of *Bahadur* v. *Eraʻatullah Mallick* (3).

The explanation given by the respondent why he could not move the Court to take action under section 476, Criminal Procedure Code, earlier is because he did not know that the 1st appellant leased the mill and the gigs to Sei Sheng by a deed and that the numbers of the gigs were given therein. This explanation is on the face of it most unsatisfactory. If he had made any attempt to enquire, he would have found out about the existence of the deed during the pendency of the case against him. In any event what is clear from the respondent's own explanation is that it was never apparent to the mind of the Magistrate either during the pendency of the case or soon after that the two appellants had committed perjury. In the Calcutta case cited above Geidt J. said :

"It was never intended that when the proceedings had terminated, the attention of the Court should be subsequently drawn by some private person to the fact that in those proceedings there had been committed some offence in contempt of the Court's authority or against public justice which deserved punishment."

(1) I.L.R. 31 Mad. 140. (2) I.L.R. 34 Cal. 551.
(3) I.L.R. 37 Cal. 642.

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Therefore the delay in taking action under section 476, Criminal Procedure Code, is in my opinion fatal to the case of the respondent. The respondent apparently did not move the machinery of the law so as to vindicate His Majesty but to satisfy his private grudge.

There is also another point which is fatal to the case of the respondent. As pointed out above, there was plenty of evidence to prove that the respondent sold one cargo boat to one U Po Thaw. Therefore, the statement made by the 1st appellant that the respondent sold one cargo boat or gig to U Po Thaw is not false. As regards the statement that the number of the cargo boat so sold was 5, it was made on information received by him from the 2nd appellant and others. Therefore it cannot be said that the 1st appellant *intentionally* gave false evidence. Therefore so far as the 1st appellant is concerned, it is very doubtful whether the prosecution will be successful.

As regards the 2nd appellant, he undoubtedly said that he had to alter the number of the cargo boat from 5 to 6 under instructions of the respondent. There is only the statement of the respondent to contradict the 2nd appellant's statement. Therefore, it is a case of the word of one person against that of another.

Furthermore, there is evidence on the record to prove that at the time of the lease of the mill and 11 cargo boats to Sei Sheng, there were two unserviceable gigs lying near the mill, and it is the case of the 2nd appellant that one of those two cargo boats was repaired by the respondent and then after it had been repaired it was sold to Po Thaw. There is in my opinion a good deal of substance in this statement of the 2nd appellant. Therefore in his case also the prosecution is, in my opinion, not likely to be successful.

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BA U, J.

In the case of *Jadu Nandan Singh* v. *Emperor* (1) Mookerjee and Chatterjee JJ. observed, "No sanction should be granted unless there is a reasonable probability of conviction." What it means in terms of section 476 is that no complaint should be made unless there is a reasonable probability of conviction.

For all these reasons I allow the appeal and direct the withdrawal of the complaint.

(1) I.L.R. 37 Cal. 250.

APPELLATE CIVIL.

Before Mr. Justice Blagden.

DAW TOKE AND ONE (APPELLANTS)

v.

MAUNG PO CHA AND OTHERS (RESPONDENTS).*

1947

Dec. 9.

Arbitration Act, 1944, ss. 32, 33.

Held: In view of ss. 32 and 33 of the Act no suit lies on any ground whatsoever for a decision upon the validity of an award or to set it aside. The procedure laid down in the Act must be followed.

Saw Hla Pru for the appellants.

Kyaw Htoon for the respondents.

BLAGDEN, J.—This is an appeal from an order of the District Judge of Meiktila reversing an order of the 2nd Subordinate Judge of that District sitting at Thazi. The suit was commenced by a plaint in the latter Judge's Court on the 22nd of October 1946 and the plaint set out a previous suit between the parties, a reference to arbitration, and the making of an award, and proceeded to allege misconduct by the arbitrators and to pray for cancellation of the award, costs and further or other reliefs.

The Court of First Instance dismissed the suit on its merits and the learned District Judge reversed that decision and made an order as prayed for.

The Arbitration Act, 1944, came into force by virtue of a notification on the 1st of March 1946 and section 32 of that Act provides (omitting immaterial words) that "no suit shall lie on any ground whatsoever for a decision upon the validity of an award, nor shall any award be set aside or in any way affected

* Civil 2nd Appeal No. 84 of 1947 against the decree of the District Court of Meiktila in Civil Appeal No. 7 of 1947.

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BLAGDEN, J.

otherwise than as provided in this Act." The following section, 33, contemplates questions of the kind raised in this suit being decided by the Court as a general rule on affidavits and section 44 empowers the High Court to make rules consistent with the Act for the purpose of all proceedings in Court under the Act.

It seems to me clear that, for some reason, the Legislature intended to bar suits such as the present suit and that the plaintiffs ought to have applied to the Court in a summary manner on affidavits. To my regret, therefore, I have no option but to allow the appeal on this technical ground and restore the order of the learned trial Judge.

The appellants are entitled to their costs here and in the District Court. Advocate's fee before me five gold mohurs.

APPELLATE CRIMINAL.

Before Mr. Justice Thein Maung.

TUN KHA AND OTHERS (APPELLANTS)

v.

THE KING (RESPONDENT).*

1947

Oct. 15.

Criminal Procedure Code, ss. 164, 364—Admissibility of confession.

Held: Where a confession has been recorded by a 2nd Class Magistrate who has not been empowered by the Government to record confessions, such confession is not admissible in evidence. The Magistrate cannot give oral evidence of the confession.

Nazir Ahmad v. *The King-Emperor*, (1936) L.R. 63 I A. 372 : *The King* v. *Saw Min*, A.I.R. (1939) Ran. 219, followed.

Po Dwe and others v. *The Emperor*, A.I.R. (1934) Ran. 78, deemed to be overruled by the Privy Council.

THEIN MAUNG, J.—I shall deal in this judgemnt with Criminal Appeals Nos. 1500, 1501, 1502, 1503 and 1520 of 1947 and Criminal Revision No. 234A of 1947, as all of them have arisen out of one and the same trial.

Tun Kha, Aung Kyin, Hla Maung, Maung Than and Ma Aye, the appellants in the said appeals, and Kyaw Sein, the respondent in the said revision case, have been convicted of an offence under section 395 of the Penal Code, and each one of them, except Ma Aye, has been sentenced to five years' rigorous imprisonment, whereas Ma Aye has been sentenced, under the same section, to three years' rigorous imprisonment only.

All of them, except Ma Aye, made confessions before U Aung Mo, Township Magistrate, Padaung (P.W. 15) on one and the same day ; and all of them, except Maung Than and Ma Aye, have pleaded guilty.

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*Criminal Appeals Nos. 1500—1503 and 1520 of 1947 ; Criminal Revision No. 234A of 1947 from the order of 3rd Special Judge of Prome, dated the 30th June 1947, passed in Criminal Regular Trial No. 21 of 1947.

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Moreover, all of them, except Ma Aye, have produced articles which have subsequently been identified at identification parades by their respective owners as properties which were taken away by the dacoits.

According to Maung Htwe, S.I.P. (P.W. 5), the appellant Tun Kha produced a Japanese rifle, 21 live Japanese cartridges, 2 misfired cartridges, 24 rifle cartridges and several pieces of clothes in the presence of witnesses on the 27th April, 1947, *i.e.* within five days after the dacoity; and his evidence is supported by the evidence of Maung Pu and ten-house *gaung* Thein Aung, who attested the search lists (Exhibits B, C and D). Tun Kha, who has now retracted his confession on the ground that he was beaten by three or four policemen to make him confess, does not know the men who beat him. He has alleged in his evidence on oath that the police officer and Thein Aung "searched themselves and brought the rifle." However, he did not cross-examine Thein Aung and Maung Pu at all, and he did not cross-examine Maung Htwe with a view to substantiation of the said allegation Some of the clothes produced by him like the cotton blankets, exhibits 2 and 3, and the woollen blanket, exhibit 6, have been identified at an identification parade by Maung Mya and his sister Ma Than (P.Ws. 1 and 2) as their properties. However, he did not cross-examine Maung Mya at all and he cross-examined Ma Than just to find out if she identified them in the presence of elders conducting the identification parade. She told him that she did so in their presence, and ten-house *gaung* Maung Thai (P.W. 12), who supervised at the identification parade and gave evidence of its having been conducted properly, was not cross-examined by him at all.

He merely called witnesses to prove that on the night of the occurrence he was at his house with them as his sister-in-law Ma Hla Saing fell from the house. Ma Hla Saing (D.W. 13) herself does not remember the date on which she fell from the house. However, the other witnesses, namely, Hla Maung, Ma Hla Mai, Maung Toe Shin and U Hla Pe (D.Ws. 11, 12, 13 and 14) agree that he was arrested by the police on the following day. Now, according to U Than Pe, P.S.I. (P.W. 17), he was arrested on the 6th April 1947, *i.e.* on the fourth day after the dacoity. So if Ma Hla Saing fell down from the house at all, it must have been on the 25th April 1947, and not on the 22nd April 1947, which is the date on which the dacoity was committed.

It will thus be seen that he, Tun Kha, must be convicted even if his own confession and the confessions of his co-accused must be left out of consideration on the ground that they are not admissible in evidence.

As for the appellants, Hla Maung, Aung Kyin and Maung Than, who have not only made confessions, but also pleaded guilty, their appeals need be considered under section 412 of the Code of Criminal Procedure only as to the extent or the legality of their sentences. The same remarks apply to the case of the respondent Kyaw Sein who has "declined to submit appeal against the conviction and sentence passed upon him." They do not deny having taken part in the commission of the dacoity, but they plead that they were compelled to do so by Tun Kha and Ma Aye, who were then armed with a rifle and a hand grenade respectively. Only one of them, namely, Hla Maung, has chosen to give evidence on oath to that effect, and he has stated, under cross-examination by counsel for Tun Kha and Ma Aye, that he did not know them before. It is difficult to believe that Ma Aye and Tun Kha would

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have compelled a man, whom they did not know before, to join them in committing a dacoity. Besides, Hla Maung and his companions appear to have had ample opportunity to leave Tun Kha and Ma Aye on the way as he himself has stated "Ma Aye let us from the front when going to the place where we were to commit dacoity. Before we set out on mission Ma Aye, Aung Kyin, Maung Than and I remained in a *kaing* jungle while Tun Kha went to fetch the rifle * * * * Tun Kha left at about dusk and returned about two hours later. Kyaw Sein was also with us in the *kaing* jungle." It further appears from the above extract from his evidence that Ma Aye alone was with Hla Maung and his companions who were altogether four in number and that they could easily have overpowered her if they wanted to. His companions, namely, Aung Kyin, Maung Than and Kyaw Sein have not given evidence on oath in support of their case that they had to join in the dacoity under compulsion. It is true that they have made statements about it in their confessions to U Aung Moe but these confessions were made on one and the same day after they had been in custody together for several days. Besides they are now contending that these confessions should not be admitted in evidence. Under these circumstances I am of the opinion that they have failed to prove that they did not join in the dacoity voluntarily and that they have failed to establish extenuating circumstances for interference with the sentences which have been passed on them.

To turn now to Ma Aye's appeal which stands on a different footing altogether. She was arrested only on the 9th May, 1947, probably on account of her having been incriminated by the other appellants and the respondent Kyaw Sein in their confessions; and she has been convicted on the strength of those confessions

and the evidence of Tun Kyaing (P.W. 16), who was examined by U Than Pe, P.S.I., five days after her arrest. Now it has been laid down in *Ahphut and others* v. *The King* (1) that the confession of a co-accused can only be treated as lending assurance to other evidence against the co-accused and that it cannot be relied upon as the main evidence ; and the fact that these are the confessions of five co-accused against her does not make any difference inasmuch as the confession of one co-accused cannot sufficiently support the confession of another co-accused as against her. (Cf. *Takanah* v. *The Emperor*, 10 C.W.N. 16.) The confessions can just lend assurance to the evidence of Tun Kyaing ; and Tun Kyaing's evidence is not very helpful. He merely says that on the night of dacoity at about lamp lighting time as he was returning from Taungbwe village he saw Ma Aye and five men between *pongyi kyaung* at Seik-te and Thanbandin village. Now his village, according to him, is about two hours' journey from Yewin where the dacoity was committed. He did not see any weapon with Ma Aye and her companions and he cannot say whether Tun Kha was among her companions although he has known Tun Kha for many years. Even if he did see Ma Aye with five men it was at a great distance from Yewin and it was about lamp lighting time although, according to Hla Maung, he and his companions set out with Ma Aye and Tun Kha at about 8 p.m. only. Besides Tun Kyaing has admitted that he smoked opium although he has added at the same time that he brought the opium from Ma Aye and that he smoked it when he was ill. He has also admitted that he was examined by the police "for this case." Under these circumstances

(1) (1940) R.L.R. 104.

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I am of the opinion that the prosecution has failed to prove its case against Ma Aye and that she is entitled to an acquittal.

For the above reasons I dismiss the appeals of Tun Kha, Aung Kyin, Hla Maung and Maung Than and I refuse to take any action in the Criminal Revision in favour of Kyaw Sein. However, I set aside the conviction and sentence of Ma Aye and acquit her. She shall be released so far as this case is concerned.

I have been able to decide all the above cases without coming to a definite decision as to whether the confessions made before U Aung Moe were admissible or not, as it will not make any difference (1) in favour of Tun Kha, Aung Kyin, Hla Maung, Maung Than and Kyaw Sein even though their confessions are left out of consideration altogether, and (2) against Ma Aye even if all the confessions be regarded as admissible evidence against her. However, it will not be proper for me to leave the question as to the admissibility in evidence of these confessions open.

U Aung Moe has admitted that he is only a 2nd Class Magistrate and that he has not yet been empowered by Government to record confessions. So the questions for consideration are (1) whether a confession which has been recorded by a 2nd Class Magistrate who has not been empowered by Government to record confessions is admissible in evidence, and (2) whether in the case of the record of the confession itself being inadmissible in evidence the Magistrate can give oral evidence of the confession.

I am of the opinion that both questions must be answered in the negative in view of the ruling in *Nazir Ahmad* v. *The King-Emperor* (1). That was a

(1) (1936) L.R. 63 I.A. 372.

case in which the Magistrate, who was empowered to record confessions, did not make any attempt to comply with the requirements of sections 164 and 364 of the Code of Criminal Procedure in recording the confession, and their Lordships held that the Magistrate's evidence of the alleged confession was inadmissible. Their Lordships observed in the course of their judgment:

"On the matter of construction ss. 164 and 364 must be looked at and construed together, and it would be an unnatural construction to hold that any other procedure was permitted than that which is laid down with such minute particularity in the sections themselves. Upon the construction adopted by the Crown, the only effect of s. 164 is to allow evidence to be put in a form in which it can prove itself under ss. 74 and 80 of the Evidence Act. Their Lordships are satisfied that the scope and extent of the section is far other than this, and that it is a section conferring powers on magistrates and delimiting them. It is also to be observed that, if the construction contended for by the Crown be correct, all the precautions and safeguards laid down by ss. 164 and 364 would be of such trifling value as to be almost idle. Any magistrate of any rank could depose to a confession made by an accused so long as it was not induced by a threat or promise, without affirmatively satisfying himself that it was made voluntarily and without showing or reading to the accused any version of what he was supposed to have said, or asking for the confession to be vouched by any signature. The range of magisterial confessions would be so enlarged by this process that the provisions of s. 164 would almost inevitably be widely disregarded in the same manner as they were disregarded in the present case.

As a matter of good sense, the position of accused persons and the position of the magistracy are both to be considered. An examination of the Code shows how carefully and precisely defined is the procedure regulating what may be asked of, or done in the matter of examination of, accused persons, and as to how the results are to be recorded and what use is to be made of such records. * * * * * So with regard to the magistracy: it is for obvious reasons most undesirable that magistrates and judges should be in the position of witnesses in so far as it can be avoided. Sometimes it

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cannot be avoided, as under s. 533; but where matter can be made of record and therefore admissible as such there are the strongest reasons of policy for supposing that the Legislature designed that it should be made available in that form and no other. In their Lordships' view, it would be particularly unfortunate if magistrates were asked at all generally to act rather as police-officers than as judicial persons; to be by reason of their position freed from the disability that attaches to police-officers under s. 162 of the Code; and to be at the same time freed, notwithstanding their position as magistrates, from any obligation to make records under s. 164. In the result they would indeed be relegated to the position of ordinary citizens as witnesses, and then would be required to depose to matters transacted by them in their official capacity unregulated by any statutory rules of procedure or conduct whatever. Their Lordships are, however, clearly of opinion that this unfortunate position cannot in future arise because, in their opinion, the effect of the statute is clearly to prescribe the mode in which confessions are to be dealt with by magistrates when made during an investigation, and to render inadmissible any attempt to deal with them in the method proposed in the present case."

This ruling has been followed by this Court in *The King* v. *Saw Min* (1), where it was held:

"If a Magistrate has made no attempt to comply with the requirements of ss. 164 and 364 in recording the confession of an accused person, such a confession is not admissible in evidence. Where such an attempt has been made, but there is a formal defect in the procedure thereof, then it will become curable under s. 533."

It is true that the present case is not one in which the learned Magistrate himself has failed to comply with the requirements of sections 164 and 364 of the Code of Criminal Procedure. It is a case in which a Magistrate, who is not empowered to record confessions, has recorded confessions, making every attempt to comply with the requirements of the said sections. However, the fact that he has not been so

(1) A.I.R. (1939) Ran. 219.

empowered cuts at the very root of the proceedings. It is not a case of mere irregularity in recording confessions. It is a case of their having been recorded without any power to do so. It is similar to the case of a magistrate having acted without jurisdiction and the entire proceeding must be regarded as a nullity. Otherwise in the words of their Lordships of the Privy Council "all the precautions and safeguards laid down by sections 164 and 364 would be of such trifling value as to be almost idle", "any magistrate of any rank could depose to a confession made by an accused", and magistrates would "be relegated to the position of ordinary citizens as witnesses."

The learned Special Judge has admitted the confessions and the oral evidence of the magistrate who recorded them, on the authority of *Po Dwe and others* v. *The Emperor* (1) but this ruling must be deemed to have been overruled by *Nazir Ahmad* v. *The King-Emperor* (2 *supra*) and it has been expressly dissented from in *The King* v. *Saw Min* (3 *supra*).

The other authority which has been relied upon by the learned Special Judge is *Emperor* v. *Dhanka Amra* (4) which related to a confession recorded by a magistrate in a native state. This ruling however is distinguishable inasmuch as the confessions in the present case have been recorded by a mere 2nd Class Magistrate in Burma who cannot record confessions under section 164 of the Code of Criminal Procedure.

(1) A.I.R. (1934) Rang. 78.
(2) (1936) L.R. 63 I.A. 372.
(3) A.I.R. (1939) Rang. 219.
(4) (1914) 16 Bom. L.R. 261.

APPELLATE CRIMINAL.

Before Mr. Justice Thein Maung.

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Oct. 21.

KHWE DI AUNG (APPELLANT)

v.

THE KING (RESPONDENT).*

Penal Code, s. 395—S. 32 (3) of the Evidence Act—Admissibility of statements made as against other accused—Necessity of corroboration of material particulars of such statement.

Held: That the said incriminating statement made by a person who was one of the dacoits was not admissible under s. 32 (*1*) of the Evidence Act against another inasmuch as it did not relate to the cause of his death or to any of the circumstances of the transanction which resulted in his death. Under s. 32 (*3*) of the Evidence Act it could not be admitted in this case on the ground that he must have known that he was dying, and exposure to a criminal prosecution for the dacoity cannot under the circumstances be taken seriously At any rate, he must be treated to be an accomplice and his statement required corroboration on some material particulars so as to satisfy the court of its truth in so far as it implicates the appellant.

Nga Te and others v. *King-Emperor*, 7 L.B.R. 33, followed.

Hari Ram v. *The Crown*, (1934) I.L.R. 15 Lah. 693, applied.

THEIN MAUNG, J.—The appellant Khwe Di Aung has been found guilty of having committed dacoity at Sinboke Village, Kyaukpyu Township, at about dawn on the 14th March 1947 and he has been sentenced to seven years' rigorous imprisonment under section 395 of the Penal Code.

He has been convicted solely on his having been incriminated by Than Khe, since deceased. Than Khe, who was one of the dacoits, was caught by the villagers in the house which was attacked by the dacoits. He received several injuries at the hands of the villagers before he was actually arrested by them and he died

* Criminal Appeal No. 1374 of 1947—appeal from the order of Specia Judge of Kyaukpyu, dated the 7th June 1947, in Criminal Regular Trial No. 31 of 1947.

about one rice pot boil after he had been examined by Po Nyun (P.W. 9).

The learned Special Judge has observed in the course of his judgment :

"It is, therefore, obvious that before Nga Than Khe died, Nga Than Khe informed the villagers that the accused Khwe Di Aung was in the party though Khwe Di Aung did not come actually into the village. The point for consideration is whether this statement of Nga Than Khe should be accepted as evidence against the accused Khwe Di Aung. Possibly Nga Than Khe was then in fear of the villagers but he must have known that he was dying and I do not see why Nga Than Khe should falsely implicate the accused Khwe Di Aung, because, Nga Than Khe not only implicated the accused Khwe Di Aung but also others."

The learned Special Judge has not stated under what section of the Evidence Act Nga Than Khe's statement is admissible in evidence as against the appellant. In *Nga Te and others* v. *King-Emperor* (1), a similar statement was held not to have been admissible in evidence. In the course of the judgment therein Mr. Justice Hartnoll observed that sub-section (*1*) of section 32 of the Evidence Act "refers to statements made by a person *as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death in cases in which the cause of that person's death comes into question.* The present case is one concerned with who were the dacoits * * * * * and it can hardly be said that the cause of Po Thaw Gyi's death comes into question in it directly, though it may come indirectly and incidentally ; but the trial is clearly not one into the circumstances of his death as to who caused it and whether an offence was committed by some one in causing it."

(1) 7 L.B.R. 33.

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Than Khe's statement may be admissible in evidence under sub-section (3) of section 32 of the Evidence Act on the ground that it would have exposed him to a criminal prosecution for the dacoity. However, the learned Special Judge himself has found that Than Khe must have known that he was dying and exposure to a criminal prosecution for the dacoity cannot under the circumstance be taken seriously. At any rate, Than Khe must have been an accomplice and his statement requires corroboration on some material particulars which will satisfy the Court of its truth in so far as it implicates the appellant. [See *Hari Ram* v. *The Crown* (1).] And there is no independent corroborative evidence to connect the appellant with the crime.

I accordingly set aside the conviction and sentence of Khwe Di Aung. He is acquitted and he shall be released so far as this case is concerned.

(1) (1934) I.L.R. 15 Lah. 693.

APPELLATE CRIMINAL.

Before Mr. Justice Thein Maung.

B. RAJANA (APPELLANT)

v.

THE KING (RESPONDENT).*

1947

Oct. 21.

Penal Code, s. 408—Distinction between a civil wrong and criminal offence.

Appellant, a tindal of a boat in the employment of Port Lighterage Department, was entrusted with a 1,000 bags of rice on 27th November 1946 to be loaded on S.S. "Stagen". On 29th November 1946 the appellant loaded the rice bags and when loading was over 12 bags were found short. He was convicted of criminal breach of trust in respect of the 12 bags and sentenced to six months' rigorous imprisonment.

Held: That there was nothing to show that the shortage was due to dishonest misappropriation or conversion by the appellant. Every breach of trust case gives rise to a suit for damage but it is only when there is evidence of a mental act of fraudulent misappropriation that an offence under ss. 408 and 409 can arise.

Kanhaiya Lall v. *Emperor*, 38 Cr.L.J. 491, followed.

Held further: Mere failure to deliver the full quantity of goods is insufficient to prove dishonest misappropriation or conversion.

Ramaya and others v. *The Crown*, 1 Cr.L.J. 908, applied.

Sona Meah v. *King-Emperor*, (1924) I.L.R. 11 Ran. 476, distinguished.

Hla Gyaw for the appellant.

THEIN MAUNG, J.—The appellant Rajana has been found guilty of a criminal breach of trust in respect of 12 bags of rice and has been sentenced to six months' rigorous imprisonment under section 408 of the Penal Code.

The case for the prosecution is that the appellant was the tindal of the cargo boat SR 156, in the employment of Port Lighterage Department of the Port Commissioners and that in his capacity as such he was entrusted by the ABC Rice Mill, Upper

* Criminal Appeal No. 1780 of 1947—appeal from the order of 1st Additional Magistrate (Special Power) of Rangoon, dated the 9th September 1947, passed in Criminal Regular Trial No. 6 of 1947.

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Pazundaung, of which the complainant J. S. Forrest is a Director, with a thousand bags of rice on the 27th November, 1946, as per Exhibit A, to be loaded on board the S.S. "Stagen". The appellant loaded the rice bags on the S.S. "Stagen" on the 29th November 1946 and Than Maung (P.W. 2), who was a shipping clerk employed by the said company, checked the loading thereof. When the loading was over, Than Maung found that there were only 988 bags and that there was a shortage of 12 bags. Than Maung then informed the appellant of the shortage and also of the fact "that the totals of the loading as noted by the ship's clerk and the ship's tally clerk also showed that 12 bags of rice were short." The appellant then denied that there was any shortage at all. So Than Maung made a report to the company with the result that on the 2nd December, 1946, Mr. Forrest complained of the shortage to the Commissioners for the Port of Rangoon and forwarded copies of his complaint to the Police Superintendent, River Division, *inter alia*.

The case for the prosecution rests almost entirely on the evidence of Than Maung and his record of loading, Exhibit B. Although he has stated that the totals of the loading as noted by the ship's clerk and the ship's tally clerk also showed that 12 bags of rice were short, neither the ship's clerk nor the ship's tally clerk has been called as a witness for the prosecution, and the notes which are alleged to have been made by them have not been produced. Than Maung has merely stated, "I looked up the totals of the loading in the records prepared by those clerks." He does not say that these notes were shown to and checked by the appellant also.

Ardia, who probably is the same person as Addiyya mentioned in the charge, was called to give corrobora-

tive evidence, either as the ship's clerk or the ship's tally clerk, but it is quite clear from his evidence that he had nothing to do with the loading of the rice bags by the appellant on S.S. "Stagen". He does not even know the appellant and Than Maung.

According to Than Maung's own statement, the appellant denied that there was any shortage at all then and there. So one would have expected him to have asked the appellant to check his note Exhibit B with the notes of the ship's clerk and the ship's tally clerk, or to have asked either or both of those clerks to certify that his record was correct at least by counter-signing on it, but he did nothing of the sort. He has not even noted the names of those clerks, and it is not known whether he made a report to the company before S.S. "Stagen" left Rangoon so that the rice bags could, if necessary, be unloaded for the purpose of checking.

Moreover the prosecution has not produced any receipt granted by the mate or other officer in charge of S.S. "Stagen" for the rice bags which were shipped on it, and it is not known to which place the rice bags were consigned and how many bags of rice were actually received by the consignee.

Under these circumstances I am of the opinion that Than Maung's evidence, even though it is supported by his note Exhibit B, is not conclusive evidence of there having really been a shortage of 12 bags of rice.

Even if there was such a shortage there is nothing to show that the shortage was due to dishonest misappropriation or conversion by the appellant. Nanavutty J. has observed in *Kanhaiya Lall* v. *Emperor* (1):

"The distinction between a civil wrong, which gives rise to a suit for damages for that wrongful act or tort, and a criminal

(1) 38 Cr.L.J. 491.

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offence punishable under the Indian Penal Code is very clear. Every breach of trust gives rise to a suit for damages, but it is only when there is evidence of a mental act of fraudulent misappropriation that the commission of embezzlement of any sum of money becomes a penal offence punishable as criminal breach of trust under ss. 408 and 409 of the Indian Penal Code. It is this mental act of fraudulent misappropriation that clearly demarcates an act of embezzlement which is a civil wrong or tort, from the offence of criminal breach of trust punishable under s. 408, Indian Penal Code. This is clearly brought out in the observations of Coleridge J. in *Rex* v. *Williams*—(1836) 7 C.P. 338—and in *R.* v. *Lynch*—6 Cox C.C. 445."

Fox J. has also held in *Ramaya and others* v. *The Crown* (1) that the mere failure to deliver the full quantity of goods was not sufficient to support a conviction of the tindal of a cargo boat for having dishonestly misappropriated or converted the missing quantity to his use. The facts proved in that case were that 200 hides and other goods were entrusted to the tindal of a cargo boat to be carried to a steamer. On delivery on the steamer 22 hides were missing but there was no evidence as to what became of them. It will thus be seen that the facts are similar to the facts in this case.

The case of *Sona Meah* v. *King-Emperor* (2) is distinguishable. In that case the appellant Sona Meah was entrusted with 2,680 gunnies with instructions to deliver them at certain places. On the day following the entrustment he reported to the complainant that the sampan had come into collision with a sailing boat with the result that it capsized and all the gunnies were thrown into the river and lost; and Lentaigne J. observed in the course of his judgment:

"The only reasonable inference that I can draw from this failure to salve the gunnies is either that the story is a false one

(1) 1 Cr.L.J. 908. (2) (1924) I.L.R. 11 Ran. 476.

and that the appellant was not upset at all or that he intentionally let the gunnies drift away, presumably in order that his accomplices might pick up the gunnies. On either aspect the inference to be drawn would be one as to the guilt of the appellant."

In the present case the appellant has not given an account of the loss of the 12 bags of rice which is shown to be false and incredible. He does not even admit that there has been a shortage of 12 bags of rice and he has denied that Than Maung informed him then and there or at all of the alleged shortage.

Cases relating to failure to account for money entrusted are also distinguishable as the rice bags could not be kept under lock and key and they had as a matter of fact to be kept in the cargo boat from the 27th November 1946 up to about 3 p.m. on the 29th November 1946.

For the above reasons I set aside the conviction and sentence of the appellant Rajana. I acquit him and direct that he shall be released so far as this case is concerned and that his bail bond be cancelled.

APPELLATE CRIMINAL.

Before Mr. Justice Thein Maung.

1947

Oct. 24.

TUN KYAING (APPELLANT)

v.

THE KING (RESPONDENT).*

Right of private defence—How long exists—Existing right—Error of judgment.

When the deceased struck the appellant with a wooden yoke pin and the latter wrenched it from his hand and both were struggling and the appellant gave a blow on the head of the deceased with it as a result of which the other man died.

Held: That as parties were struggling—right of private defence was not gone and he must have inflicted the blow not only on grave and sudden provocation but also in exercise of the right of private defence. It is not possible for a person under such circumstances to weigh what maximum amount of force is necessary to keep within that right. The sentence was therefore reduced to one of one year's rigorous imprisonment.

The King v. *Hla Maung*, (1946) R.L.R. 50 at p. 55; *Bhut Nath Dave* v. *King-Emperor*, 13 C.W.N. 1180; *Radhey and others* v. *Emperor*, 24 Cr.L.J. 735; *Queen* v. *Fuzza Meeah*, (1866) 6 W.R. (Cr.) 89; *Queen* v. *Shunker Sing*, (1864) 1 W.R. (Cr.) 34, followed.

Tun Maung for the Crown.

THEIN MAUNG, J.—The appellant Tun Kyaing has been found guilty of having caused the death of Tun Yin while he was deprived of the power of self-control by grave and sudden provocation, and he has been sentenced to undergo seven years' rigorous imprisonment under section 304 of the Penal Code.

He has appealed to this Court for reduction of the sentence on the ground that he acted in self-defence while he was terror-stricken; and his appeal has been admitted by my brother Mr. Justice Ba U with the remark "On the facts found I am not sure whether the sentence is not somewhat severe."

* Criminal Appeal No. 1782 of 1947 being appeal from order of Special Judge of Henzada, dated the 15th August 1947, passed in Special Judge Trial No. 36 of 1947.

The facts which have been found by the learned Special Judge are that the appellant made a report against the deceased to the village elder Maung Sint (P.W. 2) one day before the date of the incident as the deceased had removed a post from his fencing. On the day of the incident, the appellant, the deceased and some other villagers were having tea in Maung Sint's house after they had helped Maung Sint in roofing his house. While they were having tea there, the deceased picked a quarrel with the appellant for having made the said report, picked up an untrimmed wooden yoke pin and went towards the appellant in a threatening manner "uttering deadly threats." As the deceased struck at the appellant with the yoke pin, the latter wrenched it from his hand and gave him a blow on the head with it. Thereupon the deceased fell on the ground and the appellant ran away with the stick.

Dr. John (P.W. 8) found two contused wounds on the right side of the head of the deceased with fractures of the skull bone underneath and, according to him, each injury by itself was sufficient in the ordinary course of nature to cause death.

Although the doctor found two injuries as stated above, the eye-witnesses Maung Sint, Po Nyan, May Doe, Gan Gaw and Tun Thin (P.Ws. 2, 3, 4, 5 and 6), are unanimous that the appellant delivered only one blow and the doctor also has stated "If the weapon used was of irregular shape, both injuries could have been caused by the infliction of one blow." Under these circumstances, the learned Special Judge has found that only one blow was delivered by the appellant.

The learned Special Judge has also found that the provocation given by the deceased to the appellant was grave and sudden ; but he has held that the appellant's plea of self-defence is clearly untenable. He has observed in the course of his judgment "After he had

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THEIN-MAUNG, J.

deprived the deceased of the use of the stick, the accused was no longer in danger of being grievously assaulted by the latter and with several friends looking on close by, there was really no threat of danger to his life when he yielded to the sudden impulse of delivering the murderous blow on the deceased's head."

The plea of self-defence may be untenable in the sense that the appellant has exceeded his right of private defence ; but it is not quite correct to say that the appellant after he had deprived the deceased of the yoke pin was no longer in danger of being grievously assaulted by him. The appellant who has given evidence on oath in his own defence has stated that he struck the blow as the deceased tried to snatch the yoke pin back from him, and the probabilities are that the deceased did try to get the yoke pin back from him with a view to further assault on him. Besides, nothing turns on there having been "several friends looking on close by" since none of them has given evidence of any attempt having been made by anyone of them to restrain the deceased, or to prevent him from assaulting the appellant any further.

In his judgment in *The King* v. *Hla Maung* (1), Mr. Justice Ba U has quoted with approval the eminent jurist Mayne who said :

"But a man who is assaulted is not bound to modulate his defence step by step, according to his attack, before there is reason to believe the attack is over. He is entitled to secure his victory, as long as the contest is continued. He is not obliged to retreat, but may pursue his adversary till he finds himself out of danger ; and if, in a conflict between them, he happens to kill, such killing is justifiable. And, of course, where the assault has once assumed a dangerous form every allowance should be made for one, who, with the instinct of self-preservation strong upon him, pursues his defence a little further than to a perfectly cool bystander

(1) (1946) R.L.R. 50 at p. 55.

would seem absolutely necessary. The question in such cases will be, not whether there was an actually continuing danger, but whether there was a reasonable apprehension of such danger."

So the question really is not whether there was an actually continuing danger but whether there was a reasonable apprehension of such danger ; and I am of the opinion that the appellant was not out of danger so long as the deceased was struggling with him for possession of the yoke pin [cf. *Queen* v. *Fuzza Meeah* (1) and *Farida* v. *Emperor* (2)].

So the appellant must be held to have inflicted the blow not only on grave and sudden provocation but also in exercise of the right of private defence although he has exceeded the right of private defence in delivering the blow with such force as to cause fractures of the skull.

With reference to the question of sentence, the Court must take into consideration not only the grave and sudden provocation and the right of private defence but also the facts that the appellant struck the deceased with the very yoke pin with which the deceased was going to strike him, that he struck the deceased only one blow and that the yoke pin is only 1½ cubits long. In this connection the Court must also bear in mind the remarks of Jenkins C.J. and Ryves J. Jenkins C.J. observed in *Bhut Nath Dave* v. *King-Emperor* (3) :

"A man in the predicament of the accused could not be expected to judge too nicely."

Ryves J. observed in *Radhey and others* v. *Emperor* (4)—

"When exercising the right of private defence it is difficult to expect the person to weigh 'with golden scales' what maximum amount of force is necessary to keep with that right."

(1) (1866) 6 W.R. (Cr.) 89.
(2) 35 Cr.L.J. 174.
(3) 13 C.W.N. 1180.
(4) 24 Cr.L.J. 735.

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THEIN MAUNG, J.

My brother Mr. Justice Ba U has also remarked in *The King* v. *Hla Maung* (1) :

"Every allowance should in my opinion be made for the stress, danger and excitement under which he labours."

So I am of the opinion that the sentence of seven years' rigorous imprisonment is too severe. I find that, in *Queen* v. *Fuzza Meeah* (2), the facts in which are more or less similar to the facts in the present case, the sentence was reduced from three years' rigorous imprisonment to one year's rigorous imprisonment. I also find that in *Queen* v. *Shunker Sing* (3), which is a case of an affray respecting land wherein one party was the aggressor and the other party (had the affair not ended fatally) would have been in the legal exercise of the right of defence of property, the sentence was reduced to one year's rigorous imprisonment.

I accordingly reduce the appellant's sentence from seven years' rigorous imprisonment to one year's rigorous imprisonment only.

(1) (1946) R.L.R. 50 at p. 55. (2) (1866) 6 W.R. (Cr.) 89.
(3) (1864) 1 W.R. (Cr.) 34.

CRIMINAL REVISION.

Before Mr. Justice E Maung.

MAUNG HLA BAW (PHAW) (APPLICANT)

v.

MA OH ZA (RESPONDENT).*

1947
Sept. 15.

Criminal Procedure Code, s. 490—Effect of re-union of husband and wife upon an order for maintenance.

A wife had an order for maintenance : subsequently there was a re-union of the husband and wife. The wife asked for execution of the order for maintenance up to re-union.

Held: That she was entitled to the same. The order for maintenance may remain in suspension for the period during which they live together and during such period the husband may apply to have the order cancelled under s. 488 (5) or 489, Criminal Procedure Code.

Judgment of Doyle J., 8 Ran. 460, doubted.

Kanagammal v. *Pandara Nadar*, 50 Mad. 663 ; *Pearey Lal* v. *Naraini*, 58 All. 379 ; *Coelho* v. *Coelho*, (1937) Nag. 230, followed.

E MAUNG, J.—I cannot accept the recommendation of the District Magistrate of Kyaukpyu in his Criminal Revision No. 63 of 1947.

It is true that in *U Po Shein* v. *Ma Sein Mya* (1) Doyle J. at page 462 of the report has said that the re-union of the husband and the wife after the making of an order of maintenance must be interpreted as removing the basis on which the order of the Magistrate rests and as therefore vacating the order. But this decision, even if it is correct, does not go to the extent of denying the wife the arrears of maintenance that had accrued to her before the re-union. The vacation of the order, if there can be a vacation at all, by a mere re-union between the husband and the wife would take effect only as from the date of the re-union. The rights

* Criminal Revision No. 169B of 1947 being a review of the order of the Township Magistrate, Kyaukpyu, in Criminal Misc. No. 5 of 1947.

(1) 8 Ran. 460.

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under the order prior to that date, which till that date was in force, cannot be taken away in the absence of any express provision in the Code of Criminal Procedure.

It is not necessary for me, in this case, to pursue the matter of the effect of a re-union between the husband and the wife on an order of maintenance made prior to such re-union. I shall not therefore refer this matter to a Bench to have the correctness of Doyle J.'s decision tested. I must, however, say that, in my opinion and speaking with the greatest respect to Doyle J., there is a great deal to be said for the contrary view. The decisions in *Kanagammal* v. *Pandara Nadar* (1), *Pearey Lal* v. *Naraini* (2) and *Coelho* v. *Coelho* (3) should, in my opinion, be followed. As has been said in the Allahabad case, the order of maintenance may remain in suspension for the period during which the husband and the wife, after the re-union, live together and that during the period of suspension the husband may apply to have the order cancelled under section 488 (5) or section 489 of the Code of Criminal Procedure. If it is not so cancelled and if the re-union should turn out to be a failure and the wife is turned out again, I do not see why she should not take advantage of an order made by a competent Court which has not been set aside in due process of law.

In this case, the sum which is claimed by the wife, who is the respondent before me, is the sum which had accrued due before the re-union of the husband and the wife. I cannot also overlook the fact that when the applicant Maung Hla Baw appeared before the Township Magistrate on the 19th May 1947 he promised to pay Rs. 60 on the 3rd June 1947. It was only on the latter date that he changed his mind and stated his

(1) 50 Mad. 663. (2) 58 All. 379.
(3) (1937) Nag. 230.

intention to apply to the District Magistrate, Kyaukpyu, in revision.

I accordingly reject the recommendation of the District Magistrate, Kyaukpyu, and uphold the order of the Township Magistrate, Kyaukpyu.

APPELLATE CRIMINAL.

Before Mr. Justice E Maung.

1947

Sept. 19.

TUN KYAING (APPELLANT)

v.

THE KING (RESPONDENT).*

Penal Code, ss. 366, 366A—"Seduced to illicit intercourse", meaning of—Whether conviction under s. 366 of Penal Code can be altered into one under s. 7 of Suppression of Brothels Act.

Held: Where a girl below the age of 18 years was living a life of prostitution in a brothel and she was induced, without any force or deceit, by the appellant to leave the brothel and live with him as his concubine, he could not be convicted under ss. 366 and 366A of the Penal Code.

Held further: "Seduced to illicit intercourse" is something different from "seduction" in its popular sense. It means induced to surrender or abandon a condition of purity from unlawful sexual intercourse. Where the girl was already living a life of prostitution, she could not be said to have been seduced to illicit intercourse.

Shaheb Ali v. *Emperor*, I.L.R. 60 Cal. 1457; *Emperor* v. *Baijnath*, 54 All. 756; *Nura* v. *Emperor*, 35 Cr.L.J. 1386, followed.

King-Emperor v. *Nga Ni Ta*, (1902-03) 1 U.B.R. (Penal Code) 15; *King-Emperor* v. *Nga Nge*, (1904—06) 1 U.B.R. (Cr.) 17; *Crown* v. *Chan Mya*, 1 U.B.R. 297, dissented from.

Bahadur v. *The Empress*, (1881) P.R. (Cr.) 7, referred to.

Held further: S. 7 of Brothels Act was the proper section but the conviction could not be altered into one under that section as this is a special law and s. 237, Criminal Procedure Code, is not applicable.

S. N. Sastry for the appellant.

Tin Maung (Government Advocate) for the respondent.

E MAUNG, J.—The facts, which are not in dispute in the case from which this appeal arose, are that Ma Tin Yi (P.W. 4), whose age has been estimated by the medical witness Dr. Matharu (P.W. 11) at about 16 years and who in her own deposition stated that she

* Criminal Appeal No. 1699 of 1947—appeal from the order of 5th Additional Magistrate of Rangoon, dated the 11th June 1947, in Criminal Regular Trial No. 739 of 1946.

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was born about April 1930, had, sometime prior to September 1946, been an inmate of what clearly was a brothel at No. 93, 22nd Street, Rangoon, maintained by a person named Hoke Kyu and that her position in that brothel was as a prostitute serving the visitors to it. The evidence of Ma Kyin Saing (P.W. 7), herself a prostitute and an inmate at one time of the same establishment, and that of Thein Maung (P.W. 8), clearly proves, these facts.

One day in September 1946 the appellant visited Ma Tin Yi at the establishment in 22nd Street and following that visit Ma Tin Yi was removed to a house in Sparks Street and from there to a house, No. 76, Fraser Street, which was in the occupation of the appellant. Ma Tin Yi remained in the house in Fraser Street till the 23rd November 1946 when U Hla Maung (P.W. 1), Officer-in-charge of Anti-Vice Squad, Rangoon, visited the premises, arrested the appellant and took her away from it.

It has been claimed on behalf of the prosecution that Ma Tin Yi was taken away by force from the establishment in 22nd Street and that after having taken her away first to Sparks Street and then to Fraser Street, the appellant forced her to continue a life of prostitution in the latter place for his pecuniary benefit. It is also alleged that before forcing the girl to continue a life of prostitution the appellant committed several acts of rape on her. On these allegations and also on the allegation that the appellant would not allow the girl to leave the premises in which he kept her after her removal from the 22nd Street establishment, the appellant was sent up for trial under sections 344, 366 and 376, Penal Code.

The 5th Additional Magistrate, Rangoon, in his Criminal Regular Trial No. 739 of 1946 found the appellant guilty of an offence under section 366 of the

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Penal Code and sentenced him to three years' rigorous imprisonment. The appellant appeals to this Court against this conviction and sentence.

I may say at once that if I had been able to confirm the conviction, I could not have seen my way to interfere with the sentence at all. I agree with the learned trial Magistrate that if the facts had been as were found by him, the appellant is deserving of at least three years' rigorous imprisonment.

On the facts, however, I find myself unable to agree with the learned trial Magistrate. Indeed it is difficult to discover from his judgment what definitely he found the appellant did so far as getting the girl Ma Tin Yi to remove herself from 22nd Street to Sparks Street is concerned. It appears to me that the learned Magistrate was unable to make up his mind whether the girl was made to leave the 22nd Street establishment under a threat, as alleged by her, of physical injury or by an act of deceit which, however, appears to be nobody's case. The learned Magistrate relied for his decision on the case of *Bahadur* v. *The Empress* (1). A study of that case would appear to suggest that the learned Magistrate rejects the prosecution story of the girl Ma Tin Yi being compelled by force to go away from the 22nd Street establishment and go with the appellant to Sparks Street and later to Fraser Street house. There the accused, concealing from the parents of the girl and herself that he was a *kanjar*, and falsely representing himself to be subedar of his brother's regiment, induced the girl to marry him and to leave her home and accompany him to Kohat and on arrival there he instigated her to prostitute herself. The circumstances of that case also were such that the learned Judges of the Punjab Chief Court could have drawn a fair inference that the accused intended, when

(1) (1881) P.R. (Cr.) 7

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he married the girl, to make her a prostitute. It is not a correct interpretation of the decision in that case to say, as the learned trial Magistrate by implication said, that where a person on the promise to make a girl his wife induced her to go away with him, he would be guilty of an offence under section 366 of the Penal Code if, though he made her his wife, he intended nevertheless to induce her to continue to live a life of prostitution after the marriage with him.

In the present case, as I have already said, the prosecution case is not that there was any concealment of facts or misrepresentation which operated on the girl's mind so as to make her come away from the 22nd Street establishment. The prosecution case was quite plain and unequivocal : it is that the appellant, armed with an open clasp knife and threatening to use it on the girl, forced her to come away with him from that establishment. It is therefore necessary to consider if that story, and that story alone, is substantiated in this case.

Ma Tin Yi (P.W. 4) says that the abduction took place at about 10 a.m. while she was in Hoke Kyu's lodging rooms in 22nd Street. According to her there was in the premises at the time a Chinese cook known to her as "lumbar". The man's proper name appears to be Wan Law and he is the 5th witness for the prosecution. Ma Kyin Saing (P.W. 7) who, as I have already said, was another prostitute living in that establishment, claimed that she was in the room next to that occupied by Ma Tin Yi. These three witnesses speak to Ma Tin Yi being taken away under threats of physical injury to be done to her if she did not comply. Ma Tin Yi's story is that while she was in her room the appellant came in and raped her but that as he had a dagger with him she did not shout for help as she was afraid of physical injury at his hands. She then goes

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on to say that after the act of rape the appellant took her out by force to a trishaw which was waiting outside the house. There she saw another trishaw occupied by two other persons, one of whom was Thein Maung (P.W. 8). She says the appellant was holding the dagger all the time in one hand and with the other he held her. She got into the same trishaw as the appellant, the appellant taking the front seat and she the back seat. The two trishaws then moved off and as it was raining then, the appellant put a rain coat over her head and body while they were travelling. She says that she was crying all the time.

Wan Law (P.W. 5), who calls himself a tea-shop assistant but who obviously was actively engaged in the management of the brothel kept under the euphemistic name of lodging rooms by Hoke Kyu, says that the appellant entered Ma Tin Yi's room and stayed there for about one hour before he took her away "embracing her body with his hands." He said that he did not interfere as he was afraid of the appellant and his companions one of whom was Thein Maung (P.W. 8). From this man's evidence it appears that the appellant was no stranger to the lodging house kept by Hoke Kyu for he says: "I have seen Tun Kyaing one or two times before the occurrence. He used to come once or twice to Hoke Kyu's lodging room."

Ma Kyin Saing (P.W. 7), who on the same day and soon after Ma Tin Yi was removed from Hoke Kyu's lodging rooms shifted to the appellant's house in the company of one Maung Thein and his wife, claims that she heard Ma Tin Yi saying: "I do not want to go with you" and that when she peeped through the door of the room where Ma Tin Yi was then, she saw the appellant taking her out of the room pointing a dagger at her.

It must be remembered that 22nd Street, Rangoon, at 10 a.m. in the morning is a very busy thoroughfare.

It must also be remembered that the route from 22nd Street to Sparks Street lies in a crowded area of the city where the girl could easily have sought assistance from the police or other persons on the road. Moreover, according to the girl, the appellant was seated in the front seat and she at the back seat and she could easily have dropped off from the trishaw. On the evidence of Ma Tin Yi, Wan Law and Ma Kyin Saing I cannot accept the story of her being compelled by threats of physical injury to accompany the appellant to the Sparks Street establishment.

But the matter does not rest there. It is admitted by Ma Tin Yi that she went to the cinema show at Kandawmeik Hall twice while she was living in Sparks Street with the appellant. The first visit to the cinema was soon after noon of the day she came away from the 22nd Street establishment. The evidence of Ma Bi (P.W. 9) is quite clear on this point. U Ohn Maung (D.W. 1) and Ma Hnin Yin (D.W. 2) his wife, against whom nothing whatsoever has been suggested, speak of the appellant and Ma Tin Yi visiting their house once as husband and wife during the rainy season of last year. Moreover, when the house in Fraser Street was visited by a party led by Bo Tin Maung (P.W. 2), who describes himself as a leader of P.V.O., Bagayataik, they met the girl Ma Tin Yi at the house and though this party was bent on rescuing girls who were reported to them as forced to earn their livelihood as prostitutes, they did not take away Ma Tin Yi then because both the appellant and Ma Tin Yi said that they were husband and wife. It was only on a subsequent raid by U Hla Maung (P.W. 1) that Ma Tin Yi for the first time reported to any person in authority that she had been kept unwillingly in the appellant's house. It is significant in this connection that U Hla Maung, though an Officer-in-charge of Anti-Vice Squad, allowed himself

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to be led by the P.V.Os. For instance he says: "I examined Yebaws Bo Tin Maung, Ko Nyunt Shein and Ko Hla Han on 26th November 1946. I examined Ma Tin Yi on 27th November 1946. When I went to examine Ma Tin Yi, Yebaw Bo Tin Maung handed over a statement made by her to the elders." Ma Tin Yi and Maung Nyunt Shein (P.W. 6) soon after the "rescue" of Ma Tin Yi began to live as husband and wife.

In these circumstances, the conviction under section 366 of the Penal Code cannot be sustained. I have, however, to consider whether the appellant has committed any other offence for which I can rightly convict him in respect of the acts disclosed from and established by the evidence at the trial Court. I have to do so because it appears to me that the police, when they sent up the case, had not been able to make up their mind what offence it was that they were to charge the appellant with, as many witnesses have been examined who would have been totally out of place if the trial had been in respect of an offence under section 366 of the Penal Code. Persons who claim to have visited the establishment in Fraser Street where Ma Tin Yi received male visitors in prostitution and persons who speak of several other girls being maintained in the same place to earn their living as prostitutes, were examined at the trial. I have therefore to consider if on this evidence it would be possible for me, whilst acquitting the appellant of an offence under section 366 of the Penal Code, to convict him either under section 366A of the Penal Code or one of the relevant provisions of the Suppression of Brothels Act

Section 366A of the Penal Code makes it an offence to induce a minor girl under the age of 18 years, by any means whatsoever, to go from any place with intent that such girl may be, or knowing that it is

likely that she will be, forced or seduced to illicit intercourse. In this case the girl is clearly under 18. For reasons already given by me, I cannot believe that she was forced to live a life of prostitution in the house of the appellant, though I am prepared, on the materials before me, to hold that the appellant did connive at her living that life and profited by her earnings. If the law has been correctly laid down in *King-Emperor* v. *Nga Ni Ta* (1) it is clear that the appellant has committed an offence under section 366A. At page 16 of the report it has been said :

> " I am unable to hold that the words in section 366 ' seduced to illicit intercourse ' refer only to the first act of seduction or the surrender of chastity. To ' seduce ' as defined in Webster's Dictionary is to draw aside from the path of rectitude and duty in any manner, to entice to evil, to lead astray, to tempt and lead to iniquity. I think that it would be a monstrous proposition, and one that would strike at the very roots of social and moral rectitude to hold, that because a man had induced a girl while in the custody of her parents to surrender her chastity, he committed no further act of seducing to illicit intercourse, when he persuaded her to live with him in a condition of **concubinage** not sanctioned by marriage."

If the principle has been rightly stated in that case, the fact that the girl Ma Tin Yi was a prostitute and living in prostitution at the 22nd Street establishment when the appellant induced her to go away from that place with the intent that she should continue her life of prostitution in another place, would not make it any the less seduction to illicit intercourse within the meaning of section 366A. That decision, however, does not stand alone even as far as Burma is concerned. There is a decision, militating to some extent against that, in *King-Emperor* v. *Nga Nge* (2). There is also a

(1) (1902-03) 1 U.B.R. (Penal Code) 15. (2) (1904—06) 1 U.B.R. (Cr.) 17.

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decision of the Chief Court of Lower Burma in *Crown* v. *Chan Mya* (1). In my opinion, the decision of a Bench of the Calcutta High Court in *Shaheb Ali* v. *Emperor* (2) states the true rule. The head-note, which correctly sums up the decision of Lort-Williams J., may be reproduced here:

> "The phrase 'seduced to illicit intercourse' within the meaning of section 366 of the Indian Penal Code is intended to indicate something different from 'seduction' in its popular, usual or ordinary sense and cannot be restricted to inducing a girl to surrender her chastity for the first time. It means 'induced to surrender or abandon a condition of purity from unlawful sexual intercourse.' Therefore, an accused cannot be convicted of this offence unless the girl was leading a life pure from unlawful sexual intercourse at the time when the kidnapping took place. This does not mean that it is necessary to prove that the girl has never at any time surrendered her condition of purity from unlawful sexual intercourse. She may have surrendered it in the past, and thereafter have resumed a life of purity. On the other hand, if she is already leading a life of indulgence in unlawful sexual intercourse, it cannot be said that she was kidnapped 'in order that she might be seduced to illicit intercourse.'"

The Allahabad High Court's decision in *Emperor* v. *Baijnath* (3) is also in the same direction. The Lahore High Court in *Nura* v. *Emperor* (4) also supports the same view. A comparison of section 366 or 366A with section 498 of the Penal Code clearly supports the view taken by the Calcutta High Court in *Shaheb Ali* v. *Emperor* (2). When the Penal Code contemplates the continuation of illicit intercourse, which began prior to the enticement, it did not employ in the definition of the offence any word signifying seduction.

In these circumstances and holding as I do that Ma Tin Yi, who was living a life of prostitution in Hoke

(1) 1 L.B.R. 397.
(2) I.L.R. 60 Cal. 1457.
(3) 54 All. 756.
(4) 35 Cr.L.J. 1386.

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Kyu's lodging rooms, was induced, without force or deceit, to remove herself to the premises occupied by the appellant to live as his wife or concubine and at the same time to continue her life of prostitution, I cannot convict the appellant under section 366A of the Penal Code. Section 7 of the Suppression of Brothels Act appears, *prima facie*, the provision under which action should have been taken against the appellant on the allegations in this case. I cannot, however, alter the conviction in this case into one under that section It has been held that section 237 of the Code of Criminal Procedure is not applicable where of the two offences one is under the Penal Code and the other is under a special law.

Considering that the appellant had been in custody since the 26th November 1946, I do not propose directing his re-trial under the appropriate provisions of the law. It must be remembered that Ma Tin Yi, her present husband Maung Nyunt Shein, Ma Kyin Saing and Wan Law have greatly exaggerated the case against the appellant and because of this exaggeration the appellant has been in custody for nearly a year. On the record, assuming everything against the appellant, as far as an offence under section 7 of the Suppression of Brothels Act is concerned, is proved, this is not a case out of the ordinary and the appellant, if convicted, might not be sentenced to more than a year's rigorous imprisonment. That he has already suffered, in anticipation, under a wrong charge.

I accordingly allow the appeal and acquit the appellant. His bail bond will be cancelled.

APPELLATE CRIMINAL.

Before Mr Justice E Maung.

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Sept. 22.

CHANNA SAMMA (APPLICANT)

v.

SANKARAYA (RESPONDENT).*

Criminal Procedure Code, s. 523 (1)—Amending Act† adding a proviso - Power of Police Officer to delivery to any person.

Held: That addition of proviso to s. 523 (1) has altered the law. In respect of a light or portable article the police have no power to make any disposition, but when cattle, paddy or rice, boat or other bulky articles are concerned, subject to the review by the Magistrate, the police may at any time before the termination of the trial, dispose of the property in the way provided in the proviso.

The Court and the police should in each case consider who was in apparent lawful possession of the goods at one particular moment. It may vary according to the circumstances of the case. This does not mean that the goods should be delivered to a thief or a dacoit because he was last in possession.

P.R.V.N. Valiappa Chetty v. *S. Joseph*, 2 B.L.J. 85 ; *Laxmichand Rajmal* v. *Gopikisan Balmukund*, 60 Bom. 183, referred to.

B. C. Paul for the applicant.

G. N. Banerji for the respondent.

E MAUNG, J.—The facts necessary for the purposes of this revision application lie within a very short compass. One Hussein lodged a report with the Taunglonbyan police on the 27th June 1947, charging the respondent with theft in respect of two rickshaws which Hussein claimed were taken away from his godown. The police started investigation and seized the two rickshaws from Lewis Street where the respondent kept them. Having seized the rickshaws and having completed the investigation, the police sent up the

* Criminal Revision No. 140B of 1947 being review of the order of Eastern Subdivisional Magistrate, Rangoon, Criminal Regular Trial No. 187 of 1947.

† Burma Act XI of 1941.

charge sheet to the Court of the District Magistrate, Rangoon, on the 30th June 1947

At the time the charge sheet was sent up, the rickshaws were still in the custody of the police ; but on the 1st July 1947 on the orders of the Superintendent of Police, East, who purported apparently to act under the powers given to him under the proviso to section 523 (1) of the Code of Criminal Procedure, the Taunglonbyan police returned the two rickshaws to the informant Hussein. I may note here that section 523 of the Code of Criminal Procedure, so far as it is applicable in Burma, is fundamentally different from similar provisions originally enacted when the Code was first passed by the Indian Legislature in 1898. The additional proviso to sub-section (1) has made it open to the police in certain cases to dispose of certain classes of property pending the orders of the magistrate.

On the 4th July 1947 and apparently in ignorance of the arrangement made by the police, the respondent applied to the Eastern Subdivisional Magistrate, before whom the trial was pending, for the return to him of the two rickshaws. The learned trial Magistrate, also clearly in ignorance of the arrangement already made by the police, summarily directed the return of the two rickshaws to the respondent on his executing a bond with two sureties for Rs. 500. The bond was executed and the orders of the Court were communicated to the police who reported that the rickshaws in question had already been returned to Hussein. On the 25th July 1947 the learned trial Magistrate passed orders directing the complainant Hussein to produce the rickshaws before the Court on the 31st July 1947. On the latter date the complainant failed to produce the rickshaws and he was given further time till 7th August 1947. On the 7th August the complainant asked for another

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postponement and he was granted time till the next day. On the next day the present applicant appeared in Court, being represented by Mr. B. C. Paul, and filed a written objection showing cause against the rickshaws being returned to the respondent. The rickshaws were at the same time produced before the Court and the Magistrate directed the Bailiff to take charge of them pending further orders.

On 11th August 1947, the learned Magistrate directed that the rickshaws be returned to the respondent on his furnishing security for the sum of Rs. 500 to produce them whenever required by Court. The order in question is very short.

With great respect, it seems to me that the learned Magistrate began with a misappreciation of the position. In the course of his order he said : " The police to say the least has no business to do so " referring to the police action in returning the rickshaws to Hussein. In coming to this view, the learned Magistrate appears to have either ignored the provisions of the proviso to section 523 (1) of the Code of Criminal Procedure or took the view that once a charge sheet has been presented to a magistrate the police become *functus officio* and that thereafter no disposition whatsoever can be made by the police of any of the exhibits which should have been submitted to the Court for orders. Either view is not justified in law. But I must say this in all fairness to the learned Magistrate that if section 523 (1) stood as it was when originally enacted, he would be perfectly right. Under the scheme set up by the Criminal Procedure Code before the Burma Legislature inserted the proviso to sub-section (1) of the said section, I agree with him that once the charge sheet is submitted to the Court, the police would not have any right to make any disposal of the exhibit property which will have to be before the Court.

But because of the great inconvenience which would result from a strict application of that rule, the Legislature in Burma has inserted this proviso. This proviso reads :

" Provided that any police officer, who has made a seizure of cattle, paddy or rice or of a boat or any other bulky article, may, pending the order of the magistrate, deliver such cattle or article to any person who may appear to be entitled to the possession of such cattle or article on his executing a bond, with or without sureties, to return or produce such cattle or article at a police-station whenever required."

Now, as I understand the legal position, if the article falling within sub-section (1) of section 523 had been a light or portable article, the duty of the police would be to submit it to the Court together with the charge sheet. In respect of such articles, the police would have no power whatsoever to make any disposition, either before or after the charge sheet has been submitted. It would be for the Court under section 516A of the Code of Criminal Procedure or under section 517, according as to whether the order is to be made pending the trial or at the termination of the trial, to pass the necessary orders for the disposal of the article. But when the article is of the nature specified in the proviso to sub-section (1) of section 523 of the Code of Criminal Procedure, the police cannot be expected to have such articles taken bodily before the Court and therefore in these cases, subject to the power of review by the magistrate, the police at any time before the termination of the trial can make such disposition of the article in consonance with the principles laid down in the said proviso.

The learned Magistrate, having misdirected himself with respect to the powers of the police, proceeded on the basis of the decision of this Court in

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P.R.V.N. Valiappa Chetty v. *S. Joseph* (1) to direct that the two rickshaws be returned to the respondent Sankaraya from whom they had been seized by the police. With the principle laid down in that case and in other cases, one of which for instance would be *Laxmichand Rajmal* v. *Gopikisan Balmukund* (2) that the Court, and accordingly the police also, in exercising the powers under sections 516A, 517 or 523 of the Code of Criminal Procedure, would have to ignore the civil rights of the parties and confine their attention to the question of the present right to possession, I have no quarrel whatever. I agree with the learned Judge who decided *P.R.V.N. Valiappa Chetty*'s case that what the Court, and therefore in this case what the police, would have to consider would be a question of fact, namely, who was in apparent lawful possession of the goods at one particular moment ; but, speaking with great respect, it seems to me that the learned Magistrate in applying that rule failed to remember that the particular moment at which the possession has to be established must vary according to the circumstances of the case. When under section 517 of the Code of Criminal Procedure the Court has to make an order at the termination of the trial for the disposal of the property, the Court has either convicted or acquitted the accused or has discharged him. In each case the Court bases its order on the materials which has been placed before it on behalf of the complainant or of the accused or either. Therefore in a case like that the material point of time at which right to possession must be established is generally in relation to the moment when the property was seized from the person who had been accused or from a person who derived a claim to the property through the accused. But where, as in

(1) 2 B.L.J. 85. (2) 60 Bom. 183.

this case, the trial is still pending, the relevant moment is the moment at which the accused person is alleged to have committed the offence.

In the present case, the charge made by Hussein was that on the 27th June 1947 the two rickshaws were in his possession. That fact is not disputed by the respondent. What the respondent says is that he took the two rickshaws away from Hussein because he had a lawful right to take possession thereof. Now that is a matter in dispute ; whereas the other matter that prior to the respondent taking away the rickshaws Hussein was in lawful physical possession thereof, is not at all in dispute. To take the other view, as has been taken by the learned trial Magistrate, would lead to this absurdity that in all cases of theft and all cases where theft forms an ingredient of the offence charged, the property will have, during the pendency of the trial, to be returned to the accused ; for if the principle were inflexibly applied that the person last in possession of the goods when the police made the seizure should be given possession, such person can be no other than the thief or the dacoit or such person claiming through the thief or dacoit. Accordingly, in this case, as I have said, on the 26th June 1947 Hussein's possession was lawful possession and the fact of that possession was not disputed by the respondent. It may be found that the respondent has a higher right to possession after material evidence is gone into. But pending the respondent establishing his claim, which may be a perfectly good one, the person at present shown as having a present right to possession of the rickshaws would be Hussein.

It has been urged by Mr. Banerji, who appears for the respondent Sankaraya, that Hussein is not now in actual possession. He says that Hussein, having got the two rickshaws from the police, has handed them

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over to the applicant who is represented before me by Mr. B. C. Paul. That, however, is not of any moment. Hussein has entered into a bond to be responsible for the two rickshaws and that is what matters.

Accordingly I set aside the order of the Eastern Subdivisional Magistrate, Rangoon, and direct that Hussein, during the pendency of the trial, retain possession of the two rickshaws the custody of which have been given to him by the police.

APPELLATE CRIMINAL.

Before Mr. Justice E Maung.

MA MYA SEIN (APPLICANT)

v.

THE KING (RESPONDENT).*

1947

Sept. 23.

Cognizance of an offence—S. 190 (a) (b) *of Code of Criminal Procedure—Report of a non-cognizable offence by a Police Officer—Ss. 11* (a) *and 11* (b) *and 15 of Suppression of Brothels Act.*

Held : That after the amendment of the Code of Criminal Procedure in 1923, a Magistrate under s. 190 (*b*) of the Code can take cognizance of an offence upon a report in writing of such facts made by any Police Officer whether the facts constitute a cognizable or non-cognizable offence.

Bhairab Chandra Barua v. *Emperor*, 46 Cal. 807 ; *The Public Prosecutor* v. *Ratnavelu Chetty*, I.L.R. 49 Mad. 525, followed.

Under s. 15 of the Suppression of Brothels Act only, a Police Station Officer or officer higher than a Sub-Inspector was entitled to enter a brothel for ascertaining whether an offence under s. 11 has been committed. In the present case the entry was by a Sub-Inspector but such illegal entry does not vitiate the proceedings if the Magistrate takes cognizance under the report of the Police.

Emperor v. *Chandri Bawoo*, 26 Bom. L.R. 1225, dissented from.

Maung San Myin v. *King-Emperor*, I L.R. 7 Ran. 771 ; *Chwa Hum Htive* v. *King-Emperor*, I.L.R 11 Ran. 107 ; *Aung Kim Sein* v. *The King*, (1941) Ran. 552, followed.

S. 11 (*a*) of the Suppression of Brothels Act penalizes a person who keeps or manages or assists in the management of a brothel—as the report does not make any such allegations and the report simply suggests prostitution by some women, no offence under the Act is disclosed.

Leong for the applicant.

Tin Maung for the respondent.

E MAUNG, J.—These four proceedings arose out of Criminal Regular Trial No. 236 of 1947 of the Court of the 3rd Additional Magistrate, Rangoon, instituted on a report in writing by the Station Writer, Latter Street Police Station, on the 27th May 1947. Four persons

* Criminal Revisions Nos. 137B, 211A, 212A and 213A of 1947 being review of the 3rd Additional Magistrate of Rangoon—order passed in Criminal Regular Trial No. 236 of 1947.

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were sent up for trial under sections 11 (*a*) and 11 (*b*) of the Suppression of Brothels Act. Ma Mya Sein, who is the applicant in Criminal Revision No. 137B of 1947, was charged with an offence under section 11 (*b*) and the three respondents in Criminal Revision Nos. 211A, 212A and 213A of 1947 were charged with offences under section 11 (*a*) of the said Act.

It is necessary to reproduce here the report thus made. It runs as follows :

" On 26-5-47, at about 8-45 p.m. while making rounds in the jurisdiction along with P.C. Mg. Myint of Latter Street P.S. and villagers Chit Aung and Than Pe, visited Soon Ngon Hun lodging room, 19th street whereby found Mg. Tun Lwin and Ma Than Kyi in a room, Ah Mya and one unknown Indian, Ma Khin Kyi with Chinaman Ah Kun. Brought all the mentioned persons and on being questioned they replied that they are engaged by the said persons for sexual intercourse getting Rs. 25, Rs. 60 and Rs. 30 respectively. Therefore, the said women are arrested to take action under 11 (*a*) S.B. Act. Ma Mya Sein, lodging room keeper was also arrested for taking action under 11 (*b*) S.B. Act."

On this report, which was sent by the District Magistrate, Rangoon, to the 3rd Additional Magistrate, Rangoon, cognizance was taken against the four persons named and after one witness for the prosecution had been examined Dr. Maung Thein, who appeared for Ma Mya Sein, raised a preliminary objection. He contended that since an offence under section 11 of the Suppression of Brothels Act is a non-cognizable offence and since section 15 of the Act enables only a police officer in charge of a police station or an officer above the rank of Sub-Inspector of Police, to enter without a warrant any premises for the purpose of ascertaining whether an offence under section 11 of the Act has been or is being committed, the prosecution initiated on the report in writing, above referred to, is incompetent.

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This objection was rejected by the learned trial Magistrate and Ma Mya Sein has come up in revision to this Court. After hearing her counsel as to admission, I considered it desirable in the interests of justice to have all the accused persons before this Court and directed the opening of revision proceedings in respect of the other three accused, namely, Ah Mya, Ma Than Kyi and Ma Khin Kyi. I have since heard Mr. Leong for Ma Mya Sein and U Tin Maung, Government Advocate, on behalf of the Crown. Ah Mya and Ma Khin Kyi, who appeared in person, had nothing to say. Ma Than Kyi was absent at the hearing though she had been served.

Mr. Leong's sheet anchor was a decision of the Bombay High Court in *Emperor* v. *Chandri Bawoo* (1). He also cites a decision of this Court in *Jagdeo Panday* v. *N. C. Hill* (2) in support. His contention, if I understand him right, is that the report in writing in this case, being made in respect of an offence not cognizable by the police (the maximum penalty provided for an offence under the Act being imprisonment for one year or a fine of Rs. 1,000), the police could not investigate into the offence except under the direction of a Magistrate. He further says that under section 15 of the Act, only a police officer in charge of a police station or an officer holding rank higher than that of a Sub-Inspector of Police is competent to make an enquiry but that in this case the officer who entered into the premises for the purpose of ascertaining whether an offence under section 11 of the Act has been committed or was being committed, was only of the rank of a Sub-Inspector of Police, and that the illegal entry would, as was laid down in similar circumstances in the Bombay case, vitiate the subsequent prosecution.

(1) 26 Bom. L.R. 1225. (2) (1938) Ran. 150.

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Section 190 (*b*) of the Criminal Procedure Code allows a Magistrate to take cognizance of any offence upon a report in writing of such facts made by any police officer. Prior to the amendment of this section in 1923, clause (*b*) read : " Upon the police report of such facts." There was then a conflict of judicial interpretation on the words " the police report ", certain Courts taking the view that the police report must refer necessarily to cases where the police can take cognizance and other Courts the view that the police report could be in respect of non-cognizable offences as well. To clear up the matter the amendment was made by Act VIII of 1923 and it has been consistently held since that the effect of the amendment is to enable a Magistrate to take cognizance on a report in writing made by a police officer, whether the facts constitute a cognizable offence or a non-cognizable one. The matter is so very obvious that authorities are hardly necessary. I need only mention two decisions here in support : *Bhairab Chandra Barua* v. *Emperor* (1) and *The Public Prosecutor* v. *Ratnavelu Chetty* (2). It is therefore against this background that I have to consider the applicability of the Bombay decision in *Emperor* v. *Chandri Bawoo* (3) to the facts of the present case. At page 1230 of that report Marten J. said :

> "I am certainly not inclined to stretch a point and hold that the arrest, though illegally made, did not affect the powers of the Magistrate subsequently to hear the case."

Section 10 (*1*) of the Bombay Prevention of Prostitution Act corresponds in essence to section 14 of the Burma Act. The arrest in the Bombay case was made by an unauthorized police officer without the necessary complaint being made to him and the arrest was therefore, in that case, an illegal arrest. It is true that in

(1) 46 Cal. 807. (2) I.L.R. 49 Mad. 525.
(3) 26 Bom. L.R. 1225.

the case before me also, if the entry into the premises was made by U Nyunt Din and his subordinates only, there was in the party no one superior in rank to that of a Sub-Inspector of Police. The entry therefore would be an illegal one and if I can agree with Marten J. that an illegal entry would vitiate a subsequent prosecution, the application of Ma Mya Sein must be allowed. In support of his view that an illegal arrest would vitiate the consequent prosecution, the learned Judge said at page 1229 of the report :

" It is a new Act, and, as I read s. 10, it has been deliberately inserted so as to afford reasonable protection to the public. An ordinary police constable is not to be allowed to arrest any female in a street unless a complaint has been made to him of her conduct, and unless he himself sees the offence committed, and he cannot discover her name and address. Or, on the other hand, the constable must be athorized by the Commissioner of Police by a special order to effect an arrest of this description, and one can quite understand the reason for this, *viz.* to ensure that mistakes should not be made and that some innocent woman should not be dragged off to prison or put under arrest in the public street by any ordinary police constable.

One knows that mistakes of that kind by the police in England have led to strong public criticism. I remember in particular many years ago one case at Cambridge where a mistake of that nature by the University Proctors led to interference by Parliament and a public enquiry, as a result of which the jurisdiction of the University authorities to arrest women in the streets on an accusation of soliciting was taken away from them altogether."

With respect, I find myself unable to agree with Marten J. A Judge has to administer the law as he finds it. He may not stretch the law either in favour of the accused or in favour of the prosecution, upon grounds of public morals or public expediency. It is for the Legislature to say, if it is so advised, that to ensure that mistakes are not made no police officer below a certain rank should be competent to institute

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criminal proceedings. This in the case of the Burma Act the Legislature has not done. The decisions of this Court in *Maung San Myin* v. *King-Emperor* (1), *Chwa Hum Htive* v. *King-Emperor* (2) and *Aung Kim Sein* v. *The King* (3) are clearly against the view taken by Marten J. in the Bombay case. Fawcett J. in the same case proceeded on the application of the special provisions of the Bombay City Police Act. This Act is not before me but at page 1231 of the report Fawcett J. stated "that valid report by a police officer in the town of Bombay of the kind contemplated by clause (*b*) of section 190 can only be made (i) in the case of a non-cognizable offence and (ii) when it contains information of a cognizable offence which he has been authorized by a Presidency Magistrate to investigate." There is no provision in the Burma Act to correspond.

In these circumstances, I consider that the application of Ma Mya Sein to be premature and accordingly reject it.

Coming to the case of the three other women Ah Mya, Ma Than Kyi and Ma Khin Kyi, who have each been charged with an offence under section 11 (*a*) of the Suppression of Brothels Act, I do not see any offence either under that section or any other provisions of the Act, made out against them on the facts stated in the report in writing before the trial Court. The Court taking cognizance, whether under clause (*a*) or clause (*b*) or clause (*c*) of section 190 of the Criminal Procedure Code must proceed either on a complaint or a report or information of facts which constitute an offence. The learned Magistrate had before him a report stating certain facts as far as these persons are concerned and the facts alleged against them were that Ah Mya was found with an unknown Indian in a bedroom, Maung

(1) I.L.R. 7 Ran. 771. (2) I.L.R. 11 Ran. 107.
(3) I.L.R. (1941) Ran. 552.

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Tun Lwin and Ma Than Kyi in another bedroom and Ma Khin Kyi and a Chinaman in a third, and that on enquiry the three men said that each of them was in the company of the respective woman for the purpose of sexual intercourse having paid Rs. 60, Rs. 25 and Rs. 30 respectively for the services of the woman. Accepting these facts to be true, as I must for the purpose of the revision proceedings in hand, what offence do they disclose? They certainly do not disclose an offence under section 11 (*a*) of the Suppression of Brothels Act which penalizes a person who keeps or manages or assists in the management of a brothel. Neither do the facts bring the women under the provisions of section 4 of the Act. There is no question here of soliciting or molesting for the purpose of prostitution. There is no question also at these three women attracting or endeavouring to attract the attention of any one for the purpose of prostitution. All that the facts would establish are that these three women are prostitutes and that they were present in the premises entered by the police officers carrying on the business of prostitution. It may or may not be desirable to make prostitution penal. On that I say nothing; it is beyond my province as a Judge. But as the law now stands, prostitution as such is not a criminal offence and these three women against whom no fact has been alleged which would constitute a criminal offence, must be discharged from the case. I accordingly direct their discharge.

APPELLATE CRIMINAL.

Before Mr. Justice E Maung.

1947
Oct. 29.

MAUNG KAN NYUNT (APPLICANT)

v.

THE KING (RESPONDENT).*

Police Act—Ss. 43 (a) *and 43* (d)*—Protest against an order of reversion—Whether offence under s. 43* (d)*—Absence from duty for strike—Offence under s. 43* (a)*—Sentence.*

Held: Protest for an order of reversion to the Headquarters Assistant is not an offence under s. 43 (*d*) of the Police Act. That section penalizes violation of duty or wilful breach of any rule or order. That rule or order should relate to the duties of a police officer in discharge of his function, not a private protest against an order of reversion.

If a police officer absents himself from duty without leave, by joining a strike, he is guilty of offence under s. 43 (*a*) of the Police Act.

But where out of 72 strikers only four were selected and sent up for trial and others equally guilty were not prosecuted at all, nominal punishment should meet the end of justice.

E MAUNG, J.—This is a joint application by four persons who had been convicted by the District Magistrate, Minbu, in his Criminal Regular Trial No. 2 of 1947 of offences under sections 43 (*a*) and 43 (*d*) of the Police Act, 1945.

Maung Kan Nyunt, the 1st applicant, had been found guilty of an offence under section 43 (*d*) of the Act and had been sentenced to pay a fine of Rs. 65 or in the alternative to undergo imprisonment for 21 days. The learned District Magistrate has acquitted him of the charge under section 43 (*a*) of the Act and with that order of acquittal I am in entire agreement. I must say, however, that I cannot see my way to agree with the learned District Magistrate in convicting the applicant Maung Kan Nyunt of an offence under section 43 (*d*) of the Police Act. What has been

* Criminal Revision No. 181B of 1947 being review of the order of Mr. G. L. Merrells, District Magistrate of Minbu, in Criminal Regular Trial No. 2 of 1947.

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E MAUNG, J.

found established against him is that on receipt of an order reverting him from the position of a Police Station Inspector to that of a Sub-Inspector of Police, he in the company of several other persons went to the Headquarters Assistant (Police) and protested against the order of reversion. It is not for me to go into the question whether the reversion was justified or whether the protest was made for good reasons, but I am clearly of the opinion that a police officer by merely protesting against an order of reversion to the Headquarters Assistant (Police) does not commit an offence under section 43 (*d*) of the Police Act. Section 43 (*d*) of the Police Act penalizes a police officer who is guilty of any violation of duty or wilful breach or neglect of any rule or order made by a competent authority. I cannot see that there has been any violation of duty or wilful breach or neglect of any rule or order made by a competent authority in Maung Kan Nyunt making a protest against the order reverting him from the post of a Police Station Inspector. It seems to me quite clear that the words "any rule or order" in section 43 (*d*) of the Police Act do not extend to an order of the nature in the present case. The rule or order contemplated by the Act in this behalf must be a rule or order relating to the duties of a police officer in the discharge of his functions, namely, maintenance of law and order. An order, for instance, made by a competent authority under the Criminal Procedure Code would be such an order, but a mere executive order reverting a police officer from a higher appointment to a lower one is not such an order and a protest against such an order or a request to have the order revised cannot fall within the purview of section 43 (*d*) of the Act.

The applicant Maung Kan Nyunt is accordingly acquitted. The fine which he has paid will be refunded to him.

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In the case of the other three applicants, however, it is clear that they have been convicted on their own admissions of having kept away from their duty without the necessary leave being granted to them to be so absent. They are therefore clearly guilty of the offence under section 43 (*a*) of the Police Act. But from the materials on the record I am not prepared to hold that these applicants should have been so severely dealt with as they have been by the trial Magistrate. In fact the learned trial Magistrate himself, in the course of his judgment, said : "But it appears that there is no reason to penalize them heavily merely because they have been selected from a large number of possible accused persons." As the learned Magistrate pointed out there were no less than 72 police constables and other officers involved in the strike, each of whom had been as guilty as any of these three applicants of an offence under section 43 (*a*) of the Police Act. The other 69 persons have not been prosecuted and no action whatsoever appears to have been taken against them. I feel therefore that a nominal sentence would meet the ends of justice in the case of these three applicants in these circumstances.

I accordingly confirm the conviction of the applicants Maung Than Shein, Maung Sint and Maung Thwin under section 43 (*a*) of the Police Act, 1945, but reduce the fine in the case of each of them to a sum of Rs. 5 only. The difference between the amount which each of them has paid, and Rs. 5 which is now imposed on each of them, will be refunded to them.

CRIMINAL REVISION.

Before Mr. Justice E Maung.

R.M.M.R.M. CHETTYAR FIRM (APPLICANT)

v.

MAUNG KYAW HTU AND ONE (RESPONDENTS).*

1947
Nov. 3.

Agricultural Debts Moratorium Act (Burma Act XXIV of 1947)—Ss. 2 (b) and 3—S. 2 (b) when applicable—S. 3 when applicable to pending cases.

Held: S. 3 of the Act does not apply to pending suits. In pending suit the plaintiff seeks to have defendant's liability declared. Before he can reap the fruits of that decree he must apply for execution. It is at that stage that s. 2, clause (*b*), comes into play and it would then be for the defendants to claim that the decree could not be enforced and it must be kept under suspension.

V. S. Venkatram for the applicant.

E MAUNG, J.—The applicant instituted a suit for the recovery of Rs. 393-12 on the 31st March 1947. This suit was met with a plea by the defendants under section 3 of the Agricultural Debts Moratorium Act of 1947 (Burma Act XXIV of 1947). The defendants' case was that in view of section 3 of the Act the suit could not proceed. The learned trial Judge accepting the defendants' plea accordingly stayed further proceedings in the suit. The plaintiff has come up to this Court on revision against this order.

It must be conceded, as the learned trial Judge himself has said in the course of his judgment, the Act was couched in very unsatisfactory language. Section 3 of the Act leaves much to be desired.

I have not had the advantage of hearing learned counsel representing the respondents who were defendants at the trial Court; but it seems to me

* Civil Revision No. 57 of 1947 against the order of the Subordinate Judge's Court of Thègon.

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E MAUNG, J.

clear that section 3 of the Act does not apply to pending suits ; all that the plaintiff in a pending suit seeks is to have the defendants' liability declared. Before he can expect to reap the fruits of that decree he must apply for execution and it is at the stage when he applies for execution that section 2, clause (*b*), of the Act would come into play and it would then be at that stage that the defendants may, if at the time section 3 is still in operation, claim that the decree of a civil Court which is to be enforced—would be the debt which could not be enforced or must be kept under suspension. Till that stage is reached and in the absence of any specific provision to the contrary, I am definitely of the opinion that the present suit must proceed.

Accordingly, I set aside the order of the trial Court and direct that the case be proceeded in due course of law. The applicant is entitled to costs of this application. Advocate's fee 3 (three) gold mohurs.

APPELLATE CRIMINAL.

Before Mr. Justice Gledhill.

F. M. JONES AND ONE (APPELLANT)

v.

THE KING (RESPONDENT).*

1947

Sept. 27.

Penal Code, s. 414—Application of the doctrine of ejusdem generis *rule.*

Held : That ingredients of an offence under s. 414 of Penal Code are "concealing" or "disposing of" or "making away with" properties which the offender knows or has reason to believe to be stolen. It is not one of the ingredients of the offence that the person who deals with stolen property should deal in such a way that it becomes impossible to identify it or use it as evidence.

Amar Nath v. *Emperor*, 36 Cr.L.J. 1459; *Nga Yan* v. *Emperor*, (1910—13) 1 U.B.R. 8, dissented from.

The rule of *ejusdem generis* has no application in the interpretation of s. 414 of Penal Code. That rule applies when the words of general meaning are followed by words of more particular meaning. Here concealing, disposing of or making away with cannot constitute a genus. Disposing may be a genus of which "concealing" forms a species, but "concealing" is not a species of "making away with."

Thein Moung for the appellant.

GLEDHILL, J.—The appellant was tried jointly with one Mohamed Ebrahim, who was convicted under section 408, Penal Code, on his plea of guilty, of criminal breach of trust of a Dodge Tipper belonging to the Army. The appellant was convicted under section 414, Penal Code, of voluntarily assisting in disposing of the vehicle, knowing it to be stolen property.

Mohamed Ebrahim was a driver in the employ of the Nizami Corporation which had a contract with the Army. To enable the Corporation to perform its contract, several motor vehicles, including the Dodge

* Criminal Appeal No. 1710 of 1947 being appeal from the order of Western Subdivisional Magistrate, Rangoon, dated the 23rd August 1947, passed in Criminal Regular Trial No. 178 of 1947.

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GLEDHILL, J.

Tipper, were lent by the Army to the Corporation. One day, either at the end of December 1946 or beginning of January 1947, the tipper was sent out in charge of Mohamed Ebrahim, and was not returned.

On the 3rd January the appellant sold the vehicle to a Mr. Trutwein of Yenangyaung for Rs. 2,500, and it was eventually recovered from him.

The appellant deposed that Mohamed Ebrahim was brought to him by Maung Kauk (P.W. 3), and introduced as a person in a position to sell a dodge truck, and two days later Mohamed Ebrahim delivered it, the price agreed upon being Rs. 1,500. According to the manager of the Nizami Corporation (P.W. 5) the truck was worth Rs. 5,000.

The appellant admitted that he made no enquiries about Mohamed Ebrahim's position in life, and he did not ask him to produce any documents of title or even ask him where he got it from.

Maung Kauk's evidence is in many respects suspicious, but his evidence that he suspected the truck was stolen, because Mohamed Ebrahim was a mere driver, and in no position to purchase a truck, is obviously true.

Trutwein (P.W. 2) says he agreed to purchase the truck for Rs. 2,500, and the truck was at the appellant's house. It had then no military or civil number. He had it painted before he took it to Yenangyaung. The appellant was at the time of the crime a foreman in the Road Transport Board.

There are other facts indicating the nature of the transaction, but I feel I have said enough to show that everyone concerned in the transaction must have known the truck was stolen property.

U Thein Moung's main point in argument was that, admitting the facts, the appellant has not committed the offence punishable under section 414 of the Penal Code.

He relies on *Amar Nath* v. *Emperor* (1) and *Nga Yan* v. *King-Emperor* (2).

The former dealt with the case of a person spending money which he knew to have been embezzled by another. It was held that the *ejusdem generis* rule must be applied to the words " concealing or disposing of or making away with the property " in section 414 of the Penal Code, and it was said that the section was clearly intended to penalize persons who deal with stolen property in such a way that it becomes impossible to identify it or use it as evidence.

In the latter case, the question was whether the person (not the thief) who restored stolen property to the owner was liable to conviction under section 414. It was held he was not. Here again, the *ejusdem generis* rule was applied and it was held that the section referred to assistance given to a thief to enable him to conceal the stolen property or to convert it to his own use.

For reasons which I hope to make clear, with respect, I differ from both these dicta as to the scope of the section. With respect, I agree that the person who restores stolen property is not punishable under section 414.

The *ejusdem generis* rule is applicable when words of more general meaning follow words of more particular meaning.

Primarily, every word in a statute is to be given its full meaning, as understood in the Courts, but, subject to the condition that the Courts are not at liberty to impose upon the words limitations not called for by the sense, objects, or mischief of the enactment, where particular words are followed by a general word, the general word is presumed to be restricted to the same

(1) 36 Cr.L.J. 1459. (2) (1910—13) 1 U.B.R. 8.

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GLEDHILL, J.

genus as the other words. Thus to repeat an example quoted in *Nga Yan*'s case (1) where a statute provided for a rate on the owners of " houses, buildings, and property other than land " in excess of that imposed on land, it was held that " property other than land " must be restricted to property of the same genus as houses and buildings, and would not include a railway or canal.

Now, in considering this question it is necessary to remember that the object of the Act was to provide a " general penal code ", *i.e.* to provide a punishment for all generally known and recognized crimes. It was intended to punish, not only those who committed the well known crimes such as theft, but also those who were so connected with the principal as to come within the categories described in English common law as accessories, before and after the fact.

A professional thief, of necessity needs a person, sometimes described as a " fence ", to dispose of his ill-gotten gains, and I cannot think it likely that it was intended to save him from punishment. Usually his activities would be punishable under section 411 of the Code, but the " fence " might arrange for the disposal of stolen property for a thief to a 3rd person without ever having possession of the property. I cannot believe it was ever intended that such an act was to go unpunished.

If the *eiusdem generis* rule is to be applied to the words " concealing, or disposing of, or making away with property ", it must first be shown that the words *concealing*, *disposing of*, and *making away with* can constitute a genus.

It seems to me that the interpretation of these words in *Amar Nath*'s case (2) as meaning dealing with

(1) (1910—13) 1 U.B.R. 8. (2) 36 Cr.L.J. 1459.

stolen property in such a way as to make it impossible to identify it cannot be correct, because this puts a narrower meaning on the words when combined than is contained in the first word, which should be the most particular if the rule is applicable, and which by itself would connote concealment for any purpose, not merely concealment to avoid the property being identified.

" Disposing of " may be a genus of which " concealing " forms a species, but " concealing " is not a species of the genus " making away with ", and " making away with ", which comes last is surely a species of " disposing of." When a more particular word follows a general word, surely the *ejusdem generis* rule can have no application.

In my opinion, then, each of the expressions " concealing ", " disposing of ", and " making away with " must be given its full meaning, and I think the acts of the appellant set out above amount to assisting in the disposing of, and making away with the stolen truck.

I have been asked to reduce the sentence. The appellant received a sentence of one year's rigorous imprisonment, the same as Mohamed Ebrahim received, and I cannot think it too much. The appellant is an Anglo-Indian of 45, in such a position, and possessed of such knowledge, as to make his conduct particularly blameworthy.

The appeal is dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Gledhill.

1947
Oct. 16.

U THEIN (APPELLANT)

v.

MA KHIN NYUNT (RESPONDENT).*

Criminal Procedure Code, ss. 488, 489.

Held : An order for payment of maintenance remains valid and enforceable until it is cancelled or modified according to law. Mere subsequent cohabitation does not necessarily revoke the order though it would be automatically suspended for the period of cohabitation. If the marriage between the parties is dissolved by virtue of desertion, on the dissolution of marriage, the wife is not entitled to maintenance.

Pearey Lal v. *Naraini*, 58 All. 379 ; *Kanagammal* v. *Pandara Nadar*, I.L.R. 50 Mad. 663 ; *Shah Abu Ilyas* v. *Ulfat Bibi*, I.L.R. 19 All. 50, followed.

Kyaw Din for the appellant.

Ba Sein and *Thein Maung* for the respondent.

GLEDHILL, J.—U Thein, the petitioner in this case, was the husband of Ma Khin Nyunt, the respondent in this case and the petitioner in the other two cases. U Thein has not cohabited with the respondent since 1931. Ma Khin Nyunt obtained an order for maintenance under section 488 (1) of the Code of Criminal Procedure and in Criminal Miscellaneous No. 72 of 1941 of the Headquarters Magistrate, Henzada, on the 1st January 1942, the allowance was enhanced to Rs. 100 per mensem. Since then, despite the fact that Ma Khin Nyunt filed four applications to recover the maintenance due to her under the order, nothing has

* Criminal Revisions Nos. 152B, 158B and 159B of 1947 being review of the order of Headquarters Magistrate, Henzada, dated the 31st March 1947, passed in Criminal Revision No. 1 of 1947.

been paid by U Thein, except a sum paid under the stay order of Wright J. in Criminal Revision No. 174B of 1947.

In Criminal Miscellaneous No. 1 of 1946 of the Headquarters Magistrate, Henzada, Ma Khin Nyunt filed an application to recover arrears of maintenance for 49 months at Rs. 100 per mensem, and the application was granted.

U Thein unsuccessfully appealed tc the Court of Session, but, in Criminal Revision No. 174B of 1946 of this Court, I held that it was open to U Thein to plead that his marriage with Ma Khin Nyunt had been dissolved under the rule in section 17 of Book V of *Manugye*, and I remanded the case for hearing the issues whether, and if so when, the marriage had been dissolved. The learned Magistrate held that the marriage was dissolved on 1st January 1945. Both parties unsuccessfully appealed to the Court of Session, and both parties now apply to this Court in revision, U Thein to have it held that the marriage was dissolved in 1935, and Ma Khin Nyunt to have it held that the marriage is still subsisting.

I do not wish to repeat what I have said in my judgment in Criminal Revision No. 174B of 1946, but both lower Courts have shown a reluctance to accept my ruling in that case, which makes it necessary that I should comment on some of the remarks in their judgments.

The learned Magistrate appears aggrieved that U Thein, by omitting to pay maintenance during the Japanese occupation, should be able to put himself in a better position than he would be in if he had paid. He says " if the Buddhist law is strictly applied, as done in the present case, many wives will be deprived of their allowances through no fault of theirs. I therefore think that section 488, Criminal Procedure Code,

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and the rule in section 17 of Book V of *Manugye* need consideration."

The fact that, in unexpected circumstances, a strict application of the law produces curious results, is no reason for a Judge assuming the functions of the Legislature.

In his judgment, the learned Sessions Judge has remarked " Where the operation of a principle of the personal law of the parties is bound to result in a change or abrogation of any provision of law created by statute and defeat the purpose for which the statute was enacted, it is submitted that public policy demand that despite the seeming conflict the settled rule of statute law should be held to prevail."

Now had I held that a rule in the *Dhammathats* respecting contract prevailed over a rule laid down in the Contract Act, this implied criticism might have been deserved, but I must point that, in questions relating to marriage, the Buddhist Law has statutory force by the provisions of section 13 (*1*) of the Burma Laws Act. There is no conflict between the Code of Criminal Procedure and the Burma Laws Act in this case. Chapter XXXVI of the Code was intended to provide for maintenance of wives, not to prevent divorce. The basis of an order of maintenance, and its enforcement is that there should be a valid marriage and that it should be still subsisting. In deciding whether that status exists, a Criminal Court must apply the law as laid down in the Burma Laws Act.

On behalf of Ma Khin Nyunt it has been submitted that the order for payment must remain valid and enforceable until it is cancelled or modified, and *Pearey Lal* v. *Naraini* (1) and *Kanagammal* v. *Pandara Nadar* (2) have been cited. In both these

(1) 58 All. 379. (2) I.L.R. 50 Mad. 663.

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cases reference has been made to the general principle of law that an order whose term is not fixed, and whose currency is not made expressly dependent upon the continued existence of circumstances remains in force until cancelled.

I observe, however, that the only provision in Chapter XXXVI of the Code of Criminal Procedure for the cancellation of an order passed under section 488 (1) is that set out in section 489 (2) which is only applicable when a decree of a Civil Court affects the position of the parties.

In the cases cited, the question was whether a maintenance order obtained by a wife was revoked by subsequent cohabitation with the husband, and in both cases the finding was in the negative, but in both cases it was held that the order would be automatically suspended for the period of cohabitation.

In *Kanagammal*'s case (1) reference was made to *Shah Abu Ilyas* v. *Ulfat Bibi* (2), and the judgment was, in part, founded upon the decision in that case that it was the duty of the Court, when a plea of divorce had been established, to decline to enforce the maintenance order.

It was chiefly upon the last cited case that I based my judgment in Criminal Revision No. 174B of 1946. When an application to enforce a maintenance order is made under section 488 (3) the respondent is entitled to shew cause, and the magistrate has a discretion to refuse to enforce it. What cause can be more sufficient than the fact that the relationship of husband and wife, the essential basis of the order, has ceased to exist ?

As for U Thein's contention that the marriage was dissolved in 1935, I think it is quite clear from the

(1) I.L.R. 50 Mad. 663. (2) I.L.R. 19 All. 50.

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evidence that it cannot be sustained. It appears that U Thein's father, U Po Sein, paid the money, due under the orders, first into Court for about two years, and subsequently to Ma Khin Nyunt direct. During this period, U Thein was making his father an allowance, and U Po Sein says that, on one occasion he wrote to U Thein and asked for an increase in the allowance, as the Court had enhanced Ma Khin Nyunt's allowance. It is futile, in the face of these statements, to contend that U Thein was unaware of, or did not acquiesce in, these payments. So long as they continued, the marriage tie subsisted.

It seems to me then that the starting point of the period of three years' desertion required to bring the case within the rule in section 17 of Book V of *Manugye* is 1st January 1942, as held by the lower Courts, and that the marriage was dissolved on 1st January 1945. The consequential order of the learned Magistrate is correct.

The applications are dismissed.

FULL BENCH (CIVIL).

Before U Thein Maung, Chief Justice, U Tun Byu and U San Maung, JJ.

BABU SAGARMAL TIBREWALA (APPELLANT)

v.

G. M. LATIMOUR (RESPONDENT).*

H.C. 1948

Mar. 8.

Order for ejectment under s. 17 of the Rangoon City Civil Court Act—Execution of the order—Obstruction by a third person—Whether Order 21, Rule 97, applies.

Held by the Full Bench: That when a landlord has obtained an order of ejectment against his tenant under s 17 of the Rangoon City Civil Court Act and in course of the execution of the said order is obstructed by a third person who is not a party to the proceedings under s. 17, the landlord can avail himself of the provision of Order XXI, Rule 97, of the Code of Civil Procedure and obtain an order under Rule 98 if the facts would justify such a course. In view of ss. 36 and 141 of the Code and s. 23 of the Rangoon City Civil Court Act and Rule 3 of the Rangoon City Civil Court (Recovery of Possession and Distress) Rules, the word "decree" in Rules 97 and 98 of the Order XXI of the Code includes an "order."

D. H. Atchia & Co. v. *M. E. Jeewa*, (1924) 3 B.L.J. 263; *Baggiammal* v. *Appadurai Gramany*, 6 I.C. 722; *Mahomed Ghouse Sahib* v. *Shaik Mohideen Sahib*, A.I.R. (1924) Mad. 74; *Narayana Iyengar* v. *Desika Chariar*, (1933) I.L.R. 57 Mad 35; *Meredith* v. *Sanjibani Dasi*, (1915) I.L.R. 42 Cal. 313; *Kilachand Devchand & Co., Ltd.* v. *Ajudhia Prasad Sukhanand & Co. and others*, 59 Bom. 10, referred to

B. K. Dadachanji for the appellant.

Ba Sein for the respondent.

U THEIN MAUNG, C.J.—The question which has been referred to the Full Bench is as follows:

"When a landlord has obtained an order of ejectment against his tenant under section 17 of the Rangoon City Civil Court Act and in the course of the execution of that order is obstructed by a third person, who was not a party to the proceedings under section 17, can the landlord avail himself of Order XXI, Rule 97, of the Code of Civil Procedure to obtain relief under Rule 98 if the facts would justify such a course?"

* Civil Reference No. 7 of 1947 of the High Court of Judicature at Rangoon but disposed of by High Court of the Union of Burma.

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The reference has been made as there is some conflict of authority with *D. H. Atchia & Co.* v. *M. E. Jeewa* (1) and *S. Periayya* v. *Kyaw Leong Tong Society* (2) on one side and *Baggiammal* v. *Appadurai Gramany* (3) and *Mahomed Ghouse Sahib* v. *Shaik Mohideen Sahib* (4) on the other, and it is desirable that there should be an authoritative decision of this Court on a matter of such practical importance.

The answer to the question under reference will depend on the answers to the following questions:

(1) Whether an order of ejectment under section 17 of the Rangoon City Civil Court Act can be treated as a decree within the purview of Order XXI, Rules 97 and 98, of the Code of Civil Procedure.

(2) If it cannot be so treated, whether it is an order which can be executed under section 36 of the Code.

(3) If it can be so executed, whether the provisions of Order XXI, Rules 97 and 98, will apply in case of resistance or obstruction to delivery of possession.

These questions have not been considered in the cases of *D. H. Atchia & Co.* v. *M. E. Jeewa* (1) and *S. Periayya* v. *Kyaw Leong Tong Society* (2). In the first case a Bench of the High Court of Judicature at Rangoon held that where a landlord gets an order of ejectment against his tenant under section 17 of the Rangoon Small Cause Court Act and the property is in the possession of a sub-tenant, only symbolical and not actual possession can be granted under Order XXI, Rule 36, of the Code of Civil Procedure, as the sub-tenant was not a party to the proceedings and not bound by the order. In the second case Wright J.,

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(1) (1924) 3 B.L.J. 263.

(2) Civil Revision No. 14 of 1947 in the High Court of Judicature at Rangoon.

(3) 6 I.C. 722.

(4) A.I.R. (1924) Mad. 74.

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who by the way is the Judge who has made the present reference to the Full Bench, followed the ruling in the first case and held that Rule 7 of the Rangoon City Civil Court (Recovery of Possession and Distress) Rules was *ultra vires* in so far as it provided that an order of ejectment under section 17 of the Rangoon City Civil Court Act shall justify the bailiff in giving possession of the property after removing, if necessary, not only the defendant but all other persons in occupation thereof. He did not go into the question as to whether Order XXI, Rules 97 and 98, might not be applicable and whether persons other than the defendant who were found in occupation of the property might not be liable to be ejected under the provisions thereof, *i.e.* as persons who are not in possession of the property on their own account or on account of some person other than the defendant.

Incidentally Rule 7 of the Rangoon City Civil Court (Recovery of Possession and Distress) Rules has been amended by deletion of reference to all other persons in occupation since the case of *S. Periayya* v. *Kyaw Leong Tong Society* (1) was decided by Wright J. [see Notification No. 11 (General), dated the 8th October 1947, of the High Court of Judicature at Rangoon]. However, the amendment does not make any difference with regard to the question now under reference.

Baggiammal v. *Appadurai Gramany* (2) and *Mahomed Ghouse Sahib* v. *Shaik Mohideen Sahib* (3) relate to orders of ejectment under the Presidency Small Cause Courts Act. Such orders are similar to orders of ejectment under section 17 of the Rangoon City Civil Court Act. Such orders are passed under section 43 of the Presidency Small Cause Courts Act on applications filed under section 41 thereof just as

(1) Civil Revision No. 14 of 1947 in the High Court of Judicature at Rangoon.

(2) 6 I.C. 722.

(3) A.I.R. (1924) Mad. 74.

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orders of ejectment under the Rangoon City Civil Court Act are passed on applications under section 17 thereof. *Baggiammal* v. *Appadurai Gramany* (1) is a case in which a person who was dispossessed under an order of ejectment objected under Order XXI, Rule 100, of the Code of Civil Procedure and it was held that the Court had jurisdiction to deal with the objection. Miller J. observed in the course of his judgment therein "I am asked to hold * * * * that a person dispossessed under Chapter VII has no remedy but the suits given by sections 45 and 46. * * * * but it seems to me that the language of section 48 is wide enough to give the necessary jurisdiction. The case is closely analogous to that of dispossession of a third party under a decree and Chapter VII makes no express provision of the procedure to be adopted in such a case." Section 48 of the Presidency Small Cause Courts Act provides that in all proceedings under Chapter VII of the Act the Small Cause Court shall follow the procedure prescribed for a Court of First Instance by the Code of Civil Procedure. There is no section similar to section 48 of the Presidency Small Cause Courts Act in Chapter V of the Rangoon City Civil Court Act, *i.e.* the chapter in which section 17 is enacted. However, under section 32 thereof, the High Court may from time to time by rules having the force of law regulate the procedure of the Court in the exercise of its jurisdiction under Chapter V; and according to Rule 3 of the Rangoon City Civil Court (Recovery of Possession and Distress) Rules which have been made by the High Court "an application under section 17 of the Act shall be in the form of a plaint in which the applicant shall be the plaintiff and the occupant the defendant and the matter shall be treated as a suit." So section 23 of the Act applies and the procedure prescribed by the

(1) 6 I.C. 722.

Code of Civil Procedure must be followed. Besides, according to section 141 of the Code of Civil Procedure "the procedure provided in this Code in regard to suits shall be followed as far as it can be made applicable in all proceedings in any Court of civil jurisdiction."

Mahomed Ghouse Sahib v. *Shaik Mohideen Sahib* (1) is a case in which it was held that section 48 of the Presidency Small Cause Courts Act makes the provisions of the Court of Civil Procedure applicable to proceedings under Chapter VII of the Act and that the language of section 48 is wide enough to include a power to act under Order XXI, Rule 98, of the Code of Civil Procedure. Krishnan J. observed in the course of his judgment therein : "To hold otherwise would lead to the extraordinary result that, though Small Cause Court can pass an order in ejectment against a tenant, its order could be defeated by the tenant giving over possession to a third party a day previous to the date fixed for ejectment. The Small Cause Court has power to remove any improper obstruction to the carrying out of its own order." These remarks of Krishnan J. may be compared with the remarks of Wright J. in his order of reference wherein he has stated "there are the practical difficulties which will arise if a tenant can defeat an order under section 17 of the Rangoon City Civil Court Act by making over possession of the property to a third party a few days before the time fixed for the tenant's eviction."

It will thus be seen that there has been a conflict of authority as the High Court of Judicature at Rangoon has not in the said two cases considered the questions as to—

(1) whether an order of ejectment under section 17 of the Rangoon City Civil Court Act should not be treated as a decree ;

(1) A.I.R. (1924) Mad. 74.

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(2) whether it is not an order which can be executed in the same way as a decree ; and

(3) whether Order XXI, Rules 97 and 98, of the Code of Civil Procedure will not apply in the case of resistance or obstruction to delivery of possession in execution of such an order.

Now, with reference to the first question, as has already been stated above, Rule 3 of the Rangoon City Civil Court (Recovery of Possession and Distress) Rules provides that an application under section 17 of the Act shall be in the form of a plaint, and that the matter shall be treated as a suit, and final orders in suits usually take the form of decrees. So, even though the rule does not proceed to lay down that the final order on the application shall be treated as a decree, it must, in our opinion, be treated as such. The distinction between an order and a decree as defined in section 2, clauses (14) and (2), is very fine, and there is no reason why the formal expression of a decision in a matter which must be treated as a suit should not be treated as a decree. It has been contended by the learned advocate for the respondent that, according to section 17 of the Rangoon City Civil Court Act itself, the Court can pass only an order of ejectment of the occupant and for delivery of possession of the property, and that what must be an order thereunder cannot be a decree. However, there is nothing to prevent the order which is not a decree being treated as a decree, just as the application is treated as a suit and the respondent thereto is treated as a defendant.

With reference to the second question, the learned advocate for the respondent has contended that section 36 of the Code of Civil Procedure refers only to orders under the Code itself. However, "order" has been defined in section 2, clause (14), of the Code

as "the formal expression of any decision of a civil Court which is not a decree." The definition does not contain any restriction or limitation to support the learned advocate's contention. In this particular case the Rangoon City Civil Court is a civil Court, and the order of ejectment is the formal expression of a decision of that Court. So, if that order be not a decree, it must be an order as defined in the Code, and therefore an order to the execution of which the provisions of the Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply under section 36 of the Code With reference to the contention that section 36 of the Code is limited to orders made only under the Code, Kania J. has observed in *Kilachand Devchand & Co., Ltd.* v. *Ajudhia Prasad Sukhanand & Co. and others* (1): "In my opinion section 36 is not limited to orders made only under the Code, but is applicable to all orders which could be included in the definition of the term 'order' as defined in section 2 (14). * * * * * In my opinion, if the Court has jurisdiction to make an order, it has necessarily jurisdiction to enforce the order and the law does not allow its machinery to be clogged in this respect. * * * * * In *Narayana Iyengar* v. *Desika Chariar* (2) it was held that once a Court is given jurisdiction, the necessary consequences flow from its exercise of such jurisdiction, without any express words, and, therefore, the Court's order can be enforced in the usual way in which orders made by the Courts are enforced." It has been pointed out in *Meredith* v. *Sanjibani Dasi* (3) that an order under section 43 of the Presidency Small Cause Courts Act, which is similar to an order of ejectment under section 17 of the Rangoon City Civil Court Act, is a

(1) (1935) I.L.R. 59 Bom. 10. (2) (1933) I.L.R. 57 Mad. 35.
(3) (1915) I.L.R. 42 Cal. 313.

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writ or warrant for the giving of possession which must be executed by the bailiff.

The order clearly is an executable order, and not a mere *brutum fulmen*. So, under section 36 of the Code of Civil Procedure, the provisions of the Code relating to the execution of decrees must be deemed to apply to the execution of the order.

With reference to the third question, we are of the opinion that Order XXI, Rules 97 and 98, of the Code of Civil Procedure are applicable in the case of resistance or obstruction to delivery of possession in execution of an order of ejectment under section 17 of the Rangoon City Civil Court Act, whether that order be regarded only as an "order" under section 36 of the Code or whether it be treated as a decree in view of Rule 3 of the Rangoon City Civil Court (Recovery of Possession and Distress) Rules and section 141 of the Code of Civil Procedure. Rules 97 and 98 refer only to "the holder of a decree", "the execution of a decree" and "a judgment-debtor." However, in view of section 36 of the Code, the reference to a decree must be deemed to include a reference to an order also. Besides, a decree-holder has been defined in section 2, clause (3), of the Code as "any person in whose favour a decree has been passed or an order capable of execution has been made", and judgment-debtor has been defined in clause (10) thereof as "any person against whom a decree has been passed or an order capable of execution has been made."

In the words of Plowden, "it is not the words of the law but the internal sense of it that makes the law and our law (like all other) consists of two parts, namely, of body and soul; the letter of the law is the body of the law and the sense and reason of the law is the soul of the law"; and in this case we

have come to the conclusions which have been set out above by construing the Statutes and the Rules according to the plain, literal and grammatical meaning of the words and our interpretation of the Statutes and the Rules has the advantages of making the order of ejectment effective and also of preventing any person from profiting by his own wrong, *i.e.* of making it possible for the Court to deal under Order XXI, Rule 98, of the Code of Civil Procedure with any person who resists or obstructs delivery of possession under the order of ejectment at the instigation of the judgment-debtor. "On the general principle of avoiding injustice and absurdity, any construction would, if possible, be rejected (unless the policy and object of the Act required it) which enabled a person to defeat or impair the obligation of his contract by his own act, or otherwise to profit by his own wrong." (Maxwell on Interpretation of Statutes, 9th Edition, page 215.) So our interpretation of the Statutes and the Rules appears to be in consonance not only with the language but also the spirit thereof.

We accordingly answer the question which has been referred to us in the affirmative.

U TUN BYU, J.—It has been contended on behalf of the respondent that the applications filed under section 17 of the Rangoon City Civil Court Act are not suits, and they accordingly do not attract the provisions of section 23 (*1*) of the Rangoon City Civil Court Act. Rule 3 of the City of Rangoon (Recovery of Possession and Distress) Rules, made under section 32 of the Rangoon City Civil Court Act, prescribes that an application under section 17 of the Rangoon City Civil Court Act is to be made in the form of a plaint and that the matter is to be treated as a suit.

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It is also contended on behalf of the respondent that Rule 3 is *ultra vires* of section 17 of the Rangoon City Civil Court Act in that it purported to convert what is called an application under section 17 into a suit. This contention cannot be accepted as Rule 3 of the City of Rangoon (Recovery of Possession and Distress) Rules purports to do nothing more than to apply the Civil Procedure Code to applications made under Chapter V of the Rangoon City Civil Court Act and to all proceedings arising out of the applications made under Chapter V; and the High Court has clearly, under section 32 of the Rangoon City Civil Court Act, power by means of rules to regulate the Procedure of the Court in connection with Proceedings instituted under section 17 of the Rangoon City Civil Court Act. The first point is, whether an application under section 17 of the Rangoon City Civil Court Act, which is included in Chapter V of that Act, can be considered to be a suit for the purpose of section 23 (*1*) of that Act. The expression "suit" has not been defined in the Code of Civil Procedure or in any other Act, but there can be no doubt that the expression "suit" is a very comprehensive one. Under Order IV, Rule 1, of the Code of Civil Procedure a suit must be initiated by a plaint, and Rule 3 of the City of Rangoon (Recovery of Possession and Distress) Rules prescribes that the application under section 17 of the Rangoon City Civil Court Act must be made in the form of a plaint. As Rule 3 has also prescribed that the application so initiated is to be treated as a suit, it seems to be clear that the purport of Rule 3 is to make the provisions of the Code of Civil Procedure applicable to the applications made under Chapter V of the Rangoon City Civil Court Act and to all proceedings arising out of those applications. It might also be observed that for the purpose of Court Fees Act an application under

section 17 of the Rangoon City Civil Court Act is, under section 27 (2), deemed to be a suit. It could thus be said that the provisions of the Code of Civil Procedure have been made applicable to applications filed under section 17 of the Rangoon City Civil Court Act and to all proceedings arising out of those applications.

If the Civil Procedure Code applies to applications made under section 17 of the Rangoon City Civil Court Act, it seems to be immaterial whether the order passed under section 17 amounts to a decree or not, because under section 36 of the Code of Civil Procedure, the provisions of the Code of Civil Procedure apply to orders made under section 17 of the Rangoon City Civil Court Act. The order made under section 17 of the Rangoon City Civil Court Act is clearly an order which may be required to be enforced or executed, and such order appears to be within the meaning of section 2 (14) of the Code of Civil Procedure. It is, however, contended that section 36 of the Code of Civil Procedure applies only to orders that have been made under the Code of Civil Procedure, and to no other orders. The expression "order" is defined in section 2 (14) of the Code of Civil Procedure to mean a formal expression of any decision of a civil Court which is not a decree, but the word "order" in section 36 ought to be given a meaning consistent with the definition given in section 2 (14) in the absence of anything in section 36 to indicate that the word "order" appearing therein is used in a more restricted sense than as defined in section 2 (14). The observation of Kania J. in *Kilachand Devchand & Co., Ltd.* v. *Ajudhia Prasad Sukhanand & Co. and others* (1) may

(1) (1935) I.L.R. 59 Bom. 10.

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be referred to, and it appears, with respect, to be correct, and it is as follows :

"In my opinion section 36 is not limited to orders made under the Code, but is applicable to all orders which could be included in the definition of the term 'order' as defined in section 2 (14)."

The case of *D. H. Atchia & Co.* v. *M. E. Jeewa* (1) does not throw much light on the question under reference in this case as it does not purport to deal with the provisions of Rule 97 or Rule 98 of Order 21 of the Code of Civil Procedure. There the case was decided solely on the provisions of Order 21, Rule 35, of the Code of Civil Procedure, but it is clear that the relevant wordings in Rule 35 are not the same as in Rule 97 or Rule 98 of Order 21 of the Code of Civil Procedure. Under Order 21, Rule 98, it is not only the judgment-debtor but any person who acts under the instruction or instigation of the judgment-debtor can be proceeded against, although the latter person might not be a person who came within the meaning of the expression "any person bound by the decree" in Order 21, Rule 35, of the Code of Civil Procedure.

The cases of *Baggiammal* v. *Appadurai Gramany* (2) and *Mahomed Ghouse Sahib* v. *Shaik Mohideen Sahib* (3) relate to the construction of certain section of the Presidency Small Cause Courts Act, which is not the same as in the present section 23 of the Rangoon City Civil Court Act. It seems, however, to be clear that the provisions of section 23 (*1*) of the Rangoon City Civil Court Act, if read with Rule 3 of the City of Rangoon (Recovery of Possession and Distress) Rules and section 36 of the Code of Civil Procedure show

(1) (1924) 3 B.L.J. 263. (2) 6 I.C. 722.
(3) A.I.R. (1924) Mad. 74.

the answer to the question propounded in the reference must be in the affirmative.

U SAN MAUNG, J.—I agree with my Lord the Chief Justice and I have nothing to add to his judgment.

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FULL BENCH (CIVIL).

Before U Thein Maung, Chief Justice, U Aung Tha Gyaw and U Bo Gyi, JJ.

H.C. 1948

Mar. 17.

MA THEIN NU (APPELLANT)

v.

MA PWA THIT AND ONE (RESPONDENTS).*

Burmese Buddhist Law—Grandchild of parents when divorced—Does not maintain filial relationship with one of its parents—Whether loses its right of inheritance of that parent's parent.

Held by the Full Bench : That a child who after the divorce of its parents who are Burmese Buddhists, neither lives with nor maintains filial relationship with one of its parents does not lose its right of inheritance to the property of that parent's parent and it is not necessary that filial relationship between itself and its parent should be resumed before it can inherit from the grandparent.

Mi Thaik v. *Mi Tu*, (1872—92) S.J.L.B. 184 ; *Ma Shwe Ge* v. *Nga Lan and one*, (1872—92) S.J.L.B. 296 ; *Ma Pon and others* v. *Maung Po Chan and others*, (1897—1901) 2 U.B.R. 116 ; *Ma Sein Nyo* v. *Ma Kywe*, (1892—96) 2 U.B.R. 159 ; *Maung Pan* v. *Ma Hnyi*, (1897—1901) 2 U.B.R. 104 ; *Ma Yi* v. *Ma Ga'e*, 5 L.B.R. 133 ; *Ma E Me* v. *Maung Po Mya*, 11 B.L.R. 316 ; *Ma Hla Kin* v. *Maung Chit Po and others*, (1910) 3 B.L.T. 109 ; *Mi Nyo* v. *Mi Nyein Tha*, (1904—06) 2 U.B.R., Buddhist Law of Inheritance, p. 15 ; *Le Maung* v. *Ma Kwe*, (1919) 10 L.B.R. 107 ; *Maung Dwe and others* v. *Khoo Haung Shein and others*, (1925) I.L.R. 3 Ran. 29 ; *Maung Hmat and others* v. *Ma Po Zon*, (1893—1900) P.J.L.B. 469 at p. 470 ; *Maung Po Thu Daw* v. *Maung Po Than*, (1923) I.L.R. 1 Ran. 316 (F.B.) ; *U Sein* v. *Ma Bok and others*, (1933) I.L.R. 11 Ran. 158 ; *Maung Paik* v. *Maung Tha Shun and another* (1940) R.L.R. 28, referred to.

Hla Gyaw for the appellant.

Tun Maung for the respondent.

The following judgment of the Full Bench was delivered by

U THEIN MAUNG, C.J.—The question which has been referred to the Full Bench is as follows :

"Does a child who, after the divorce of its parents (being Burmese Buddhists) neither lives with, nor maintains filial

* Civil Reference No. 8 of 1947 against the decree of the District Court of Sagaing in Civil Appeal No. 43 of 1946.

relations with, one of its parents, lose its rights of inheritance to the property of that parent's parents unless and until filial relations between itself and that parent are resumed ?"

There is no express provision in the *Dhammathats* as to whether such a child should lose his rights of inheritance to the estate of the grandparents at all ; and the reference has been made to find out whether the law relating to the rights of inheritance of such a child in respect of the estate of his own parent, with whom he has not maintained filial relations, should or should not be extended to cover the case.

As has been pointed out by U E Maung (now a Judge in the Supreme Court of the Union of Burma) at page 245 of his book on Burmese Buddhist Law the law relating to the children of divorced parents is mainly case-law. *Mi Thaik* v. *Mi Tu* (1) is the leading case. It decided "where husband and wife divorced by mutual consent and the young daughter remained till her father's death in the house of her mother and her mother's second husband, and did not renew filial connection with her own father, and where there was no special contract to a contrary effect at the time of the divorce, the daughter is not entitled to a share of the joint property acquired by the father and the second wife." In the course of his judgment therein Jardine J.C. observed, "The principle applied to an adopted son runs more or less through the whole law of inheritance. It is presumed that the children will be dutiful to their parents even if they (the children) have married and received as gifts the wherewithal to set up separate establishments. In the 5th section of the *Dhammavilasa* the reason why the eldest son gets a share is said to be that he with his parents had planned and worked. In section 17 it is mentioned

(1) (1872—92) S.J.L.B. 184.

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that the son who lives with his parents is better able to help them in lawsuits and disputes; and the written law and present opinion coincide in requiring the principal heir to take up the parent's burden on the parent's death. Section 13 of the *Wunnana* shows clearly that children who expect to inherit should remember their parents in adversity as well as in prosperity. If the parents become too poor to support themselves, filial piety would induce the children to sell themselves in order to provide the means. See also sections 9 to 12 of the *Mchavicchedani*, Notes on Buddhist Law, VI: 'If the eldest son or eldest daughter do not perform the business of their father and mother, the share of such son or daughter shall be forfeited or made less.'"

In *Ma Shwe Ge* v. *Nga Lan and Nga On* (1), Ward J.C. observed "The rule (in *Mi Thaik* v. *Mi Tu*), moreover, is an equitable rule and should I think be maintained so long as there is no distinct provision in the *Dhammathats* which conflicts with it." And in *Ma Pon and two others* v. *Maung Po Chan and two others* (2), Thirkell White J.C. cited with approval the following passage from the judgment in *Ma Sein Nyo* v. *Ma Kywe* (3), "Now, it appears to be clearly a principle of Buddhist Law that the child who is to inherit must aid and cherish the parent, and live with him, or under such circumstances as to show that filial duty is discharged according to his wishes and that the family tie is unbroken." And he has also observed in the course of his judgment therein, "The intention of the law seems to be that on divorce separate households should be constituted and that the members of each household should not retain the right of sharing in the estate of the other. As Mr. Jardine observed in

(1) (1872—92) S.J.L.B. 296. (2) (1897—1901) 2 U.B.R. 116.
(3) (1892—96) 2 U.B.R. 159.

a passage already quoted, 'The principle applied to an adopted son runs more or less through the whole law of inheritance.' If, as was held in the case of *Maung Pan* v. *Ma Hnyi* (1), the adopted child has no claim to share in the estate of his natural father, there does not seem to be any reason why daughters, who separate from their father's house in consequence and on the occasion of their parents' divorce, should retain any claim to their father's estate."

In the leading case the daughter was an adult who had not maintained filial relations with her father and the father was a man who had married again after his divorce. However, the rule has been extended subsequently to cover (i) the case of a person who was a mere child when its father died and had no opportunity of exercising any option of renewing filial relationship with him. See *Ma Yi* v. *Ma Gale* (2) and *Ma E Me* v. *Maung Po Mya* (3) and (ii) the claim to inherit the estate of a father who did not marry again but lived the rest of his life with a daughter by an earlier marriage. [See *Ma Hla Kin* v. *Maung Chit Po and two* (4).]

Now the question is whether the rule should be further extended to cover the case of a claim to inherit the estate of grandparents. The rule may be an equitable one so far as it relates to a claim to inherit the estate of the parent with whom a child has not maintained filial relations, filial relationship being in the words of U May Oung "the fundamental requisite in order to qualify a child for inheritance." However, the rules relating to the incidents of adoption must be applied with caution. The analogy is not perfect. It is open to the child to renew filial relations and thereby regain the status of an heir and in the case of a son conceived in wedlock but born after divorce he has a

(1) (1897—1901) 2 U.B.R. 104.
(2) 5 L.B.R. 133.
(3) 11 B.L.R. 316.
(4) (1910) 3 B.L.T. 109.

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claim upon the estate of his father in the absence of other heirs. [*See* Kinwunmingyi's Digest, Vol. I, ss. 297, 298 and 299 ; *Manukye*, Book X, sections 53 and 55, and *Mi Nyo* v. *Mi Nyein Tha* (1).] A Bench of the Chief Court of Lower Burma observed in *Le Maung* v. *Ma Kwe* (2) "if it were a question of inheriting from Maung Le Maung (the father), we might properly consider the claims of Ma Kwe (a daughter who was born before divorce) if she were the only surviving descendant by blood." And in the case of an adoption, the child cannot have a claim on the estate of the father even in the absence of other heirs.

There is no rule of law which requires grandchildren to live or work with grandparents ; and even in the case of step-grandchildren their Lordships of the Privy Council have held that failure on the part of minor step-grandchildren to live with the step-grandmother and their failure to bury her did not disqualify them from inheriting her estate. [*See Maung Dwe and others* v. *Khoo Haung Shein and others* (3).] Besides a son conceived in wedlock and born after divorce is entitled to inherit the estate of his paternal grandparents although he has been living with his mother for the reason that he is a son begotten after a regular marriage by the consent of parents—an excellent child and entitled to inherit. (ဖခင်နှစ်ဦးပေးဆိုးမြားရာ တွင်ရသောသနွေးသည်၊ သားမြတ်ရမွေခံသင့်သည်။) (*See* Kinwunmingyi's Digest, Vol. I, sections 297, 298 and 299 ; *Manukye*, Book X, section 55.

It may be equitable to hold that a child removed from the father's family and continuously resident with her divorced mother acquires or retains rights in her mother's or new family's property and loses her rights

(1) (1904—06) 2 U.B.R., Buddhist Law, Inheritance, 15.

(2) (1919) 10 L.B.R 107.

(3) (1925) I L.R. 3 Ran. 29.

in the family whence she came as she has not lived and planned or worked with the father's family. [*Cf. Maung Hmat and two others* v. *Ma Po Zon* (1).] But the *ratio decidendi* in such a case does not apply to a claim to inherit the estate of the paternal grandparents, and it will be against justice, equity and good conscience to extend the rule to such a claim. Buddhist Law like all other systems of law attaches great importance to blood relationship and the grandchild in such a case claims to inherit in his own right as a blood relation—as a son begotten after regular marriage by consent of parents (ဖခင်နှစ်ပါးသဘောတူခင်ရင်သား)—and not as a representative of the father or his family. [See *Maung Po Thu Daw* v. *Maung Po Than* (2).] *Cf.* section 38 of the Succession Act.

In *U Sein* v. *Ma Bok and others* (3) it was held that the rule in Burmese Customary Law relating to the disinheritance of a dogson does not apply to grandchildren ; and in *Maung Paik* v. *Maung Tha Shun and another* (4) an out-of-time grandchild by an *orasa*, who became a dogson, was held to be entitled to share the estate of his grandparents equally with his uncle. So the same considerations and requirements do not apply to the case of a grandchild as to that of a child.

In the words of Jardine J.C. himself in *Mi Thaik* v. *Mi Tu* (5) "There is no reason therefore to apply the analogy of the one case to the other" ; and it will be "extremely dangerous to make categorical rules out of mere inference" on the analogy of adoption or on the analogy of a claim to inherit the estate of the father himself.

We accordingly answer the question which has been referred to us in the negative.

(1) (1893—1900) P.J.L.B. 469 at p. 470.
(2) (1923) I.L.R. 1 Ran. 316 (F.B.).
(3) (1933) I.L.R. 11 Ran. 158.
(4) (1940) R.L.R. 28.
(5) (1872—92) S.J.L.B. 184.

SPECIAL BENCH (CIVIL).

Before U Thein Maung, Chief Justice, U San Maung and U Thaung Sein, JJ.

H.C. 1948

Mar. 17.

MRS. R. JOUBERT BWA (APPLICANT)

v.

MR. JOUBERT BWA (RESPONDENT).*

Divorce—Communication of venereal disease—Whether proof of both legal cruelty and adultery—Whether should be done knowingly, wilfully or recklessly—Condonation of offence—Subsequent adultery—Revival of offence

Held : That mere communication of venereal disease by husband to wife is *prima facie* sufficient evidence both of adultery and legal cruelty. Burden shifts to the husband to rebut the inference. It is not necessary that such communication should be done knowingly, wilfully or recklessly.

Edna Hardless v. *Harold Richard Hardless*, I.L.R. 55 All. 134 ; *Browning* v. *Browning*, L.R. (1911) (P.D.) 161, followed.

Communication of venereal disease may be condoned by wife ; but subsequent adultery has the effect of reviving the former cruelty which has been condoned.

Ma On v. *Maung Aung Bwa*, 14 B.L.R. 173, followed.

The following judgment of the Special Bench was delivered by

U THEIN MAUNG, C.J.—The fact that a husband has communicated venereal disease to his wife is in law sufficient evidence of adultery ; it also amounts to legal cruelty [see *Edna Hardless* v. *Harold Richard Hardless* (1)].

In order to establish a charge of legal cruelty against a husband for communicating a venereal disease to the wife, it is not necessary to allege or prove that he knowingly, wilfully or recklessly communicated the disease. It is sufficient for the wife to allege and to prove that she was infected by the husband with a

* Civil Reference No. 1 of 1948 of the High Court, Rangoon, being reference by the District Judge, Amherst, under s. 17 of the Burma Divorce Act for confirmation of the decree of dissolution of marriage.

(1) I.L.R. 55 All. 134.

venereal disease ; and the burden is upon him to prove that the disease was communicated in such circumstances as not to amount to legal cruelty [see *Browning* v. *Browning* (*1*)].

In this particular case, we are satisfied on the evidence that the husband not only committed adultery with prostitutes but also communicated venereal disease to his wife. It being common knowledge that this loathsome disease is highly contagious, it must be presumed that respondent recklessly or wilfully communicated the disease to his wife, and the husband has not given any evidence to rebut the presumption and prove that the disease was communicated in such circumstances as not to amount to legal cruelty.

The husband and the wife were married in 1937, and according to the wife, the disease was communicated to her first four months after the marriage. So, there may have been condonation. However, the wife has proved by the evidence of Maung On Sein, witness No. 4 for her, that the husband had committed adultery with prostitutes again about three months before the hearing of her application. This subsequent adultery has the effect of reviving the former cruelty which may have been condoned [see *Ma On* v. *Maung Aung Bwa* (2)].

The case was heard *ex parte* as against the husband, and he has not appeared in this Court to show cause as to why the decree *nisi* should not be made absolute. Besides, no one has intervened, and there is no reason to believe that there has been any collusion between the husband and wife.

The decree *nisi* is made absolute. There will be no order as to the costs in this Court, as neither party has appeared.

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(1) L.R. (1911) (P.D.) 161. (2) 14 B.L.R.173.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

H.C. 1948

Feb. 6.

SAYA U NYO ZEINT (APPELLANT)

v.

SAYA SHEIN (RESPONDENT).*

Temporary injunction—Order 39, Rules 1 and 2, of the Code of Civil Procedure—Principle on which temporary injunction is granted—Proof of title if necessary.

Held: That if a party makes out a *prima facie* case, *i.e.* a case of a clear colour of title as distinguished from proof of real title, he is entitled to a temporary injunction if other conditions are satisfied.

Universities of Oxford and Cambridge v. *Richardson*, 31 E.R., Chancery, 1260, followed.

Spottiswoode v. *Clarke*, 41 E.R., Chancery, 901, referred to.

Held: That in order to obtain temporary injunction restraining the use of a trade mark or label, the plaintiff must show that the case is of some urgency, that he has a clear colour of title and the granting of injunction will not cause irreparable damage to the defendant if it be later proved that the defendant has a right.

Copinger on Copyright, 7th Edn., p. 156, followed.

G. N. Banerji for the appellant.

The following judgment of the Bench was delivered by

U THEIN MAUNG, C.J.—This is an appeal from an order under Order XXXIX, Rule 2 (2), of the Code of Civil Procedure granting a temporary injunction to restrain the appellant and his servants and agents from manufacturing, selling or offering for sale any bottle of tonic with a certain label attached thereto. The said order has been passed in a suit filed by the plaintiff-respondent against the defendant-appellant for a perpetual injunction to prevent the defendant-appellant

* Civil Misc. Appeal No. 51 of 1947 against the order of the Original Side of High Court in Civil Regular No. 259 of 1947.

and his servants and agents from using the particular label and also for damages and accounts, wherein the defendant-appellant has also claimed that the label is his registered trade mark.

The temporary injunction has been granted as the learned Judge is satisfied from the evidence that has so far been adduced before him that the plaintiff-respondent has made out a *prima facie* case of his having been using the label or rather the label, with which the defendant-appellant's label is almost identical, since the time prior to 1941, *i.e.* before the defendant-appellant began to use his label.

The learned advocate for the appellant has strenuously argued that the temporary injunction should not have been granted as the plaintiff-respondent has not yet proved his title to the trade mark and that the learned Judge's order granting the temporary injunction amounts to prejudgment of the question relating to the parties' rights to the trade mark.

In order to obtain an interlocutory injunction the plaintiff must show that the case is of some urgency, that he has a clear colour of title, and that the granting of the injunction will not cause irreparable damage to the defendant if it should turn out at the trial that he was in the right. (*See* Copinger on the Law of Copyright, 7th Edition, page 156.)

There can be no doubt that the case is of some urgency inasmuch as the defendant-appellant has admittedly been selling his medicine with the labels which are claimed by the plaintiff-respondent to have been colourable imitation of his trade mark.

With reference to the question of title, Cottenham L.C. has observed in *Spottiswoode* v. *Clarke* (1): "It is much better, if the legal right is to be litigated, that

(1) 41 E.R., Chancery, 901.

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U THEIN MAUNG, C.J.

this Court should abstain from expressing any opinion upon it in the meantime." However, without expressing any definite opinion on the question of title at this stage and on the materials before us, we must say that we agree with the learned Judge on the Original Side that the plaintiff-respondent has made out a *prima facie* case. He has established a clear colour of title and it is all that is necessary for him to establish for the purpose of a temporary injunction. The following extract from the judgment of Eldon L.C. in *The Universities of Oxford and Cambridge* v. *Richardson* (1), contains the reply to the contention of the learned advocate for the defendant-appellant that a temporary injunction cannot be granted unless and until the plaintiff-respondent has proved that he has got a title which is clear at law:

> "It is then said, in cases of this sort, the universal rule is that, if the title is not clear at law, the Court will not grant or sustain an injunction, until it is made clear at law. With all deference to Lord Mansfield, I cannot accede to that proposition so unqualified. There are many instances in my own memory, in which this Court has granted or continued an injunction to the hearing under such circumstances. * * * * * This Court has lately said possession under a colour of title is ground enough to enjoin and to continue the injunction, till it shall be proved at law, that it is only colour and not real title. There have been several instances of late."

We are also satisfied that no irreparable injury will be caused to the defendant-appellant and that such damage as may be caused to him can, in the case of his being ultimately found to have a better right to the trade mark, be fully compensated inasmuch as the learned Judge has granted the temporary injunction "on condition that the plaintiff furnishes security in the sum of Rs. 5,000 entering into a bond to pay a sum to be awarded by this Court against him not exceeding

(1) 31 E.R., Chancery, 1260.

Rs. 5,000 by way of damages to the defendant if subsequently the suit should fail."

Under these circumstances there is no reason for us to interfere with the order granting the temporary injunction. The appeal is dismissed. However, the hearing of Civil Regular Suit No. 259 of 1947 in this Court, which according to Mr. Banerji is to be transferred to the Rangoon City Civil Court, and Civil Regular Suit No. 2311 of 1947 in the Rangoon City Civil Court might be expedited in the interests of both parties.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

H.C. 1948

Mar. 1.

DAW KYU AND ONE (APPELLANTS)

v.

A.S.P.L.V.R. RAMASWAMY CHETTIAR (RESPONDENT).*

Attachment of immovable property—Order for sale under Rule 64 of Order 21—Effect of attachment—Subsequent mortgage suit—Attaching creditor not made party—Purchase in money decree—Suit for declaration that preliminary mortgage decree fraudulent—Properties sold under mortgage decree during the pendency of that suit—lis pendens—*S. 52, Transfer of Property Act—How long* lis pendens *continues.*

Held: Attachment (unaccompanied by any order for sale) creates a charge over the property in the general sense of the word but not in its legal sense; such general charge does not create any interest in the attached property in favour of the attaching creditor.

Baiju Lal Marwari v. *Thakur Prasad Marwari*, I.L.R. 18 Pat. 157; Mayne on Hindu Law (9th Edn.), p. 450, followed.

Bunsi Koer v. *Sheo Proshad Singh*, (1879) L.R. 6 I.A. 88, explained.

Moti Lall v. *Karrah-ul-din*, (1879) L.R. 24 I.A. 170; *Raghunath Das* v. *Sunder Das Khetri*, (1914) L.R. 41 I.A. 251; *Gummidelli Anantapadmanabhaswami* v. *Official Receiver*, (1933) L.R. 60 I.A. 167; *Krishnasawmy Mudaliar* v. *Official Assignee*, I.L.R. 26 Mad. 673; *Frederick Peacock* v. *Madan Gopal*, I.L.R. 29 Cal. 428 (F.B.), referred to.

Such attaching creditor is not a necessary party in a mortgage suit under Order 34, Rule 1, of the Code of Civil Procedure.

Baiju Lal Marwari v. *Thakur Prasad Marwari*, I.L.R. 18 Pat. 157; *Subramania* v. *Sinnamal*, I.L.R. 53 Mad. 881 (F.B.); *Mahanth Singh* v. *Arjandas*, A.I.R. (1936) Nag. 209, followed.

Held by Chief Justice: Principle of *lis pendens* applies to involuntary sales.

Purchaser under a sale in execution of money decree is affected by the doctrine of *lis pendens* if he purchased during the pendency of a mortgage suit. His subsequent suit to declare the preliminary mortgage decree as fraudulent which is later dismissed does not keep alive the right of *lis pendens* for his benefit.

E. C. V. Foucar for the appellants.

P. K. Basu for the respondent.

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*Civil 1st Appeal No. 87 of 1941 against decree of High Court of Judicature at Rangoon in Civil Regular No. 214 of 1940 in its Original Civil Jurisdiction.

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DAW KYU AND ONE v. A.S.P.L.V.R. RAMASWAMY CHETTIAR.

U SAN MAUNG, J.—This is an appeal against the judgment and decree of the High Court of Judicature at Rangoon in Civil Regular Suit No. 214 of 1940. In that suit, the plaintiff-respondent A.S.P.L.V.R. Ramaswamy Chettyar sued one U Ba Tin for a declaration that he was entitled to redeem the property known as No. 15, Insein Road, Kamayut, which was mortgaged to U Ba Tin by one Daw Thein Mya on the 1st January 1935 for a sum of Rs. 5,000 by the deposit of title deeds. The plaintiff obtained the decree sought for by him, and the appeal against the decree by the defendant U Ba Tin was still pending in the High Court of Judicature at Rangoon at the time of the general evacuation in February 1942. Both the original and the appellate proceedings are no longer traceable now. Fortunately, the facts, which were said to be not in dispute, have been fully set out in the judgment dated 11th July 1941. Briefly put, they are as follows :

On the 1st January 1935 the suit property was mortgaged to U Ba Tin by Daw Thein Mya as already mentioned. On the 4th December 1936, the plaintiff obtained a decree against Daw Thein Mya for Rs. 33,304-7-6, and in execution of that decree attached the suit property. On the 22nd February 1939, before the suit property could be sold, the defendant U Ba Tin filed a suit (Civil Regular No. 46 of 1939) against Daw Thein Mya for the recovery of Rs. 8,500 due on his mortgage, and the usual preliminary decree was passed on the 13th March 1939. To that suit the plaintiff was never a party. On the 6th May 1939 the right, title and interests of Daw Thein Mya were sold to the plaintiff in execution of his decree, and on the 8th December 1939 the plaintiff filed a suit (Civil Regular No. 246 of 1939) against U Ba Tin and Daw Thein Mya to set aside the preliminary mortgage decree as having been obtained by fraud and collusion.

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U SAN MAUNG, J.

On the 26th December 1939 U Ba Tin sent a letter to the plaintiff to redeem the suit property. This the plaintiff declined to do on the ground that his last mentioned suit was pending. On the 6th November 1939 the defendant U Ba Tin obtained a final decree in his mortgage suit and in pursuance of that decree the "right, title and interests" of the mortgagor (Daw Thein Mya) were again sold on the 18th May 1940 to the defendant U Ba Tin himself. The sale was confirmed on the 24th June 1940, and on the 7th August 1940 the plaintiff offered to redeem the suit property, and with this end in view asked for particulars of the defendant's claim. As this offer was refused the plaintiff brought the suit, now under appeal, for a declaration that he was entitled to redeem the mortgage and for consequential relief. The defendant contended that in the events that had happened, the plaintiff had no longer any right to redeem the suit property of which he (the defendant) had become the absolute owner by virtue of his purchase of the 18th May 1940. The suit was decreed by the trial Judge (Blagden J.) mainly on the ground that the "right, title and interests" of the mortgagor Daw Thein Mya, having been extinguished by the sale of the 6th May 1939, could not be sold again to the defendant on the 18th May 1940, and that in any event the defendant could not have acquired any title to the suit property by a purchase which was made during the pendency of the plaintiff's suit to set aside the preliminary mortgage decree.

Hence the appeal by U Ba Tin, and I ought to mention that Daw Kyu and Daw Tin, whose names now appear on the record as appellants, are the assignees of the original appellant U Ba Tin.

For the purpose of this appeal, two points appear to arise for decision ; (1) whether the plaintiff obtained a charge on the suit property by virtue only of his

attachment thereof, and (2) whether the plaintiff was a person who should have been joined in the mortgage suit under Order 34, Rule 1, of the Civil Procedure Code as one having an interest in the right of redemption of the suit property.

As regards (1), it would appear that Mr. Doctor, who appeared for the plaintiff at the hearing of the suit, had admitted that the plaintiff had obtained no charge on the suit property by virtue only of his attachment hereof. In appeal, Mr. Basu for the plaintiff-respondent contends that Mr. Doctor was in error in making that admission, and that, in any event, the plaintiff must be deemed to have obtained a charge on the suit property after the Court had passed an order for its sale.

As to this latter contention, it must be pointed out that there is nowhere in the judgment (which, as I have already mentioned, is the only document to be relied upon for the facts of this case) anything to show that, in fact, the order for sale was passed by the Court on a date prior to the 22nd February 1939 when the mortgage suit was filed by U Ba Tin or to the 13th March 1939 when the usual preliminary mortgage decree was passed in favour of U Ba Tin. Therefore, it is only necessary to consider whether the plaintiff obtained a charge on the suit property by virtue only of his attachment thereof.

Now, in the case of *Baiju Lal Marwari* v. *Thakur Prasad Marwari* (1) where a Bench of the Patna High Court held that an attachment does not create any title in or charge upon the attached property, Chatterji J. who wrote the judgment in that case observed that the effect of an attachment was merely to prevent private alienations, that if an attachment did have the effect of creating a charge upon the attached property a Court

(1) I.L.R. 18 Pat. 157.

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U SAN MAUNG, J.

sale would be affected by such a charge, and that the contention that an attachment created a charge was inconsistent with the provisions of section 73 and Order 21, Rule 57, of the Civil Procedure Code. With great respect, I must say that I entirely agree with the observations made by him on these points.

The learned Judge also relied upon the dicta of their Lordships of the Privy Council in the case of *Moti Lall* v. *Karrah-ul-din* (1) and *Raghunath Das* v. *Sunder Das Khetri* (2) for the proposition that attachment merely prevents private alienation but does not confer any title. These are also the cases relied upon by the learned counsel for the appellants. On the other hand, Mr. Basu for the respondent Chettyar relies upon the earlier case of *Suraj Bunsi Koer* v. *Sheo Proshad Singh and others* (3) for the broad proposition that attachment creates a charge upon the attached property. He argues that the authority of the decision in *Moti Lall* v. *Karrah-ul-din* (1) and *Raghunath Das* v. *Sunder Das Khetri* (2) have been entirely shaken by the following observation of their Lordships of the Privy Council in *Gummidelli Anantapadmanabhaswami* v. *Official Receiver of Secunderabad* (4):

"In *Kristnasawmy Mudaliar* v. *Official Assignee of Madras* (5) the Court appears to have ignored the opinion expressed by this Board in *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (3) which was cited to them, and to have taken a dictum in the judgment of this Board in *Moti Lall* v. *Karrah-ul-din* (1) from its context and used it for a purpose which it did not have in view. In *Frederick Peacock* v. *Madan Gopal* (6) the case of *Suraj Bunsi* (3) was not referred to, and the dictum from *Moti Lall's* case (1) was similarly employed. Their Lordships desire to reserve their opinion as to the soundness of the Madras and Calcutta decisions. The decision of this Board in *Raghunath Das* v. *Sunder Das Khetri* (2) was also

(1) (1897) L.R. 24 I.A. 170.
(2) (1914) L.R. 41 I.A. 251.
(3) (1879) L.R. 6 I.A. 88.
(4) (1933) L.R. 60 I.A. 167 = 56 Mad. 405.
(5) I.L.R. 26 Mad. 673.
(6) I.L.R. 29 Cal. 428 (F.B.)

referred to, but that decision proceeded on an admission by counsel, the point was not argued and the case of *Suraj Bunsi* (1) was not referred to."

In my opinion, the above observation was made when their Lordships of the Privy Council realized that the Board had on two separate occasions spoken with two different voices on the question involved and felt that the best way of withdrawing from a somewhat untenable position was to take up a non-committal attitude on the point. It seems to me that when, in *Suraj Bunsi Koer*'s case (1), their Lordships spoke of an attachment as constituting a "charge" in favour of the judgment-creditor they were using the term in a general and not in a strictly legal sense. This is the view expressed by Mr. Mayne, with reference to this case, in his treatise on Hindu Law (9th Edition at page 450).

For these reasons I hold that the plaintiff in the case under appeal did not obtain a charge on the suit property by virtue only of the attachment thereof.

I should mention, in passing, that the cases reported in 26 Madras and 29 Calcutta referred to by the Privy Council in *Gummidelli Anantapadmanabhaswami* v. *Official Receiver of Secunderabad* (2) are some of the cases relied upon by Mr. Foucar for the appellants.

As regards the question whether the plaintiff should have been made a party to the mortgage suit as a person having an interest in the right of redemption of the suit property within the meaning of Order 34, Rule 1, of the Civil Procedure Code, the Full Bench case of the Madras High Court [*Subramania* v. *Sinnamal and two others* (3)] is of great authority. There it was held that an attaching creditor is not a necessary party

(1) (1879) L.R. 6 I.A. 88. (2) (1933) L.R. 60 I.A. 167 = 56 Mad. 405.
(3) I.L.R. 3 Mad. 881.

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within the meaning of Order 34, Rule 1, Civil Procedure Code, to a suit by a mortgagee and that if, under the decree in the mortgage suit to which he is not a party the property is sold before he redeems it, he loses the right to redeem which was given to him by clause (*f*) of section 91 of the Transfer of Property Act (since repealed).

In this connection, I would respectfully adopt the following observations of Chatterji J. in *Baiju Lal Marwari* v. *Thakur Prasad Marwari* (1) which I have already cited earlier in this judgment :

" Under the express provision of the old section 91, clause (*f*), an attaching decree-holder would be entitled to redeem or institute a suit for redemption. But still the question remains whether such right would amount to an interest in the right of redemption within the meaning of Order 34, Rule 1, of the Civil Procedure Code. Apparently it may look as if a person who is entitled to redeem has an interest in the right of redemption. But upon a comparison of the clauses (*b*) and (*f*) of the old section 91 it will appear that the Legislature recognized a distinction which puts an attaching decree-holder in a different position from a person having an interest in the right of redemption, otherwise the separate provision in clause (*f*) for the attaching decree-holder, if really he could come under clause (*b*) as a person having an interest in the right of redemption, would be quite redundant. Section 91 enumerates the class of persons entitled to redeem and amongst them those who have an interest in, or charge upon, the property or the right of redemption are put under clauses (*a*) and (*b*) of the old Act which correspond to clause (*a*) of the new Act. Such persons only, in my opinion, come under the purview of Order 34, Rule 1, of the Civil Procedure Code. Looking to the plain phraseology of the different clauses of old section 91 of the Transfer of Property Act, it is rather difficult to hold that an attaching creditor coming under clause (*f*) has the same interest as a person coming under clause (*b*) of that section. *A fortiori* an attaching decree-holder does not fall within the class of persons contemplated by Order 34, Rule 1, of the Civil Procedure Code."

(1) I.L.R. 18 Pat. 157.

The decision in the case of *Mahant Amardas and others* v. *Jailalsao and others* (1) is to the same effect. This case was distinguished by Blagden J. on the ground that the plaintiffs (*Mahant Amardas and others*) purchased the mortage property after (and not as in the present case before) the final decree for foreclosure. However, the learned Judge had overlooked the fact that the plaintiffs, on realizing the futility of their second ground that they had a right to redeem the mortgage as purchasers of the equity of redemption, abandoned it in the course of the argument and relied solely on the right of redemption arising in their favour as attaching creditors and that the question which was referred for the opinion of the Bench was, "Whether an attaching creditor who attaches property subject to a mortgage is entitled to redeem the mortgage after he purchases the property in execution *simply on the strength of his attachment.*" (The italicized is mine.) *Mahant Amardas and others* v. *Jailalsao and others* is therefore not distinguishable from the present case in so far as the question involved for decision is concerned.

In my opinion, one of the tests to be applied in considering whether a person has an interest in the right of redemption of a mortgaged property is whether that person has in law, the right to transfer such an interest to another by executing a deed of transfer. Obviously an attaching creditor has no such right merely by virtue of his attachment and therefore he is not a person having an interest in the right of redemption within the meaning of Order 34, Rule 1, Civil Procedure Code.

For these reasons I hold that the plaintiff-respondent in the case under appeal was not a necessary party to the mortgage suit filed by U Ba Tin against Daw Thein Mya.

(1) A.I.R. (1936) Nag. 209.

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As the purchase of the suit property was made by the plaintiff-respondent after the preliminary mortgage decree was passed in the mortgage suit by U Ba Tin, the only right which the plaintiff had acquired was that which Daw Thein Mya then had, namely, the right to redeem the property before the final decree was passed. The plaintiff must now abide by the result of his own action in refusing to redeem the property when he was called upon by U Ba Tin to do so.

In the result the appeal succeeds. The judgment and decree of the High Court of Judicature at Rangoon appealed against are set aside and the plaintiff-respondent's suit dismissed with costs. Advocate's fees in this appeal twenty (20) gold mohurs.

U THEIN MAUNG, C.J.—I agree and I have very little to add. The learned Judge who decided the case on the Original Side attached undue importance to the purchase by the mortgagee in execution of the final mortgage decree having been during the pendency of the respondent's suit (Civil Regular Suit No. 246 of 1939) to set aside the preliminary mortgage decree and attached little or no importance to the respondent's own purchase of the same property having been during the pendency of the mortgagee's suit (Civil Regular Suit No. 146 of 1939) in the same Court.

Under section 52 of the Transfer of Property Act, immovable property cannot be transferred or otherwise dealt with during the pendency of a suit so as to affect the rights of any other party thereto under any decree or order which may be made therein. However, the respondent's suit has been dismissed and he cannot claim that any right of his under the decree therein has been affected by the sale to the mortgagee. On the other hand the respondent's purchase during the pendency of the mortgagee's suit and after the passing

of the preliminary decree for sale therein cannot affect the rights of the mortgagee under any decree or order which may be made in that suit and the mortgagee has purchased the property in execution of the final decree therein. Though section 52 itself may not apply to involuntary sales, the principle of *lis pendens* applies to such alienations. (See Mulla's Transfer of Property Act, 2nd Edition, page 233 and the cases cited thereat.)

The respondent, who refused to redeem the mortgage although he was actually called upon to do so by the mortgagee, must now take the consequences of his own failure to redeem the mortgage in time. [*Cf.* Illustration (1) at page 233, *ibid*, which is an adaptation of *Radhamadhub Holder* v. *Monohur*, 15 I.A. 97.]

APPELLATE CIVIL.

Before U Tun Byu and U Aung Tha Gyaw, JJ.

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Feb. 16.

TAN BYAN SENG (APPELLANT)

v.

ELLERMANS ARRACAN RICE AND TRADING COMPANY, LIMITED AND ONE (RESPONDENTS).*

Transfer of Property Act, s. 69—Power of Sale—Deed giving power to mortgagee "to buy in, or rescind or vary the Contract of Sale and to resell without being responsible for any loss"—Meanings of words "buy in" and "resell"—Power of mortgagee to buy on his own account—If valid—Mortgagee when selling mortgaged property under a power of sale if an agent—S. 215, Contract Act—Rules interpretation of legal documents.

Held: That s. 69 (3) (4) of Transfer of Property Act does not authorize the mortgagee exercising power of sale to purchase the property for himself. The expression "buy in" has acquired a definite meaning and means "to buy back for the owner at an auction." This expression in effect empowers the mortgagee at whose instance the auction is held to take the property out of auction, if adequate price is not obtained. The word "resell" does not imply a previous "effective sale." It is consistent with sale in outward appearance by which a mortgagee apparently purchases to save the property from being sold at a low price. These expressions do not authorize the mortgagee to buy the property either directly or indirectly on his own account.

Mulraj Virji v. *Nainmal Pratapchand*, I.L.R. (1942) Bom. 83 at pp. 92-3; *Downes* v. *Grazebrook*, (1817) 36 E.R. 77 at p. 80; *National Bank of Australia* v. *The United Hand-in-Hand and Bank of Hope Company*, (1878-79) 4 A.C. 391; *Martinson* v. *Clowes*, (1882) 21 Ch.D. 857, *Hodson* v. *Deans*, (1903) 2 Ch.D. 647, followed.

Held further: That the mortgagee in exercising the power of sale acts in his own right and not as the agent of the mortgagor and s. 215 of Contract Act has no application in a purchase by mortgagee in the exercise of his power of sale.

Achutha Naidu v. *Oakley Bowden & Co.*, I.L.R. 45 Mad. 1005, referred to.

Held further: That one who reads a legal document, whether public or private, should not be prompted to ascribe, should not, without necessity or some sound reason, impute to its language tautology or superfluity, and should be rather at the outset inclined to suppose each word intended to have some effect, or be of some use.

Ditcher v. *Denison*, (1856) 11 Moore (P.C.) 325 at p. 337, followed.

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* Civil 1st Appeal No. 21 of 1947 being appeal against the decree of the Original Side of the High Court of Judicature at Rangoon in Civil Regular No. 58 of 1941, dated the 3rd December 1941.

P. K. Basu for the appellant.

E. C. V. Foucar for respondent No. 1.

The judgment of the Bench was delivered by

U TUN BYU, J.—The brief facts are that the 2nd defendant, Tan Byan Seng, who is the appellant, executed, on the 8th April, 1932, an instrument which might be described as an anomalous mortgage, in favour of the plaintiff Messrs. Ellermans Arracan Rice and Trading Company, who is the 1st respondent in this appeal, making certain house properties, which are situated in Rangoon, as security for a sum of Rs. 50,000 due by the 2nd defendant. The mortgage deed of the 8th April, 1932, confers a power of sale without the intervention of the Court on the plaintiff. On the 26th October, 1938, the plaintiff gave a notice to the 2nd defendant of its intention to exercise its power of sale without the intervention of the Court in case of default of payment of the amount due to it. The plaintiff, in pursuance of its power of sale, next instructed Messrs. Balthazar & Sons to place the mortgaged properties for sale by auction. The first attempt to sell the mortgaged properties by auction, which was fixed on the 10th April, 1940, was without success, but subsequently, on the 17th July, 1940, the mortgaged properties were again put up for sale by auction and were purchased by the representative of the plaintiff, as the highest bidder, for Rs. 8,750. The plaintiff, by an instrument dated the 9th November, 1940, executed a conveyance of the mortgaged properties to itself, which was registered on the same date. The 1st defendant, who is the 2nd respondent in this appeal, was a tenant of the 2nd defendant who is the appellant in this appeal. The plaintiff, relying on its title which was said to have been obtained by it under

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the instrument dated the 9th November, 1940, attempted to get the 1st defendant to attorn as a tenant to the plaintiff, but this was without success; and the plaintiff, on the 13th March, 1941, filed a suit for possession of the premises in Canal Street, which was one of the mortgaged properties, against the 1st defendant, who was at that time in possession of that premises. On the 19th June, 1941, the 2nd defendant was added as a party to the suit. A decree was passed on the 3rd December, 1941, against the defendants with costs. The 2nd defendant filed the present appeal against the said decree.

It might be mentioned that the records, both of the Original Side and of the appeal proceedings, had been lost—perhaps, during the Japanese military occupation of Burma. Fortunately, a copy of the judgment of the Original Side is available, and the judgment appears to furnish all the materials that are required for the decision of this appeal.

It is contended on behalf of the 2nd defendant, who is the appellant in this appeal, that there is nothing in the mortgage deed of the 8th April, 1932, to empower the plaintiff, who is the 1st respondent, to purchase the mortgaged properties for itself; and it is also contended that even if the mortgage deed of the 8th April, 1932, had conferred on the plaintiff the power to purchase the mortgage properties at a sale held without the intervention of the Court, that power to purchase would be invalid in law, and that the sale contemplated under section 69 of the Transfer of Property Act is sale to a third party.

The material part of the mortgage deed of the 8th April, 1932, is as follows:

"That if the mortgagee (plaintiff) shall serve a notice in writing on the mortgagor (2nd defendant) requiring him to pay up the money for the time being owing on this mortgage and

default shall have been made in payment of such or some part thereof for three calendar months from the time of serving such notice it shall be lawful for the mortgagee *to sell* the said mortgaged lands and premises either by public auction or private contract and subject to such stipulations as to title or otherwise as the mortgagee may think necessary and *with power to buy in* or rescind or vary any contracts for sale *and to re-sell without being responsible for any loss occasioned thereby* and with power also to sign and register assurances to give effectual receipts for the purchase money and do all other acts and things for completing the sale which the mortgagee shall think proper."

The most material words are italicized.

The first point which arises in this appeal is whether the expression "with power to buy in", italicized above, if read with the context in which that expression appears, means "to buy back for the owner", as urged on behalf of the appellant; or does it mean as observed by the learned Judge in the judgment dated the 3rd December, 1941, which is as follows :

"In the events I have mentioned you may either instruct an auctioneer to sell my property or you may sell it yourself by private treaty. If you choose the former course you may yourself bid and purchase : if the latter you may, as far as I am concerned, cancel or vary the sale contract : in the former event you may resell it and in the latter you may again offer it for sale, without in either case being responsible for any resulting loss."

It is difficult to follow how it can, in this case, be said that the word "in" in the expression "to buy in" is superfluous, if the expression "to buy in" is read literally. It has been observed by the Judicial Committee in the case of *Ditcher* v. *Denison* (1)—

"It is also a good general rule in jurisprudence that one who reads a legal document, whether public or private, should not be prompted to ascribe, should not, without necessity or some sound reason impute to its language tautology or superfluity, and should

(1) (1856) 11 Moore (P.C.) 325 at p. 337.

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be rather at the outset inclined to suppose each word intended to have some effect, or be of some use."

This rule of interpretation still holds good, and it is clearly based on good sense; and we ought to keep this rule of interpretation constantly in view when attempting to construe what the expression "to buy in" means. There does not appear to be anything in the context which suggests that the expression "to buy in" can be said to indicate that the word "in" ought to be regarded as a superfluity, particularly in view of the words that follow it. On the other hand, the expression "to buy in" has acquired a definite meaning—"to buy back for the owner"—so far as the sale at an auction is concerned. In Chambers' 20th Century Dictionary, the expression "to buy in" means to buy back for the owner at an auction; in the King's English Dictionary, the meaning is given as "to purchase for the owner at the sale by auction"; and in Murray's Oxford Dictionary, it means to buy back for the owner, especially at an auction when no sufficient price has been offered. It will thus be observed that the expression "to buy in" has acquired the meaning "to buy for the owner at an auction sale", in so far as the sale at an auction is concerned.

The power of sale without the intervention of the Court given in section 69 of the Transfer of Property Act is exercised in this country, more often than not, through an auctioneer. The expression "to buy in" appears to be also well-known in English law. It appears in section 11 of Lord Cranworth's Act of 1860, in section 19 of the Conveyancing Act of 1881, and in section 101 (*1*) of the Law of Property Act, 1925. Thus the expression "to buy in" has been used in English statutes as far back as 1860.

In this connection the following passage may also be quoted from *Mulraj Virji* v. *Nainmal Pratapchand* (1):

"No mortgagee has a right to buy the mortgage premises without an express authority from the Court. If he attempted to buy directly or indirectly, on proof that the transaction was of that nature, the Courts have always held that the mortgage subsisted and the transaction of sale was a nullity. I do not think the expression 'buy in' has ever been intended to give the mortgagee that right. It should be realized that if at an auction sale there are several intending purchasers and the highest bid is very inadequate, a way has to be found by which the property is not sold to the highest bidder and cause a tremendous loss both to the mortgagor and the mortgagee. The expression 'buy in' is therefore used so that in effect the party at whose instance the auction is held takes the property out of the auction. The only way in which the auction can be closed is by such an offer being given and the property not being knocked down to an outsider. The expressions used after the words 'buy in' make this position very clear. The mortgagee is given a right to buy in or to rescind, *i.e.* to set aside the contract of buying or vary any contract for sale and to resell the same. Therefore when an auction sale is found not to result in realizing the proper value, the mortgagee may either postpone the sale, or if he finds that he is unable to do, so because the auction sale had started, he has to resort to the second way to prevent the property being knocked down at an undervalue and to resell the same. I do not think, on a true interpretation, the clause relating to the power of sales gives the mortgagees a right to buy the property for themselves."

The learned Judge, who tried the present case, observed in the judgment that "If the only effect of 'buy in' is to cancel a proposed sale there never has been a sale at all, and you cannot 'resell' what has never been sold." It is also urged on behalf of the plaintiff that the word "resell" connotes that there is a prior concluded sale, and the word "in" in the expression "to buy in" is accordingly superfluous

(1) I.L.R. (1942) Bom. 83 at pp. 92-93.

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as that expression ought to be given a meaning consistently with the word " resell " which follows it. The word " resell " according to—(i) the Chambers, 20th Century Dictionary, means to sell again ; (ii) the King's English Dictionary, means to sell again ; to sell what has been bought and sold ; and (iii) Murray's Oxford Dictionary, means to sell again. It is clear however that, where a property is purchased at an auction by another person to save the property from being sold at a low price, there was in that case, at least in outward appearance, a transaction which amounted to a sale, although the transaction might not amount to an effective sale. It is therefore difficult to see how the word " resell " can strictly be said to be altogether inapplicable to a transaction where a property is bought by someone to save it from being sold at a low price. Thus the word " resell " in the context which follows the expression " to buy in " is quite consistent, or at least not inconsistent, with the expression " to buy in ", which precedes the word " resell ". In the circumstances, it must be held that the expression " to buy in " cannot be construed to give the mortgagee, *i.e.* the plaintiff, a power to purchase the property for itself. The omission of the word " to " between the expressions " buy in " and " resell " in section 6 of the Trustee and Mortgagee's Powers Act does not appear to have any real bearing on the construction of the expression " to buy in " in the mortgage deed in question.

It has been urged on behalf of the plaintiff that even if the mortgage deed did not expressly give power to the plaintiff as mortgagee to purchase the property itself, the plaintiff could still buy the property for itself independently of such power, in view of section 69 of the Transfer of Property Act, read with section 215 of the Contract Act. The contention is that where a power

of sale is conferred, a mortgagee has also the power to buy the mortgaged property for himself, and that, in any case, the power to buy the property should be implied.

It is contended that where the purchaser and the mortgagee exercising the power of sale is one and the same person, the provisions of sub-section (*3*) of section 69 of the Transfer of Property Act would still apply. It appears, however, that sub-section (*3*) and sub-section (*4*) of section 69 of this Act ordinarily contemplate the existence of three parties, *viz.* the mortgagor, the mortgagee and the purchaser. It is thus difficult to see how it could be said that the provisions of sub-section (*3*) or sub-section (*4*) give the mortgagee the power to buy the property over which he had exercised the power of sale. Such a construction would not be warranted by the plain wordings of either sub-section (*3*) or sub-section (*4*) of section 69.

It is further contended that there is nothing illegal, so far as the law in Burma is concerned, for the mortgagee to buy the property sold at an auction sale under a power of sale given to him under the instrument of mortgage in view of section 215 of the Contract Act, which section, according to the plaintiff, creates a departure from the English law under which a mortgagee who had been given a power of sale could not at all purchase the mortgaged property for himself. The following cases might be mentioned as indicating that under the English law a mortgagee, who is given the power of sale cannot purchase the mortgaged property for himself :

(i) *Downes* v. *Grazebrook* (1),

(ii) *National Bank of Australia* v. *The United Hand-in-Hand and Bank of Hope Company* (2),

(1) (1817) 36 E.R. 77 at p. 80. (2) (1878-79) 4 A.C. 391.

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(iii) *Martinson* v. *Clowes* (1), and
(iv) *Hodson* v. *Deans* (2).

Section 215 of the Contract Act is as follows:

"215. If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him."

There can be no doubt that section 215 of the Contract Act will apply only where the relationship of agent and principal exists, and not otherwise. It is contended that a mortgagee selling a mortgaged property under a power of sale can be said to be an agent of the mortgagor for the purpose of the sale of the mortgaged property. It is true, that the relationship of agent and principal might be inferred from the circumstances of the case. But the question is whether it can be properly said that the relationship of principal and agent has been constituted between the mortgagor and the mortgagee for the purpose of giving effect to the power of sale without the intervention of the Court. It seems not. The mortgagor obviously retains no control over the mortgagee after the mortgage deed with a power of sale is executed, and the mortgagor can issue no direction whatever to the mortgagee. The words "without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his knowledge on the subject" in section 215 of the Contract Act are inappropriate to the relationship of a mortgagor and mortgagee with a power of sale, because no consultation with the mortgagor is at all necessary to enable the mortgagee to effectively exercise his power

(1) (1882) 51 Ch.D. 857. (2) (1903) 2 Ch.D. 647.

of sale given in a mortgage deed. It will also be observed that the power of sale given under the mortgage deed cannot be exercised immediately after the execution and registration of the mortgage deed are effected, as the provisions of clause (*a*) or clause (*b*) of sub-section (*2*) of section 69 of the Transfer of Property Act will have to be complied with before the power of sale given in the mortgage deed can be exercised. Moreover, the power of sale, it must be remembered, is given, not for the benefit of the mortgagor or for the purpose of advancing the interest of the mortgagor, but it is more for the purpose of protecting the interest of the mortgagee, and whereas in the relationship of agency, it is primarily the interest of the principal which brings about the relationship of principal and agent.

The provisions of section 215 of the Contract Act do not therefore apply to the circumstances of this case, and as this section does not apply to the present case, it follows that section 202 of the Contract Act also does not apply in this case. It is difficult to see how the decision in the case of *Achutha Naidu* v. *Oakley Bowden & Co.* (1) can be usefully applied to the facts of this case. The relationship of principal and agent is in that case apparent and is indisputable, and it relates to a transaction entirely different from the present case.

It must therefore also be held that the provisions of section 69 of the Transfer of Property Act, read with section 215 or section 202 and any other section of the Contract Act, cannot be construed as permitting or authorizing the mortgagee to purchase the mortgaged property for himself at an auction sale. As the mortgage deed of the 8th April, 1932, does not purport to empower the mortgagee to purchase at the auction

(1) I.L.R. 45 Mad. 1005.

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sale of the mortgaged properties, it will not be necessary to decide in this case whether such power to purchase, if conferred, is valid in law.

The sale purported to be effected under the instrument dated the 9th November, 1940, is therefore void, and the appeal is allowed with costs, both in this appeal and the Original Side. The judgment and decree passed in the Civil Regular No. 58 of 1941 are accordingly set aside.

APPELLATE CIVIL.

Before U Tun Byu and U Aung Tha Gyaw, JJ.

SEI SHENG COMPANY (APPELLANT)

v.

U THEIN (RESPONDENT).*

H.C. 1948

Feb. 24.

Contract Act, ss. 70, 168—CAS(B) Officer instructing a rice miller to repair boats belonging to unknown owners—Whether rice miller entitled to under s. 70, to compensation from the owner.

Held : That there are three essential ingredients for application of s. 70 of Contract Act :

(i) the person claiming compensation must have lawfully done something for another person ;

(ii) he did not intend to do so gratuitously ; and

(iii) such other person enjoys the benefit thereof.

In ascertaining whether anything has been lawfully done, it should be found out whether the person so acting held such a position to the other as either directly to create or by implication reasonably to justify the inference that by the act done for the other person he was entitled to look for compensation for it to the person for whom it is done.

Punjabhai v. *Bhagwandas Kisandas*, I.L.R. 53 Bom. 309, followed.

S. 168 of the Contract Act applies to a finder of lost goods. The section has no application to a person who was handed over a boat by a Government officer who had found the boat.

S. T. Leong for the appellant.

Dr. Ba Han for the respondent.

U AUNG THA GYAW, J.—In Civil Regular Suit No. 14 of 1947 on the Original Side of this Court the respondent U Thein sued the appellant for recovery of Rs. 6,980 by way of compensation for expenses incurred by him in the repairs made to three cargo boats

* Civil 1st Appeal No. 49 of 1947 against the decree of the Original Side of the High Court of Judicature at Rangoon in Civil Regular No. 14 of 1947, dated the 18th July 1947.

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belonging to the appellant. The repairs to the said boats were alleged to have been carried out in these circumstances.

When Rangoon was re-occupied by the British in May 1945, a certain number of cargo boats were seized and collected by the officers of the Civil Affairs Service [CAS(B)] in charge of Rice Project, and three of the boats were made over to the respondent, U Thein, with instructions to use them free of hire charges after bringing them to a sea-worthy condition at his own expense, which expenses he was to recover later when the owners turned up to claim their boats. It was further understood then that the boats were to be used exclusively for the purposes of the said Rice Project.

The appellant evacuated to China during the war and, on his return to Burma in 1946, he laid his claim to these three cargo boats then still lying in the respondent's possession, and, after an exchange of correspondence between them, the boats were finally returned to him. To the subsequent claim made by the respondent for the expenses incurred by him in the repairs done to the cargo boats, the appellant ineffectually raised the defences that the repairs done to his boats were mainly for the respondent's personal benefit, that his act amounted to an officious interference with the property of an absentee owner and that the respondent's position in law was no better than that of a finder of goods under section 168 of the Contract Act, who could not sue for recovery of compensation for expenses voluntarily incurred by him in preserving the property.

It has again been put forward in this appeal that section 70 of the Contract Act cannot apply to the circumstances of this case, in view of the fact that the respondent has not alleged in his plaint that the repairs to the cargo boats were effected by him *for* the appellant

and that the respondent, having obtained possession of the said cargo boats from the CAS(B), who were admittedly the finders thereof within the meaning of section 168 of the Contract Act, had no right to sue for compensation for trouble and expenses voluntarily incurred by him to preserve the said boats, after the same had been restored to the appellant before the institution of the suit. The claim in the case was evidently made on the strength of the law contained in section 70 of the Contract Act which reads :

"70. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

The circumstances in which the three cargo boats came into the respondent's hands are disclosed in the evidence of the witnesses Maung Than Daing (P.W. 6), U Aung Tin (D.W. 3) and Mr. Hin Wor (D.W. 2); the last named was a civilian gazetted officer in the Civil Affairs Staff of the area in charge of the Rice Project. With a view to maintain civil supplies in the area under British Military occupation, Hin Wor had to organize the supply of rice for the Project, and he accordingly contacted the respondent, who happened to be a rice miller, and on the latter pleading that he had no boats with which to bring the supplies of rice and paddy for the Project, this officer obtained authority from his superiors for the respondent to use these three cargo boats after making necessary repairs to them. It was then understood between them that the expenses incurred by the respondent were to be recovered from the owners when they arrived back in the country. These boats were collected by U Aung Tin (D.W. 3), who held an appointment as civilian

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officer in the Civil Affairs Service (Burma). Out of twelve boats collected by him, six were handed over to the respondent, all of which were " very much out of order, some of them being half filled with water." Maung Than Daing, who was the appellant's tindal before the war but in the respondent's employ at the time, testifies to the fact that the boats which the respondent obtained from the CAS(B) for his use for the purposes of the Rice Project, were in need of substantial repairs. From this evidence it would appear that in or about June 1945, the respondent obtained the three cargo boats No. CAS(B) 95, 149 and 150, all in a state of disrepair, and that he was asked to carry out extensive repairs to the same to enable him to use them in the rice and paddy supply business which he was asked to do by officers of the CAS(B).

From the evidence of Mr. Hin Wor, it is sufficiently clear that the respondent had no intention whatever of carrying out the repairs to these boats gratuitously when the boats were taken over by him. The fact of their owners being absent from Burma was sufficiently realized by the respondent, so that the prospect of recovering the expenses incurred by him in the said repairs was discussed between him and the said Rice Area Officer. The boats having been returned to the appellant, the benefit of the repairs done by the respondent is now being enjoyed by the latter. In all the reported cases to which attention has been drawn both in this Court and the Court below it is agreed that to sustain a claim made under the provisions of section 70 of the Contract Act, it has to be shown : (1) that the person claiming compensation must have lawfully done anything for another person, (2) that he did not intend to do so gratuitously and (3) that such other person enjoys the benefit thereof. In

Punjabhai v. *Bhagwandas Kisandas* (1) it was pointed out

"that in ascertaining whether an act is lawfully done within the purview of section 70 of the Indian Contract Act, it must be ascertained whether the person so acting held such a position to the other as either directly to create or by implication reasonably to justify the inference that by the act done for the other person he was entitled to look for compensation for it to the person for whom it was done."

There can be no doubt that in this case, placed in the position in which he found himself and in view of the assurances received from Mr. Hin Wor, the respondent, when told to undertake the repairs to the boats, reasonably entertained the belief that he was entitled to look to the appellant for compensation for the expenses incurred by him. If the appellant were present in Burma at the time and be placed in the same position as the respondent, he would have undoubtedly carried out the repairs himself.

The further objection to the claim taken under the provisions of section 168 of the Contract Act does not appear to have any merits whatsoever, in view of the established fact that the respondent did not obtain possession of the three cargo boats in the capacity of a finder of lost goods. When the boats came into his possession, they were already in the custody of the officers of the CAS(B).

On the question of the actual cost of repairs claimed by the respondent, the finding arrived at by the trial Court has been objected to on the ground that the original accounts in respect of the various items of expenditure have not been produced in Court. But instead of entries in the account books, the trial Court had before it original vouchers and receipts, Exhibits 1 to 9, which have been produced and some of

(1) I.L.R. 53 Bom. 309.

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them bore the signature of the appellant's tindal, Maung Than Daing (P.W. 6). The fact that they represented genuine transactions has not been questioned by the appellant. Maung Than Daing made certain admissions as to the substantial nature of the repairs of which the three boats were in need of. Thus on the facts and circumstances brought out in this case, there can be no question that the respondent is entitled to the compensation claimed by him. The decree passed in his favour must accordingly be confirmed and the appellant's appeal dismissed with costs.

U TUN BYU, J.—I agree.

APPELLATE CIVIL.

Before U Tun Byu and U Aung Tha Gyaw, JJ.

I. J. DUCKWORTH (APPELLANT)

v.

MISS D. I. DUCKWORTH (*a*) MA KHIN THI (RESPONDENT).*

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Mar. 8.

Succession Act, ss. 229, 230—Grant of letters of administration without issuing special citation to the executor—Whether valid—Effect of grant of letters—Order XLI, Rule 27, of the Code of Civil Procedure.

Held: Renunciation by an executor can be made prior to the institution of proceedings for letters. Under s. 229 of the Succession Act a duty is cast on an applicant for letters of administration to prove satisfactorily that the executor has already renounced. When the fact of renunciation by executor has not been proved the court has no power to grant letters of administration unless special citation calling upon the executor to accept or renounce his executorship has been issued to him. Service of general citation is not sufficient.

Renunciation of executorship may be made orally before a Judge or by a writing signed by the executor.

It is not necessary or expedient in an application for a probate or letters of administration to consider any issue relating to the title of the testator to, or his power to dispose of, any property. Grant of probate or letters of administration does not confer on the grantee any title to the property over which the testatrix had no right to dispose of. It only perfects the representative title of the executor or administrator to the property which belonged to the testator and over which he had the disposing power.

Behary Lal Sandyal v. Jagat Mohan Gossam, I.L.R. 4 Cal. 1, followed.

Held further: The scope of Order 41, Rule 27 (1) (*c*), of the Code of Civil Procedure is limited and it is for the court to decide whether such evidence as is applied to be admitted is necessary to enable the court to pronounce its judgment and whether there is substantial cause for admitting it at that stage.

Thet Tun for the appellant.

P. K. Basu for the respondent.

* Civil Misc. Appeal No. 40 of 1947 being appeal from the order of the District Court of Yamèthin in Civil Suit No. 1 of 1947, dated the 23rd June 1947.

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The judgment of the Bench was delivered by

U TUN BYU, J.—Miss D. I. Duckworth, who is the respondent and I. John Duckworth, who is the appellant in this appeal, are the children of Daw Shwe Hle of Pyinmana who died in September, 1941 leaving behind a will, in which she appointed one Saya Chit Pe as executor, which was filed in the proceedings before the District Court of Pyinmana as Ex. "A." Miss D. I. Duckworth applied in 1947 for letters of administration to the estate of Daw Shwe Hle in the Court of the District Judge, Yamèthin, making the appellant I. John Duckworth and three other persons who were the grandchildren of Daw Shwe Hle, as respondents to the application. Miss D. I. Duckworth in paragraph 2 of her application for letters of administration stated that Saya Chit Pe, who had been appointed executor to the last will of the deceased Daw Shwe Hle, had renounced or failed to accept the executorship and that he had not taken any steps to prove the said will. The application was opposed by I. John Duckworth, who is the appellant in this appeal, and the District Judge, after hearing the parties, granted letters of administration to Miss D. I. Duckworth.

The most important contention so far as the appellant is concerned is that, as no special citation required under section 229 of the Succession Act had been issued, the District Judge had no power to issue the letters of administration to Miss Duckworth in view of the explicit provisions of section 229 of the Succession Act. It is not disputed that no special citation was issued in this case. It is, however, urged on behalf of the respondent Miss Duckworth that Saya Chit Pe had renounced the executorship, and that it was, accordingly, not necessary to issue the special citation required under section 229 of the

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U TUN BYU, J.

Succession Act. The first question which has to be determined is, whether Saya Chit Pe had in fact renounced the executorship. Miss Duckworth in her evidence stated as follows :

"Saya U Chit Pe was appointed executor, but Saya Chit Pe shifted to Myingyan and altogether failed to accept the executorship. I did not call him to prove the will or take any steps."

And in her cross-examination she also stated that Saya U Chit Pe was still alive, and was residing at Pyinmana and that she had no occasion to ask him to file an application in Court to prove the will. It is clear, therefore, from her own statements made in Court that Miss Duckworth implied that Saya Chit Pe had renounced the executorship from the mere fact that he had not taken any steps to prove the will or, at least, from the fact that he had remained inactive. It is also clear from the record of this case that there is no evidence to prove that Saya Chit Pe had declared, whether orally or in writing, that he had renounced the executorship. There is also no evidence to suggest that Saya Chit Pe had even informed anybody of his intention to renounce the executorship. It is urged that the failure of Saya Chit Pe to appear in Court after the issue of the general citation to him ought also to be considered as indicating that he had renounced the executorship. It will however not be proper to make such a presumption from the mere failure of a person, who had been appointed executor, to take steps to prove the will, or because he had remained inactive.

The provisions of section 230 of the Succession Act might be reproduced here, and it is as follows :

"230. The renunciation may be made orally in the presence of the Judge, or by a writing signed by the person renouncing, and when made shall preclude him from ever thereafter applying for probate of the will appointing him executor."

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It will be observed that section 230 of the Succession Act lays down the manner in which the renunciation of the executorship might be made. It provides that the renunciation might be made either by writing, and in which case it is to be signed by the person making the renunciation, or the renunciation might be made orally, and in which case it is to be made in the presence of the Judge, apparently meaning the Judge before whom the proceeding is pending. Section 230 does not however say when the renunciation should be made, and thus it might be said that renunciation could be made even before the citation is issued, and the wording at the commencement of section 229 does suggest that renunciation could be made even before any proceeding is instituted. Section 230 has however provided the mode in which the renunciation of the executorship might be made, and the provisions of section 230 ought accordingly to be regarded as the provisions which must be looked into for the purpose of considering whether the renunciation which is alleged to have been made is effective in law. The Court could also when issuing the special citation under section 229 of the Succession Act specify in the citation that, after the citation has been served upon the person who has been appointed executor, the Court will on his failure to appear within the prescribed time, assume that he has renounced the executorship and grant letters of administration with the will annexed to another person. Order 8, Rule 5, of the Code of Civil Procedure had been referred to, but Rule 5 of Order 8 does not preclude the Court from scrutinizing the evidence in the case in order to ascertain whether the provisions of section 229 of the Succession Act have been complied with. A duty is cast upon the applicant to prove clearly that she had conformed to all the requirements of law before

the Court can issue the letters of administration to her. There is moreover no definite evidence, in the present case, on which it is possible to arrive at a conclusion that Saya Chit Pe did or had renounced the executorship.

The next question to consider is, what is the effect of the failure to issue the special citation under section 229 of the Succession Act, which is as follows :

"229. When a person appointed an executor has not renounced the executorship, letters of administration shall not be granted to any other person until a citation has been issued, calling upon the executor to accept or renounce his executorship :

Provided that, when one or more of several executors have proved a will, the Court may, on the death of the survivor of those who have proved, grant letters of administration without citing those who have not proved."

It is thus clear that in this case the Court has no power to grant letters of administration unless the special citation has been issued, except in the cases where the executor had renounced the executorship. The failure to issue the special citation to Saya Chit Pe under section 229 of the Succession Act will, in effect, mean that the order granting the letters of administration with the will annexed will have to be set aside in view of the finding that there was no renunciation by Saya Chit Pe in this case. It might, however, be said that Saya Chit Pe, the executor, could be considered to be a party to the proceedings to prove the will as a general citation had been issued to him ; and, from the evidence appearing in this case, it appears that the will Ex. "A" has been proved, and its validity properly established. The course which ought to be pursued will be to set aside the order of the Court below which directs the issue of letters of administration to Miss D. I. Duckworth in respect of the estate of

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Daw Shwe Hle and to direct that the Court below should, when the proceedings are received back, issue the special citation to the executor named in the will as required by section 229 of the Succession Act, and, in the event of the executor renouncing or declining to accept the executorship within the time mentioned for the acceptance or refusal of the executorship in the special citation to be issued to him, to grant letters of administration with a copy of the will annexed to Miss D. I. Duckworth.

It might also be mentioned that it has been contended on behalf of the appellant that there was a will left by J. I. Duckworth, the husband of the deceased Daw Shwe Hle, who died in or about 1930 and that the appellant ought to be allowed to produce this will as it would show that the deceased Daw Shwe Hle did not own the immovable properties which she devised under her last will to Miss Duckworth, and it is urged that the Court of Appeal could under Order XLI, Rule 27 (1) (*c*), Code of Civil Procedure, allow such evidence to be put in. The scope of Order XLI, Rule 27 (1) (*c*), is certainly limited, and it is for the Court to decide whether such evidence is necessary to enable it to pronounce judgment or whether there is a substantial cause for admitting the document which the appellant now desires to produce. It does not appear that it is necessary or even expedient in an application for the grant of a probate or letters of administration to consider any issue relating to the title of the testator to any of the property included in the will, or relating to the disposing power of the testator in respect of such property. The grant of letters of administration does not really confer any title to the property over which the testatrix had no right to dispose of, and in this connection the observation made by Garth C.J. in the case

of *Behary Lal Sandyar* v. *Juggo Mohan Gossam* (1) appears to be apposite, which is as follows :

"On the other hand, it is clear that the grant of probate to the executor does not confer upon him any title to property which the testatrix had no right to dispose of. It only perfects the representative title of the executor to the property which did belong to the testator and over which he had the disposing power."

Moreover Mr. J. I. Duckworth was said to have died in 1930, and what is purported to be his last will had also so far not been proved, and apparently what is intended to be produced before the Court now is merely a copy of the alleged will. What would be the probative value of such a document, if it is admissible at all, will have to be decided elsewhere, if necessary. It is obvious that the attempt to introduce such a will under Order XLI, Rule 27 (1), even if it can be proved to exist, cannot be entertained as its production is not necessary or expedient to enable this Court to decide the matters which are now before it.

The order of the District Judge of Pyinmana granting letters of administration to Miss D. I. Duckworth with the will annexed in respect of the estate of Daw Shwe Hle is accordingly set aside, and the case will be sent back to the lower Court for the purpose indicated earlier in this judgment. The appellant will be entitled to the costs of this appeal, but the costs of the Court below will be left to be decided by the District Judge at the conclusion of the hearing before him after the proceedings are returned to him.

(1) I.L.R. 4 Cal. 1 at p. 5.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice.

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U BA U (APPLICANT) *v.* U YWET (RESPONDENT).*

Feb. 19.

Civil Procedure Code, s. 115—Direction in the judgment regarding burden of proof—Successor giving direction to the contrary—Interference in Revision.

Held : That where the judgment and decree of the Court gave directions regarding procedure and burden of proof, and there was no appeal against the decree, the successor of the Judge had no jurisdiction to alter the direction regarding the burden of proof.

Where a lower Court has failed to take into consideration some material proposition of law or some material fact in evidence, it has acted illegally in the exercise of its jurisdiction and its decision may be revised by the High Court.

Fut Chong v. *Maung Po Cho*, (1929) I.L.R. 7 Ran. 339, followed.

The High Court will not interfere in revision against an Interlocutory Order unless some grave injustice or hardship would result from a failure to do so.

L.P.R. Chettyar Firm v. *R. K. Bannerji*, (1931) I.L.R. 9 Ran. 71, followed.

Thein Moung for the applicant.

U THEIN MAUNG, C.J.—This is an application to revise the order of the District Court of Mandalay, dated the 7th August 1947, in which it is stated that the burden of proof lies on the present petitioner U Ba U and that the Commissioner for taking accounts should proceed on the basis of the burden of proof being on him. The main ground for revision is that the learned District Judge has acted without jurisdiction in passing the said order which is in direct conflict with the judgment of the Assistant District Judge, Mandalay, in Civil Regular Suit No. 14 of 1940, dated the 8th September 1941.

The following is an extract from the said judgment :

" As U Po Thin was liable to render accounts to the plaintiffs there should be a preliminary decree for taking accounts. The plaintiffs should first produce full evidence of the properties

* Civil Revision No. 80 of 1947 against the order of the District Court of Mandalay in Civil Misc. No. 66 of 1946, dated the 7th August 1947.

(books, documents, moneys, etc.) handed over to U Po Thin and, if they like, produce full evidence of the uses made by U Po Thin of the said moneys or any portion thereof, *e.g.*, in purchasing the Kankauk land or erecting the barrack. Then the defendant will produce full evidence in rebuttal of the evidence produced by the plaintiffs, *e.g.*, the evidence to show (*a*) that no money was handed over to U Po Thin, (*b*) that the Kankauk land was purchased with U Po Thin's own money or (*c*) that U Po Thin did not erect any barrack at all. He will render account of the properties handed over or received by U Po Thin. Thus the decree will direct an enquiry into (i) the properties handed over to U Po Thin as trustee and treasurer, (ii) the expenditure incurred or payments made by him in such capacity, (iii) the profits received by him and by the defendant after his death and (iv) how much money is payable by him (*i.e.*, his estate or his legal representative) to God or *vice versa* and what property is or properties are recoverable from him (*i.e.*, his estate or his legal representative).

So the Commissioner who has been appointed to take accounts in accordance with the said judgment must follow the procedure which has been prescribed in the above extract The learned District Judge has no jurisdiction to review the said judgment, or to give directions to the contrary.

It has been held in *Fut Chong* v. *Maung Po Cho* (1) that if a lower Court has failed to take into account some proposition of law or some material fact in evidence, it has acted illegally and its decision may be revised by the High Court. In this case it is fairly obvious that the learned District Judge has failed to take into account the fact that the question as to the burden of proof is not an open one in view of the above extract from the said judgment. He has overlooked the fact that the said judgment contains directions as to the procedure to be followed by the Commissioner in taking accounts.

As has been pointed out in *L.P.R. Chettyar Firm* v. *R. K. Bannerji* (2), the High Court does not interfere

(1) (1929) I.L.R. 7 Ran. 339. (2) (1931) I.L.R. 9 Ran. 71.

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unless some grave injustice or hardship would result from a failure so to do. However, in this case I am satisfied that a grave injustice or hardship will result from the burden of proof being placed on the present petitioner contrary to the directions contained in the said judgment.

The application is allowed with costs, advocate's fee three gold mohurs. The order of the District Court is set aside and the Commissioner for taking accounts must proceed in accordance with the directions contained in the said judgment.

APPELLATE CRIMINAL.

Before U San Maung, J.

MAUNG CHIT PO AND ONE (APPLICANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

H.C. 1948

Feb. 6.

Autre foi acquit—*S. 403 of the Code of Criminal Procedure—Offence under s. 19* (f), *Arms Act—Acquittal for want of sanction under s. 29—Whether it bars a subsequent prosecution with sanction of the District Magistrate.*

Held: That where an accused person was acquitted in a trial for an offence under s. 19 (*f*) of Arms Act, on the ground of the absence of sanction of the District Magistrate, s. 403 of the Code of Criminal Procedure does not bar a subsequent prosecution with the sanction of the District Magistrate for the same offence, as the Court was not acting as a Court of competent jurisdiction when he took cognizance at the time of the first trial with sanction.

San Baw and others v. *The Crown*, 1 L.B.R. 340 (F.B.); *The Crown* v. *Ram Rakha*, I.L.R. 20 Lah. 373; B. B. Mitra's Code of Criminal Procedure, 10th Edn., p. 1273, followed.

U SAN MAUNG, J.—This is a report by the Sessions Judge, Shwebo, under section 438 of the Code of Criminal Procedure, with the recommendation that the proceedings of the Township Magistrate, Shwebo, in his Criminal Regular Trial No. 63 of 1947 may be quashed. As the facts of the case have been fully set out in the learned Sessions Judge's report it is not necessary for me to recapitulate them in detail. It would appear that in Criminal Regular Trial No. 30 of 1947 of the Township Magistrate, Shwebo, one Maung Chit Po and Maung Po Htin were prosecuted under section 19 (*f*) of the Arms Act by the police without the requisite preliminary sanction of the District Magistrate under section 29 of the Arms Act. The defect was discovered after charges were framed against

*Criminal Revision No. 245B of 1947 being the Review of the Order of the Township Magistrate of Shwebo in Criminal Regular Trial No. 63 of 1947 on the recommendation of the Sessions Judge of Shwebo in his order, dated the 1st November 1947, in Criminal Regular Trial No. 23 of 1947.

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these two persons, and, on an application made by the Court Prosecuting Inspector to withdraw the case against them, they were directed by the learned Township Magistrate, Shwebo, to be acquitted. Later, after the necessary sanction was obtained, the police again prosecuted Maung Chit Po and Maung Po Htin under section 19 (*f*) of the Arms Act before the same Magistrate. Then, while the trial (Criminal Regular Trial No. 63 of 1947) was proceeding before the Township Magistrate, Shwebo, Maung Chit Po and Maung Po Htin filed an application before the Sessions Judge, Shwebo, contending that the proceedings before the Township Magistrate, Shwebo, were illegal inasmuch as they could not be prosecuted again while their previous acquittal remained in full force. It would appear that they were unsuccessful in their attempt to persuade the learned Magistrate that the trial should not proceed against them. The learned Sessions Judge held that their plea of *autre foi acquit* should be allowed to prevail and that the proceedings of the Township Magistrate of Shwebo in his Criminal Regular Trial No. 63 of 1947 should be quashed.

Now, section 403 of the Code of Criminal Procedure provides that a person who has once 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, etc. There is no dispute regarding the fact that Maung Chit Po and Maung Po Htin were again tried in Criminal Regular Trial No. 63 of 1947 for the same offence for which they were tried in the previous case. However, there is ample authority for the proposition that when the Township Magistrate tried it in the previous case he was not acting as a Court of competent jurisdiction. Under the head-note "Court of competent jurisdiction"

in the Code of Criminal Procedure by B. B. Mitra the following passage occurs at page 1273 of the 10th Edition :

" Where the law requires a previous sanction (now complaint) under section 195 before a charge can be entertained by a Court, that Court is not a Court of competent jurisdiction until the sanction has been obtained or the complaint has been made. Therefore, the discharge or acquittal of the accused owing to the want of such sanction (complaint) does not bar a subsequent trial of the accused for the same offence after the requisite complaint has been made or sanction obtained."

In the case of *San Baw and nine others* v. *The Crown* (1), where it was held that an acquittal for preparation to commit dacoity is no bar to a subsequent trial on the same facts for collecting men to wage war against the King, when authority for the prosecution under Chapter VI of the Indian Penal Code had not been accorded at the time of the first trial, Thirkell White C.J., who delivered the judgment of the Full Bench, had the following observation to make :

" It seems to me that want of sanction in a case where sanction is requisite goes to the root of the jurisdiction of the Court, and it affects the competency of the Court. In the circumstances stated, the District Magistrate could not have framed a charge against the accused under section 122 of the Indian Penal Code. If he had done so, whether he had acquitted or convicted the accused, his proceedings would have been void under section 530, clause (*p*), of the Code of Criminal Procedure. In my opinion, it is impossible to hold that the District Magistrate was competent to try the offence, when owing to the want of sanction he had no power to take cognizance of it."

In the case of *The Crown* v. *Ram Rakha* (2), where a similar question had to be considered, Tek Chand J. observed :

" The question for consideration is as to what exactly is meant by the ' competency ' of the Court to try an offence. Does

(1) I.L.B.R. 340 (F.B.). (2) I.L.R. 20 Lah. 373.

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it mean the status or character of the former Court to try the offence with which the accused is subsequently charged or does it also include within its purview cases in which the Court, though otherwise qualified to try the case, could not have done so because certain conditions precedent for the exercise of its jurisdiction had not been fufilled? The wording of the sub-section is by no means as clear as it might have been, but the preponderance of judicial authority in this Court as well as the other Courts in India is in favour of the latter view."

Now, section 29 of the Arms Act provides that no proceeding shall be instituted against any person in respect of an offence punishable under section 19, clause (*f*), without the previous sanction of the District Magistrate. Therefore, the Township Magistrate, Shwebo, in his Criminal Regular Trial No. 30 of 1947, was not acting as a Court of "competent jurisdiction" when he took cognizance of that offence, against Maung Chit Po and Maung Po Htin, under section 19 (*f*) of the Arms Act, without the previous sanction of the District Magistrate.

For these reasons, Maung Chit Po and Maung Po Htin cannot successfully raise the plea of *autre foi acquit* in Criminal Regular Trial No. 63 of 1947, and the proceedings of the Township Magistrate, Shwebo, in his Criminal Regular Trial No. 63 of 1947 call for no interference. The recommendation of the Sessions Judge, Shwebo, to quash these proceedings cannot, therefore, be accepted.

APPELLATE CRIMINAL.

Before U San Maung, J.

MAUNG NYEIN MAUNG AND ONE (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

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Feb. 9.

Criminal Procedure Code, ss. 190 (1) (a) (c), 235 (1)—Cognizance of offence under joinder of charges— Ss. 302 and 323 of Penal Code.

Held: That when case is sent for trial under s. 302 of Penal Code and the Special Judge after hearing the evidence frames charges under ss. 302 and 323 of the Penal Code, he takes cognizance of the offence punishable under s. 323 and under s. 190 (1) (*a*) and not 190 (1) (*c*) of the Code of Criminal Procedure and therefore s. 191 of the Code does not come into operation.

Abdul Rahman v. *K.E.*, I.L.R. 5 Ran. 53 (P.C.); *Baldeo Prasad* v. *K.E.*, I.L.R. 12 Pat. 758, followed.

Under s 235 (1) of the Code of Criminal Procedure joinder of two charges under ss. 302 and 323 of the Penal Code is justified because both the offences arose out of series of acts so connected together as to form part of the same transaction.

U SAN MAUNG, J.—The appellants Nyein Maung and Maung Kywe were two convict warders of Tharrawaddy Jail who have been prosecuted by the police for the alleged murder of a prisoner by the name of Chit Sein who was an inmate of cell No. 7 of a series of eight cells which were known as Punishment Cells, the principal witness for the prosecution being Maung Tin (P.W. 3) who was the inmate of the adjacent cell No. 8. Cognizance of the offence was taken in a police report which only mentioned about the fact of murder and not of the assault on Maung Tin (P.W. 3). The learned Special Judge, Tharrawaddy, however, framed charges under section 323 of the Penal Code against the appellants for causing hurt to Maung Tin, in addition to the charges under section 302 of the Penal Code for the alleged murder

* Criminal Appeal No. 2067 of 1947 arising out of Criminal Regular Trial No. 21 of 1947 of the Special Judge, Tharrawaddy.

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of Chit Sein. Eventually he acquitted the appellants of the charges of murder, but convicted them of the offence of causing hurt to Maung Tin and sentenced each of them to rigorous imprisonment for eight months. This appeal was mainly admitted to consider—

(1) whether the joinder of charges of murder in respect of Chit Sein and of simple hurt to Maung Tin is permissible in law, and

(2) whether the learned Judge has taken cognizance of the offences under section 323 of the Penal Code under clause (*c*) of sub-section (1) of section 190, Criminal Procedure Code, so as to attract the provisions of section 191 of the Code.

The case for the prosecution was that Maung Tin and Chit Sein who were considered to have been in joint possession of rifle cartridges were assaulted by the two appellants in quick succession inside the two adjacent cells in order to have further information extracted from them, and that while Maung Tin got off with minor injuries Chit Sein died as a result of the injuries received. Therefore, what the prosecution was attempting to prove by the evidence of Maung Tin (P.W. 3) and by other circumstantial evidence was that the murder of Chit Sein took place in course of the same transaction as the assault on Maung Tin. Therefore the joinder against each of the two appellants of the charges under section 302 of the Penal Code and section 323 of the Penal Code is justified under sub-section (1) of section 235 of the Criminal Procedure Code. The fact that after a review of the whole of the evidence in the case, the learned trial Judge acquitted each of the appellants for the offence under section 302 of the Penal Code does not alter the case.

As regards the second question, it is clear that when a Judge or Magistrate takes cognizance under clause (*b*) of section 190 (1), Criminal Procedure Code, he takes cognizance of an offence and not of the person charged in the report as the offender. Therefore, it does seem at first sight that in this case, cognizance was only taken of the offence of murder since that was the only offence mentioned in the police report. However, in the case of *Abdul Rahman* v. *K.E.* (1) it was held that a Magistrate in formulating against the appellant, after hearing the evidence, a new charge in place of one originally framed, was acting under clause (*a*), not clause (*c*) of section 190, sub-section (1), of the Code and that section 191 did not apply. In the case of *Baldeo Prasad* v. *K.E.* (2) it was held that when the Magistrate has before him a police report disclosing one offence of which he takes cognizance and if in the course of taking evidence a different offence is disclosed and he takes cognizance of it, he would be deemed to have taken cognizance of the latter offence, not under clause (*c*) of section 190 (1), but under clause (*b*).

I can see no difference in principle, between the case cited above and the present, where the learned Special Judge took cognizance against the appellants of an *additional* offence under section 323 of the Penal Code which he considered them to have committed in course of the same transaction as the offence under section 302 of the Penal Code.

The convictions of the appellants under section 323 of the Penal Code are amply supported by the evidence adduced. In fact the appellants do not now deny having assaulted Maung Tin. The sentences call for no interference.

Appeals dismissed.

(1) I.L.R. 5 Ran. 53 (P.C.). (2) I.L.R. 12 Pat. 758.

APPELLATE CIVIL.

Before U Thaung Sein, J.

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Mar. 5.

U PAW TUN AUNG & Co. (APPELLANTS)

v.

ABDUL RAZAK (RESPONDENT).*

Pledge of jewellery for loan—Ss. 176 and 177, Contract Act—Whether stipulation that pledge would become irredeemable, valid—Sale by pledgee without notice to the pledgor, conversion—Measure of damages—Value at the date of the conversion—Accrual of Interest (War-Time Adjustment) Act—Whether applies to settled transactions.

Held: The rights of pledgor and pledgee are governed by ss. 176 and 177 of the Contract Act. Pledgee has no right to foreclose, and his remedy is either to sell the pledged article or to file a suit and retain pledged article as collateral security. The stipulation in the contract of pledge that if the pledgor does not redeem by a particular date the pledge will be irredeemable is void, and the right of pledgee to redeem the pledged article subsists.

If the pledgee sells the pledged articles without notice as provided under ss. 176 and 177 of the Act it amounts to conversion even though there was a contract that after a particular date the pledge will become irredeemable.

The Co-operative Hindusthan Bank, Limited v. *Surendranath De*, 59 Cal. 667, followed.

Dwarika v. *Bagawati*, A.I.R. (1939) Ran. 413, dissented from.

The general measure of damages in case of conversion is in general the value of the goods at the time of conversion.

Ratanlal's Law of Torts (10 Edn.), p 305; Iyer's Law of Torts (1932 Edn.), p. 140; *Cooverji Umersey* v. *Mawji Vaghji and another*, A.I.R. (1937) Bom. 26, followed.

Ma Me Shin v. *R.M.R.M.N. Chettyar Firm*, A.I.R. (1933) Ran. 76 at p. 79, distinguished.

The Accrual of Interest (War-Time Adjustment) Act, 1947 (Burma Act XI of 1947), applies only to outstanding debts and not to settled transactions that are settled before the Act came into force.

P. K. Basu for the appellants.

Tun Sein for the respondent.

U THAUNG SEIN, J.—On the 17th January 1941 the respondent Abdul Razak borrowed a sum of Rs. 950

* Civil 2nd Appeal No. 129 of 1947 against the decree of the District Court of Akyab in Civil Appeal No. 20 of 1947.

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from the appellants U Paw Tun Aung & Co., bearing interest at ten annas per cent per mensem, and deposited a certain quantity of gold jewellery as security for the loan. This transaction took place at Akyab. However, with the declaration of war by Japan on the 8th December 1941 there was general unrest all over Burma and the respondent evacuated from Akyab and did not return to that town till 1944. He then sought to redeem his pledged jewellery but the appellants were unable to produce the same as it had been sold away in or about September 1942. The respondent therefore sued the appellants in Civil Regular Suit No. 19 of 1947 of the 2nd Assistant Judge, Akyab, for the return of the pledged articles or their value after deducting all moneys due in respect of the previous loan.

The appellants contested the suit on two main grounds, *viz.* that at the time of the loan the respondent had executed a document (filed as Exhibit A in C.R. Suit No. 19 of 1947) by which he had promised to redeem the jewellery by about April 1941 and failing which the ownership in the properties was to pass to the appellants. It was further contended that if the transaction between the parties was found to be a pledge of gold jewellery, then all that the respondent could claim was for payment of the surplus sale proceeds of the articles after deducting the amount due on the loan.

The learned 2nd Assistant Judge, Akyab, held that the transaction in question was a pledge and that the appellants had sold away the articles and thus rendered redemption impossible. He accordingly decreed that the respondent be allowed to redeem his gold jewellery or else be paid a sum of Rs. 2,747-5 being the price of the gold ornaments on the date of suit, *minus* the sum due in respect of the loan. The appellants

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appealed to the District Court of Akyab against this decree but without success and they have now come to this Court to have the judgment and decrees of both the lower Courts set aside.

There is little or no dispute as to the facts, and the main grounds advanced in the present appeal are as follows.

The appellants insist that the transaction between the parties was one of conditional sale and not a pledge. In the grounds of appeal, however, it was contended that the transaction was a mortgage. The learned counsel for the appellants in his argument stated that he did not intend to press this ground and relied mainly on his contention that it was a conditional sale.

The question whether the transaction was a pledge or a conditional sale depends mainly on the construction to be put on Exhibit A. At the outset I would say that this document is very vaguely worded and reads as follows: " If the goods are not redeemed by *Tagu* (April) 1302 B.E. U Paw Tun Aung & Co. will take the same. There will be no right to object to anything." The document does not read as if it were a sale deed, and as far as I can see from the evidence on record the parties did not regard it as anything more than a document of pledge.

The question is : Whether the undertaking by the respondent-pledgor in Exhibit A to forfeit his title to the goods and also his right of redemption on his failure to redeem it by a certain date is valid ? The rights and duties of pledgor and a pledgee are set out clearly in sections 176 and 177 of the Contract Act and I agree with the learned District Judge, Akyab, that the parties cannot contract themselves out of these statutory rights and liabilities. If it were possible to defeat the statutory provisions of any Act, then there

could be no object in having such Acts as the Limitation Act or the Transfer of Property Act. For instance, parties may agree by mutual consent to transfer orally immovable property worth more than Rs. 100. This would certainly be an invalid transaction even though the parties may have mutually agreed on it as there are statutory provisions in the Transfer of Property Act which lay down that transfers of immovable property of Rs. 100 or more must be evidenced by a registered deed. I note with surprise, however, that there is a ruling by Mackney J. in *Dwarika* v. *Bagawati* (1)— where it was laid down that an agreement that the pledge should become irredeemable on failure to redeem within a limited period is not necessarily invalid. This case is reported in an unofficial law report and with all due respects I do not consider that it correctly interprets sections 176 and 177 of the Contract Act. These sections were designed to prevent any clogs in the way of redemption and parties cannot override these statutory provisions by mutual agreement. In my opinion, the document, Exhibit A, did in fact create a pledge and nothing else even though the wording in it may be vague.

The transaction between the parties being one of pledge, the rights and liabilities between them must be decided by reference to sections 176 and 177, Contract Act. The learned counsel has sought to distinguish between these two sections in the following manner.

According to him, where no date is fixed for the redemption of the articles then under section 176, Contract Act, the pledgee is required to serve a notice on the pledgor before the pledged articles are sold. Where a date is stipulated or fixed for the redemption of the articles then under section 177, Contract Act,

(1) A.I.R. (1939) Ran. 413.

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the pledgee is entitled to sell the property without notice to the pledgor. The answer to this argument is by reference to the two sections which read as follows :

" 176. If the pawnor makes default in payment of the debt or performance *at the stipulated time of the promise*, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security ; or he may sell the thing pledged on giving the pawnor reasonable notice of the sale.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

177. If a time is stipulated for the payment of the debt or performance of the promise, for which the pledge is made, the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them ; but he must, in that case, pay in addition any expenses which have arisen from his default."

I have italicized the words " *at the stipulated time of the promise* " in section 176 to indicate that where a date has been fixed for the redemption reasonable notice must be given to the pledgor before the properties are sold. It is evident that whether a time has been stipulated or not for the redemption of the pledged articles reasonable notice must be given to the pledgor before the sale in accordance with section 176, Contract Act. In this connection, I would refer to the ruling in *The Co-operative Hindusthan Bank, Limited* v. *Surendranath De* (1). The following extract from the head-note of that case will be of great assistance in the case under consideration by me :

" Section 176 of the Contract Act, unlike some other sections, *e.g.* sections 163, 171 and 174, does not contain a saving clause

(1) 59 Cal. 667 (668).

in respect of special contracts contrary to its express terms. The section gives the pawnee the right to sell only as an alternative to the right to have his remedy by suit. Besides, section 177 gives the pawnor a right to redeem even after the stipulated time for payment and before the sale.

In view of the wording of section 176 as compared with the wordings of the other sections of the Contract Act referred to and also in view of the right, which section 177 gives to the pawnor, and in order that the provisions of that section may not be made nugatory, the proper interpretation to put on section 176 is that notwithstanding any contract to the contrary notice has to be given, which, in the words of the section should be 'a reasonable notice of the sale.' "

This ruling goes so far as to say that notice of sale must be given to the pledgor even if there were a contract between the parties to dispense with this notice.

The above sections of the Contract Act outline the rights and liabilities of the pledgor and the pledgee. To put it briefly the rights of a pledgee are to sue for the moneys due while retaining the pledged articles as collateral security or to sell the articles after due notice to the pledgor. A pledgee has no right of foreclosure and cannot sell the articles till the expiration of reasonable notice to the pledgor. Applying these principles to the present case I am in agreement with the findings of the lower Courts that the transaction between the parties was one of the pledgor and pledgee and hence under section 176, Contract Act, notice of the sale should have been served on the respondent before the jewellery were actually sold.

There is no dispute that the respondent had evacuated from Akyab in 1942 and that no notice was served on him. In all probability, the appellants, who were labouring under the impression that according to the document, Exhibit A, they became the owners of

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the pledged properties from April 1941, sold them away as their own properties. This act of the appellants is what is known in law as " conversion " and the real bone of contention between the parties is as to the compensation which is payable to the respondent-pledgor for the wrongful conversion. Both the lower Courts have held that for the purpose of assessing the damages payable the value to be fixed for the pledged articles is their value at the date of suit. The appellants, on the other hand, assert that this value must be the value at the time of the conversion. I have referred to two treatises on the Law of Torts and find the following annotations as regards the measure of damages in cases of wrongful conversion of pledged properties. At page 305 of Ratanlal's Law of Torts (10th Edition) there is the following note under the heading " Damages " :

" The measure of damages is in general the value of the goods at the time of the conversion, where no special damage has been sustained, and the goods have not been tendered and received back after action. This would be the market value of the goods at the time of conversion."

The same principles are also set out at page 140 of the Law of Torts (1932 Edition) by S. R. Iyer :

" *Method of Ascertainment.*—The value of the chattel is ascertained generally as at the time and place of conversion. But this rule is not a rigid one and must be interpreted in the light of the circumstances of each case. . . . . Where the article is wrongfully detained by the defendant and not produced for assessment of value, the Court will make every presumption against him and put the highest value on it."

The general rule as to the value to be put on the goods which have been the subject of conversion

has also been laid down in *Cooverji Umersey* v. *Mawji Vaghji and another* (1). In this case there is the following passage in the head-note :

" The correct measure of damages is the loss which the pawnor has actually sustained, taking into account the pawnee's interest in the goods at the time of the conversion."

The learned District Judge, Akyab, refused to rely on the principle laid down in this ruling on the ground that the goods referred to therein were merchandise whereas in the case before him the property pledged was gold jewellery. I am unable to appreciate how any distinction can be drawn between these articles both of which are easy to dispose of in the open market.

My attention has however been drawn by learned counsel for the respondent to the case of *Ma Me Shin* v. *R.M.R.M.N. Chettyar Firm* (2) as authority for the principle that the value to be put on the pledged articles in a case of conversion is the price at the date of suit. I have read this ruling carefully and note that there is no general discussion in the body of the judgment as to the principles by which damages are to be ascertained in cases of wrongful conversion. There is, however, the following passage :

" I understand that it is agreed by the parties that that being so, the respondents are entitled to claim the amount due on the promissory notes after deducting what is a reasonable value for the jewellery deposited. The value must be taken as the value at the date of suit, that is 20th June 1930."

As far as I can see, the value of the goods was fixed by mutual consent in that case as their value on the date of suit. This case cannot, in my opinion, be cited as authority for the rule urged by the learned counsel for the respondent, that the price to be fixed for goods

(1) A.I.R. (1937) Bom. 26. (2) A.I.R. (1933) Ran. 76 at p. 79.

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which have been the subject of conversion is their value on the date of suit

In the present case, the sale of the pledged jewellery in September 1942 was probably under the *bona fide* belief that the ownership in them had passed to the appellants. Under these circumstances, I am of opinion that in assessing the damages payable by the appellants the value to be put on the pledged articles should be in accordance with the general rule, namely, their value at the date of conversion. Had the appellants been guilty of fraudulent retention of the properties, then I would have held that a departure from the general rule would be justified and fixed the value at the price on the date of suit. Both the lower Courts thus erred in the calculation of damages. The amount which would be payable by the appellants to the respondent may be worked out as follows :

Amount due by respondent to appellants :

	Rs.	A.
(1) Amount of original loan	950	0
(2) Interest at As. 10 per cent per mensem from 17th January 1941 to 14th September 1942 ..	118	12
(3) Extra charges for preservation of the gold jewellery (the 2nd Assistant Judge, Akyab, has already held that this sum is payable) ...	47	6
Total ...	1,116	2
Value of the jewellery at the date of conversion, *i.e.* on 14th September 1942, for 23 ticals 12 annas and 4 ratis of gold at Rs. 60 per tical (rate decided by 2nd Assistant Judge, Akyab)	1,425	0

It will be noticed that I have allowed interest on the loan up to the 14th September 1942. The Accrual of Interest (War-Time Adjustment) Act, 1947 (Burma Act No. XI of 1947), applies only to outstanding debts and not to settled transactions, *i.e.* transactions settled before the Act came into force. The amount payable by the appellants to the respondent for the wrongful

conversion of the pledged jewellery was therefore Rs. 1,425 *minus* Rs. 1,116-2, *i.e.* Rs. 308-14 (Rupees three hundred and eight and annas fourteen only).

The appeal will accordingly be allowed in this sense, that the decree of the learned 2nd Assistant Judge, Akyab, will be modified and the appellants U Paw Tun Aung & Co. shall pay to the respondent Abdul Razak the sum of Rs. 308-14. As the appellants have only been partially successful in this appeal no costs will be allowed in this Court ; they shall, however, pay proportionate costs in both the lower Courts.

CIVIL REVISION.

Before U Bo Gyi, J.

H.C. 1948

Feb. 9.

MAUNG MOE THI (APPLICANT)

v.

MA GYI TAUK (RESPONDENT).*

Right to drain off rain water—Whether immovable property within the meaning of Rules 97 and 98 of Order 21 of the Code of Civil Procedure—The definition of immovable property in General Clauses Act s. 2, sub-s. (29).

Held: That there is no definition of immovable property in the Civil Procedure Code. S. 2, sub-s. (29), of the General Clauses Act defines immovable property as including "lands, benefits to arise out of lands and things attached to the earth or permanently fastened to anything attached to the earth."

The right to drain off rain water is an easement and is not immovable property within the meaning of Order 21, Rules 97 and 98, of the Code of Civil Procedure.

Mangaldas v. *Jewanram and others*, I.L.R. 23 Bom. 673.

B. W. Ba Tun for the applicant.

U Ni for the respondent.

U BO GYI, J.—The respondent obtained a decree against Ma Aye Tin and Ma Aye Yin in Civil Regular Suit No. 73 of 1946 of the Court of the Subordinate Judge, Myingyan, directing the latter to allow her to dig a drain between their house compounds and to let off rain water from her house compound along the drain. A drain was dug as directed, but subsequently, it appears the petitioner Maung Moe Thi, the husband of one of the judgment-debtors, Ma Aye Yin, obstructed the drain. The respondent thereupon filed an application before the Court of the Subordinate Judge

* Civil Revision No. 111 of 1947 against the order of the Subordinate Judge, Myingyan, in Civil Execution No 27 of 1946, dated the 23rd September 1947.

purporting to be under Rules 97 and 98 of Order 21 of the Code of Civil Procedure.

The petitioner objected *inter alia* that the said Rules of Order 21 of the Code do not apply to the present dispute inasmuch as the right to drain off rain water from the respondent's house compound is not immovable property within the ambit of the said Rules. The objections were overruled by an order dated the 23rd September 1947, and the Court on the 11th October directed the petitioner to remove the obstruction to the drain. On the petitioner's failing to do so, the Court issued several warrants of arrest against him until the proceedings were stayed by this Court.

The first question is whether the right to drain off rain water is immovable property within the meaning of Rules 97 and 98 of Order 21 of the Code of Civil Procedure. The Code contains no definition of the term " immovable property " and consequently in interpreting this term the Court has to fall back upon the General Clauses Act. Section 2, sub-section (*29*), of the said Act defines " immovable property " as including " land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth." The question then is whether the right to drain off rain water which is an easement is a benefit arising out of land. In the case of *Mangaldas* v. *Jewanram and others* (1) it was held that a right of way is not immovable property within the meaning of section 9 of the Specific Relief Act. The relief contemplated by section 9 of the Specific Relief Act is analogous to the relief which may be granted under Rule 97 *et seq* of Order 21 of the Code of Civil Procedure. In that both kinds of relief are to be granted in summary proceedings in certain contingencies. Furthermore, an easement, such as the

(1) I.L.R. 23 Bom. 673.

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one involved in this case, is incapable of possession either physical or constructive. I am of opinion that a right to drain off water is not immovable property within the contemplation of Order 21, Rules 97 and 98.

It follows then that in invoking the law which cannot be invoked to enforce a right, the lower Court assumed a jurisdiction which it did not possess. I accordingly set aside the orders of the lower Court, dated the 23rd September 1947 and the 11th October 1947, with costs : advocate's fee two gold mohurs.

APPELLATE CRIMINAL.

Before U Bo Gyi, J.

DAW SAN YI AND ONE (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENTS).*

H.C. 1948

Feb. 5.

Confession before an Excise Officer is no longer admissible in view of the Burma Act 28 of 1940. The decision in Maung San Myin v. King-Emperor, *I.L.R. 7 Ran. 771, is no longer law.*

T. K. Boon for the appellants.

U Bo Gyi, J.—The appellants Daw San Yi and Ma Ah Mar Sein have been convicted under section 9 (*a*) of the Opium Act for possession of raw opium and sentenced each to six months' rigorous imprisonment and a fine Rs. 1,000, or, in default, a further term of three months' rigorous imprisonment.

The undisputed facts are that about 3 p.m. on August 18th, 1947, an Excise party led by Inspector of Excise U Maung Maung Tin raided house No. 77, Windsor Road, Rangoon, under the personal supervision of the Superintendent of Excise (2) U Tun Kyi and Assistant Superintendent of Excise U Tha Aung. The search party were accompanied by two elders, U Yone and Esoof Ebrahim Khabaidi (P.Ws. 2 & 3). They found the downstairs front door padlocked on the outside and shouted for the inmates. The door was of collapsible metal, through which a young woman, the 2nd appellant, was seen coming down the stairs. When told that the party had come to see the owner of the house, she went up again and a little while later the 1st appellant came down. She said she was the

* Criminal Appeal No. 1973 of 1947 being appeal against the order of the District Magistrate of Rangoon, dated the 10th November 1947, passed in Criminal Regular Trial No. 41 of 1947.

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owner of the house and when the search party apprised her of the object of their visit she replied that people of her standing would never have dealt in opium. But she found that the search party were not impressed and she shouted to the 2nd appellant to bring the keys. While the party at the front door were waiting for the keys, certain members of the Excise party stationed at the back of the house shouted that packets were being thrown down. U Maung Maung Tin, accompanied by U Yone, rushed towards the back of the house, and they saw the 2nd appellant on the backstairs of the house. Sub-Inspector of Excise Maung Pe Thein (P.W. 5) had seen the 2nd appellant fling down a gunny bag and its contents, 5½ packets, strewn about. The packets were seized and the 2nd appellant was taken upstairs.

Meanwhile, those at the front door had managed to get into the house and had gone upstairs with the 1st appellant. There the 1st appellant was asked to produce the key of an almirah in the dining room. She did not produce it and apparently getting impatient U Maung Maung Tin tugged at it, when it came away together with the hasp. Inside the almirah were found three trunks containing a considerable quantity of raw opium. These facts have not been challenged.

The real points of controversy are whether, as alleged by some of the searchers, the 1st appellant told them before the almirah was opened that there was opium inside the almirah and whether she told them that three trunks whose contents she did not know had been left with her by one Saw Tun. The authority of the decision in *Maung San Myin* v. *King-Emperor* (1) that an admission to an Excise Officer is admissible in evidence seems to have been shaken by section 20A of the Opium Act, which has been added by Burma

(1) I.L.R. 7 Ran. 771.

Act XXVIII of 1940, according to which no confession made to an Excise Officer empowered thereunder can be proved as against a person accused of any offence. U Maung Maung Tin says that he has been invested with the powers of a Police Station Officer to investigate into cases. As to the second point in dispute, an overwhelming array of prosecution witnesses have stated that the 1st appellant never told them that the trunks had been left in her care by Saw Tun. What they do say is that she told them that the trunks had been left with her by Nyi Bu, Ba Ba Gyi and Sunny. Those men were arrested forthwith and denied knowledge of the affair. In her examination she states that as the Excise party wanted three or four men to be sent up she mentioned the names that occurred to her. It is plain that she only mentioned those three men as the persons who had kept the trunks in her house, and in these circumstances the evidence of her witnesses who say that a certain unknown man left the trunks in her house is unworthy of credit. Furthermore, her story that a person who was comparatively a stranger to her left three trunks said to contain nothing more valuable than medicine and clothing in an almirah which was padlocked is very improbable on the face of it. Then there is the fact that two cigarette tins full of opium were found on the almirah.

The 2nd appellant in her examination states that when she heard that the raiding party would search for opium she thought that what she saw on the almirah was all that had been kept by the unknown man and through fear threw it down not knowing it to be opium. This statement considered in conjunction with the evidence that she threw out 5½ packets of opium leaves no room for reasonable doubt that she knew that there was opium in the house.

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After a consideration of all the evidence, I find that these two appellants were in possession of the opium. They were the principal occupants of the house, the other inmates being two minor girls. Since 9,597 tolas of opium were found it is clear that the appellants were trafficking in opium on a large scale and accordingly I am not prepared to hold that the sentences passed upon them, though severe, are excessive. The appeals are dismissed. The appellants must surrender to their bails.

SUPREME COURT.

G. N. BANERJI (APPLICANT)

†S.C. 1948

May 10.

v.

THE SUPERINTENDENT, INSEIN JAIL ANNEXE, INSEIN (RESPONDENT).*

[On appeal from the High Court.]

Directions in the nature of habeas corpus—*Nature and scope—Powers of Supreme Court—Public Property Protection Act, 1947—S. 7 (2), (3), (5)—"Officer" authorized to arrest without warrant—Whether Public Property Protection Committee is an officer—Nature of arrest—If power to arrest can be delegated—Arguments as to absurd consequences—How far applicable—Report by officer under s. 7 (2) condition precedent to action by President under s. 7 (3).*

The writ of *habeas corpus* is an ancient Common Law writ used as the normal procedure for protecting the liberty of the subject against unlawful arrests and detainments. It enables the immediate determination of the right to the applicant's freedom. It is not a proceeding in a suit but a summary application by the person detained. The efforts of the Court are invariably directed to prevent evasion and delay. The exercise of this check, whole and unimpaired but shorn of antiquated technicalities, has been entrusted to the Supreme Court by the Constitution of the Union.

Liversidge v. *Sir John Anderson*, (1942) A.C. 206, *Greene* v. *Secretary of State for Home Affairs*, (1942) A.C. 284 at pp. 301—3 ; *Secretary of State for Home Affairs* v. *O'Brien*, (1923) A.C. 603 at p. 609, referred to.

Under s. 7 (2), Public Property Protection Act, 1947, by Notification 131, dated 31st December 1947, the Governor purported to authorize the Public Property Protection Committee to arrest without warrant, persons coming under s. 7 (2) of the Act suspected of having committed prejudicial acts. An order signed by the Chairman of the Committee was delivered to an Inspector of Police, who arrested applicant on 18th February 1948. On 1st March 1948 an order purporting to be under s. 7 (3) authenticated by a Deputy Secretary to Government, directed detention of applicant for six months from 18th February 1948. On an application for a writ of *habeas corpus*, *Held* : Authority under s. 7 (2) cannot be invested in a Committee and the Committee is not an officer who can arrest. The act of arrest is a physical act and a Committee of several persons cannot touch or arrest. The officer has to entertain a suspicion and a Committee cannot do so.

General Clauses Act, s. 2 (44), referred to.

Cecil Gray v. *The Cantonment Committee of Poona*, 34 Bom. 583 ; *Vishnomal* v. *Court of Wards*, (1928) Sind. 76 ; *Tewari* v. *Deputy Commissioner, Lucknow*, 14 Luck. 351 ; *Ismail Mohamed Hajee* v. *The King*, (1941 Ran. 536, distinguished.

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* Criminal Misc. Application No. 5 of 1948.

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

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Held further : The exercise of the power of arrest cannot be delegated. There is no provision in s. 7 (2) to have the arrest effected through another, as in ss. 56 and 65 of Criminal Procedure Code. Further this deprives the person affected of an opportunity to satisfy the officer concerned. The question of administrative inconvenience involved in requiring high officers to arrest personally cannot outweigh the liberty of the subject.

Barnard v. *Gorman*, (1941) A.C. 378 at pp. 383-4, relied on.

The duty of Judges is only to take the words as they stand, give its natural meaning and appropriate construction, but not cure loopholes in a statute.

Held also : The receipt of a report from the officer arresting is a condition to the exercise of the powers of the Governor under s. 7 (5). As there was no report in this case, the further order is invalid and not in accordance with law.

King-Emperor v. *Deshpande*, 73 I.A. 144, applied.

From the order it appears that U Thet Tin was satisfied and not the President. The Law contemplates that the President should be satisfied. Greater precision of language should be exercised in drafting documents of great importance involving interference with fundamental rights.

P. K. Basu for the applicant.

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

The judgment of the Court was delivered by

E MAUNG, J.—This is an application for directions in the nature of *habeas corpus* made by one G. N. Banerji, who had been committed to custody in Insein Jail for a period of six months from the 18th February 1948, under the provisions of sub-section (5) read with sub-section (3) of section 7 of the Public Property Protection Act, 1947. The right which by the application it is sought to establish is the right of personal liberty guaranteed under Article 16 of the Constitution and it is said on behalf of the applicant that his incarceration in Insein Jail is one directed other than in due course of law and is accordingly illegal.

It would not be inappropriate here to state shortly the history, nature and scope of directions in the nature of *habeas corpus* and for such a statement it

would be difficult to better the account given by such an eminent jurist as Lord Wright in *Greene* v. *Secretary of State for Home Affairs* (1):

"The writ of *habeas corpus* is an ancient common law writ, which from about the end of the sixteenth century or the earlier years of the seventeenth century came to be used as the normal procedure for protecting the liberty of the subject against unlawful arrests and detainments, in particular those by order of the executive. The history of this great remedial writ is succinctly but lucidly and accurately described in Sir William Holdsworth's History of English Law, vol. ix, 2nd ed., pp. 112 to 124. I am merely concerned here with limited aspects. The common law adapted the old writ *habeas corpus ad suscipiendum et recipiendum* to the purpose of securing the subject's right to immunity from arbitrary arrest and imprisonment save by due process at law. In its earlier use, the writ had been from old days one of the procedural or mesne process writs. The right to freedom which the writ was directed to vindicate was said to be secured by the famous words of Magna Carta, a translation of which was embodied in the Petition of Right of 1628, s. 3: 'And where also by the statute called 'The Great Charter of the Liberties of England' it is declared and enacted that no freeman may be taken or imprisoned or be disseised of his Freehold or Liberties or his Free Customs, or be outlawed or exiled, or in any manner destroyed but by the lawful judgment of his Peers or by the Law of the land.' This provision was reiterated in the Petition of Right because of the refusal of the Court of King's Bench to grant the writ in *Darnel*'s case (1627 3 St. Tr. 1), where the return that the arrest was *per speciale mandatum domini regis* was held to be good return, which meant that a lawful cause of imprisonment was shown. We are told, no doubt with good reason, that the judges were influenced by the opinion that some degree of prerogative power was necessary to unable the Crown to deal with emergencies. The decision and arguments are analysed by Sir William Holdsworth, op. cit., vol. vi; 2nd ed., p. 34 and *seq.*, But the Petition of Right declared such a cause of imprisonment to be unlawful. In the same way it was enacted, in the Act of 1640 abolishing the Star Chamber, that any person committed or imprisoned by order of

(1) (1942) A.C. 284 at pp. 301—3.

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the Star Chamber or similar bodies should have his *habeas corpus*.

It is clear that the writ of *habeas corpus* deals with the machinery of justice, not the substantive law, except in so far as it can be said that the right to have the writ is itself part of substantive law. It is essentially a procedural writ, the object of which is to enforce a legal right. The writ is described as being a writ of right, not a writ of course. The applicant must show a *prima facie* case that he is unlawfully detained. He cannot get it as he would get an original writ for initiating an action, but if he shows a *prima facie* case he is entitled to it as of right. The first question, therefore, in any *habeas corpus* proceeding is whether a *prima facie* case is shown by the applicant that his freedom is unlawfully interfered with, and the next step is to determine if the return is good and sufficient. A person unlawfully detained is entitled as of course to obtain a writ of trespass, but an action of trespass or false imprisonment does not by itself secure the immediate or speedy release of the plaintiff, if he is still detained when he commences his action. As Littledale J. said in *Leonard Watson*'s case (9 A & E, 731, 795), 'A party imprisoned has two modes of proceeding, either by action for false imprisonment or by application for a *habeas corpus*. In an action for false imprisonment the defendant must prove his justification, if any and (except where allowed by express provision to give it under the general issue) he must also set forth the justification specially on the record. In the return to an *habeas corpus* no such minuteness of detail is necessary, nor in any instance that I can find has it been considered necessary to support the return by affidavit.' The incalculable value of *habeas corpus* is that it enables the immediate determination of the right to the applicant's freedom. On this aspect I may refer to the discussion by Lord Halsbury L.C. in *Cox* v. *Hakes* (15 App. Cas. 506, 514). He said: 'In days of technical pleading no informality was allowed to prevent the substantial question of the right of the subject to his liberty being heard and determined. The right to an instant determination as to the lawfulness of an existing imprisonment, and the twofold quality of such determination that if favourable to liberty it was without appeal and if unfavourable it might be renewed until each jurisdiction had in turn been exhausted have from time to time been pointed out by judges as securing in a marked and exceptional manner the personal freedom of the subject. It was not a proceeding in a

suit but was a summary application by the person detained. No other party to that proceeding was necessarily before or represented before the judge except the person detaining and that person only because he had the custody of the applicant and was bound to bring him before the judge to explain and justify, if he could, the fact of imprisonment. It was, as Lord Coke described it, *festinum remedium*.' When in the *Habeas Corpus* Act, 1816, the court was given power, if it sees fit, in the cases to which the Act applies, to inquire into the truth of the facts set out in the return, it was to be in a summary way, by affidavit or affirmation (s. 3). The efforts of the courts aided by the Legislature by means of the Acts of 1679 and 1816, have invariably been directed to prevent evasion and delay in the proceedings such as the *alias* and *pluries* writ or the cruder course of removing the person detained out of the jurisdiction and to make them effective in the shortest possible time. I have adverted to these features of the *Habeas Corpus* Act because I shall later have to deal with some questions of the procedure.

I have emphasized the use of the writ to secure freedom from arbitrary or unlawful arrest by the government, but besides these public occasions it was employed in connection with private arrests and detainments so that the writ applies to indefinitely wider and more various exigencies, indeed to any case whatever in which the liberty of the subject is unlawfully interfered with."

Of the writ of ***habeas corpus ad subjiciendum***, Lord Birkenhead in *Secretary of State for Home Affairs* v. *O'Brien* (1) says :

"It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I. It has through the ages been jealously maintained by Courts of Law as a check upon the illegal usurpation of power by the Executive at the cost of the liege."

The exercise of this check, whole and unimpaired in extent but shorn of antiquated technicalities in

(1) (1923) A.C. 603 at p. 609.

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procedure, has by the Constitution of the Union been entrusted to this Court.

The facts essential for the determination of this application lie within a narrow compass and are not in dispute. The applicant G. N. Banerji, an advocate of the High Court, was at a time prior to the 23rd December 1946 a District Supplies Officer at Mergui. On the 23rd December 1946 he relinquished his appointment and handed over his duties to his successor and thereafter resumed his practice at the Bar. On the 16th February 1948 an order for his detention under section 7 (*2*) of the Public Property Protection Act, 1947, was made by U Chan Tha, Chairman of the Public Property Protection Committee. This order of detention was for a period of 15 days from the date his arrest was effected. This order, it appears, was delivered to one U Mya, an Inspector of Police in the Criminal Investigation Department of the Government of the Union of Burma and the police officer, purporting to act under the order, arrested the applicant on the 18th February 1948. Thereafter the applicant was detained at the Kyauktada Police Station, Rangoon, till the 1st March 1948 when, on the authority of another order purporting to be under sub-sections (*3*) and (*5*) of section 7 of the Public Property Protection Act and authenticated by U Thet Tin, Deputy Secretary to the Government of the Union of Burma, the applicant was removed to the Insein Jail and detained therein. This order of the 1st March 1948 directed the detention of the applicant for a period of six months from the 18th February 1948, the date of his arrest.

The relevant provisions of the Public Property Protection Act, 1947, read as follows :

"7 (*2*) Any officer authorized in this behalf by general or special order by the Governor may arrest without warrant any

person whom he suspects of having committed, whether before or after the commencement of this Act, or of committing any prejudicial act.

(3) Any officer who makes an arrest in pursuance of sub-section (1) or sub-section (2) shall forthwith report the fact of such arrest to the Governor, and pending the receipt of the orders of the Governor, he may, by an order in writing, commit any person so arrested to such custody as the Governor may, by general or special order, specify :

Provided—

(i) that no person shall be detained in custody under this sub-section for a period exceeding fifteen days without the order of the Governor ;

(ii) that no person shall be detained in custody under this sub-section for a period exceeding six months.

(4) * * * *

(5) On receipt of any report made under the provisions of sub-section (3) the Governor may, in addition to making such orders subject to the second proviso to sub-section (3) 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 Governor by any law for the time being in force, such final order as to his detention, release, residence or any other matter concerning him as may appear to the Governor in the circumstances of the case to be reasonable or necessary."

It is not necessary to consider whether the word "suspects" in section 7 (2) of the Act imports an arbitrary or irrational state of suspicion and therefore excludes a justiciable issue. Neither is it necessary in this case to consider whether it is open to the Court to examine the reasonableness of such suspicion and for that purpose to discuss the applicability of *Liversidge* v. *Sir John Anderson* (1), *Greene* v. *The Secretary of State for Home Affairs* (2) and *Rex* v. *Secretary of State for Home Affairs* (3).

The learned counsel for the applicant contends that under section 7 (2) of the Public Property

(1) (1942) A.C. 206. (2) (1942) A.C. 284 at pp. 301—3.
(3) (1942) 2 K.B. 14.

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Protection Act, the Governor (now the President of the Union) is empowered to invest the authority to arrest without warrant to an officer only and not to an amorphous body like the Public Property Protection Committee and that accordingly Notification No. 131 of the 31st December 1947, Commerce and Supply Department, Legislation Branch, purporting to authorize the Public Property Protection Committee to effect the arrest without a warrant of persons coming within section 7 (2) of the Act is *ultra vires* of the Governor of Burma (now the President of the Union of Burma).

The learned Attorney-General claims that the provisions of section 2 (44) of the General Clauses Act and *Cecil Gray* v. *The Cantonment Committee of Poona* (1), *Vishnomal* v. *Court of Wards* (2), *Tewari* v. *Deputy Commissioner, Lucknow* (3) and *Ismail Mohamed Hajee* v. *The King* (4 are clear authorities for the view that the word "officer" may embrace a committee. We find it impossible to accept this contention. The General Clauses Act was enacted, as is clear from section 1 thereof, to advance brevity in drafting and certainty in interpretation of "all Acts, Regulations and Ordinances forming part of the law of Burma, whenever and by whatever authority they were passed or made." Section 2 provides definitions of words and is prefaced by the qualification "unless there is anything repugnant in the subject or context"; and in section 2 (44) the word "person" is defined as including *inter alia* a body of individuals whether incorporated or not. The learned Attorney-General's contention is that because an officer is defined judicially as a person employed to exercise to some extent and in certain circumstances the delegated

(1) 34 Bom. 583.
(2) (1928) Sind 76.
(3) 14 Luck. 351.
(4) (1941) Ran. 536.

functions of the Government, the term "officer" may embrace a committee which is a body of individuals not incorporated. This argument involves a fallacy. It does not follow that because the word "person" is to be deemed to include a body corporate or a body of individuals not incorporated, in the interpretation of Acts and other statutory enactments, the same extended definition is to be applied in the interpretation of the word "person" in contexts other than in such Acts and enactments. Moreover, this argument overlooks the overriding qualification "unless there is anything repugnant in the subject or context." What under section 7 (2) of the Act the Governor (now the President of the Union) is empowered to authorize is "to arrest without a warrant" and an arrest, as is clear from section 46 of the Code of Criminal Procedure, is a physical act; the person making the arrest is required actually to touch or to confine the body of the person to be arrested, unless there is submission to the custody by word or action. How would it be possible for a body incorporate, which has only a notional existence as a legal entity, to effect an arrest? How would a committee composed of several individuals exercise the physical act or arrest? Would all the members of the committee have to attend and each actually touch or confine the body of the person to be arrested?

To say that all the members of the committee except one may delegate their functions to the remaining member would not be an answer to the difficulty. The committee has to entertain a suspicion as a preliminary to arrest and the entertainment of suspicion cannot possibly be delegated to one member of the committee by the rest thereof.

The decision in *Ismail Mohamed Hajee* v. *The King* (1) is not relevant to the present case. The other

(1) (1941) Ran. 536.

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decisions relied upon by the learned Attorney-General are in different collocations and cannot possibly be said to be *in pari materia* with the present case. Moreover, these decisions are of doubtful validity in view of the provisions of sections 57 and 58 of the Municipal Act and sections 272 and 273 of the Cantonment Act.

The learned counsel for the applicant goes further. He says, and rightly we think, that even if the Governor (now the President of the Union) was competent to authorize the committee under section 7 (2) of the Public Property Protection Act to arrest his client without a warrant under sub-section (3), the exercise of the power of arrest could not have been delegated, as was done in this case, to a police officer. The learned Attorney-General contends that the maxim "*Delegatus non potest delegare*" is controlled by the maxim "*Qui facit per alium facit per se*" in respect of all functions which are purely ministerial and not involving the exercise of any judicial or discretionary powers. He claims that a person who has been directed to effect an arrest on behalf of another who himself could have arrested the person concerned, is merely doing a purely ministerial act. No authority is cited for this proposition and our researches have not disclosed any in support thereof.

In fact, both on general principles and on the analogy of statutes *in pari materia* it is clear that, unless empowered by legislation in that behalf, a person who may effect an arrest is not entitled to delegate that function to another. Article 16 of the Constitution requires every interference with the personal liberty of a citizen to be justified by law. What section 7 (2) of the Public Property Protection Act justifies is arrest without warrant by the officer authorized thereunder. That officer is not vested with the power to issue a

warrant of arrest; and an officer who can arrest without a warrant but may not or does not issue a warrant of arrest requires legislative sanction similar to that in sections 56 and 65 of the Code of Criminal Procedure to have the arrest effected through another person. There is no such legislative sanction in relation to an officer acting under section 7 (2) of the Public Property Protection Act.

Practical considerations also support the view that the exercise of the power of arrest is one which, save by legislative sanction, should not be delegated. The right to personal liberty is a fundamental human right under the Constitution and every person arrested on suspicion has a right, then and there, to give an explanation which may have the effect of removing a misunderstanding, if any, that resulted in suspicion being engendered in the mind of the officer entitled to effect his arrest. To regard the act of arrest as a purely ministerial one would lead to the situation that when the person arrested offers to the police officer arresting him an explanation which might be sufficient to explain away the suspicious circumstances existing against him, the police officer can merely say: "That has nothing to do with me; come and remain in detention for 15 days." This is a preposterous situation.

It is next contended by the learned Attorney-General that section 7 of the Public Property Protection Act should be interpreted in such a manner as to make for the smooth working of the executive machinery provided therein. He says that a high Government official such as the Chairman of the Public Property Protection Committee or a Deputy Commissioner, who normally would be the persons authorized by the President of the Union to arrest a person without a warrant, cannot be expected to effect an arrest in

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person, and that the Legislature obviously intended that such high Government officials must have the power to delegate the exercise of actual arrest. Any other interpretation of the Act, he contends, would make the Act unworkable or at least would result in administrative inconvenience. To the argument based on administrative convenience we cannot do better than adopt the words of a learned Law Lord in England and say with him: "The liberty of the subject and the convenience of the police or any other executive authority are not to be weighed in the scales against each other."

Arguments drawn from absurd consequences are no doubt forceful but in this case we can see no justification for implementing by forced judicial construction the power of delegation. In *Barnard* v. *Gorman* (1) Viscount Simon, the Lord Chancellor, said:

"The question is a very serious one, for, on the one hand, it is rightly stressed that the liberty of the subject is involved, and if an innocent man is detained under official authority his personal freedom is for the time being interfered with, even though he may be treated with all consideration and may, in fact, have suffered little from being in temporary custody. On the other hand, if officers of customs cannot detain a man who is coming off a ship and whom they suspect on reasonable grounds of endeavouring to defraud the customs, but must either let him go and rely on a subsequent summons being effectually served on him, or, if not, must arrest him at their own risk, the working of our customs law is likely to be seriously impeded, and the question would arise whether it did not require to be amended. Our duty in the matter is plain. We must not give the statutory words a wider meaning merely because on a narrower construction the words might leave a loophole for frauds against the revenue. If, on the proper construction of the section, that is the result, it is not for judges to attempt to cure it. That is the business of Parliament. Our duty is to take the words as they stand and to give them their true construction, having regard to

(1) (1941) A.C. 378 at pp. 383-4.

the language of the whole section, and, as far as relevant, of the whole Act, always preferring the natural meaning of the word involved, but none the less always giving the word its appropriate construction according to the context."

The learned counsel for the applicant contends that under section 7 (3) of the Act it is for the officer who makes the arrest to report the fact of the arrest to the President of the Union and that sub-section (5) makes the receipt of the report of such officer a condition precedent to action by the President directing the detention of the person arrested for a period not exceeding six months but exceeding 15 days. That appears to be so. The learned counsel then claims that in this case there was no report by the officer who made the arrest and that therefore the order of detention of the 1st March 1948 is invalid and not in accordance with law. We can see no answer to this contention.

The learned counsel for the applicant sought to develop an argument in support of the application based on Article 24 of the Constitution. It is not necessary, in view of the conclusions we have arrived at in this case, to pursue this argument further and we are relieved from attempting to resolve the antinomy that faced Lord Shaw of Dunfermline in *The King* v. *Halliday* (1) between a preventive detention and imprisonment as also between preventive justice and executive action.

To sum up, our conclusions are that authority under section 7 (2) of the Public Property Protection Act, 1947, cannot be invested in the Public Property Protection Committee, that U Chan Tha had no authority to act either individually or on behalf of the Committee, that the police officer who actually effected the arrest was not authorized in law to arrest the

(1) (1917) A.C. 260.

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applicant, that his detention under the preliminary warrant under the hand of U Chan Tha was unlawful, and that there not having been a report to the President by the officer effecting the arrest (in fact, there is in this case no officer who could have legally made such a report) the final order of detention of the 1st March 1948 is invalid.

This, in our opinion, is a stronger case for interference than that which went before the Privy Council in *King-Emperor* v. *Deshpande* (1).

In view of the findings arrived at by us on matters of substance, what follows is a matter of minor detail. Still, as the liberty of a citizen is in issue, we consider it right to draw attention to matters even of detail. The warrant directing the detention of the applicant for a period of six months reads as follows :

> "Being satisfied that G. N. Banerjee Ex. Supply Officer Mergui son of late Mr. Bannerjee has committed a prejudicial act, I, U Thet Tin, Ministry of Commerce, Supply and Transport, by order of the President of the Union hereby direct that G. N. Bannerjee be detained in Insein Jail for a period of six months with effect from the 18-2-48."

From this order it would appear as if it was U Thet Tin who was satisfied that G. N. Banerji had committed a prejudicial act. That is not what the law requires. The law contemplates that the President should be satisfied. It is to be hoped that in drafting documents of grave importance involving interference with fundamental rights of the citizen greater precision in the use of language would be exercised.

In the result we direct that G. N. Banerji, who is now in detention in Insein Jail under an order of the 1st March 1948 of the Government of the Union of Burma, Ministry of Commerce, Supply and Transport,

(1) 73 I.A. 144.

being Order No. 49/PPP48, be forthwith released and that this order of the Court be forthwith communicated to the Superintendent of the Jail, Insein Jail Annexe, Insein.

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SUPREME COURT.

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Apl. 8.

MA MAR MAR (APPLICANT)

v.

P.S.O., AHLONE, AND OTHERS (RESPONDENTS).*

[On appeal from the High Court.]

Union Judiciary Act, s. 6—Residuary provisions—When can be used—Constitution Act, s. 25.

Applicant applied under s. 6 of the Union Judiciary Act for special leave to appeal from an order of the High Court under s. 491 of the Criminal Procedure Code.

Held : That there is an effective remedy in s. 25 of the Constitution whereby the Supreme Court could issue directions in the nature of *habeas corpus*. S. 6, Union Judiciary Act, provides for cases which do not come within the purview of s. 5. It is a residuary provision enacted with the sole intention that no subject of the Union shall go without redress from the Supreme Court if he has a genuine grievance ; but where there is an effective remedy provided in s. 25 of the Constitution for issue of directions in the nature of *habeas corpus*, the application for special leave will be refused.

The provision in s. 25 of the Constitution is only an adaptation of the English Common Law practice in *Eshugbayi Eleko* v. *Officer administering the Government of Nigeria and another*, (1928) A.C. 459.

Dr. Thein for the applicant.

U Chan Tun Aung (Assistant Attorney-General of the Union of Burma) for the respondent.

The judgment of the Court was delivered by

E MAUNG, J.—This is an application laid under section 6 of the Union Judiciary Act for special leave to appeal from an order passed by a Bench of the High Court under section 491 of the Code of Criminal Procedure.

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* Criminal Misc. Application No. 1 of 1948 ; appeal from the order of a Bench of the High Court, Rangoon, dated the 2nd March 1948, passed in Criminal Misc. Application No. 2 of 1948.

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

Section 6 of the Union Judiciary Act provides—

"Notwithstanding anything contained in section 5, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, or final order of any Court (whether passed before or after the commencement of the Constitution) in any civil, criminal or other case."

By section 5 of the Union Judiciary Act a right of appeal is granted in cases (*a*) where a question as to the validity of any law, having regard to the provisions of the Constitution, is involved, or (*b*) where the amount or value of the subject-matter of the suit and of appeal is rupees ten thousand or over, or (*c*) where, even though the value of the suit and of appeal is rupees ten thousand or over, but if the decree appealed from is of the affirmance of the decree of the Court of first instance, a substantial question of law is involved.

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*."

What this means is that, although a subject may have failed in his attempt to move another Court (*i.e.* the

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High Court in the present case) for issue of directions in the nature of *habeas corpus* under section 491 of the Code of Criminal Procedure, yet he can still come to this Court and move it under section 25 of the Constitution. This is not a new procedure of law ; it is only an adaptation of the English Common Law practice in the matter of issue of writs [see *Eshugbayi Eleko* v. *Officer administering the Government of Nigeria and another* (1)].

For all these reasons we do not propose to grant special leave. The application is dismissed.

(1) (1928) A.C. 459.

APPELLATE CRIMINAL.

Before U On Pe, U San Maung and U Bo Gyi, JJ.

U SAW AND NINE OTHERS (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

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Special Crimes (Tribunal) Act, 1947 (Burma Act LIII of 1947), whether ultra vires—*Government of Burma (Temporary) Provisions Act, 1945, Notification No. 94—Proclamations of House of Commons and House of Lords—Opportunity of accused be defended by "pleader"—S. 340, Criminal Procedure Code—Confessions of accused—Admissibility of—S. 24, Evidence Act—Delay in recording confession—Recording of confessions not in open court or court hours—Effect of contravention of rules—Value of confessions as evidence—Corroboration and admissibility against co-accused—S. 114* (b), *Evidence Act—Examination of accused under s. 342* (2), *Criminal Procedure Code, as amended by Burma Act XIII of 1945—Whether can be taken into consideration under s. 30, Evidence Act—Burma Act XXXIII of 1947, crimes committed before the Act came into force.*

The accused were tried by a Special Tribunal under Burma Act LIII of 1947 and convicted under s. 302 (1) (*b*) of the Penal Code as amended by Burma Act XXXIII of 1947 and sentenced to death in connection with the shooting in the Council Room of the Secretariat, of the Governor's Executive Council presided over by its Deputy Chairman resulting in the instantaneous death of five Ministers, a Deputy Secretary, the death of two other Councillors later and of the Personal Body-guard of one Minister.

Held: Under s. 1 of the Government of Burma (Temporary) Provisions Act, 1945, published in the Government of Burma Home Department Notification No. 94. dated 24th July 1945, any proclamation made after the passing of that Act varying the previous proclamation of the 10th of December 1942 under s. 139 (*3*) of the Government of Burma Act, 1935, shall continue in force, unless revoked, till 9th December 1948, if resolutions in that behalf are from time to time passed by both the Houses of Parliament. The House of Commons on the 2nd of April 1947 approved the proclamation of the Governor of Burma and the House of Lords also on the 15th of April 1947 approved the continuance of the same. Therefore the proclamation issued by the Governor must be deemed to be still in force and the Governor must be deemed to have all the powers vested in the Legislature of Burma.

Held: By the establishment of a new court the Governor did not assume to himself the powers vested in the High Court and he was entitled to appoint a Special Tribunal as the Legislative Assembly in Burma could establish a new or collateral court and the fact that the High Court was at that time holding its criminal sessions was irrelevant.

* Criminal Appeals Nos. 3, 4, 7, 11, 12, 13 and 14 of 1948 being appeal from the order of the Special Crimes Tribunal, Rangoon, dated the 30th December 1947.

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Chitambaram v. *The King-Emperor*, (1947) R.L.R. 66 (P.C.), applied and followed.

S. 340 of the Criminal Procedure Code provides that an accused before a criminal Court may of right be defended by a pleader. Where accused was defended by a pleader since the beginning of the Trial and later a King's Counsel appeared who was given the opportunity to recall prosecution witnesses and he recalled some of the witnesses for the prosecution for further cross-examination and did not recall others, the accused can have no grievance and the section has been complied with.

The words " appears to the Court " in s. 24 of Evidence Act is something less than positive proof that the confession is not voluntary.

The King v. *Hla Maung*, (1946) Ran. 102, and *The King* v. *San Myint*, (1939) Ran. 97, referred to.

The fact that to avoid publicity and ensure the safety of the life of the confessing accused, the Magistrate recorded the confession and had each accused brought before him at 6 a.m. in the Senate Hall of the Law Courts Building and not in open court after giving sufficient time for reflection does not amount to any infringement of the rules framed by the High Court in Notification No. 6-General, dated 19th September 1946. The rule refers that a confession should *ordinarily* be recorded in court and during court hours. In exceptional circumstances the rule may be relaxed and there was no deliberate infringement. A contravention of the rules though to be deprecated did not render the confession inadmissible.

Emperor v. *Panchkowri Dutt*, I.L.R. 52 Cal. 67, referred to and followed.

The confessions are sufficient evidence against the confessing accused if the court is satisfied of their truth ; as against the other co-accused corroboration is required in material particulars acting or tending to connect each of the accused with the offence.

The King v. *Nga Myo*, (1938) Ran. 190 (F.B.), followed.

If by extraneous evidence or matters appearing on the record it is established that the confessing accused are not in collusion, the cumulative effect may be sufficient to remove the *prima facie* presumption of the individual unworthiness of credit. S. 114, Evidence Act, illustration (*b*), referred to.

Statements made by the accused on examination under s. 342 (2), Criminal Procedure Code, as amended by Burma Act XIII of 1945 after the accused had been called upon to enter the defence, cannot be taken into consideration even if it confesses partly or wholly his guilt, under s. 30 of the Evidence Act against the other accused persons.

Mt. Sumitra v. *King-Emperor*, A.I.R. (1940) Nag. 287, and the case mentioned therein, relied upon.

As regards evidence given on oath by an accused person under s. 342 (1), Criminal Procedure Code, as amended it may be used against the co-accused. The weight to be given to such evidence will depend on the circumstances of each case. The admissions under s. 342 (2), Criminal Procedure Code, as amended are however valuable as showing consistency.

As the act was committed before 1st August 1947 on which date the Burma Act XXXIII of 1947 came into force, the conviction should be under s. 302 and s. 34 or 109 of the Penal Code as the case may be.

Shwe Hla U v. *The King*, (1941) Ran. 58, referred to and compared.

There was no circumstance under which the accused could get a lesser sentence and in any case the question whether mercy should be extended to any one of the appellants is a matter with which this Court is not concerned.

Aung Hla v. *King-Emperor*, 9 Ran. 433, referred to.

F. J. Salisbury Havock for U Saw.

D. J. Daniel for Thu Kha, Khin Maung Yin and Maung Ni (*a*) Boni (*a*) Gani.

U Kya Gaing for Maung Soe, Thet Hnin, Yan Gyi Aung (*a*) Hla Tun and Hmone Gyi (*a*) Maung Hmone.

U Saw Hla Pru for Maung Sein (*a*) Sein Gyi (*a*) Hla Aung.

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

The judgment of the Court was delivered by

U OHN PE, J.—These are appeals under section 410 of the Criminal Procedure Code, read with section 8 of the Special Crimes (Tribunal) Act, 1947 (Burma Act LIII of 1947), which enacts that—

"Save as otherwise provided in this Act, the provisions of the Code and of any other law for the time being in force shall, to such extent as may be applicable, apply to trials before the Tribunal constituted under this Act, and to appeals from and confirmations of sentences of such Tribunal . . . ."

The Tribunal, consisting of the Hon'ble Mr. Justice Kyaw Myint, U Aung Tha Gyaw and U Si Bu, convicted the appellants, Maung Soe, Thet Hnin, Maung Sein *alias* Sein Gyi *alias* Hla Aung, and Yan Gyi Aung *alias* Hla Tun, of offences punishable under section 302 (1) (*b*) of the Penal Code as amended by the Penal Code (Amendment) Act, 1947 (Burma Act No. XXXIII of

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1947), and sentenced each of them to death. The Tribunal also convicted the appellants, U Saw, Thu Kha, Khin Maung Yin, Maung Ni *alias* Boni *alias* Gani and Hmone Gyi *alias* Maung Hmone, of the offence punishable under section 302 (1) (*b*) of the Penal Code, read with section 109, and sentenced them to death.

The facts, in brief, are as follows : On the morning of the 19th July, 1947, at about 10-30 a.m, while a meeting of the Governor's Executive Council, presided over by its Deputy Chairman (The Hon'ble U Aung San), was being held, four assassins dressed in jungle-green uniforms, with 12th Army badges on their shoulders and armed with automatic weapons, forced their entry into the Council Room, and after uttering shouts such as " Don't get up " or " Don't run away " or words to that effect, fired at those seated in conference. Having committed these murders, the four assassins left the Council Room and made for the main Staircase at the central porch of the western wing of the Secretariat Building. While making their withdrawal, they met one Maung Htwe, the Personal Body-guard of the Hon'ble Mr. Razak, and one of them shot him down. The assassins then entered the jeep which was waiting for them at the foot of the stairs and left the Secretariat compound in that jeep by the Exit Gate leading out to Sparks Street. The shooting in the Council Room resulted in the instantaneous death of the Hon'ble U Aung San, the Hon'ble Thakin Mya, the Hon'ble U Ba Win, the Hon'ble Mr. Razak, the Hon'ble Mahn Ba Khaing, all of whom were Members of the Governor's Executive Council. It also resulted in the instantaneous death of U Ohn Maung, Deputy Secretary, who had just arrived inside the Council Room when the shooting began. The Hon'ble U Ba Choe and the Hon'ble Saw San Htun, two other Councillors who

attended the conference, received fatal injuries which resulted in their death after their removal to the Rangoon General Hospital. Maung Htwe similarly succumbed to his injuries after his arrival in hospital. Two other Councillors, the Hon'ble U Aung Zan Wai and the Hon'ble Pyawbwe U Mya, escaped without any injury; while the Hon'ble U Ba Gyan received a bullet-wound on his right ring-finger while he lay flat on the floor of the Council Room. U Shwe Baw, the Secretary of the Council, was also unhurt.

Among the first arrivals at the Council Room after the incident were Bo Tun Hla (P.W. 6), the then Personal Assistant to the Hon'ble U Aung San, and U Aung Chein (P.W. 1), Commissioner of Police, Rangoon. When they entered the room, they could still get the smell of gun-powder inside. They saw empty cartridges, spent bullets and live cartridges strewn all over the floor, and they also saw a Sten-gun magazine fully charged with cartridges. U Po Sein (P.W. 18,) who arrived soon after the arrival of Bo Tun Hla and U Aung Chein, picked up from the floor 23 empty Tommy-gun cartridges and 8 empty Sten-gun cartridges exhibited in the case. The Police Station Inspector, Mr. Bell (P.W. 59), also assisted U Po Sein in picking them up. This officer also picked up the Sten-gun magazine full of cartridges and handed them over to U Po Sein. Later, U Po Sein handed over the empty cartridges, live cartridges and the Sten-gun magazine to U Than Pe (P.W. 19), the then Superintendent of Police, Central, who took them to Botataung Police Station and handed them over to the Guard-Writer Maung Aye Pe (P.W. 68), who entered them in Register No. VI in the presence of U Than Pe. U Hla Pe (P.W. 72) picked up 7 empty Tommy-gun cartridges, 14 empty Sten-gun cartridges and 3 spent bullets, which he later handed over to Maung Su

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(P.W. 69), the Guard-Writer who relieved Maung Aye Pe. All these empty cartridges were kept at Botataung Police Station in sealed cigarette tins (Exhibits 6 & 6A), and they were later taken over by U Hla Baw (P.W. 30) on the 21st of July, 1947. Two empty Sten-gun cartridges were picked up by U Soe Yin (P.W. 53) from near Maung Htwe's body at the Secretariat, and these were handed over by him to Mr. Sant Singh (P.W. 27) on the 21st July to be taken to U Hla Baw for examination.

In the meantime, at about 10 a.m, one Hla Tin (P.W. 47), Clerk of Mr. Khan (P.W. 39), who was keeping a watch that morning of the house and compound of the appellant U Saw in 7 Ady Road, Rangoon, reported to Mr. Khan that he had seen a jeep go out of U Saw's house, bearing the number RC 1814 and carrying four or five men wearing grey-coats. He also reported that a little after the jeep had left, he saw U Saw go up to the gate and whisper something to the gate-keeper before going back to his house. At about 11 a.m. Mr. Khan left his house to go to his office in Rangoon. As he came out of his gate, which was diagonally opposite to that of U Saw, he saw a jeep coming down Ady Road from the direction of Prome Road at a great speed. Mr. Khan stopped his car in order to avoid a collision, as he did not then know whether the jeep was or was not going into U Saw's compound, U Saw's gate being nearer to Prome Road than was his. He then saw the jeep turn hurriedly into U Saw's gate and saw the gate quickly thrown open and closed again after the jeep had entered the compound. Being suspicious, Mr. Khan drove up to a spot on the Prome Road from where he could see the front of U Saw's house, and from that spot saw a group of men clustered around the jeep somewhere in front of U Saw's house. He then proceeded to his office in Barr Street,

which took him approximately about 25 minutes by car. On receiving news of the assassination of the Councillors, sometime between 12 a.m. and 12-30 p.m., he immediately became suspicious of the jeep which he had seen entering U Saw's house about an hour earlier. He immediately went to the house of U Tun Hla Oung (P.W. 38), the then Deputy Inspector-General, Criminal Investigation Department, and not finding U Tun Hla Oung at home, went back to his office with a view to send a telephone message to U Tun Hla Oung at his office. U Tun Hla Oung received the message while he was in conference with U Ba Maung, the then Inspector-General of Police, and U Ka Si, the then Chief Secretary to the Government of Burma. He asked Mr. Khan to come over to the Secretariat, and Mr. Khan arrived there at about 1-45 p.m. After hearing what Mr. Khan had to tell him, U Tun Hla Oung reported the matter to the Inspector-General of Police and the Chief Secretary, and, as a result, an immediate raid was ordered to be made on U Saw's house and compound. This raid actually took place at about 3 p.m., the raiding party being led by U Soe Yin (P.W. 53), Deputy Superintendent of Police. All the guns and ammunitions which were seized from U Saw's house on that day as shown in the Search List (Exhibit M) were licensed. At about 5-30 p.m., when U Tun Hla Oung himself visited U Saw's house, he saw U Saw and the other inmates of the house, who were under arrest, being put into trucks to be taken away. Under the portico of the house, parked back to back, were two jeeps. The one immediately under the portico had a hood on, while the other had none. The one with the hood bore the numbers RB 9831 both in its front and its rear. The front number plate was a piece of iron about 3 feet long, tied to the front bumper with pieces of electric wire. The back number was

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painted on the body and the paint was still wet when U Tun Hla Oung saw the numbers both at the front and in the rear; the numbers were in white paint. In the garage there was a saloon car and a 15-cwt. Fordson Truck bearing the number "MTLA 183." While U Tun Hla Oung was still at U Saw's house, he received the report (Exhibit B) of U Aung Kyaw Sein (P.W. 31), a C.I.D. officer in plain clothes who had been deputed to keep a watch over U Saw's house and compound since the 16th of July. He also received the report (Exhibit B3) of Maung Hla Tin (P.W. 47), Clerk of Mr. Khan, who was also deputed to watch U Saw's house and compound. The search inside the house and the compound lasted till about 6-30 p.m., so that no search could be conducted in the waters which surrounded the compound. That night, two officers of the Criminal Investigation Department, Mr. Boon Khine, and another, stayed the whole night with the members of the Striking Force and the members of the Insein Armed Police who guarded the house and compound. U Soe Yin (P.W. 53) himself remained there till midnight and came back again to the place at about 7 a.m. the next morning. He found the place guarded and watched as arranged on the previous night. In the morning a search inside the compound was made, and after tea-time, with the assistance of the Striking Force, a search was made in the waters near and about the shrine. At about 2-30 or 3 p.m., a box of ·303 ammunition was found in the waters near the shrine, and when this find was made, U Soe Yin asked the man diving and searching near the brick steps and the white corrugated iron hut in the compound to go over and join the search near the shrine. Maung Soe Thein (P.W. 24), a member of the Striking Force, found two Tommy guns and four cases of ·303 ammunition at a spot on the east of the shrine indicated by the letter "J" in

the map (Exhibit E). Maung Tin Maung (P.W. 25), another member of the Striking Force, found four cases of ·303 ammunition, two Tommy guns and one Sten gun at a spot near the shrine indicated by the letter "I" in the map (Exhibit E). The search by these members of the Striking Force was supervised by Bo Saw Thaung (P.W. 26) as well as by U Soe Yin. Soon after the finding of these arms and ammunition in the waters near the shrine, Mr. Jupp (P.W. 52), the then Superintendent of Police, Criminal Investigation Department, arrived and U Soe Yin reported to him about the finding of these arms and ammunition. Mr. Jupp saw them on the bank of the lake near the shrine. He was so pleased that he gave rewards to the persons who found them. The particulars of these arms and ammunition were entered in the Search List (Exhibit N), which was prepared by Mr. Sant Singh and attested by the search witnesses, Mr. Khan, U Po Han (P.W. 62) and one U Thein Gywe. The weapons were as follows:

One Tommy gun No. S266236.
One Tommy gun No. S138164.
One Tommy gun No. S91401.
One Tommy gun No. S161373.
One Sten gun No. 22847.

These weapons were taken by Mr. Jupp himself to the Town Lock-up, where they were deposited for the night with U Maung Maung (P.W. 29), Police Station Inspector in-charge of that Lock-up. They were taken back the next day by Mr. Jupp and handed over to Mr. Sant Singh with instructions to take them to U Hla Baw (P.W. 30), the Principal of the Detective Training School, Insein, together with the note (Exhibit P). Mr. Sant Singh accordingly proceeded to U Hla Baw's office and handed over to U Hla Baw the firearms, along with the exhibit note. He also

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handed over to U Hla Baw two empty Sten gun cartridges as directed by U Soe Yin, as well as the Sten gun No. R41157 and the 9 mm. sub-machine gun No. B301456, which were the licensed weapons seized from U Saw's house on the 19th of July.

On the 20th July, as well as on subsequent days, the house and compound of U Saw were closely guarded by the police, as well as by the members of the Striking Force. On the 29th July, Maung Shein *alias* Yan Gyi Naing and Tin Shwe (cited by the prosecution but waived) accompanied a police party to U Saw's place, and there Maung Shein pointed out a heap of ashes, from which the unburnt piece of *longyi* (Exhibit 8A) was retrieved. From a place in the water near the shrine pointed out by Yan Gyi Naing, five soft green hats and a brick (Exhibit 4) were salvaged. A motor-car number plate bearing the number RA 3123 (Exhibit 1A) was found in the waters of the lake at a place pointed out by Maung Tin Shwe (point "M" in the map, Exhibit E). On the next day, Sein Maung (cited by the prosecution but waived) pointed out a heap of burnt cloth in the fireplace inside U Saw's kitchen, from which was picked up a half burnt piece of the 12th Army shoulder-badge (Exhibit 24)—point "N" in the map (Exhibit E). On the 31st July, the appellant Khin Maung Yin produced the two tins of white and yellow paint and the brush (Exhibit 25) from an almirah in the 1st appellant U Saw's bedroom. All these articles were found and seized in the presence of U Ba Kyine (P.W. 37), a Magistrate from Insein, who was specially deputed by the District Magistrate, Insein, to witness the searches. They were duly entered in the Search List (Exhibits 2A to 2C).

The discoveries mentioned above were followed on the 1st of August, 1947, by the confession (Exhibit J) of the approver Ba Nyunt, made before U Hla Gyaw

(P.W. 36), the then 5th Additional Magistrate, Rangoon. Appellant Yan Gyi Aung and Thu Kha gave their confessions (Exhibits Y and Y1) before the same Magistrate on the 2nd August. The next day being Sunday, the confession of Maung Sein (Exhibit Y2) was recorded by the same Magistrate on the 4th August. On the same day, Tun Shein (cited but waived) pointed out the spot in the lake near the 1st appellant's house, from where a motor-car number plate (Exhibit 1D) with the number RB 9831 in yellow paint was salvaged by the diver Pascoe (P.W. 46)—point "P" in the map (Exhibit E). On the 5th August, the appellant Maung Ni gave his confession before U Hla Gyaw, and on the same date, appellant Yan Gyi Aung pointed out a place in the lake, from which the diver Pascoe recovered the number plate (Exhibit 1C) bearing the number RA 3123—point "Q" in the map (Exhibit E). On the 6th August, the appellant Khin Maung Yin's confession (Exhibit Y4) was recorded by U Hla Gyaw. A further search in the bed of the lake in the immediate vicinity of the 1st appellant's house was conducted by Lieutenant Coulson (P.W. 32) and his men, including Sapper Jit Singh (P.W. 33) and Bim Row (P.W. 34). The search was systematic and it began on the 6th August. It was continued day to day until the 14th August. The search party started working from the steps from the point marked "W" in the map (Exhibit E) and worked towards the north and north-west. When that area was finished, they went over to the side of the shrine, working eastwards. On the 12th August, they started from the shrine, working towards the steps. It was in this third area that the number plate bearing the number RC 1814 in yellow paint on one side and RB 4140 on the other was found at a spot about 22 feet to the east of the shrine—point "R" in the map (Exhibit E).

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Meanwhile, on the 8th August, 1947, an identification parade was held in the Town Lock-up, Rangoon, under the supervision of U Aung Chein (P.W. 35), a Stipendiary Magistrate of Rangoon. U Htin Baw (P.W. 12) identified the appellant Maung Soe as one of the four men in Army uniform whom he saw walking along the verandah of the west wing of the Secretariat Building on the morning of the occurrence and entering the Council Room immediately before the shooting took place. Maung Thaung Sein (P.W. 14), the *minsay* whose duty was to wait at the door of the Hon'ble U Aung San's room, identified the appellant Thet Hnin as another of these four men. U Htin Baw and Maung Than (P.W. 15) identified the appellant Yan Gyi Aung as the third of the four men. Maung Ohn (P.W. 16) and Maung Htwe (P.W. 17) identified the appellant Thu Kha as the driver of the jeep in which the assassins escaped after the murders were committed.

Out of the six appellants who gave confessions, appellant Ba Nyunt was granted a conditional pardon by the District Magistrate, Rangoon, and he was made an approver in the case. The prosecution sought to establish by the evidence of the approver, the confessions of the other five accused in the case, the evidence of the watchers Maung Hla Tin (P.W. 47) and Aung Kyaw Sein (P.W. 31), the evidence of the witnesses who identified appellants Maung Soe, Thet Hnin, Yan Gyi Aung and Thu Kha, and the circumstantial evidence in the case, that the assassinations of the Hon'ble U Aung San and the Councillors of the Governor's Executive Council took place as a result of the conspiracy which was hatched by the appellant U Saw as the chief conspirator, and the other appellants, who were his followers.

Before the Special Tribunal the approver adhered to the story told by him in his confession; so did the

appellants Maung Sein, Thu Kha and Khin Maung Yin. The appellant Maung Ni tried to vary the statements contained in the confessions by making statements more advantageous to him when examined as a witness on behalf of his own defence. The appellant Yan Gyi Aung resiled completely from the story told by him in his confession, and alleged that it was a false confession which had been extorted from him by the police by threat and torture. The appellants U Saw, Maung Soe, Thet Hnin and Hmone Gyi denied their complicity in the conspiracy or in the murders committed in pursuance thereof and disclaimed all knowledge about them. U Saw's defence was that he was ill in bed on the morning of the 19th July, 1947. Maung Soe, Thet Hnin, Yan Gyi Aung and Hmone Gyi pleaded *alibis*.

The learned Members of the Tribunal, after a careful examination of the evidence adduced for the prosecution and for the defence, came to the conclusion that the appellants should be convicted and sentenced as already mentioned above : hence this appeal.

The decision of the Tribunal has been attacked on the ground that it is wrong both on facts and in law. At the very outset it has been urged that the Special Tribunal had no jurisdiction whatsoever to try the case against the appellant U Saw and the other appellants in this case, as the Special Tribunal Act was *ultra vires*. In our opinion, this contention cannot prevail. Now, section 1 of the Government of Burma (Temporary) Provisions Act, 1945, which was published in the Government of Burma, Home Department, Notification No. 94, dated Simla, the 24th July, 1945, is in the following terms :

"Notwithstanding anything in the proviso to sub-section (3) of section 139 of the Government of Burma Act, 1935, the Proclamation under that section, made on the tenth day of December, 1942, and any proclamation made after the passing of

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this Act varying that proclamation, shall not cease to be in force by reason only that it has been in force for three years, and any such proclamation which would, but for this sub-section, cease to be in force for that reason, shall, if the resolutions in that behalf required by the said proviso are from time to time passed by both Houses of Parliament, continue in force, unless revoked, until the ninth day of December, 1948."

The requisite proclamation, which was passed by the House of Commons on the 2nd of April, 1947, was in the following terms :

"RESOLVED that this House approves the continuance in force of the proclamation issued under section 139 of the Government of Burma Act, 1935, by the Governor of Burma on the 17th October, 1945, a copy of which proclamation was presented on the 22nd February, 1946."

(*vide* Hansards Parliamentary Debates, House of Commons, Volume 435, No. 81, page 2144).

The Resolution in the House of Lords, which was passed on the 15th April, 1947, was also in the following terms :

"That this House approves the continuance in force of the Proclamation issued under section 139 of the Government of Burma Act, 1935, by the Governor of Burma on the 8th October, 1945, a copy of which was presented to this House on February 26th, 1946."

(*vide* Hansards Parliamentary Debates, House of Lords, Volume 146, No. 56).

Therefore, at the time the Special Crimes (Tribunal) Act, 1947 (Burma Act LIII of 1947), was enacted on the 30th August, 1947, the Proclamation issued under section 139 of the Government of Burma Act, 1935, by the Governor must be deemed to be still in force, and the Governor must be deemed to have all the powers vested in and exercisable under the Act by the Legislature of Burma in either Chamber thereof.

In the case of *Chitambaram* v. *The King-Emperor* (1) where the main specific objection taken on behalf of the appellants was that the Governor had infringed the provisions of the proviso to section 131 of the Government of Burma Act, 1935, by enacting the Special Judges Act (Burma Act X of 1943), because he had, by that Act, assumed to himself the powers vested in, or exercisable by, the High Court, or had suspended the operation of the provisions of the Act in relation to the High Court, it was pointed out by their Lordships of the Privy Council that the Governor did not interfere with the High Court or its jurisdiction. Their Lordships observed that there was nothing to give exclusive jurisdiction to the High Court, and that it was a fallacy to say that, by establishing a new Court, the Governor was assuming to himself the powers vested in the High Court, that he was not making himself the Judge, and that he was entitled to vest the right to appoint the Judges of the new Court as he did in the Special Judges Act. It was also pointed out that there was no law to prohibit the Legislative Assembly in Burma from establishing a new or collateral Court. In our opinion, the observations of their Lordships in regard to the Special Judges Act (Burma Act X of 1943) apply with equal force to the Special Crimes (Tribunal) Act, 1947. The fact that at the time of the setting up of the Special Crimes Tribunal the High Court of Judicature at Rangoon was holding its Criminal Sessions is quite irrelevant.

The next contention which was raised by the learned counsel for U Saw was to the effect that the trial was unsatisfactory because U Saw did not have the opportunity of having himself defended by a lawyer of his choice. Now, section 340 of the Criminal Procedure Code provides that any person

(1) (1947) R.L.R. 66 (P.C.).

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accused of an offence before a criminal Court, or against whom proceedings are instituted under the Code in any criminal Court, may of right be defended by a pleader. U Saw was in fact defended by a pleader, Mr. Vertannes, briefed by him right from the beginning of the trial, which began on the 15th October, 1947. We have no doubt that "the learned counsel from England" referred to in the Diary entry dated the 8th October, 1947, was not Mr. Vertannes but a King's Counsel from England whose services U Saw was trying to procure. However, it would appear that U Saw was satisfied with the services of Mr. Vertannes at the preliminary stages of the proceedings. The reference to "learned Counsel from England" again appears in the Diary entry dated the 4th November, when Mr. Vertannes asked for an adjournment for a fortnight to enable the learned counsel from England to appear for U Saw. The hearing was adjourned till the 17th of November, 1947. On the latter date, the Court was informed that, according to a cablegram from one "Gyi", Mr. Curtiss-Bennett, K.C., had lost his priority in respect of a seat on the seaplane which he had booked, owing to the delay in remitting his fees. Mr. Vertannes, on being asked to communicate by cablegram with Mr. Curtiss-Bennett, promised to do so, and the case was adjourned for mention on the 20th November, 1947. On that day, Mr. Vertannes produced a cablegram from Mr. Gyi stating that both the solicitor and Counsel would be cabling to him from London, and the case was again adjourned till the 21st November, 1947. On the next date Mr. Vertannes produced a cablegram from Mr. Curtiss-Bennett stating that he had been briefed for the defence of U Saw, that he was waiting for an Air passage and that he would cable the date of his arrival in Rangoon as soon as it could

be ascertained. The Court then refused to give any adjournment further than the 24th November, 1947, on the ground that the date of Mr. Curtiss-Bennett's arrival was uncertain. The case then proceeded from day to day from the 24th November, 1947. On the 25th as well as on the 26th, November, Mr. Vertannes applied for an adjournment on the ground that Mr. Curtiss-Bennett would arrive on the 5th or the 6th December, but the Tribunal refused to give the adjournment asked for. Mr. Curtiss-Bennett actually appeared for the first time on the 8th December, 1947. It has been strongly urged by the learned counsel for the appellant that after being definitely told of the date of Mr. Curtiss-Bennett's arrival, the Tribunal should have adjourned the case to a date subsequent to the 6th December, 1947. However, a perusal of the proceedings would show that many witnesses for the prosecution had already been summoned to be examined on the dates subsequent to the 24th November, 1947, and that to allow an adjournment asked for, would mean that all these witnesses would have to be resummoned. In these circumstances, and considering that U Saw was still represented by Mr. Vertannes who appeared for him from the very beginning, we do not see how the Special Tribunal could be blamed for refusing to give any further adjournments. Furthermore, after the arrival of Mr. Curtiss-Bennett, the defence was given every opportunity of recalling any of the prosecution witnesses who had already been examined for the purpose of further cross-examination. If the defence did not take full advantage of that concession, the blame could scarcely be attached to the Tribunal. The contention that U Saw did not have a fair trial because he was not given an opportunity of being defended by a pleader of his choice is not really borne

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out by the facts mentioned above ; in fact, the learned counsel from England seems to have taken full advantage of the privilege accorded to him of recalling such of the prosecution witnesses as he wished to have for further cross-examination.

The next important point of law which we should discuss at this stage is whether the confessions given by Maung Sein, Yan Gyi Aung, Thu Kha, Khin Maung Yin and Maung Ni should be ruled out as inadmissible under section 24 of the Evidence Act, which provides that " a confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person proceeding from a person in authority and sufficient in the opinion of the Court to give the accused person grounds which would appear to him reasonable for supposing that, by making it, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him." Now, it has been held in *The King* v. *Hla Maung* (1), following the decision in *The King* v. *San Myint* (2), that the phrase " appears to the Court" occurring in section 24 shows that something less than positive proof in the nature of a well-grounded conjecture or probability though not a mere possibility, that the confession is not voluntary, is sufficient.

[The learned Judges then discussed the evidence and added :]

We are firmly convinced that by the date the approver Ba Nyunt gave his confession there was such a mass of circumstantial evidence connecting the

(1) (1946) Ran. 102. (2) (1939) Ran. 97.

appellants with the crime that the appellant who did give the confession realized that the game was up and that the only salvation, if any, lay in making a clean-breast of the whole affair.

It has been contended on appellant's behalf that the Magistrate U Hla Gyaw (P.W. 36) who recorded the confessions in this case contravened the rules framed by this Court in its Notification No. 6 (General), dated the 19th September, 1946, in that the confessions were, as admitted by the Magistrate, not recorded in open Court and during Court hours and the confessors were not remanded to a jail. U Hla Gyaw explains that to avoid publicity and to ensure the safety of the confessors themselves he had each confessor brought before him at 6 a.m. in the Senate Hall on the top floor of the Law Courts Building and after giving him two hours' time for reflection would begin recording his confession at about 8 a.m. He apparently adopted the same procedure as regards each and every one of the confessors and recorded the confessions of Ba Nyunt, Yan Gyi Aung, Thu Kha, Maung Sein, Maung Ni and Khin Maung Yin and the statements of Thet Hnin and Hmone Gyi from day to day from the 1st August, 1947. Considering the fact that feelings were running high at the time, we are of the opinion that the Magistrate in taking the precautions he did, exercised a wise discretion. After all, the rules in question are in the nature of counsels of prudence rather than rules of law to be rigidly observed in each and every case. This is clear from rule 1 of the rules, which prescribes that a confession should ordinarily be recorded in open Court and during Court hours but that in exceptional circumstances the rule may be relaxed. Regarding the contention that the confessors should have been remanded to a jail, the Magistrate says in effect that he had no choice in the matter since

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the confessors were then under detention under section 5 of the Public Order Preservation Act, and he allowed the police officers who had brought the confessors before him to take them away after the confessions had been recorded In the circumstances mentioned by the Magistrate we do not think that there was any deliberate infringement of the rules framed by this Court. In *Emperor* v. *Panchkowri Dutt* (1) it was held that a contravention of the rules of the Calcutta High Court similar to the rules of this Court for recording the confessions of accused persons, though to be deprecated, did not render a confession inadmissible if the Court was satisfied that it was voluntary.

The next point urged before us is that although, according to U Thein Ohn (P.W. 49), it was on the 25th July, 1947, that Khin Maung Yin and Maung Sein expressed their willingness to confess, they were not produced before the Magistrate till the 1st August following. U Thein Ohn explains the delay by saying that he immediately reported the matter to his superior officers and that at the time the situation in the country was uncertain and there were several matters requiring attention. U Thein Ohn's explanation is not unreasonable, and in the circumstances of this case the utmost that can be said against the confessions is that they should be treated with caution; and if after due caution has been exercised we are satisfied that the confessions are free and voluntary we may proceed to consider whether they are true also.

Now, the Magistrate has complied with the provisions of law embodied in sections 164 and 364 of the Code of Criminal Procedure. He put questions to the confessors to ascertain whether they wished to

(1) I.L.R. 52 Cal. 67.

confess voluntarily, he gave them time for reflection, he examined their persons carefully for marks of violence, and they told him that they desired to confess having been seized with remorse. That the precautions taken by the Magistrate were effective in securing free and voluntary confessions is clearly borne out by the facts that out of the eight persons produced before him two men merely contented themselves with making statements without implicating themselves and that of the six persons who confessed five including the approver Ba Nyunt have adhered to their confessions throughout and the sixth person who has gone back on his confession, Yan Gyi Aung, is closely related to the principal appellant U Saw.

For these reasons we consider the confessions to be voluntary.

[The learned Judges then discussed the evidence of Ba Nyunt and held that his evidence was corroborated in material particulars.]

The confessions, both retracted and unretracted, are sufficient evidence as against the confessors if the Court is satisfied of their truth. However, before they can be considered as lending assurance to the testimony of the approver as against the other co-accused in the case, the ruling in the case of *The King* v. *Nga Myo* (1), we consider, is apposite. In regard to the co-accused in the case, the corroboration required is corroboration in material particulars connecting or tending to connect each of the accused with the offence. It is not enough that the corroboration shows the approver to have told the truth in matters unconnected with the guilt of the accused. However, provided that it has been established by extraneous evidence or *matters appearing on the record*

(1) (1938) Ran. 190 (F.B.).

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that the accomplices are not acting in collusion with one another, the cumulative effect of the evidence of two or more of them may be sufficient to remove the *prima facie* presumption of the individual unworthiness of credit of their statements, and if this be the case, a conviction may legitimately be recorded upon their statements alone, if the Court is convinced of their truth. The same observation applies to the cumulative effect of the evidence of an accomplice and the confession of the co-accused where the presumption of their unreliability has, in the special circumstances, been rebutted.

Now, by illustration (*b*) to section 114 of the Evidence Act "the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars." The Court should, however, have regard to the following facts in considering whether the above maxim does or does not apply to the particular case before it: A crime is committed by several persons: **A**, **B** and **C**, three of the accused are captured on the spot and kept apart from each other: each accused gives an account of the crime implicating **D**, and the accounts corroborate each other in such a manner as to render previous concert ***highly improbable.***

The example just quoted is an instance where three of the criminals gave confessions in such circumstances as to make previous concert among them highly improbable. However, one can easily envisage circumstances which render previous concert "highly improbable", even though the accomplices have not been kept apart from each other.

In the present case, the approver Ba Nyunt, the appellant Khin Maung Yin and the appellant Yan Gyi Aung were, no doubt, kept together for a few days in Insein Jail after their arrest and before they were brought to the Town Lock-up. Therefore, it

cannot be said that they had no opportunity of having a discussion before they gave confessions in this case. Nevertheless, in our opinion the circumstances are such as to make it highly improbable for Khin Maung Yin and Yan Gyi Aung to have colluded with Ba Nyunt in order to give a confession falsely implicating the appellant U Saw. U Saw's wife is the own aunt of the appellant Khin Maung Yin, while Yan Gyi Aung's father is U Saw's own cousin. If, as has been suggested on behalf of the defence, it was really Ba Nyunt, and not U Saw, who had been the chief conspirator in this case, we see no possible reason why these two appellants should have falsely stated that U Saw was the chief conspirator. Therefore, we consider that the confessions of Khin Maung Yin and Yan Gyi Aung should be taken as in corroboration of the testimony of the approver Ba Nyunt, even if the same cannot be said about the confessions of the other co-accused in the case.

[The learned Judges then discussed the corroborating evidence in detail and held that Ba Nyunt's evidence has been corroborated.]

The nine persons whom the approver Ba Nyunt had implicated were persons residing with him at that time, inside U Saw's compound. The appellants Maung Soe, Thet Hnin, Thu Kha and Maung Sein were occupying the same corrugated iron hut with Ba Nyunt. Khin Maung Yin and his wife occupied a room in the small brick building (shown by the letter "*Z*" in the map, Exhibit E), the other room being occupied by Maung Ni and his wife. Hmone Gyi used to sleep in the barrack near the gate as he had to act as a night watchman. Out of the nine appellants five gave confessions more or less corroborating the approver's story and only one Yan Gyi Aung resiled

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from it, he being a close relation by blood of the appellant U Saw. These and the other circumstances already mentioned above afford strong corroboration of the general truth of the approver's story.

As for the confessions given by the appellants it will be convenient for us to deal with them when the case against each of them is considered; otherwise there will be unnecessary repetitions. At this stage we would like to lay down the law as we understand it of the use to be put of the statements made by the appellants when they were examined under the provisions of sub-section (2) of section 342 of the Criminal Procedure Code as amended by the Code of Criminal Procedure (Amendment) Act (Burma Act XIII of 1945). As regards the law as it stood before section 342 of the Criminal Procedure Code was amended, the following observations of a Bench of Nagpur High Court in the case of *Mt. Sumitra* v. *King-Emperor* (1) seem apposite :

"The question of law which arises for consideration at this stage is whether these statements made under section 342, Criminal Procedure Code, can be taken into consideration under section 30, Evidence Act, as if they were confessions recorded under section 164, Criminal Procedure Code (read with section 364, Criminal Procedure Code). In 27 Nagpur Law Reports 163 it was held that they were admissible under section 30, Evidence Act. There is however a divergence of judicial opinion on this point as will be evident from 45 All. 323, 54 Bom. 531, 54 Mad. 788 and 16 Lah. 651.

In 45 All. 323 Walsh J. held that the expression 'proving a confession' is inapplicable to the procedure where a Judge asks questions and an accused person gives explanations under section 342, Criminal Procedure Code, and that even if that statement amounts to a clear confession of his own guilt it cannot be taken into consideration under section 30, Evidence Act, against the co-accused. The learned Judge interpreted the word 'proving' occurring in section 30, Evidence Act, as meaning

(1) A.I.R. (1940) Nag. 287.

tendering evidence at the trial that on some previous occasion the accused made a confession. He also pointed out that to permit any material to be used against an accused such as a confessional statement made by his co-accused in the dock would be tantamount to re-opening of the case for the prosecution to enable it to make additions to it and that such a procedure could not have been contemplated by section 30, Evidence Act, inasmuch as it would be repugnant to the first principles of criminal law. This view was accepted as sound by the Madras High Court in 54 Mad. 788 and A.I.R. (1929) Mad. 285 in preference to the opposite view taken in 38 Mad. 302.

In 54 Bom. 531, Mirza J. discussed the question at some length and concluded that the language of section 30 did not justify a distinction between a confession made by an accused person before the trial and one in the course of the trial. Broomfield J., who was a party to the Division Bench which heard the case conceded the cogency of the reasoning of Walsh J. in 45 All. 323 and was inclined to the view that the language of section 30 was clearly not very appropriate to the statement made or put in from the dock. The learned Judge was, however, not disposed to put a too restricted interpretation on the word 'confession' and the word 'proof' and regarded the nature of section 30, Evidence Act, as wide enough technically to cover a confessional statement made or put in from the dock. It is clear that it was with some hesitation that the learned Judge dissented from the view taken by Walsh J. in the Allahabad case. In 16 Lah. 651 the learned Judge who decided the case took the view that the word 'proof' occurring in section 30, Evidence Act, when understood in the light of the definition of that word given in section 3 of that Act, could be taken into consideration as a matter before the Court although not as evidence.

This reasoning is not very intelligible. The statement recorded by the Court under section 342, Criminal Procedure Code, is indeed 'a matter before the Court' and that matter, although it happens to be a confession, would require no proof whatever. There is obviously a difference between proof a confession and proof of a fact. A confession is proved like of any piece of documentary evidence if it is in writing or by the mouth of witnesses if it is oral. Confession, it is well known, are of two kinds, judicial and extra judicial. A judicial confession is recorded by the Magistrate and it proves itself by virtue of

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section 80, Evidence Act. Extra judicial confessions are those which are made by a party elsewhere than before a Magistrate. They are proved by witnesses who heard the speaker's words constituting the confession. When the fact of the confession is proved, that itself becomes evidence which serves as a means to the ascertainment of the fact in issue. The definition of the word 'proved' given in section 3, Evidence Act, relates to proof of a fact in issue and not a statement recorded by the Court in the presence of the persons under trial. Section 30 speaks of the proof of a confession and not proof of a fact in issue. When the confession is actually recorded by the Court in the presence of the accused persons it is such a patent fact that no evidence is required to prove that the statement was made. When the meaning of the words used in section 30 are so clear there can be no room for any interpretation. The word confession used there clearly means such a confession as is required to be proved at the trial as a part of the prosecution evidence. It cannot therefore signify any matter which comes on the record at the end of the prosecution evidence."

We have looked at all the cases referred to in the above observation and we entirely agree that the statement made by a co-accused confessing partially or wholly his guilt when examined under section 342, Criminal Procedure Code, cannot be taken into consideration under section 30, Evidence Act, against the other accused. All the more so, when as in this case the examination under sub-section (2) of section 342, as amended, was only made after the appellants have been called upon to enter upon the defence.

As regards the evidence given by an accused under sub-section (1) of section 342 of the Criminal Procedure Code, as amended, it is clear from proviso (*b*) to that section that such evidence may be used against the co-accused in the case. The weight to be given to such evidence will of course depend upon the circumstances of each case.

The admissions made by the appellants when they were examined under section 342 (2) of the Criminal

Procedure Code, as amended, are however valuable as showing that they have been telling a consistent story throughout.

The case against each of the appellants will now be discussed.

[The learned Judges then discussed the evidence against each of the accused separately and found them guilty and then proceeded to consider U Saw's case.]

Last but not least we come to U Saw who has been characterized by the prosecution as the chief conspirator or the brain directing the assassination which took place on the morning of the 19th of July 1947. The circumstances which appear to us to have been established against U Saw by the evidence on record will be stated below :

(1) All the assassins who entered the Council Chamber on the morning of the 19th of July to carry out the assassination resided in his compound.

(2) Three of these men Maung Soe, Thet Hnin and Maung Sein were senior members among those residing in his compound and Yan Gyi Aung is the son of his own cousin.

(3) Of the persons who went in the Fordson Truck Khin Maung Yin is his wife's nephew and Ba Nyunt has been described by himself as having obtained eminence among his followers.

(4) The jeep which carried the assassins to and from the Secretariat Building was his and it went out of his compound at about 10-5 a.m. on the 19th of July to return thereto at about 11 a.m.

(5) The Fordson Truck which took Ba Nyunt and others that morning was his. It left his compound at about 8-30 a.m. to return thereto about 5 minutes after the return of the jeep.

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(6) All the weapons used by the assassins which were discovered in the water near his shrine on the 20th July have been satisfactorily identified, as those used in the assassination.

(7) All the assassins were arrested in his compound about four hours after the assassination.

(8) Two of the assassins gave confessions implicating him, so did four others implicated in the crime.

(9) Out of the confessors, one turned approver and four others adhered to their confessions. The one who resiled is his own nephew.

(10) One of the confessors (Khin Maung Yin) is the nephew of his wife while the other is his own.

(11) The confessions were found to be voluntary and true and in so far as the confessions of Khin Maung Yin and Yan Gyi Aung are concerned it was held that these confessions could not have been made in collusion with the approver.

(12) One of the watchers Aung Kyaw Sein saw him come up to the truck to give something before the truck left his compound that morning.

(13) All the conspirators were under oath of fidelity to him.

It has been strenuously urged on behalf of this appellant that the whole case has been fabricated by the police against him. It has also been suggested that if any one of the inmates of his compound took part in the conspiracy to murder the Executive Councillors it was entirely without his knowledge and consent and that he would have disapproved of such a conspiracy if he had known about it. It was also suggested that the chief conspirator was probably Ba Nyunt, who after having carried out his nefarious design attempted to throw the blame on him in collusion with the other persons who gave confessions. It was also

urged that if U Saw had been the brain of the enterprise he would not have made such elementary errors as to direct the jeep to come out of the Secretariat compound by the Sparks Street gate (which would have involved a circuitous route round the south of the Secretariat compound to get to Judah Ezekiel Street), or to allow the assassins to return to his compound after the crime was committed.

None of these contentions are, in our opinion, tenable. There seems no reason why the police should have fabricated the case against U Saw so as to exonerate the real leader of the enterprise. Furthermore, in view of the circumstances mentioned it is impossible for the assassins and the abettors to have left U Saw's compound and return thereto without his knowledge. Even if Ba Nyunt wished to foist a false case on U Saw it is most unlikely that Khin Maung Yin and Yan Gyi Aung would have been a party to it. As regards the jeep leaving the Secretariat compound by the Sparks Street gate it must be remembered that that gate was the closest to the western porch of the Secretariat Building and that to leave the compound by the Judah Ezekiel Street gate would have involved the crossing of the quadrangle between the western and the eastern wing of the Secretariat. Furthermore, there is in evidence that the offices of the Inspector-General of Police and the C.I.D. were at the south-eastern corner of the Secretariat Building and that in fact a meeting of high police officers was in progress in the Chamber of the Inspector-General of Police at the time of the assassination.' As regards the reason why the jeep with the assassins was allowed to return to U Saw's compound after the assassination, this was the safest thing to do. There is in evidence the fact that by about 11 a.m. U Po Sein (P.W. 18) had sent out radio messages to all parts of the city to keep a

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look-out for a jeep and to search all moving jeeps. Such a contingency must have been envisaged by U Saw at the time he directed that the jeep should return to his house after committing the crime. Furthermore, it could hardly be envisaged by him that the police would have raided his house four hours after the assassination. In fact but for the foresight of U Tun Hla Oung (P.W. 38) in enlisting the help of Mr. Khan to keep a watch over the house and compound of U Saw in view of the recent cases of theft of the Bren guns and ammunition in which U Saw was suspected to be involved, the public spiritedness of Mr. Khan and the large measure of luck involved in Mr. Khan coming across the jeep carrying the assassins back to U Saw's compound, the probabilities are that U Saw's house would not have been raided at all and this crime remain undetected till to-day.

U Saw's defence was that he was more or less confined to his bed on the morning of the 19th of July. In this case he is supported by the evidence of U Tin Ohn (D.W. 3), Hla Myat Soe (D.W. 5), and Kyaw Than (D.W. 6). However, these witnesses are probably friends and adherents of U Saw and the evidence such as that given by them does not inspire confidence.

U Saw must be convicted of the offence of abetment of murder on the evidence of the approver, the confessions of the co-accused especially Khin Maung Yin and Yan Gyi Aung and the other circumstantial evidence on record.

It now remains to be considered under what sections of the Penal Code the appellants should have been convicted. As the crime was committed before the 1st of August 1947 on which date Burma Act XXXIII of 1947 came into force, the conviction should be under section 302 of the Penal Code read with

section 34 of the Penal Code or section 302 of the Penal Code read with section 109 of the Penal Code as the case may be. In this connection compare the case *Shwe Hla U* v. *The King* (1) where it was held that of the provisions of Burma Act IV of 1940 which amended section 397 of the Penal Code having come in force only on the 16th of March 1940, the provisions of section 397 of the Penal Code as they existed prior to the amendment were applicable to a case in which the robbery took place before the 16th of March 1940 although the accused was convicted after that date.

The convictions recorded against the appellants by the Special Tribunal will be amended by the substitution of section 302 of the Penal Code wherever section 302 (1) (*b*) occurs.

As regards sentences we do not see how under the circumstances obtaining in this case we can reduce the sentence on any of the appellants. Each had a vital part to play in the conspiracy which led to the assassination of the Hon'ble U Aung San and some of his colleagues besides U Ohn Maung and Maung Htwe. It is difficult for us to find any judicial reason for interference and as pointed out by Sir Arthur Page in *Aung Hla* v. *King-Emperor* (2) the question whether mercy should be extended to any one of the appellants is a matter with which this Court is not concerned, the prerogative of mercy resting in other hands.

Before we leave this case we must again reiterate our appreciation of the manner in which the appeal has been argued by the learned counsel for the appellant U Saw. If we did not mention in this judgment all the points both large and small raised by him in his argument and also set out in his written argument it is not because we have not carefully

(1) (1941) Ran. 58. (2) 9 Ran. 433.

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considered them. On a review of the whole case we are firmly of the opinion that the case against all the appellants have been so fully established by the prosecution that it is not necessary for us to cumber these proceedings by writing a lengthier judgment than this.

We would also like to mention that we have not made any local inspections because we found that it was not necessary for the purpose of appreciating the evidence on record. The Maps and the Memorandum of local inspection recorded by the learned Members of the Special Tribunal were quite sufficient for our purpose.

In the result the appeals fail. The convictions and sentences on the appellant U Saw and the other appellants will be confirmed except that section 302 of the Penal Code will be substituted for section 302 (1) (*b*) wherever it occurs. The appeals are otherwise dismissed.

SUPREME COURT.

U SAW AND FOUR OTHERS (APPLICANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

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Apl. 27

[On appeal from the High Court.]

Union Judiciary Act, ss. 5 (a), 6—Principles involved in granting—S. 13 of the Constitution Act—Setting up Special Crimes Tribunal if amounts to discrimination—Findings of fact interfered with.

Applicants were tried by a Special Crimes Tribunal, Rangoon, constituted under the Special Crimes Tribunal Act, 1947. The convictions were confirmed by the High Court. In the application for special leave it was contended (1) That great prejudice had been suffered because the applicant No. 2 was deprived of his right to be defended by a pleader of his choice; (2) That by the Special Crimes Tribunal Act, 1947, the Governor could not take away the inherent right of trial by jury; (3) That confessions by certain accused which were admitted were not voluntary and relevant; (4) That the effect of s. 13 of the Constitution was to deprive the Tribunal of its powers.

Held: That many of the rules laid down by the Privy Council on applications for special leave to appeal in criminal matters are rules of wisdom and should ordinarily act as guidance to the Supreme Court in applications under s. 6 of the Union Judiciary Act. An exhaustive definition of such limits would be futile but if the application raises questions of great and general importance which are likely to occur often or to prevent wrong precedents for the future, the Supreme Court could interfere by way of appeal by special leave in criminal matters as defined in *Reg* v. *Bertrand*, L.R. 1 P.C. 520; *Mohindar Singh* v. *King-Emperor*, L.R. 59 I.A. 233; *Sheo Swarup* v. *King-Emperor*, L.R. 61 I.A. 398; *Nazir Ahmad* v. *King-Emperor*, L.R. 63 I.A. 373 and *Pakala Narayan Swamy* v. *King-Emperor*, I.L.R. 18 Pat. 238 (P.C.), referred to.

Held further: That a pleader is defined in s. 4 (*r*) of the Code of Criminal Procedure and a King's Counsel from England when granted permission to appear comes within the definition of the word "pleader". Prior to granting of such permission he was not a pleader and the accused was not deprived of any right he had in law.

Held also: That trial by jury allowed by the Criminal Procedure Code is a right that can be taken away by an Act of the Burma Legislature.

Held also: Whether confessions are voluntary and relevant depend on determinations of facts, and these are questions on which the trial Court, as also the High Court on appeal, are fully competent to decide and it was not for the Supreme Court to consider such questions.

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* Criminal Misc. Applications Nos. 2 and 3 of 1948.

† *Present:* SIR BA U, Chief Justice of the Union of Burma, E MAUNG, J. of the Supreme Court, and U THEIN MAUNG, Chief Justice of the High Court, Rangoon.

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The decision of the Privy Council in *Sutton* v. *The King*, L.R. (1933) A.C. 348 at p. 360, followed.

Held also : That the trial concluded on 30th December 1947 and the operation of the Constitution was from 4th January 1948 ; a completed trial cannot be invalidated *ex post facto* on the alleged ground that the setting up of such a Tribunal amounted to any discrimination and therefore prohibited by the Constitution.

F. J. Salisbury Havock for the applicant U Saw.

U Kya Gaing for applicants Maung Soe, Thet Hnin, Yangyi Aung and Hmone Gyi.

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

The judgment of the Court was delivered by

E MAUNG, J.—These are two applications under section 6 of the Union Judiciary Act made on behalf of five persons whose convictions and sentences by the Special Crimes Tribunal, Rangoon, constituted under the Special Crimes (Tribunal) Act, 1947, had been confirmed by the High Court in Criminal Appeals Nos. 7, 11, 12, 13 and 14 of 1948.

By section 136 of the Constitution this Court is made the Court of final appeal and in sub-section (3) thereof it is laid down that "the Court shall, with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court . . . ." It is necessary to advert to these provisions in the Constitution to clarify the position of this Court in criminal matters coming before it.

The Privy Council in England derives its right to review the decisions of the Courts of the Commonwealth of British Nations from the prerogative of the King, whenever not trenched upon by legislation, to correct miscarriage of justice. The Privy Council in England exercises such residuary prerogative powers as have

not been taken away by Acts of Parliament or other competent Legislature in the British Commonwealth as the King—the fountain of justice throughout his dominions—enjoys to enable him to do in the ultimate resort justice to all his subjects. This Court, however, is one constituted as a Court of final appeal and its powers in criminal matters are regulated by sections 5 (*a*) and 6 of the Union Judiciary Act.

Though the jurisdiction of this Court and that of the Privy Council in criminal matters flow from two different sources and this difference in the origin of the jurisdiction of the two Courts is a matter which must not be lost sight of, yet it is clear that many of the rules laid down by the Privy Council in England in the various cases coming before it on applications for special leave to appeal in criminal matters, are rules of wisdom and should receive from this Court a respectful attention and should ordinarily act as guidance in the discharge of its functions under section 6 of the Union Judiciary Act.

Circumstances vary with cases and the variations may be so diverse that it would be futile to make an exhaustive definition of the limits within which only this Court, in its discretion, would grant special leave to appeal in criminal matters. The Privy Council, even though in such an extreme case as *Mohindar Singh* v. *King-Emperor* (1) it goes so far as to say: "Their Lordships have frequently stated that they do not sit as a Court of criminal appeal. For them to interfere with a criminal sentence there must be something so irregular and so outrageous as to shock the very basis of justice", has nevertheless granted in *Sheo Swarup* v. *King-Emperor* (2), *Nazir Ahmad* v. *King-Emperor* (3) and *Pakala Narayan Swamy* v. *King-Emperor* (4)

(1) L.R. 59 I A. 233.
(2) L.R. 61 I.A. 398.
(3) L.R. 63 I.A. 373.
(4) I.L.R. 18 Pat. 238. (P.C.).

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special leave to appeal on questions of the interpretation of Indian statutes on which there had been a difference of opinion in the High Courts in India, on the principle that it is salutary that doubts on matters of great importance and of general recurrence should be finally dissolved.

It would perhaps be sufficient for the purposes of the present case to say that if the application for special leave raises questions of great and general importance which are likely to occur often and which questions, if not rightly answered, would interrupt the due and orderly administration of justice or divert the administration of justice into a new and erroneous course, creating a wrong precedent for the future, this Court would interfere by way of an appeal by special leave in criminal matters. As has been said by the Privy Council in *Reg* v. *Bertrand* (1) it would be the duty of this Court "to exercise an appellate jurisdiction with a view not only to ensure, so far as may be, the due administration of justice in the individual case, but also to preserve the due course of procedure generally."

In Criminal Miscellaneous Application No. 2 of 1948 it was first said on behalf of the applicant that he suffered great prejudice at the trial by being deprived of his right to be defended by a pleader of his choice. This branch of the case was developed in this way. It was claimed on behalf of the applicant that from the inception of the trial the applicant expressed his desire to be defended by a King's Counsel from England and that he was not granted sufficient time to enable the King's Counsel of his choice to be present at the trial from its beginning. It was said that accordingly the applicant was deprived of his right under section 340 of the Code of Criminal Procedure. There is in law no

(1) L.R. 1 P.C. 520.

substance in this claim. The definition of a pleader appearing in section 4 (*r*) of the Code of Criminal Procedure is as follows :

" 'Pleader' used with reference to any proceeding in any Court, means a pleader authorized by any law for the time being in force to practice in the Court, and includes (i) any advocate of the High Court so authorized, and (ii) any other person appointed with the permission of the Court to act in such proceeding."

In the course of the trial a King's Counsel from England did appear before the Tribunal and he was granted permission to act for the applicant. It is only from the date of the granting of the permission that the King's Counsel, for the purposes of the Criminal Procedure Code, comes within the meaning of the word "pleader", and it cannot therefore be said that the applicant, prior to the Court granting permission to the King's Counsel to appear on his behalf before the Tribunal, was deprived of any right he had in law. His right, it must be remembered, was to be defended by a pleader. The argument on this part of the case really amounts to a claim that the applicant was prejudiced by not being given a special privilege. This contention must be rejected.

It was next contended that the Governor of Burma had no right by the Special Crimes (Tribunal) Act of 1947 to take away the inherent rights of a person in Rangoon to be tried in appropriate cases by a jury. This contention also must be rejected. It must be remembered that trial by jury is a creation of the Code of Criminal Procedure and the rights given by the Code of Criminal Procedure can clearly be taken away by an Act of the Burma Legislature and accordingly can be taken away by an Act of the Governor made under section 139 of the Government of Burma Act. A half-hearted attempt was made to attack the Governor's competency in 1947 to act under

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section 139 of the Government of Burma Act and it was suggested that in 1947 it could not possibly be said that "a situation had arisen in which the Government of Burma cannot be carried on in accordance with the provisions of the Government of Burma Act." This argument overlooks the fact that by the Government of Burma (Temporary Provisions) Act of 1945 the duration of the administration by the Governor under section 139 of the Government of Burma Act had, by the Parliament of the United Kingdom, been extended for a further period of three years.

On behalf of the applicant we were invited to examine the confessions of persons who were the applicant's co-accused at the trial and to say that these confessions were not voluntary and relevant as had been adjudged by the Special Tribunal and by the Hon'ble Judges of the High Court. This we must refuse to do; whether the confessions were voluntary and relevant depend on determinations of facts, and these are questions on which the trial Court, as also the High Court on appeal, are fully competent. It is not for this Court to consider such questions which are within the competence solely of the High Court and of the trial Court.

The learned counsel for the applicant does not seriously press the allegations in ground 12 of his Grounds of Appeal. Specific mention is made of this fact as, if the ground taken therein is one of substance, it would be a matter falling within the purview of this Court in an appeal by special leave. It was suggested in that ground that the Hon'ble Judges of the High Court gave the benefit of the doubt, whenever one was raised, to the prosecution instead of to the accused. But this contention has not been pressed at the hearing and is in fact void of any substance in this case.

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The learned counsel who appears on behalf of the applicants in Criminal Miscellaneous Application No. 3 of 1948 takes the point that although the Special Crimes Tribunal was within the competence of the Governor of Burma to constitute and was duly constituted in 1947, the operation of the Constitution as from the 4th January 1948 effects to deprive *ex post facto* the Tribunal of the power to adjudicate on the guilt or innocence of the applicants. It was said by him that section 13 of the Constitution supports his claim. It appears—though it is not so clear from the learned counsel's argument before the Court—that he wants to contend that under section 13 of the Constitution, the setting up of a Special Crimes Tribunal for the applicants and persons tried with them and not leaving them to be tried as other persons committing offences under similar provisions of the Code in Rangoon would be tried before the High Court, amounts to an arbitrary discrimination between one citizen or class of citizens and another and is therefore prohibited by the Constitution. We can find no authority, and no authority is suggested by the learned counsel, for the proposition that a completed trial can *ex post facto* be invalidated in this manner. It must be remembered that the trial came to its conclusion before the Special Crimes Tribunal on the 30th December 1947. Moreover, this argument overlooks the provisions of section 228 of the Constitution.

The learned counsel further invites us to examine the circumstances under which the confessions of the applicant's co-accused were given and recorded. He claims that if this Court examines such circumstances it would become apparent that the Special Crimes Tribunal and the High Court in appeal were not justified in holding that these confessions were voluntary and substantially correct accounts of what

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happened so far as they are relevant to the case before the Courts. We must refuse to act on this suggestion. As has already been said once before in the course of this judgment, these are dependent on determinations of facts and are matters on which the trial Court and the High Court in appeal are fully competent. As has been said by the Privy Council in *Sutton* v. *The King* (1):

"The question of the credibility of the witnesses and the weight to be attached to their evidence is for the tribunal of fact. There has been no irregularity of any kind: the evidence has been carefully weighed, and considered with discrimination. It might reasonably produce a different effect on different minds, as is shown by the judgmen of Fuad J., who thought that all reasonable doubt had not been removed. But the trial Court were not bound to accept the evidence of the accused: they had a case where the accused and the deceased were the last two persons in contact, and where in a few minutes the deceased was found suffering from injuries which were consistent with assault, and where the deceased in evidence that was admissible said he had been assaulted by the accused. The defence was a bare denial, and there was no suggestion that the assault (if made) was justified. There appears to have been ample evidence upon which the trial Court could find that the accused assaulted the deceased and by the assault caused his death. There is a total absence of any violation of any of the essential principles of justice as evokes the interposition of this Board in criminal appeals. On the contrary, the accused appears to have had a fair trial before a competent Court: the conviction was affirmed in a very careful judgment by the appellate Court. There was undoubtedly evidence upon which any tribunal could reasonably affirm that the accused was guilty of the offence charged: and there is no ground upon which this Board could advise interference."

On this branch of the case we are in full agreement with these observations of the Privy Council.

In the result we refuse leave to the applicants in these two applications to appeal by special leave under section 6 of the Union Judiciary Act.

(1) L.R. (1933) A.C. 348 at p. 360.

APPELLATE CIVIL.

Before U Tun Byu and U Aung Tha Gyaw, JJ., and on difference between them before U Thein Maung, Chief Justice.

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Feb. 19.

D. K. PAREKH (APPELLANT)

v.

THE BURMA SUGAR COMPANY, LIMITED (RESPONDENT).*

Contract—Whether completed—Formal contract in writing contemplated—Whether a condition precedent—Rules guiding determination—Deposit—Whether benefit given or received under contract—Contract Act, s. 64—Forfeiture of deposit—Terms and conditions for—S. 28 of Union Judiciary Act—S. 98 of the Code of Civil Procedure.

Appellant deposited on 25th November 1941 a sum of Rs. 3,750 being half the value of 750 tons of molasses at Rs. 10 a ton to be supplied during 1941-42 season and got a receipt. In the previous season, a similar receipt was followed by a written contract fixing, *inter alia*, terms and conditions of delivery. The appellant sued for recovery of the deposit, claiming (1) that there was no completed contract, (*a*) as the terms regarding delivery had not been fixed and (*b*) that the parties contemplated a written contract as a condition precedent and (2) the amount of deposit, 50 per cent of the total, could not be forfeited without proof of actual damage as it amounted to a penalty.

As regards the second point U Tun Byu and U Aung Tha Gyaw, JJ., agreed and *Held*: A deposit is not a benefit given or received under the contract and a stipulation for forfeiture in case of default is not by way of penalty.

Natesa Aiyar v. *Appavu Padayachi*, 38 Mad. 178, referred to.

For the buyer to recover deposit, it must be shown that seller was in default.

Mohamed Habibbula v. *Mohamed Shafi*, 41 All. 324; *Gowal Das Sidany* v. *Luchmi Chand Jhawar*, 57 Cal. 107; *Piari Lal and others* v. *Mina Mal Bal Kishan Das*, 50 All 82, relied on and applied.

Muralidhar Chatterji v. *International Film Company, Limited*, I.L.R. (1943) 2 Cal. 213 (P.C.), distinguished.

Per Chief Justice: Terms of the proviso to s. 28 of the Union Judiciary Act are wider than that of s. 98 of the Code of Civil Procedure under which only difference on a point of law can be referred to a 3rd Judge but under the Union Judiciary Act not only points of law but also other points can be referred.

* Special Civil 1st Appeal No. 67 of 1947 against the decree of Chief Judge, Rangoon City Civil Court, in Civil Regular No. 1803 of 1947, dated the 24th September 1947.

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As regards the first point two learned Judges differed and the matter was referred to the Chief Justice who, agreeing with U Aung Tha Gyaw, J., *Held:* That the terms as to time and mode of delivery could hardly be of importance when the parties had the whole season before them and delivery could be made according to their convenience and the parties did not consider it so important.

It is a question of construction whether execution of a contract is a condition or term of the bargain or a mere expression of the desire of the parties as to the manner in which the transaction already agreed will go through.

Shankarlal Narayandas Mundade v. *New Mofussil Company, Limited (In Liquidation)*, 73 I.A. 98 at p. 107; *Harichand Mancharam* v. *Govind Luxman Gokhale*, 50 I.A. 25, relied on.

K. R. Venkatram for the appellant.

Horrocks for the respondents.

U AUNG THA GYAW, J.—This appeal arises out of a suit brought in the City Civil Court of Rangoon by the appellant for recovery of Rs. 3,750 deposited by him with the respondents as security for fulfilment of a contract for the purchase of 750 tons of molasses. This deposit was made on the 25th November 1941 under a receipt made out in terms set out in Exhibit A. The appellant made this claim on the plea that owing to the war, a regular contract was not signed between him and the respondents; nor was any supply of molasses made to him. The respondents contended that the parties did enter into a contract on or about the 25th November 1941 for the supply of 750 tons of molasses during the season 1941-42 at the price of Rs. 7,500, but that no supply was made owing to the appellant's failure to take delivery in breach of the said contract. In their reply the plaintiff-appellant contended that a formal contract was contemplated and agreed upon to be executed between the parties embodying the terms as specified in the previous year's contract, Exhibit C and that since delivery orders were never forwarded by the defendant-respondents as provided

for in the said formal contract, there was no breach on his part.

The suit went to hearing on the issues as to whether there was a concluded contract between the parties and, if so, what its nature was, and whether the plaintiff-appellant had committed a breach of the same.

The learned Chief Judge of the Rangoon City Civil Court found these issues against the plaintiff-appellant and dismissed his suit. The correctness of this decision is now disputed by the appellant on the grounds that the execution of a formal document was part of the contract, and that all the material terms of the said contract had not been settled or arranged between the parties ; that these terms were essential to the making of the contract and that they could not be found in the terms of the deposit receipt, Exhibit A. The appellant has further contended that the security deposit could not be forfeited without proof of the actual damage suffered by the respondents.

The deposit receipt, Exhibit A, was made out in these terms :

" Received from Mr. D. K. Parekh rupees three thousand seven hundred and fifty only on account of cost of 375 tons molasses at Rs. 10 per ton deposited with us as security for fulfilment of contract for 750 tons molasses for season 1941-42."

The amount deposited represented half of the total purchase price as did the deposit made in the previous year under the deposit receipt, Exhibit B, under which the sum of Rs. 2,700 was deposited against fifty per cent of the value of molasses contracted to be sold to the appellant for season 1939-40, at Rs. 9 per ton. The terms of Exhibit A went further than those of Exhibit B in that mention is made of the fact that the deposit was effected as security for fulfilment of contract for 750 tons of molasses.

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It is the case for the respondents that the parties had entered into a complete contract when the deposit in suit was made by the appellant; the quantity contracted to be sold together with the rates per ton and the season during which the supply was to be made being all clearly stated in the deposit receipt. In the previous year deposit was made in February, and delivery was agreed to be made in the months of February, March and April, the remaining months of the molasses season. The deposit in suit was made in the month of November giving the parties five months to arrange for the making and acceptance of the monthly deliveries that would follow the making of the contract.

The question which then arises is whether this arrangement of the deliveries that were to be made under the contract can be considered to be so essential and material that it would have required further negotiation and settlement between the parties. That this could not be so might be judged from the terms of clause (5) of the previous year's contract set out in Exhibit C. This clause lays down the number of instalments in which deliveries were to be made and the manner in which the prices were to be paid therefor both by payment in cash and by appropriation of the money in deposit.

Now, the appellant in his evidence admits that, when the deposit was made in 1941, he took it that the terms of the contract would be more or less similar to those of the previous year, except perhaps, as regards delivery and that the deposit he had made was intended to be utilized in the same manner as was done in respect of the deposit made in the previous year. Since this mode of utilizing the deposit money in the previous year was inseparably bound up with the manner in which deliveries were to be made in

fulfilment of the contract, as shown in clause (5) in Exhibit C, there is strong reason to think that the terms of the contract relating to these matters had already been settled before the deposit in suit was actually made.

When explaining the making of the deposit on the 25th November 1941, the plaintiff-appellant made the further explanation that the understanding at the time was that a "formal" contract was to be drawn up later containing the terms of the contract, but that this could not be done as one Mr. Happel, the defendants' Manager, was busy elsewhere. The plaintiff-appellant was in Rangoon until February 1942 carrying on his business as usual and the admitted fact that he took no further steps in connection with his molasses deal with the respondent Company would seem to give rise to the inference that he regarded the said deal as closed, and the absence of a formal contract, as was drawn up in the previous year, was not a matter of any great concern to him. Thus both the language contained in the deposit receipt and the conduct of the appellant support the respondents' contention that at the time the deposit of half the purchase price was made, there already existed between the parties a concluded contract in regard to the purchase and supply of molasses, and that the formal contract which has been insistently pleaded on behalf of the appellant, was to be a mere formal expression of what had previously been agreed upon by the parties. In fact, the question of delivery or deliveries that were to be made would hardly be a matter of importance when the parties had the whole of the molasses season before them during which such deliveries could be made according to their convenience. The matter of giving and taking delivery as shown in clause 5 of Exhibit C was intertwined with that of the appropriation of the deposit and must in

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all probability have been discussed and settled before the deposit was made.

The case of *A. V. & Son and another* v. *Akoojee Jadwet & Co.* (1) dealt with entirely different sets of facts and is of no help to the appellant's contention that, when he made the deposit in terms set out in the receipt, Exhibit A, the contract between him and the respondents had not proceeded beyond the stage of mere negotiation. The decision in the case of *W. J. Rossiter, George Curtis and others* v. *Daniel Miller* (2), referred to in the judgment of the lower Court, is more to the point and is to this effect—that even if the parties had expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, this fact by itself would not show that they continue merely in negotiation. Thus, having regard to the terms of the deposit receipt, Exhibit A, and the formal agreement, Exhibit C, executed between the parties in the previous year and to the ordinary and probable course of business conduct, it would appear that the learned Judge of the City Civil Court was right in arriving at the conclusion that there was a concluded contract between the parties in this case.

On the question of the breach of this contract the learned Judge of the City Civil Court appears to have based his decision on the admissions made by the plaintiff-appellant himself in his evidence to the effect that in view of the circumstances arising out of the war, he was not prepared to sign a formal contract on the lines of Exhibit C, if one were presented to him and that in fact, beyond making some ineffectual attempts to contact the respondent, he took no step whatever to fulfil the terms of the contract he had already entered into with the latter. The defendant Company were

(1) (1946) R.L.R. 31. (2) (1879) 3 A.C. 1124.

producing molasses right up to 1942; thus showing that they were in a position to fulfil their part of the contract. The initiative, in the circumstances, thus rested with the plaintiff-appellant and since, on his admission, he had made no effort to ask for delivery, he was rightly held to have committed the breach. *See* also section 35, Sale of Goods Act.

On the next question as to what is to happen to the deposit made by the plaintiff-appellant, it has been put forward on his behalf that the respondents are not entitled to forfeit the sum on the score of the appellant's breach of the terms of his contract; that any clause as to forfeiture should be regarded as in the nature of a penalty and must attract the application of section 74 of the Contract Act.

The deposit receipt which the appellant had signed states that the money was paid as security for the fulfilment of the contract. The formal contract executed between the parties in the previous year also set out in clause (10) that the deposit was to be forfeited in the event of any breach on the appellant's part.

That a deposit is not a benefit given or received under the contract was pointed out in the case of *Natesa Aiyar* v. *Appavu Padayachi* (1), and it was further held that a stipulation for the forfeiture of the deposit in case of breach is not one by way of penalty.

In *Mohamed Habibbula* v. *Mohamed Shafi* (2), it was held that where the plaintiff had advanced money to the defendant by way of earnest money and as a guarantee for the fulfilment of the contract in respect of which he is suing, he cannot recover the earnest money where it is found that the breach of the contract was due to his own default.

A similar deposit, but made by an auction purchaser at a Court auction sale, was held to have been

(1) 38 Mad. 178. (2) 41 All. 324.

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forfeited to the decree-holder in the case of *Gowal Das Sidany* v. *Luchmi Chand Jhawar* (1).

For the buyer to be entitled to the recovery of the deposit made by him, it must be shown that the seller was in default and was unable to carry out his part of the contract, see *Piari Lal and others* v. *Mina Mal Bal Kishan Das* (2).

This being the state of the law on the question raised on the appellant's behalf, it is clear that he is not in this case entitled to the refund of the deposit made by him. His suit was rightly dismissed and his appeal must, accordingly, be dismissed with costs.

However, as my learned brother and I have disagreed on the question of the existence of a concluded contract between the parties and have accordingly arrived at different conclusions as to the merits of the appeal, I respectfully concur with him in making a reference to another Judge on the point of law stated by him.

U TUN BYU, J.—A contract was entered into between the plaintiff, who is the appellant in this appeal, and the defendant, who is the respondent, for the supply of 600 tons of molasses in respect of the 1939-40 crushing season. This contract was reduced into writing, namely, Exhibit C, where the terms of the contract are fully set out. The dispute, which had arisen, is in respect of the 1941-42 season.

Exhibit A shows that on the 25th November 1941 the plaintiff paid a sum of Rs. 3,750 to the defendant "on account of costs of 375 tons of molasses at Rs. 10 per ton", which sum was said to be deposited "as security for fulfilment" of the contract for the supply of 750 tons of molasses for the season 1941-42. No

(1) 57 Cal 107. (2) 50 All 82.

molasses were in fact supplied or taken in respect of the season 1941-42.

The first point which falls to be determined is whether there was a complete contract for the supply of 750 tons of molasses in respect of the season 1941-42 between the plaintiff and the defendant.

The plaintiff's contention, as urged by his advocate, is that it was contemplated by the parties that there was to be a written agreement, and that it was a condition precedent that there should be a written agreement, and as no written agreement was executed, there was no concluded contract between the plaintiff and the defendant. It was also contended on behalf of the plaintiff that in any case there was no complete contract arrived at in respect of the contract for the supply of 750 tons of molasses for the season 1941-42, and the plaintiff is accordingly entitled to the refund of the Rs. 3,750 paid to the defendant as indicated in Exhibit A.

The plaintiff had to make a similar deposit in respect of the previous-year contract, the receipt of which was filed as Exhibit B, dated the 5th February 1940. The wording in Exhibit B is not quite the same as in Exhibit A, but it was apparently intended for the same purpose as in Exhibit A.

Exhibit A, which, from the point of view of the defendant, is very important, is as follows :

"Received from Mr. D. K. Parekh Rupees three thousand seven hundred and fifty only on account of cost of 375 tons molasses at Rs. 10 per ton deposited with us as security for fulfilment of contract for 750 tons molasses for season 1941-42."

It is contended on behalf of the defendant that Exhibit A shows that there was a complete contract between the parties, and that, so far as the delivery was concerned, it could be implied that the delivery

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would be made in reasonable instalments, and it could accordingly be said that there was a complete contract between the plaintiff and the defendant. The payment of the deposit does not appear to be very significant when it is borne in mind that there had been a contract in writing between the parties for the previous season. The plaintiff would naturally anticipate that all the requisite terms of the contract for 1941-42 season could be amicably arranged after the deposit was paid, and before a formal contract was executed.

The plaintiff in his examination stated :

"On 25th November 1941 I made a deposit with the defendant of Rs. 3,750. The understanding was that a formal contract was to be drawn up later containing the terms of the contract. Exhibit A is the receipt granted to me by the defendant. It is not correct that on the date of this receipt there was a regular contract between us. Formal contract was not drawn up because Mr. Happel '(meaning, apparently, Mr. Hepburn)' was busy as a Juror in the High Court. Twice or thrice I went to the defendant but could not find him, and in December war broke out, and I went to the defendant's office two or three times but could not find Mr. Happel. I was told that Mr. Happel was in Sahmaw. After the receipt I heard nothing whatever from the defendant's company. I left Rangoon in the week (*sic*) of February 1942. I came back to Rangoon in 1946."

And on cross-examination he also stated :

"When the deposit receipt was given the price and the quantity are agreed. But a formal contract is to be drawn up later. When the deposit was made in 1941 I took it that the terms of the contract would be more or less similar to those of the previous year except perhaps as regards delivery. * * * * If there was a contract in 1941 my intention as regards Exhibit A deposit was the same."

Mr. Hepburn, who apparently negotiated the contract with the plaintiff in respect of the supply

of molasses for the 1941-42 season, was said to be present in Burma when the suit which gave rise to this appeal was filed, and it appears that he subsequently left Burma. In the absence of any evidence by Mr. Hepburn as to what actually took place at or about the time when the deposit of Rs. 3,750 was paid by the plaintiff, it seems to me that the Court will have to accept the statement of the plaintiff that when he paid Rs. 3,750, the arrangement about the dates of the delivery and the quantity of molasses to be delivered at each delivery had not been definitely arrived at. In any case, no evidence had been given on behalf of the defendant that any definite arrangement had been arrived at about the dates of the delivery of the molasses or the quantity which was required to be delivered at each delivery. The only person who could have given evidence on behalf of the plaintiff on this point was Mr. Hepburn, and he was not examined before he left Burma.

It is clear that an agreement, to be binding on the parties, must be in the nature of a complete agreement, and Lord Blackburn's observation on this matter appears to me to be explicit and appropriate, in considering the point at present under consideration, and it was made in the case of *W. J. Rossiter, George Curtis and others* v. *Daniel Miller* (1):

"I quite agree with the Lords Justices that (wholly independent of the Statute of Frauds) it is a necessary part of the Plaintiff's case to show that the two parties had come to a final and complete agreement, for, if not, there was no contract. So long as they are only in negotiation either party may retract; and though the parties may have agreed on all the cardinal points of the intended contract, yet, if some particulars essential to the agreement still remain to be settled afterwards, there is no contract. The parties, in such a case, are still only in

(1) (1877-8) 3 A.C .1124 at p. 1151.

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negotiation. But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties does not, by itself, shew that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed."

The first point for consideration is, therefore, whether there was a concluded contract between the plaintiff and the defendant in this case. No agreement had been arrived at between the parties as to the dates on which deliveries could be expected, and also in respect of the quantity of molasses, which was to be supplied at these deliveries, in so far as the 1941-42 season was concerned. It has accordingly to be considered whether these particulars can be considered to be essential or material particulars of the contract for the supply of molasses for the season 1941-42, and, if the answer is in the positive, it is clear, then, that there was no complete contract between the plaintiff and the defendant in respect of the supply of molasses for 1941-42.

It is contended on behalf of the defendant that the parties could be said to have intended that the deliveries should be made in reasonable time and that the molasses should be delivered in reasonable instalments. It appears to be clear, however, that without fixing the dates of and the quantity to be made at each delivery, the plaintiff would not be able to claim delivery of any specified quantity which might be required by him or to claim that the deliveries should be made by certain specific dates. The suggestion that the parties had five months, after the deposit was

paid, within which they could arrange for the delivery cannot get over the fact that in the absence of a definite arrangement, the plaintiff would not be able to enforce delivery by any specified date, and in any specified quantity. It must also be remembered that the contract was in writing in the previous year, and there cannot be any doubt that the parties intended that the contract for the year in dispute was also to be in writing; and if it was to be in writing, it is reasonable to conclude that the parties intended, after the deposit of Rs. 3,750 was paid, to arrive at an agreement about the dates of the delivery and the quantity to be made at each delivery. It would, if the suggestion made on behalf of the defendant is accepted, in effect mean that the plaintiff would have to accept the delivery at such time and in such quantity as the defendant might think reasonable. The word "reasonable" is elastic, and it might even justify a delivery made a month or more later than what the plaintiff might have expected, and in that way it could have led to financial loss, so far as the plaintiff's business is concerned. It does not require much foresight to observe that such a state of affairs was not likely to prove beneficial to the plaintiff's business. The plaintiff would not in that case be able to make any advanced contract of sale with any certainty as respect the date of delivery and the quantity of each delivery for the molasses to be received from the defendant for the season 1941-42, as he could not be certain of the date on which any delivery of the molasses could be expected from the defendant, or in what exact quantity. The date and quantity of delivery must accordingly be considered to be a matter of importance to a business man, especially when the quantity to be purchased is as much as 750 tons.

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As regards the contention made on behalf of the defendant that it could be implied that the molasses would be delivered in reasonable instalments, there is nothing in the evidence to indicate in how many instalments the molasses are to be delivered. The quantity required for the season 1941-42 was not the same as in the previous season. Who is to determine as to what would amount to reasonable instalments or whether the instalments were to be all in equal instalments or in varied instalments? It might be mentioned that the deposit of Rs. 3,750 was paid in the month of November, whereas the deposit in respect of the previous season was paid only in the month of February. The plaintiff, as a business man, would certainly have preferred to have the quantity and time of the delivery of each instalment to be made in accordance with his business requirement. It does not necessarily follow that because certain dates had been fixed for the previous contract that those dates would also be suitable for the plaintiff's business of the subsequent season.

It would not be correct to assume that the dates of delivery and the quantity to be supplied at each delivery had been discussed between the plaintiff and Mr. Hepburn or any person on behalf of the defendant in the absence of evidence or to even suggest that discussion on these points must have taken place. Apparently no attempt was made by the defendant to have Mr. Hepburn, who apparently negotiated the contract for the sale of 750 tons of molasses with the plaintiff, examined before he left Burma. On the evidence on the record it is not possible to determine with any certainty the quantity of molasses which is to be supplied at each instalment or the date by which each instalment is to be delivered. It will not be proper for the Court to supply such

deficiencies in accordance with its own conception of what it considers to be reasonable. In such matters it is the plaintiff's requirement which must first be considered. The fact that most of the terms of the contract have been agreed upon will not constitute a complete agreement unless all the essential or material terms of the contract have been agreed upon.

The parties in this case contemplated an agreement in writing, and it appears to me to be clear that the agreement cannot be properly reduced into writing without further reference to the parties as to the quantity to be delivered at each delivery, and the dates on which each delivery might be expected or would be made.

In the circumstances, it cannot, in this case, be said that the parties have agreed upon all essential or material terms of the contract for the supply of molasses for the season 1941-42, and on this ground alone the appeal will have to be allowed. The judgment and decree of the Rangoon City Civil Court are set aside, and the appeal is allowed with costs. The plaintiff will also be entitled to costs in the Court below.

As my learned brother and I differ on the first point to be decided in this appeal, we propose to state a point of law for reference to another Judge or such other Judges as the Hon'ble the Chief Justice may think it proper to arrange, namely,—

> Whether on the facts and in the circumstances of the case there is in law a complete contract between the parties.

For the purpose of this reference I ought also to state my views on the other points arising in this appeal. As the place of delivery of the molasses is Sahmaw, it will be necessary for the appellant to make arrangement for receiving the molasses at Sahmaw.

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In view of the fact that no arrangement was made for this purpose by the appellant I agree that, if there was a complete contract, it must be held that it was the plaintiff who had committed breach of the contract.

As regards to the deposit, the facts in the case of *Muralidhar Chatterji* v. *International Film Company, Limited* (1) are not on the same line as the facts in this appeal. In the Calcutta case the money was not paid as a deposit for the fulfilment of the contract as in this appeal, and I am accordingly not prepared to take a view different from what had been so far accepted, namely, that the buyer must show to entitle him to recover the deposit that the seller was in default; and in view of the finding arrived at by me on the second issue it must be taken, if there was a complete contract, that no default was committed by the seller.

[As the learned Judges differed on one point, the case was, under the provisions of section 28 of Union Judiciary Act, 1948, and section 98 (2) of the Code of Civil Procedure, placed before U Thein Maung, C.J.]

U THEIN MAUNG, C.J.—The following question has been referred to me as my learned brothers Tun Byu J. and Aung Tha Gyaw J. who were members of the Bench that heard the appeal differ in opinion thereon:

> Whether on the facts and in the circumstances of the case there is in law a complete contract between the parties.

They have stated it as a point of law as they probably have in mind the proviso to sub-section (2) of section 98 of the Code of Civil Procedure. However, to be on the safe side, I propose to deal with it

(1) (1943) I.L.R. 2 Cal. 213.

under the proviso to section 28 of the Union Judiciary Act, 1948, which applies not only to points of law but also to all other points.

The question has arisen in connection with the plaintiff-appellant's suit for recovery of Rs. 3,750 the receipt of which has been acknowledged by the defendant-respondent in these terms :

" Received from Mr. D. K. Parekh Rupees three thousand seven hundred and fifty only on account of cost of 375 tons molasses at Rs. 10 per ton deposited with us as security for fulfilment of contract for 750 tons molasses for season 1941-42." (*See* Exhibit A.)

According to this receipt the money was deposited partly as cost of 375 tons of molasses and partly as security for fulfilment of contract for 750 tons of molasses for season 1941-42. So it appears from this receipt that there was a contract between the parties as security for the fulfilment of which the deposit was being made. Besides, such deposits are usually made after the respective contracts of sale have been concluded. (*See* pages 44 and 45 of Pollock and Mulla's Indian Sale of Goods Act.)

The plaintiff-appellant has also stated in his plaint :

"1. On 25th November 1941 plaintiff deposited with defendant Rs. 3,750 as security for fulfilment of a contract for the supply of 750 tons of molasses by defendant to the plaintiff for season 1941-42. The defendant granted a receipt therefor, which is filed herewith.

2. Owing to war, a regular contract was not signed between the parties, nor any supply made.

3. The plaintiff is entitled to and claim a refund of Rs. 3,750 referred to above."

In paragraph 1 of the plaint he has admitted that the money was deposited as security for fulfilment of a contract for the supply of 750 tons of molasses for the

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season 1941-42. In the second paragraph he has merely stated that a regular contract was not signed on account of the war. He has not stated therein that there was no complete agreement between the parties; and it would appear from his plaint that he was claiming a refund of the deposit not because there never was a complete agreement but because "a regular contract" had not been signed.

The defendant-respondent pleaded in paragraph 2 of his written statement that there was a contract between the parties and that "the allegation that a 'regular' contract was not signed between the parties is not admitted but is in any event irrelevant." To that written statement the plaintiff-appellant filed a reply, paragraph 1 of which reads:

"1. With reference to paragraph 2 of the written statement, the plaintiff states that a formal contract was contemplated and agreed upon to be executed between the parties embodying the terms, as usual in Defendants' business, as typified in previous year's (1939-40) contract. It is not irrelevant, as alleged but most material."

In this reply also he did not state that the parties were still in negotiation and that they had not arrived at a complete agreement before the deposit was made. The formal contract which was contemplated and agreed upon to be executed by the parties is according to the reply to be a formal contract embodying the terms as usual in defendants' business.

At the hearing also the plaintiff-appellant merely stated in the course of his evidence:

"On 25th November 1941 I made a deposit with the defendant of Rs. 3,750. The understanding was that a formal contract was to be drawn up later containing the terms of the contract. Exhibit A is the receipt granted to me by the defendant. It is not correct that on the date of this receipt there was a regular contract between us. Formal contract was not

drawn up because Mr. Happel was busy as a Juror in the High Court."

It will be noticed that he has not stated that on the date of the deposit any particular term remained for settlement by agreement between the parties on a subsequent date and even with reference to a formal contract there was only an understanding that it was to be drawn up later containing the terms of the contract. He has not stated in the pleadings that the agreement was to be binding only when a formal contract was executed and he has not said so in his evidence either. On the other hand he has admitted under cross-examination, " when war broke out and circumstances made it impossible I did not want the contract to be executed. * * * In November 1941 my intention was to enter into a normal commercial transaction."

If the terms relating to delivery are so important that there cannot be a complete agreement between the parties unless and until they had settled them and if the agreement had not been complete as they were outstanding to be settled on a date subsequent to the date of the security deposit, the plaintiff-appellant would surely have said so in the pleadings and in his evidence ; but he has not done so.

Besides, the plaintiff-appellant has not offered any explanation as to why the security deposit was made, if as a matter of fact the parties were still in negotiation and some material terms remained to be settled by subsequent agreement between them.

The learned advocate for the plaintiff-appellant has submitted that in connection with the previous contract the security deposit was made before the formal contract was executed and that it must be presumed that some of the terms incorporated in the formal contract were settled by agreement only after

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the security deposit had been made. However, the security deposit was made on the 5th February 1940 and the formal contract was executed on the 7th February 1940, *i.e.* just two days later (*see* Exhibits B and C). So it is not inconsistent with the view that the terms of the agreement which were incorporated in Exhibit C had already been settled by agreement before the security deposit was made, that it only remained for a legal draftsman to draw up a formal contract incorporating them therein and that the agreement was intended by both parties to be binding even before the formal contract was executed.

For the above reasons I agree with my brother Aung Tha Gyaw J. that there was a complete agreement between the parties before the security deposit was made.

The only other question that remains for consideration is whether that agreement was to be binding only after a formal contract incorporating the terms thereof had been executed. With reference to this question the plaintiff-appellant has merely stated, "the understanding was that a formal contract was to be drawn up later." As I have already pointed out before he does not go further and say that the agreement was not to be binding till a formal contract had been executed.

"In such cases, as was said by Parker J. (as he then was), 'it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through.'" [See *Shankarlal Narayandas Mundade* v. *New Mofussil Company, Limited (In Liquidation)* (1).] And what the plaintiff-appellant has himself described as an

(1) (1946) L.R. 73 I.A. 98 at p. 107.

understanding cannot be a condition. It must be a mere expression of the desire of the parties. As a matter of fact, the case for the plaintiff-appellant, as it has been argued before me, is that there was no complete agreement inasmuch as some material terms remained to be settled afterwards and the plea that if there was a complete agreement it was not to be binding till a formal contract incorporating the terms thereof had been executed is practically abandoned.

Besides, the facts which I have set out above (especially the fact that Rs. 3,750 has been paid partly as the price of 375 tons of molasses and partly as security for fulfilment of the contract) do not support the inference that the parties intended to be bound only when a formal agreement had been executed. [Cf. *Harichand Mancharam* v. *Govind Luxman Gokhale* (1).]

I accordingly agree with my brother Aung Tha Gyaw J. and answer the question which has been referred to me in the affirmative.

Both my learned brothers have agreed that, if there was a complete contract, there was no default on the part of the defendant-respondent, that there has been a breach of contract on the part of the plaintiff-appellant himself and that he is not entitled to a refund of the deposit. I accordingly confirm the decree of the Rangoon City Civil Court and dismiss the appeal with costs.

(1) (1923) L.R. 50 I.A. 25.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

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Apl. 5.

V.E.R.M. KRISHNA CHETTIAR

v.

M.M.K. SUBBIYA CHETTIAR.*

Occupation of Burma by Japanese—Effect on contracts of agency—Decision of Supreme Court during occupation—Defence of Burma Act and Rules—Rule 97—English Common Law if applicable—Doctrine of stare decisis*—Declaration of war by Burma on Great Britain—Its legal effect.*

Held : Agency of an agent in Burma of a principal residing in India did not terminate when Burma was occupied by the Japanese and the agent remained in occupied Burma though the communication between the principal and the agent became impossible.

Held : That such question is to be decided in accordance with the Municipal Law of Burma and not by International Law.

Condition of Burma under Japanese occupation was peculiar and there is no Common Law authority on the point. The Municipal Law of Burma is in consonance with the American decisions in *Kershaw* v. *Kelsey*, (100 Mass. 561) and *Williams* v. *Paine* (169 U.S. 55).

Held : That the courts were always reluctant to upset decisions which have been accepted by the public as the basis of their transactions for a length of time and the ruling of the Supreme Court in Civil Reference No. 2 of 1943 should not be disturbed and should be followed.

Held : That during the Japanese occupation Burma did not attain the necessary status to declare war on Great Britain. Therefore the alleged declaration of war by the then Burmese Government could have no legal effect.

A.S.N.S. Firm by their duly constituted agent Karappaya Pillay v. *Maung Po Khin and Ma Thaung Kywai*, Civil Reference No. 2 of 1943 of the Supreme Court of occupied Burma, followed.

U San Wa v. *U Ba Thin*, Civil Reference No. 2 of 1947, referred to.

R.M.M.R.M. Perichiappa Chettiar v. *Ko Kyaw Than*, Civil 1st Appeal No. 34 of 1947, followed.

Sovfracht's case, (1943) A.C. 203 ; *Frelz* v. *Stover*, 22 S.C. Wall. 98 ; *Chem Abbhcong* v. *Mapacarai Mohamed Rowther and eight others*, (1946) Mad 768 ; *Daimler Company, Limited* v. *Continental Tyre and Rubber Company (Great Britain), Limited*, (1916) 2 A.C. 307 ; *Waghela Rajsanji* v. *Shekh Masludin*, 14 I.A. 89 ; *Thomas Bear & Sons (India), Ltd.* v. *Prayag Narain*, 67 I.A. 212 ; *Tingley* v. *Muller*, (1917) L.R. 2 Ch. 144 ; *Ma Mya* v. *Ma Thein*, I.L.R. (1926) Ran. 313 (F.B.) ; *Lodewyk Johannes De Jager* v. *The Attorney-General of*

* Civil Misc. Appeal No. 39 of 1947 against the order of the District Court of Bassein in Civil Execution No. 2 of 1947.

Nalai, (1937) A.C. 326; *The King* v. *Maung Hmin and three*, (1946) Ran. 1, referred to.

Per U SAN MAUNG, J.—Sir Frederick Pollock's observations "Laws of every nation are determined by their historical condition not only as to details but as to structure" should be applied to the special conditions in Burma during occupation.

The agent in Burma could very well look after the interest of his principal in India without supplying the Japanese with sinews of war.

The growth of English Common Law on the subject is not based on experience of enemy occupation of English territory.

Payment to the agent would rather tend to increase the sinews of war to the British and the Courts in Burma during occupation have followed the decision of the Supreme Court of Massachusetts.

The question is not *res integra* and the principle of *stare decisis* must apply.

Beecheno (supported by *P. K. Basu*) for the appellant.

P. B. Sen (supported by *Dr. Ba Han*, *S. K. N. Iyer*, *P. N. Ghosh*, *N. K. Bhattacharya* and *V. S. Venkatram*) for the respondent.

U THEIN MAUNG, C.J.—This is an appeal from an order passed by the District Court of Bassein in Civil Execution No. 2 of 1947 allowing the application of the respondent M.M.K. Subbiya Chettiar to record that the decree of the appellant V.E.R.M. Krishna Chettiar has been fully satisfied. The payment was made in accordance with the terms of an agreement which had been incorporated in a joint application which was signed by Annamalai Chettiar as agent for the appellant and Chocklingam Chettiar as agent for M.M.K. Kuttian Chettiar, the Judgment-debtor, since deceased, and filed in Civil Execution No. 7 of 1937 of the District Court, Bassein, on the 7th February 1942 (*see* Exhibit A). The payment was made by Chocklingam Chettiar as agent of the Judgment-debtor to Annamalai Chettiar as agent of the Decree-holder at Kangyidaung in Bassein District on the 14th September

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1944, *i.e.* during the period of Japanese occupation of Burma and therefore in Japanese currency. The Decree-holder has never been in Burma and the Judgment-debtor had evacuated himself to India after the outbreak of the war. It appears that both Annamalai Chettiar and Chocklingam Chettiar were at the time of the said payment under the impression that the Judgment-debtor was alive, but it has since been found out that he died in India on the 3rd September 1943, *i.e.* long before the payment was made.

Before the said payment Annamalai Chettiar had applied for execution of the decree as nothing had been realized in accordance with the terms of the said agreement and as he was afraid that the claim of the Decree-holder would be time barred. His application "was against the Judgment-debtor through his agent Chocklingam Chettiar." Chocklingam Chettiar never appeared in Court, but the application was dismissed on the ground that Annamalai Chettiar's agency had been terminated inasmuch as according to the learned Divisional Judge who dealt with it "War terminates agency if either the principal or the agent is a subject of a belligerent State." (*See* Exhibit B.)

The only question that has been raised in this appeal is the question as to whether Annamalai Chettiar and Chocklingam Chettiar ceased to be agents of the Decree-holder and the Judgment-debtor respectively for the reason that Burma was occupied by the Japanese. It has been conceded that nothing turns on the fact that the Judgment-debtor had died before the payment was made in view of section 208 of the Contract Act which provides, "The termination of the authority of an agency does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them."

With reference to the dismissal of the application for execution in 1944, the learned advocate for the respondent has pointed out that the Judgment-debtor had died before the application was filed and no one was made a party to the application as the legal representative of the deceased Judgment-debtor. Annamalai Chettiar has also admitted in his evidence that Chocklingam Chettiar never appeared in Court in connection with that application. Under these circumstances the learned advocate for the appellant does not seriously contend that the question as to whether Annamalai Chettiar remains an agent of the Decree-holder was *res judicata*.

The amount which is claimed by the Decree-holder as outstanding under the decree, *i.e.* ignoring the payment made by Chocklingam Chettiar to Annamalai Chettiar is Rs. 4,601 only. However, there are several other cases pending both in this Court and in subordinate Courts in which the same question of law as to the fact of Japanese occupation of Burma on contracts of agency arises. Several of the advocates, who are appearing in those cases, have asked for permission to be heard on this question of law and the learned advocates for the appellant and the respondent have no objection to their being heard. So we have heard them all and we must say that we have received valuable assistance from their arguments.

In a sense the question is not *res integra*. The question as to whether an agent, carrying on business on behalf of his principal, a British subject, formerly residing in Burma and now in India, can sue in a Court in Burma established by the Commander-in-Chief of the Nippon Imperial Army, in respect of a cause of action that has arisen before the British evacuation, was referred to a Full Bench of the Supreme Court of Burma in Civil Reference No. 2 of 1943

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(*A.S.N.S. Firm by their duly constituted agent Karappaya Pillay* v. *Maung Po Khin and Ma Thaung Kywai*). The Supreme Court was the highest Tribunal in Burma during the period of Japanese occupation and it has answered the said question in the affirmative. In the course of their judgment their Lordships observed, "What is thus now clear is that the national character of Burma and its people remains as it was before; consequently the British Indian subjects living either in Burma or in India cannot be treated as 'alien enemies' of this country. The necessary and in fact the inevitable corollary that follows from this is that British Indian subjects residing in India can sue in any Court in Burma."

This decision of the Supreme Court must be treated with great respect inasmuch as a Bench of the High Court of Judicature at Rangoon has held in *U San Wa* v. *U Ba Thin* (1) "that the Supreme Court established in Burma by the Japanese Authorities during their occupation was a duly constituted Court of Law, that decrees and orders made by it are now valid in all respects and are of the same effect as if they had been made by the High Court of Judicature at Rangoon either before or after the Japanese occupation here and that the Judges of the High Court of Judicature at Rangoon are successors to the Supreme Court."

The question as to the effect of Japanese occupation of Burma on a contract of agency where the agent was in Burma and the principal was in British India was also considered and decided by a Bench of the High Court of Judicature at Rangoon in *R.M.M.R.M. Perichiappa Chettiar* v. *Ko Kyaw Than* (2). In that case the principal had executed a Power of Attorney

(1) Civil Reference No. 2 of 1947. (2) Civil 1st Appeal No. 34 of 1947.

empowering his agent to take possession of and let his properties and to do several other things, but the agent was expressly prohibited from selling or alienating any property except with the principal's express consent and in spite of the express prohibition the agent sold some of the properties ; and the Bench held that not only was the contract of agency not terminated by the Japanese occupation of Burma, but the agent under the circumstances of war could even act as an agent of necessity under section 189 of the Contract Act. . In the course of his judgment in that case Mr. Justice Blagden observed, " Even however if it be correct to regard it as a settled and universal rule that a contract of agency is determined by war where the principal is an enemy alien, it does not necessarily follow that the rule is applicable in the converse case which is before us. There is nothing obviously advantageous to His Majesty's enemy and detrimental to His Majesty's belligerent interests in a man's being employed to look after the property and rights of His Majesty's unfortunate subjects whose homes have been overrun by the enemy."

Gledhill J. also observed therein, " In the American Civil War, there was a still nearer approach to the situation with which we are dealing than that in *Soufracht*'s case (1). The enemy is, it is true, a belligerent, but he is a rebel, and the Federal Government regards him as one to be reduced again to allegiance and to whom it owes more responsibility than it would to a neutral whose country has been overrun by the enemy. In consequence, possibly of this, in cases arising out of the circumstances of the *Civil War*, the American Courts appear to have evolved doctrines more indulgent than those in British Courts (*see* McNair, p. 208), and in the only American

(1) (1943) A.C. 203.

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case cited before us, *Fretz* v. *Stover* (1) it was not held that the outbreak of war necessarily terminated an agency, when the principal was in Federal territory, and the agent within one of the Confederate States . . . . . In the absence of authority, I would say that a British subject in enemy subjugated British territory is not in the category of enemy alien, and that subjugation does not abrogate a contract of agency between a British subject in the subjugated area and another British subject who has escaped his fate."

A Bench of Madras High Court has also held in *Chem Abbheong* v. *Mapacarai Mohamed Rowther and eight others* (2) that a Chinaman who was carrying on business in the Federated Malay States which had been overrun by the Japanese was not an alien enemy within the meaning of section 83 of the Code of Civil Procedure, that Penang in the Federated Malay States was not enemy territory within the meaning of the Defence of India Rules, and that the Chinaman was not an enemy within the meaning of those Rules.

However, it has been contended before us that the said decisions must be held to be wrong in view of (1) : the ruling of the House of Lords in *Sovfracht* v. *Van Udens Scheepvaart En Agentuur Maatschappij* (3) ; (2) the provisions of the Defence of Burma Act, 1940, and the Rules thereunder and (3) the English Common Law relating to intercourse with alien enemies.

In *Sovfracht*'s case (3) their Lordships held that a ship-owning company incorporated under the law of the Netherlands and having their principal place of business in Rotterdam was in the position of an alien enemy *at common law* and had ceased to enjoy the right of resort to the King's courts save by permission given by royal licence as the Germans had invaded the

(1) 22 S.C. Wall 98. (2) I.L.R. (1946) Mad. 768.
(3) (1943) A.C. 203.

Netherlands and brought the country entirely under their control. One of their Lordships, namely, Lord Porter also held that authority of the solicitors, who had been retained by the company before it became an alien enemy to represent it terminated when it became a technical enemy. However, his Lordship's finding thereon must be regarded as *obiter* as Viscount Simon L.C. has remarked (at p. 209 of the report) " A subsidiary question as to the validity of the retainer of the solicitors for the respondents becomes irrelevant if the appeal on the main point were to succeed" and Lord Wright has remarked (at p. 236 of the report) " The precise question does not, however, arise for decision in this appeal."

It was not a case in which the question as to the effect of enemy occupation arose in the country under enemy occupation for decision by the Courts therein. It was a case in which the question arose in another country and was decided in accordance with the Municipal Law thereof. Besides, as Blagden J. has pointed out in *R.M.M.R.M. Perichappa Chettiar* v. *Ko Kyaw Than* (1), it does not necessarily follow that English Courts themselves would apply the same rule to a converse case.

As a matter of fact there is no English precedent for a converse case, *i.e.* for a case like the one before us. Sir Arnold McNair has observed at p. 322 of Legal Effects of War, 2nd Edition, " It is a long time since any British territory was under enemy occupation though this happened for a short time in the South African War and we are not aware of English Judicial authority in the matter."

The question as to the effect of the outbreak of war or enemy occupation on contracts must be decided in accordance with Municipal Law. Oppenheim has

(1) Civil 1st Appeal No. 34 of 1947.

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stated at page 254 of International Law, Volume II, 6th Edition Revised, "The matter is one essentially of Municipal, as distinguished from International Law;" and Webber has pointed out at pages 158-9 of the Effect of War on Contracts, 2nd Edition, 1946, that the *Sovfracht* case itself "dealt with Municipal Law and any references to prize law were strictly *obiter dicta.*" So what we have to consider is whether the Indian principals (who are British subjects), became enemies of Burma and the inhabitants of Burma according to the Municipal Law of Burma—not whether their agents in Burma became enemies of British India according to the Municipal Law of India. Even though British subjects in India might have to regard the inhabitants of Burma as their enemies, the latter may not be required by their Municipal Law to regard the former as their enemies.

The Municipal Law of Burma on this question is to be found in the Contract Act, the Defence of Burma Act, 1940, and the Defence of Burma Rules which continued to be in force in spite of enemy occupation. Section 201 of the Contract Act, which relates to termination of agency, does not provide that an agency shall be terminated by an outbreak of war or by the principal becoming an alien enemy. However, section 56 thereof provides that a contract to do an act which, after the contract is made, becomes impossible or unlawful shall be void when the act becomes impossible or unlawful. So we must consider whether as a result of enemy occupation of Burma it became impossible or unlawful for the agents in Burma to act on behalf of their principals in British India on account of the Defence of Burma Act, 1940, and the Rules thereunder.

Now the Defence of Burma Act, 1940, was enacted for the defence of British Burma; the Rules

thereunder were also made for the same purpose; and neither the Legislature nor the Governor appears to have contemplated that Burma would be occupied by Japanese. They certainly did not intend to provide in the Act and the Rules for the defence of Burma while it was under enemy occupation. Sharpe J. has observed in *T. N. Ahuja* v. *H. H. Sen Gupta*, Special Civil 1st Appeal No. 2 of 1946, "The object and intention of the Legislature in passing the Defence of Burma Act was the defence of Burma; when once Burma was occupied by the Japanese forces, no further defence of Burma was possible, from the point of view of His Majesty and his loyal subjects. Except for those very small parts of Burma which never passed into the hands of the Japanese authorities, the Act could have no practical application until the liberation of Burma by the British forces again rendered it possible to defend Burma on behalf of His Majesty. You cannot defend what is held by somebody else."

The object of the Act and the Rules being as stated above, they do not contain any provision as to whether the inhabitants of Burma should regard the inhabitants of British India as their enemies in the case of Burma being occupied by the Japanese; and it is fairly obvious that occupied Burma and the inhabitants thereof cannot be required to regard one another as enemies in spite of enemy occupation.

As Blagden J. has pointed out in *R.M.M.R.M. Perichiappa Chettiar* v. *Ko Kyaw Than* (1), "strict logic is not the only matter that has to be considered in trying to ascertain what the law is: humanity also enters into the question, and the maxim *lex non cogit ad impossibilia* has to be remembered." So the answer to the question as to whether the Indian principals were enemies of Burma and the inhabitants of Burma must

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depend on whether they were enemies as defined in Rule 97 of the Defence of Burma Rules, *i.e.* whether they themselves were resident in enemy territory as defined in Rule 2 (2) thereof; and there can be no doubt that they were not enemies within the purview of the said rule as British India, in which they were resident, was "an area in the occupation of His Majesty."

"The rule against trading with the enemy is a belligerent's weapon of protection" as pointed out by Lord Parker in *Daimler Company, Limited* v. *Continental Tyre and Rubber Company (Great Britain), Limited* (1); "belligerent nations at times enact laws forbidding or regulating intercourse of their nationals with the nationals of enemy countries" as stated at page 255 of Schwarzenberger's International Law, Volume I; and British India was an enemy country so far as the Japanese were concerned. However, the Japanese never made any law to forbid or regulate intercourse between the inhabitants of occupied Burma and the inhabitants of British India.

The contracts of agency did not become illegal as the principals did not become enemies nor did they become impossible of performance within the meaning of section 56 of the Contract Act.

It has been contended that the contracts of agency must be deemed to have been terminated as it became impossible for the principals in British India to give further directions to their agents in enemy occupied Burma. However, section 201 of the Contract Act does not provide that agencies are terminated under such circumstances. On the other hand section 211 thereof contains provisions as to how an agent should conduct his principal's business in the absence of his

(1) (1916) 2 A.C. 307 at p. 344.

directions and section 189 thereof even gives an agent further authority to act in an emergency.

The English Common Law is not applicable as such in civil cases instituted in Courts other than this Court in its ordinary original jurisdiction, although it may, so far as it is applicable to Burmese society and circumstances, be used as a guide to justice, equity and good conscience under sub-section (3) of section 13 of the Burma Laws Act in the absence of any enactment [see *Waghela Rajsanji* v. *Shekh Masludin* (1)]. We cannot deal with the question as to whether English Common Law is still applicable in cases instituted in this Court in its ordinary original jurisdiction in spite of sub-section (2) of the said section and the Letters Patent of the late High Court of Judicature having been repealed as it does not arise in this appeal which is an appeal from an order of a District Court. Besides it is not necessary for us to do so as (1) even if the English Common Law be applicable, it cannot override the Defence of Burma Act, 1940 and the rules thereunder [see *Chem Abbheong* v. *M.A.P.M. Rowther and eight others* (2)] ; (2) there is no direct common law authority on the questions under reference and (3) conditions peculiar to Burma under enemy occupation must be borne in mind in applying any doctrine of English Law [cf. *Thomas Bear & Sons (India), Ltd.* v. *Prayag Narain* (3)].

With reference to the question of justice, equity and good conscience we find that our view of Burmese Municipal Law is in consonance with that of the Supreme Judicial Court of Massachusetts in *Kershaw* v. *Kelsey* (4). There Gray J. observed,

" When a creditor, although a subject of the enemy, remains in the country of the debtor, *or has a known agent there authorized*

(1) 14 I.A. 89 at p. 96.
(2) I.L.R. (1946) Mad. 768.
(3) 67 I.A. 212 at p. 216.
(4) 100 Mass. 561.

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to receive the amount of the debt, throughout the war (italics ours) payment there to such creditor *or his agent* can in no respect be construed into a violation of the duties imposed by a state of war upon the debtor ; it is not made to an enemy, in contemplation of international or municipal law ; and it is no objection that the agent may possibly remit the money to his principal in the enemy's country ; if he should do so, the offence would be imputable to him and not to the person paying him the money."

It is also in consonance with the ruling of the Supreme Court of the United States in *Williams* v. *Paine* (1) which is cited in *Tingley* v. *Muller* (2),

" There a power of attorney granted by an officer on his wife resident in Pensylvania to convey land in the City of Washington was held not to be revoked by the war in which the grantors of the power took an active part with the confederates, but to be well executed notwithstanding the war."

Besides our view of Burmese Municipal Law is in accordance with the principle of *stare decisis*. Broom has stated—

" It is, then, an established rule to abide by former precedents, *stare decisis*, where the same points come again in litigation, as well to keep the scale of justice steady, and not liable to waver with every new Judge's opinion, as also because, the law in that case being solemnly declared, what before was uncertain and perhaps indifferent, is now become a permanent rule . . . ."

" for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise . . ."

" the Courts are reluctant to upset former decisions, which, although anomalous, have been accepted by the public as the basis of their transactions for a length of time, a rule embodied in the maxim, *communis error facit jus*. It is pointed out by Lord Hatherley in *Bain* v. *Fothergill* (3) that the House of Lords has frequently acted upon the mistaken practice of conveyancers, and will regard the necessity for following previous decisions as more imperative where the common dealings of

(1) 169 U.S. 55. (2) (1917) L.R. 2 Ch. 144 at pp. 156-7.
(3) L.R. 7 H.L. 158 at p. 209.

mankind are in question." (See pages 90 to 92 of Broom's Legal Maxims, 10th Edition.)

The questions under reference have to be determined in accordance with Burmese Municipal Law as it was in force during the period of Japanese occupation of Burma and a Full Bench of the Supreme Court, which as the name implies was the highest judicial tribunal in Burma then, has held in *A.S.N.S. Firm by their duly constituted agent Karappaya Pillay* v. *Maung Po Khin and Ma Thaung Kywai* (1)

" What is thus now clear is that the national character of Burma and its people remains as it was before ; consequently the British Indian subjects living either in Burma or in India cannot be treated as 'alien enemies' of this country. The necessary and, in fact, the inevitable corollary that follows from this is that British Indian subjects residing in India can sue in any Court in Burma."

This ruling of the Supreme Court must have been " accepted by the public as the basis of their transactions for a length of time. " Even after the liberation of Burma a Bench of the High Court of Judicature at Rangoon decided in *R.M.M.R.M. Perichiappa Chettiar* v. *Ko Kyaw Than* (2) that a contract of agency between an agent in Burma and his principal in British India is not abrogated by the Japanese occupation of Burma and that the agent could even act in the emergency under section 189 of the Contract Act ; and the public must have accepted the ruling as the basis for many more transactions, thereby aggravating the necessity for following the previous decisions. Besides the necessity to follow them is more imperative as the common dealings of mankind such as payments of debt, satisfaction of decrees and redemption of mortgages are in question.

(1) Civil Reference No. 2 of 1943. (2) Civil 1st Appeal No. 34 of 1947.

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W. E. Hall, who has always been regarded as most characteristically British and positivist in his exposition of International Law, has stated at page 579 of his International Law (8th Edition),

"Thus judicial acts done under the control of the occupant, when they are not of a political complexion, administrative acts so done, to the extent that they take effect during the continuance of his control, and the various acts done during the same time by private persons under the sanction of municipal law, remain good. Were it otherwise, the whole social life of a community would be paralysed by an invasion (that is, occupation) * * * *."

Otter J. has also observed in *In re Ma Mya* v. *Ma Thein* (1)

"It seems to me of the greatest importance to bear this principle (*i.e.* the principle of *stare decisis*) in mind in view of the varied local conditions and customs peculiar to this Province (Burma)."

Mr. P. K. Basu, one of the learned advocates who appeared before us to support the view that the agency was abrogated by enemy occupation, has also relied on the "Declaration of war by Burma on Great Britain" on the 1st August, 1943. He has contended that as a result thereof citizens of the rest of the British Empire became enemies of the inhabitants of enemy occupied Burma. However, a declaration of war is a communication by one State to another that the condition of peace between them has come to an end and a condition of war has taken its place (*see* Oppenheim's International Law, Vol. II, 6th Edition, Revised, page 237). So, before Burma can declare war on Great Britain or any other State, Burma must be a State and therefore a subject of International Law, and Burma was not a State, not even a Dominion, at the time of the alleged declaration of war. It was only a

(1) I.L.R. (1926) 4 Ran. 313 (F.B.) at p. 346.

dependency in the British Empire. It is true that the Japanese purported to confer independence on Burma after they had occupied it, but they had no power to do so under International Law. Oppenheim has stated at page 342 of his International Law, Vol. II, 6th Edition, Revised,

"As the right of an occupant in occupied territory is merely a right of administration, he may neither annex it, while the war continues, nor set it up as an independent State."

He has also added at page 344, *ibid*,

"Nor may he compel them to take an oath of allegiance. Since the authority of the occupant is not sovereignty the inhabitants owe no temporary allegiance to him."

Besides, as has been pointed out by Lord Loreburn L.C. in *Lodewyk Johannes De Jager* v. *The Attorney-General of Natal* (1),

"The protection of a State does not cease merely because the State forces, for strategical or other reasons, are temporarily withdrawn, so that the enemy for the time exercises the rights of an army in occupation. On the contrary, when such territory reverts to the control of its rightful Sovereign, wrongs done during the foreign occupation are cognizable by the ordinary Courts. The protection of the Sovereign has not ceased. It is continuous, though the actual redress of what has been done amiss may be necessarily postponed until the enemy forces have been expelled."

Moreover, Mootham J. has also pointed out in *The King* v. *Maung Hmin and three others* (2),

"The 'Independent Government of Burma' had of course no legal status, and its subordination to the occupying power has not been disputed."

So, we are of the opinion that Burma never had the necessary status to declare war on Great Britain and that the alleged declaration of war can have no legal

(1) (1907) A.C. 326 at pp. 328-9. (2) (1946) Ran. 1 at p. 27.

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effect, except perhaps to render the person who purported to declare war punishable in accordance with the remarks of Lord Loreburn L.C.

With reference to the acts of the Governments of the rebel Confederate States the Supreme Court of America has observed in *Texas* v. *White* (1),

> "Acts in furtherance or support of rebellion against the United States * * * * and other Acts of like nature must in general be regarded as invalid and void."

Mr. P. K. Basu has also relied upon Act No. 5 of 1943 which was enacted during the period of the Japanese occupation by the then "Head of State." Section 2 thereof provides that Indians who are British subjects and who are resident in Burma should be regarded not as enemy subjects but as nationals of friendly countries in spite of the said declaration of war. Mr. P. K. Basu contends that the implication is that Indian British subjects who were resident in British India must be regarded as enemy subjects. However, the Act does not say so and, having regard to the circumstances under which the Act was made and promulgated, we are of the opinion that it will not be safe to infer that there was any implication as suggested by Mr. Basu. On the other hand, this enactment throws a good deal of light on, and detracts a good deal from, the so-called declaration of war, which as we have stated above was void *ab initio*.

For all the above reasons we hold that Annamalai Chettiar and Chockalingam Chettiar remained agents of the appellant and M.M.R. Kuttain Chettiar respectively in spite of the outbreak of war and enemy occupation of Burma.

One of us (*viz.* U Thein Maung) decided in *K. M. Modi* v. *Mohamed Siddique and another*, Civil

(1) (1868) 7 Wall. 700 at p. 733.

Regular Suit No. 53 of 1946 in the Original Side of the High Court of Judicature at Rangoon that a contract of agency between a principal, who remained in Burma, and an agent, who went over to India after the outbreak of war, was abrogated by enemy occupation of Burma, following the ruling in *Sovfracht*'s case (1). However, there was no issue in that case as to whether the contract of agency was abrogated by enemy occupation. The question arose as a subsidiary one in connection with one of the several issues. So the learned advocates who appeared in that case did not discuss it fully. They did not refer even to the Full Bench decision of the Supreme Court of Burma in *A.S.N.S. Firm by their duly constituted agent Karappaya Pillay* v. *Maung Po Khin and Ma Thaung Kywai*, Civil Reference No. 2 of 1943.

The Special Bench of the High Court of Judicature at Rangoon which confirmed the decree in the said suit found it unnecessary to deal with the question. (*See* the judgments in Civil 1st Appeal No. 22 of 1947.) However as we have stated above, a Bench of the High Court of Judicature at Rangoon has come to a contrary decision in *R.M.M.R.M. Perichiappa Chettiar* v. *Ko Kyaw Than*, Civil 1st Appeal No. 34 of 1947, and we respectfully agree with them.

The appeal is dismissed with costs. Advocate's fee in this Court five gold mohurs.

U SAN MAUNG, J.—I am so entirely in agreement with the reasons given by my Lord the Chief Justice in his judgment, which I have had the advantage of reading, that I feel I can add very little to it. The only question for decision in this appeal is whether Annamalai Chettiar and Chockalingam Chettiar ceased to be the agents of the Decree-holder and the Judgment-

(1) (1943) A C. 203.

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debtor respectively by reason of the occupation of Burma by the Japanese at the time their respective principals were in India. This question must undoubtedly be answered in accordance with the Municipal Law of Burma and for this purpose we must look to the Contract Act or the Defence of Burma Act, 1940, and Rules thereunder. Failing this, the decision must be based upon justice, equity and good conscience, which in the generality of cases, mean the English Common Law. There is no provision in the Contract Act to the effect that a contract of agency shall be terminated by an outbreak of war or by the principal becoming an alien enemy. Therefore, it only remains to be considered whether as a result of the Japanese occupation of Burma, it became impossible or unlawful for the agents in Burma to act on behalf of their principals in British India on account of the Defence of Burma Act, 1940, and the Rules thereunder. As pointed out by my Lord, the Defence of Burma Act, 1940, and the Rules framed thereunder were designed to ensure the public safety and interest and the defence of British Burma. It could never have been contemplated that the Act and Rules thereunder should be fully operative in Burma while practically the whole of it was under the occupation of the Japanese. To hold otherwise would lead to absurd consequences, because practically everyone in Burma would have daily committed offences punishable under the Defence of Burma Act and Rules, for the whole of the Japanese occupation period of Burma. Furthermore, the Act and the Rules do not contain any specific provision as to whether the inhabitants of Burma should regard the inhabitants of British India as their enemies in the case of Burma being occupied by the Japanese. Assuming that the relevant provisions of the Defence of Burma Act and Rules thereunder

were in operation in Burma during the time it was occupied by the Japanese, we must look to Rule 97 and the definition of "enemy" for the purpose of Part XV which relates to Control of Trading with Enemy. Obviously, to the agent in Burma, his principal in British India cannot be an "enemy" within the definition of that Rule because he is not an individual resident in enemy territory, India being "an area in the occupation of His Majesty." Hence it cannot be considered unlawful for him to act on behalf of his principal in India.

The question which remains to be considered is whether the English Common Law should be looked to as a guide to justice, equity and good conscience under sub-section (3) of section 13 of the Burma Laws Act in the absence of any enactment on the issue involved. Now, Sir F. Pollock in his book on "The Expansion of the Common Law" observes (at pp. 9 and 10) :

"We have long given up the attempt to maintain that the Common Law is the perfection of reason. Existing human institutions can only do their best with the conditions they work in. * * * It may perhaps be safe to assume, in a general way, that what is reasonable for Massachusetts is reasonable for Vermont. It will not be at all safe to assume that everything reasonable for Massachusetts is reasonable for British India. * * * We now realize that the laws of every nation are determined by their own historical conditions not only as to details, but as to structure."

The Common Law position as regards the effect of the outbreak of war upon agency has been summarized by McNair in his "Legal effects of war", page 206, Chapter 9 of the 2nd Edition. There he says,

"If we look at the matter from the point of view of principle, agency is certainly a contract which we should expect to be abrogated by reason of the prohibition of intercourse with

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enemies in the territorial sense, and moreover incapable of being created during the war. Leaving on one side for the present the American cases, we find that in *Tingley* v. *Muller* (1) (which we shall discuss later) Lord Cozens-Hardy M.R. said : 'It is true that most agencies, involving as they do continuous intercourse with an alien enemy, are revoked, or at least suspended.' (The suspension theory was then at its last gasp.) And in *Hugh Stevenson & Sons, Ltd.* v. *Actiengesellschaft fur Cartonnagen-Industrie* (2) (a partnership case) it was held by Atkin J. and by the Court of Appeal that both the partnership and the contract of agency between the partners were *ipso facto* abrogated by the outbreak of war which made one of them an enemy in the territorial sense. In the words of Swinfen Eady L.J. (3). 'the contract of agency was terminated by the war. It was a trading contract, and war dissolves all contracts which involve trading with the enemy.'"

The principles to be deduced therefrom are twofold :

(1) As the agency involves intercourse with enemies, it is abrogated by the outbreak of war by reason of prohibition of intercourse with the enemy in the territorial sense.

(2) If the agency is such that it involves trading with the enemy it is abrogated by war which dissolves all contracts involving trading with the enemy.

However, to apply the principles of the English Common Law regarding the abrogation of agency by war, to the facts of the present case, as in justice, equity and good conscience, would, in my opinion, be tantamount to an admission that what has been considered reasonable for England, which since the Norman Conquest has never experienced enemy invasion and occupation of her territory by the enemy, would be reasonable for Burma which has had to strive hard towards normal existence during the long period of three years for which she had to remain under the occupation of the Japanese. During that period, and

(1) [1917] 2 Ch. 144, 156. (2) [1917] 1 K.B. 842 ; (1918) A.C. 239.
(3) [1917] 1 K.B. 845.

only subject to the limitations imposed upon her people by the war and the fact of enemy occupation, life in the country had to go on. People must try to carry on their ordinary avocations or else starve. Business must prosper, debts must be contracted or discharged, immovable property must be looked after, Courts of law must function, and so on. As observed by Blagden J. in *R.M.M.R.M. Perichiappa Chettiar* v. *Ko Kyaw Than* (1),

> "His Majesty has no right at Common Law to expect the unfortunate inhabitants of his territory who have come for the time under the power of his enemies to denude themselves of assets, cease from gainful occupation, and starve, just because he has been unable to afford them the protection which he had afforded them. If so, the plaintiff could legitimately have carried on his business at Henzada himself, and therefore there was nothing illegal in his doing so by an agent."

In fact, in such a time as this, it is to the advantage of the principal who finds himself unable to come to Burma to look after his business, owing to enemy occupation, to have an agent there protecting his interests—and His Majesty cannot possibly object to him having an agent in Burma for this purpose, if this could be done without having intercourse across the line of war. In the generality of cases this purpose will be achieved without actual communication between the principal in India and his agent in Burma. Therefore the contract of agency between them should not be deemed to be abrogated for the reason that on the occupation of Burma by the Japanese the intercourse with the enemy in the territorial sense is prohibited.

The reason behind the prohibition against trading with the enemy is that by that process the enemy should, as far as possible, be deprived of sinews of war.

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An agent in Burma could very well look after the interests of his principal in India without supplying the Japanese with what may be described as "sinews of war." In fact he could manage his principal's business in such a way as to deprive the Japanese as much as possible of the benefits accruing therefrom, and thus achieve the very end which the prohibition of trading with the enemy intended.

Therefore, English Common Law cannot be taken as a safe guide to the determination of the question involved in this case. The position would be otherwise, if the English Common Law had been enriched by decisions born of experience of enemy occupation of English territory. As it is, the growth of English Common Law in regard to the subject now under discussion has been stunted and not to be compared with the Common Law in America, which though it came from the same stock as the English Common Law, has grown in stature owing to the experience gained during the Civil War. Hence the views of the Supreme Judicial Court of Massachusetts in *Kershaw* v. *Kelsey* (1) and of the Supreme Court of the United States in *Williams* v. *Paine* (2) cited in *Tingley* v. *Muller* (3) are far more apposite. In regard to these views, McNair, in his chapter on Agency, has the following observations to make :

"English law therefore rejects the lax view expressed in the Supreme Judicial Court of Massachusetts in 1868 in *Kershaw* v. *Kelsey* (1) where Gray J. said : 'When a creditor, although a subject of the enemy, remains in the country of the debtor, or *has a known agent there authorized to receive the amount of the debt thorughout the war*, payment there to such creditor *or his agent* can in no respect be construed into a violation of the duties imposed by a state of war upon the debtor ; is it not made to an

(1) 100 Mass. 56. (2) 169 U.S. 55.
(3) [1917] 2 Ch. 144, 156.

enemy, in contemplation of international or municipal law ; and it is no objection that the agent may possibly remit the money to his principal in the enemy's country ; if he should do so, the offence would be imputable to him, and not to the person paying him the money.' "

The criticisms against the American decisions are apparently twofold :

(1) The American Courts are more indulgent than the English to the agent suing in his own country on behalf of a principal in the enemy country.

(2) The American Courts overlooked the fact that by paying a debt due to an enemy to his agent, the enemy can increase the sinews of war by raising money in a neutral country because of his increased credit.

Both these criticisms would fail when the principle laid down in *Kershaw* v. *Kelsey* (1) are applied to the circumstances of the present case, for (*a*) the Courts in Burma functioning during the Japanese occupation period have held following the decision of the Supreme Court in *A.S.N.S. Firm by their duly constituted agent Karappaya Pillay* v. *Maung Po Khin and Ma Thaung Kywai* (2), that an agent carrying on business on behalf of his principal, a British subject in India could sue in the Courts in Burma, and (*b*) payment of a debt due to a principal in India to his agent in Burma would rather tend to increase the sinews of war to the British rather than to the Japanese.

Sovfracht's case (3) has been the anchor sheet of the arguments adduced on behalf of the appellants, especially the observation by Lord Porter at page 254 of the report, which reads,

" Ordinarily, when the principal becomes an enemy the authority of the agent ceases on the ground that it is not

(1) 100 Mass. 56. (2) Civil Reference No. 2 of 1943.
(3) (1943) A.C. 203.

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permissible to have intercourse with an enemy alien and the existence of the relationship of principal and agent necessitates such an intercourse."

In this connection, I would respectfully adopt the observations of Gledhill J. in *R.M.M.R.M. Palaniappa Chettiar* v. *Ko Kyaw Than* (1) where the learned Judge said,

"In the American Civil War, there was a still nearer approach to the situation with which we are dealing than in *Sovfracht*'s case (2). The enemy is, it is true, a belligerent, but he is a rebel, and the Federal Government regards him as one to be reduced again to allegiance and to whom it owes more responsibility than it would to a neutral whose country has been overrun by the enemy. In consequence, possibly of this, in cases arising out of the Civil War, the American Courts appear to have evolved doctrines more indulgent than those in British Courts."

Surely, had a situation such as the present arisen in England during the long period of growth of her Common Law, the British Courts could not have failed to evolve a doctrine even more indulgent than those of the American Courts in order to protect the interests of those unfortunate subjects who find themselves compelled to depend upon their trusted agents to look after their property which they had to leave behind in the enemy occupied territory during the pendency of the war. In *Tingley* v. *Muller* (3) where the Court strove to hold that the agency was still subsisting, we are vouchsafed a glimpse of the manner in which the English Common Law might have evolved to the benefit of such unfortunate subjects, had the course of British History been otherwise. Who can say that the general rule regarding the abrogation of agencies by war would not then be so full of exceptions as to be almost obscured by them ?

(1) Civil 1st Appeal No. 4 of 1946. (2) Civil Reference No. 2 of 1943.
(3) (1943) A.C. 203.

Finally, as pointed out by my Lord, the question is not *res integra*, and the principle of *stare decisis* must for ever be borne in mind. The decision of the then Supreme Court of Burma in *A.S.N.S. Firm by their duly constituted agent Karappaya Pillay* v. *Maung Po Khin and Ma Thaung Kywai* (1) must be treated with great respect in view of the ruling in *U San Wa* v. *U Ba Thin* (2) that the Judges of the High Court of Judicature are successors to the Supreme Court. Since that decision of the Supreme Court became known, it has been accepted by the public as the basis of their transactions and for us to come to a finding contrary to that decision would result in confusion worse confounded. "The Courts are always reluctant to upset decisions, which, although anomalous, have been accepted by the public as the basis of their transactions for a length of time, a rule embodied in the maxim *communis error facit jus* (*see* page 92 of Broom's Legal Maxims, 10th Edition).

I agree in the order proposed by my Lord.

(1) Civil Reference No. 2 of 1943. (2) Civil 1st Appeal No. 34 of 1947.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J

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Apl. 26.

M. H. ISMAIL (APPELLANT)

v.

M. E. O. KHAN (RESPONDENT).*

Urban Rent Control Act, s. 14 (3)—S. 11 (a) Urban Rent Control Act—Retrospective nature of—Conditions to be satisfied—Substantial compliance if sufficient.

On 20th December 1946 the Chief Judge of the Rangoon City Civil Court passed a decree for ejectment of respondent and an order for execution was passed on 14th February 1947 but the order was not executed. On the 8th August the Chief Judge altered the order under s. 14 of the Urban Rent Control Act. On appeal two contentions were raised (1) that order for execution having been passed before the amendment of the Act, s. 14 did not apply and (2) that there has been substantial compliance of s. 11 of the Act, as in fact the landlord had given a notice though it was not filed in Court.

Held: Where mere order for execution of decree for ejectment has been passed but the tenant has not been actually ejected and the rooms have not yet been delivered, relief could be given to the tenant under s. 14 (3) of the Urban Rent Control Act.

J. L. Chowdhury Bros. v. *Sit Taik Tong Society,* Civil Miscellaneous Appeal No. 21 of 1947, followed.

Further that it is not permissible for the landlord under s. 14 (3) to introduce new matters to supplement those already on record, as it will amount to allowing the landlord to substitute a fresh cause of action. As no notice of demand by registered post had been sent, an order for ejectment under s. 11 could not have been passed. S. 11 of the Act as amended must be deemed to be in force at the time of the decree or order for ejectment.

K. R. Venkatram for the appellant.

D. M. Ray for the respondent.

U SAN MAUNG, J.—This is an appeal under section 15 of the Urban Rent Control Act, 1947, as amended by Burma Act XIV of 1947, against the order dated the 8th August 1947, passed by the Chief Judge

* Civil Misc. Appeal No. 47 of 1947 against the order of the Chief Judge, Rangoon City Civil Court, in Civil Regular No. 1176 of 1946, dated the 8th August 1947.

of the Rangoon City Civil Court in Civil Regular No. 1176 of 1946 of that Court. By that order, which was purported to be made under section 14 (3) of the Urban Rent Control Act, 1946, as substituted by section 2 of the Urban Rent Control (Second Amendment) Act, 1947 (Burma Act XXVI of 1947), the learned Chief Judge altered the order dated the 20th December 1946 which was passed by his predecessor for the ejectment of Mr. M. E. O. Khan (respondent in this appeal) in the manner indicated in the order now under appeal. It is not necessary for us to recapitulate the facts which have been fully set out in the order dated the 8th August 1947. The two points raised in this appeal are:

(1) Whether the learned Chief Judge of the City Civil Court had jurisdiction under sub-section (3) of section 14 of the Urban Rent Control Act, 1946, to alter the order of his predecessor in view of the formal order granting execution, which appears in the Diary entry dated the 14th February 1947 in Civil Execution No. 27 of 1947.

(2) Whether the learned Chief Judge of the City Civil Court was justified in distinguishing this case from the case of *J. L. Chowdhury Bros.* v. *Sit Taik Tong Society* (1), where it was held that effective service of notice sent otherwise than by Registered Post was sufficient for the purpose of clause (*a*) of section 11 of the Urban Rent Control Act, 1946, if rent had been in arrears and the demand was not complied with within three weeks from the date of the notice.

As regards (1), it was contended by the learned counsel for the appellant M. H. Ismail that in view of the order dated the 14th February 1947 in Civil Execution No. 27 of 1947 the order for the ejectment

(1) Civil Misc. Appeal No. 91 of 1947.

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of the respondent M. E. O. Khan must be deemed to have been already executed so that the learned Chief Judge of the City Civil Court had no longer any jurisdiction either to alter or rescind the order for ejectment as provided for in sub-section (3) of section 14 of the Urban Rent Control Act, 1946. This contention is clearly not tenable in view of the fact that the rooms from which the respondent M. E. O. Khan was to be ejected have not yet been delivered to him in the manner laid down in Rule 35 of Order XXI of the Code of Civil Procedure. The learned Chief Judge of the City Civil Court had, therefore, jurisdiction to alter or rescind the order for ejectment if the other conditions appearing in sub-section (3) of section 14 of the Urban Rent Control Act, 1946, had been fulfilled.

The second question is a little more difficult. Sub-section 3 of section 14 of the Urban Rent Control Act, 1946, so far as is relevant to the case under consideration, is in the following terms :

"Where any order or decree of the kind mentioned in section 11 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 were in force or applicable thereto at the time when the order or decree was made, the Court shall, on application by the tenant . . . . rescind or alter the order or decree in such manner as it thinks fit for the purpose of giving effect to this Act ; *and the provisions of section 11 shall, for the purpose of such application, be deemed to be applicable to the suit or proceeding in which such order or decree was made.*" (The italics are ours.)

Turning to section 11, it is clear that in a suit or proceeding to which this section applies no order for ejectment of a tenant can be made unless the rent due from the tenant, which accrued after the resumption of civil government has not been paid or deposited in the

manner laid down therein after a written demand for payment of such rent has been sent to the tenant *by Registered Post* and has not been complied with for three weeks from the date of such demand. As has been pointed out by the learned Chief Judge of the City Civil Court in the order under appeal, the suit filed by the appellant (*Mohamed Hashim Ismail* v. *M. E. O. Khan*) in that Court was based on a simple notice to quit. It was neither contended nor proved therein that the arrears of rent had not been paid within three weeks from the date of the written notice of demand which had been sent by Registered Post. In fact, it was not alleged that any such notice was given. No doubt, in the counter-affidavit filed by the appellant M. H. Ismail in reply to the affidavit in support of the application under section 14 (3) of the Urban Rent Control Act, it is alleged that on the 29th June 1946 a notice was served upon the petitioner calling upon him to pay Rs. 800, being arrears of rent, and that the copy of the notice filed with the counter-affidavit was a true copy. The respondent M. E. O. Khan did not deny in his reply to the counter-affidavit that this was not so. Mr. M. E. O. Khan's only contention in the reply to the counter-affidavit was that the notice sent was not according to law and that therefore no ejectment-decree could have been passed thereon.

However it is clear from the language of sub-section (3) of section 14 of the Urban Rent Control Act, 1946, that the Court, in dealing with an application under that section, should consider whether on the material on record a decree for ejectment would have been passed if the provisions of section 11 of the Act had been operative during the pendency of the suit or proceeding in which the order for ejectment was in fact passed. Therefore, it is not permissible for a party

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in an application under sub-section (3) of section 14 of the Act to introduce new matters either by way of affidavits or otherwise to supplement those already on record in order to show that an order for ejectment would have been passed even if the provisions of section 11 had been applicable to the suit or proceeding. To hold otherwise would mean that in the majority of cases where ejectment suits had been filed on simple notices to quit it would be necessary to go into fresh matters, *e.g.* (1) whether an order for ejectment would have been passed because rent had been in arrears and not paid within three weeks from the date of notice of demand which had been sent by Registered Post, or (2) whether any obligation of the tenancy under the contract of tenancy or under the Urban Rent Control Act has been broken or not performed, or (3) whether any sum representing rent due from a tenant in respect of any period before the date of resumption of the civil government and in respect of which an order or decree has been made or given by a civil Court in favour of the landlord, has not been paid, or (4) whether the tenant or any other person holding under him or 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, etc. This in effect would be tantamount to allowing the landlord to substitute a fresh cause of action for ejectment for the one on which he had filed the original suit.

Therefore, as on the material on record there is nothing to show that the appellant M. H. Ismail had sent a notice of demand by Registered Post as required under clause (*a*) of section 11 of the Act, the learned Chief Judge of the City Civil Court was quite justified in distinguishing this case from the case of

J. L. Chowdhury Bros. v. *Sit Taik Tong Society* (1) and in passing the order which he did under section 14 (*3*) of the Urban Rent Control Act, 1946.

Now, even assuming for the sake of argument that the materials on record show that the appellant M. H. Ismail had in fact sent a notice of demand for arrears of rent which had been received but not complied with within three weeks from the date of the notice, it is clear that since that notice was not sent by Registered Post as required by clause (*a*) of section 11 of the Act he would not have been entitled to an order for ejectment of the respondent M. E. O. Khan. The portion which we have italicized above in sub-section (*3*) of section 14 of the Urban Rent Control Act as substituted by section 2 of Burma Act XXVI of 1947 makes it clear that for the purpose of an application under sub-section (*3*) of section 14 of the Act the Courts must assume that the provisions of section 11 of the Act were applicable to the suit or proceeding in which the order for ejectment was in fact made and under that assumption come to an opinion as to whether the order for ejectment should be rescinded or altered. If section 11 had been operative at the time Civil Regular No. 1176 of 1946 of the City Civil Court was instituted there is no doubt whatsoever that the order for ejectment would not have been passed by the then Chief Judge of the City Civil Court.

In the result the appeal fails and must be dismissed with costs. Advocate's fees two gold mohurs.

U THEIN MAUNG, C.J.—I agree.

(1) Civil Misc. Appeal No. 21 of 1947.

APPELLATE CRIMINAL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

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KHAW TAW AND ONE (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

Evidence Act, ss. 30, 133—Confession of a co-accused—Meaning of the word "may be taken into consideration."

Held: That confession of a co-accused is not specific evidence in the sense that conviction on that confession alone cannot stand.

If there is other relevant evidence tending to prove the guilt of the accused the confession of a co-accused may be taken into consideration along with the said evidence as lending assurance to it.

If there is no other evidence or if the other evidence is insufficient to establish a *prima facie* case against the accused the confession of the co-accused must be excluded altogether and cannot be taken into consideration.

The confession of a co-accused cannot be added to supplement evidence otherwise insufficient and in no case can it be used to fill gaps in the prosecution evidence.

The confession of a co-accused is therefore not on the same footing as the testimony of an approver which is substantial evidence and on which alone conviction can be made under s. 133 of the Evidence Act.

Emperor v. *Lalit Mohan Chuckerbutty and others*, I.L.R. 38 Cal. 559 at p. 587; *Maung Mya and another* v. *The King*, (1938) R.L.R. 30, followed.

Under Special Judges (Third Amendment) Act (Burma Act LXVII of 1947) s. 5 (3) a Special Judge can act on the evidence recorded by his predecessor or predecessors.

P. N. Ghosh for the appellants.

U Tin Maung (Government Advocate) for the respondent.

U SAN MAUNG, J.—On the 28th of June, 1946, corresponding to the 14th *Lazok* of *Nayon*, 1308 B.E., a motor launch named "Myinetazin" owned by

* Criminal Appeal No. 184 of 1948
Criminal Reference No. 12 of 1948; appeal from the order of the 3rd Special Judge of Insein, dated the 18th February 1948, passed in Criminal Regular Trial No. 135 of 1947.

Maung Tun Maung (P.W. 2) of Kemmendine, Rangoon, was engaged by an Arakanese by the name of Shwe Tha Aung for a special trip to Phagu near Dabein for the purpose of loading certain goods which were to have been brought inside 20 or 25 gunny bags. The nature of the goods was not by that time known to Maung Tun Maung, but, as it subsequently transpired, they were draperies from illicit sources. Shwe Tha Aung had three Arakanese as his companions. They were unknown to Maung Tun Maung, but it can no longer be in dispute that these unknown companions were Maung Than husband of Ma Aye Yi (P.W. 26), Shwe Tha Aung partner of Maung Than, Hla Baw Thu the uncle of Maung Than and Maung Gyi (P.W. 27), and Tha Gywe a friend of Maung Gyi. One other passenger was the accused Shwe Thein, who was to have acted as a broker at the transaction. The crew of the motor launch consisted of Maung Aye Maung (P.W. 1), the assistant of Sein Tun Pe who was the driver of the engine, the serang Tun Aye and his assistant Maung Kha. There were also in the launch Chit Pan and Aye Maung, who were the friends and companions of the owner Maung Tun Maung (P.W. 2). The launch with its 12 passengers aboard arrived at about 3 p.m. at a spot about two miles south of Ma-U village. There it stopped while the accused Shwe Thein and one of the Arakanese went to arrange for meals. At about 5 p.m. these two came back to the launch and took away with them Sein Tun Pe, Aye Maung, Chit Pan, Aye Maung (P.W. 1), Tun Maung (P.W. 2) and the other Arakanese to the house of Daw Shwe Sein (P.W. 3) where they were fed. At about 7 p.m. Aye Maung (P.W. 1), Chit Pan and one Arakanese came back to the launch and ordered the launch to proceed to Ma-U village. This was done and, on arrival there, Maung Kha, Tun Aye and the

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other Arakanese who had not had their meals were taken away. The launch was left in charge of Tun Maung and Aye Maung (P.Ws. 2 and 1), Aye Maung, Chit Pan and Sein Tun Pe, while the four Arakanese traders went with Maung Kha, Tun Aye and Shwe Thein into Ma-U village taking with them the gunny bags as well as the valuable properties belonging to them. At about 4 a.m. Aye Maung (P.W. 1) was awakened by Sein Tun Pe and told that the launch was ordered to be shifted back to its original position two miles south of Ma-U village for the purpose of loading goods. This was accordingly done, and when the launch arrived near the original position someone from the bank flashed a torch and ordered the launch to be brought into a small creek. No sooner had this been done than several shots were fired from the direction of the men with the torch. Aye Maung (P.W. 1) jumped into the water and Maung Tun Maung (P.W. 2) did likewise. Tun Maung swam away and hid himself among the bushes in the stream. Aye Maung (P.W. 1), however, foolishly obeyed the command which was to the effect that the five men from the launch must come up the bank. This command was also obeyed by Chit Pan and the other Aye Maung. No sooner had they clambered up the bank than the firing began again. Aye Maung (P.W. 1) again jumped into the water and swam to the opposite bank. The other Aye Maung was shot. The fate of Chit Pan and Sein Tun E—who apparently did not go up from the launch—was only known the next morning when they were found dead on the bank near the launch with *dah*-cut wounds. Aye Maung (P.W. 1) went to Daw Shwe Sein's (P.W. 3) house at sunrise and thence to the headman Maung Way (P.W. 21), to whom he made a brief report of the night's occurrence. The headman proceeded to the scene of crime and there

saw the dead bodies of Aye Maung, Chit Pan and Sein Tun E as already mentioned above. He then sent a report, Exhibit J, to Dabein police station, and the next day the launch and the three dead persons were taken to Dabein whence the dead bodies were sent to Hlegu hospital where the post-mortem examination was held by Dr. Dayal Singh (P.W. 23), whose findings are conclusive on the point that the death of Aye Maung was due to the gun-shot wounds received by him and that the deaths of Sein Tun Pe and Chit Pan were due to the incised wounds, of which there were several on each of them. After due investigation the case was sent up by the Dabein police against the appellants Khaw Taw and Tun Kyaing and three other accused Shwe Thein, Sein Aung and Nauk Chi for dacoity with murder, punishable under section 396 of the Penal Code, and as against Ba Kaing, Ba Au and Tin Maung under section 412 and/or 414 of the Penal Code for receiving and/or assisting in the disposal of dacoited properties. Nauk Chi, Ba Kaing, Ba Au and Tin Maung were discharged by the Special Judge, Insein (U Tha Mya), who first dealt with the case. The same Judge framed charges under section 396 of the Penal Code against Khaw Taw, Shwe Thein, Sein Aung and Tun Kyaing after examining the discharged accused Ba Kaing, Ba Au and Tin Maung as witnesses for the prosecution. After some of the witnesses for the defence were examined he submitted the case to the Sessions Judge, Insein, for the purpose of transferring the same to another Special Judge in view of certain observations of the then Chief Justice in Criminal Appeal No. 1461 of 1947. The case was then transferred to U Hla Nyun, Special Judge, Taikkyi, sitting at Insein. Unfortunately U Hla Nyun was not able to dispose of it before his transfer from Insein District and hence the case finally came to the file of

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U Thein Pe, 3rd Special Judge, Insein, who convicted the appellants Khaw Taw and Tun Kyaing and the accused Shwe Thein and Sein Aung of offences punishable under section 396 of the Penal Code. Shwe Thein and Sein Aung, who were only sentenced to transportation for life, have not appealed against the convictions and sentences and the present appeal was filed by Khaw Taw and Tun Kyaing who were sentenced by the trial Judge to the extreme penalty provided by the law.

The case against the appellants rests mainly upon the confessions, Exhibits W and X, of their co-accused Shwe Thein and Sein Aung and the fact that on the 31st July 1946, about a month after the dacoity took place, they and the accused Sein Aung sold a set of gold studs (Exhibit 53) belonging to Maung Than to the discharged accused Maung Tin Maung (P.W. 34) at Tada-U in Mandalay District. Besides, there is circumstantial evidence which goes to indicate that they knew or had reason to believe that the gold studs which they had sold were obtained by dacoity. As against the appellant Khaw Taw, there is also the fact that the umbrella (Exhibit 12) which was found in his possession at the time he was arrested at Daik-U on the 10th August 1946 was identified to be Maung Than's property.

Now, the confession, Exhibit W, given by Shwe Thein at Hlegu before U Hla (P.W. 25) though subsequently retracted, must be considered to be both voluntary and substantially true in so far as the confessor's own part in the crime is concerned. No doubt, Shwe Thein tried to exculpate himself of the murder of Maung Than and other Arakanese traders, but the circumstances belied his words. According to him, on the day of occurrence, the motor launch carrying himself, the four Arakanese traders Maung Than, Shwe Tha

Aung, Hla Baw Thu and Tha Gywe and the crew of seven arrived at a spot near Ma-U at about 2 p.m. Thereafter, he and Maung Than went to the house of Ma Shwe Sein (P.W. 3) to prepare meals. When ready, he and Maung Than went to the launch in a canoe and brought everyone except two or three men to Ma-U to have their meals. Shwe Tha Aung and Tha Gywe remained behind with him while the rest of the persons returned to the launch which was then brought to Ma-U. Khaw Taw soon arrived to say that the draperies were ready for inspection. He and Sein Aung then went to the launch to call Maung Than, Hla Baw Thu and two of the crew. It was already dark then. Then, as Hla Baw Thu's feet were sore, he was left behind at Ma Aye's house while he, Sein Aung and the five men from Rangoon proceeded in the direction of Taingkali *chaung* where the sampan (apparently carrying the stolen goods) was said to be moored. However, before that *chaung* was reached Khaw Taw shouted out to them to stop and also asked him to come. He went and on arrival near Khaw Taw saw Tun Kyaing and Nauk Chi *alias* Nga Pein with him. He asked Khaw Taw the whereabouts of the sampan, whereupon Khaw Taw said that they were not there to sell goods but to rob the traders of their property. He protested, but in vain. He was even threatened with death, and Khaw Taw and his two companions were at that time armed with two rifles and two hand grenades. They took him to where the traders were. He and Sein Aung again protested saying that the traders had promised them Rs. 8,000 on their return, but Khaw Taw was adamant saying that he was in need of money for the purpose of compounding the buffalo robbery case. Khaw Taw then told Maung Than that they were there not to sell draperies but to commit robbery. Thereafter, he took away

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Shwe Tha Aung and Maung Than to a short distance and killed them by hammering them with an axe. Tun Kyaing and Nauk Chi remained guarding him, Sein Aung and the three men from Rangoon. Thereafter, the three men from Rangoon were tied with ropes with the assistance of himself and Sein Aung and were taken away by Khaw Taw, Tun Kyaing and Nauk Chi to be murdered likewise. When they eventually returned, Khaw Taw brought with him a diamond ring said to be from Shwe Tha Aung's hand. Khaw Taw then asked him for the purse said to be entrusted with him by Maung Than, and he therefore handed over the purse which Maung Than had in fact entrusted along with a bundle of diamonds. He did not give up the diamonds, but told a lie instead. Thereafter, they came back to Ma-U and Khaw Taw who counted the money, announced that there were Rs. 7,000 in all. Then, at the request of Khaw Taw, he and Sein Aung went to call Hla Baw Thu who came along with them. Hla Baw Thu was also bound with ropes and taken away by Khaw Taw and his two companions to be murdered. Thereafter, all the five of them had dinner at the house of Khaw Taw's wife, who was no other than his own sister. There, Khaw Taw gave him Rs. 1,500 and Rs. 1,000 to Sein Aung saying "Both of you will also have to abscond." At about 2 a.m. he and Sein Aung went to the launch as requested by Khaw Taw and Tun Kyaing and ordered the launch to proceed to the original stopping place near Taingkali for the purpose of loading goods. The launch proceeded there and was ambushed by Khaw Taw and his companions while he and Sein Aung stood and watched the proceedings from a *kazin* about a field plot away. Then Khaw Taw and his companions came back saying "All of them are now dead—we are now safe." So saying they all came back to Ma-U village

which was reached at about dawn. He and Sein Aung then went to Daik-U and thence to Mandalay while Khaw Taw and Tun Kyaing went in a separate group. He kept the shirt and the watch belonging to Maung Than, but disposed of the diamonds of the diamond bangles for Rs. 1,060. He also sold the diamond *nagats* through Ba Khaing of Daik-U in whose house he had put up. He was cheated of one pair of bangles by a man who promised to sell them for him. On his return from Mandalay, he was arrested by the police at Pegu at the instance of Ba Khaing's wife.

This confession of Shwe Thein is corroborated by that of Sein Aung, Exhibit X, which was recorded by the same Magistrate (P.W. 25) on the same day. It is further corroborated by the evidence of witnesses for the prosecution as to the fact that Maung Than and his three Arakanese companions were taken by Shwe Thein for the purpose of purchasing draperies from illicit sources, that large sums of money and jewelleries were also taken away by these Arakanese, that the launch was attacked in the manner alleged, that Shwe Thein, Sein Aung, Khaw Taw and Tun Kyaing absconded from Ma-U soon after the crime, that Shwe Thein was in possession of Maung Than's shirt and watch, and that he had sold the diamonds from the bangles and the diamond *nagats* belonging to Maung Than. It is not necessary to recapitulate their evidence in detail as they have been carefully set out in the judgment of the learned trial Judge.

Although both Shwe Thein and Sein Aung tried to make out in their confessions that they were unwilling spectators at the murder of Maung Than and his companions by Khaw Taw, Tun Kyaing and Nauk Chi, the circumstances of the case make it clear that they must also be in the conspiracy to murder and to rob the Arakanese traders and that as the robbery was

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committed by five persons conjointly, it was a case of dacoity as defined in section 391 of the Penal Code. It is inconceivable that unless Shwe Thein and Sein Aung were in the conspiracy, they would be allowed to escape with their lives. Then again, if they were not in the conspiracy, they would have left the company of the robbers as soon as they could safely do so. Instead, they carried out the request made by Khaw Taw to bring Hla Baw Thu for the purpose of being murdered. This man was the one who remained behind at Ma-U because of his sore feet. Then again, they decoyed the motor launch to the place where it was ambushed by Khaw Taw and his companions by giving a false message to the effect that the launch was to be moved to the original position near Taingkali to be loaded with goods. Lastly, they absconded from Ma-U immediately after the crime.

What probably happened was that Shwe Thein, as brother-in-law of Khaw Taw, was assigned the role of *latthauk*, and that he successfully carried out the duty assigned to him by bringing Maung Than and his companions to Ma-U on the pretext that there was stolen drapery for sale and that when the robbery was successfully carried out, he was given the task of disposing the jewellery obtained from Maung Than. His contention that the purse containing the money and the bundle of diamonds (jewellery) was entrusted to him by Maung Than after the latter had had his dinner, is too improbable to be believed. Shwe Thein undoubtedly gave his confession in such a way as to greatly minimize the part played by him in the adventure and to explain away, as far as he could, all the incriminating circumstances appearing in evidence. Far from being the result of tuition on the part of the police, his confession seems his best effort at avoiding the death penalty which he thought was in store for

him. His contention that the confession was extorted from him by the police must be rejected as untrue. So must be the contention of Sein Aung in regard to his confession, Exhibit X.

Unfortunately for the prosecution, the confessions of Shwe Thein and Sein Aung cannot be used against the appellants in the same manner as evidence of approvers. Under section 30, of the Evidence Act, the confession of an accused can only be taken into consideration as against the co-accused and as to the meaning of the words " may take into consideration " occurring in this section the following observations of Jenkins C.J. in a Special Bench case of *Emperor* v. *Lalit Mohan Chuckerbutty and others* (1) seem apposite :

" This will be a convenient place at which to deal with the confessions.

Reliance has been principally placed on those of the accused Soilen Das and Sushi Biswas, and these the prosecution would use not only against the persons making them, but also against the rest of the accused. The warrant for this is to be found in section 30 of the Evidence Act, which provides that, when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons, is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession. The language of the section is guarded, and the history of this Act leaves me in no doubt that this section was designedly framed in these terms. While admissions, a word which embraces confessions, are by section 21 relevant, and may be proved as against the person making them, all that section 30 provides is, that the Court *may* take them into consideration, as against other persons. This distinction of language is significant, and it appears to me that its true effect is, that the Court can only treat a confession as lending assurance to other evidence against a co-accused."

(1) I.L.R. 38 Cal. 559 at p. 587.

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This observation was approved of by Mackney J. in *Maung Mya and another* v. *The King* (1) and we would have expected that, since the time *Maung Mya's* case was reported, Judges and Magistrates in Burma would have no difficulty in interpreting the meaning of the words "may take into consideration" appearing in section 30 of the Evidence Act. However, since it now appears that these Judges and Magistrates are still finding it difficult to interpret this section, we would summarize below the law on the subject as expounded and clarified in the various judicial decisions which we approve :

(1) The confession of a co-accused is not substantive evidence in the sense that a conviction on that alone can stand.

(2) If there is other relevant evidence tending to prove the guilt of the accused, the confession of a co-accused may be taken into consideration along with the said evidence as lending assurance to it.

(3) If there is no other evidence, or if the other evidence in the case is insufficient to establish a *prima facie* case against the accused, the confession must be excluded altogether and cannot be taken into consideration.

(4) The confession cannot be added to supplement evidence otherwise insufficient, and in no case can it be used to fill gaps in the prosecution evidence.

The confession of a co-accused is therefore not on the same footing as the testimony of an approver which is substantive evidence in the sense that a conviction on that alone is legal, *vide* section 133, Evidence Act, and which can be used, when the other evidence in the case is insufficient to establish a *prima facie* case against the accused, to supplement the evidence otherwise insufficient.

(1) (1938) R.L.R. 30.

Bearing these principles in mind, we must come to the conclusion that in this case the prosecution has not succeeded in establishing the offence punishable under section 396 of the Penal Code as against the appellants Khaw Taw and Tun Kyaing. No doubt the gold studs (Exhibit 59) which the two appellants and the accused Sein Aung sold to Maung Tin Maung (P.W. 34) at Tada-U about a month after the dacoity have been satisfactorily identified to belong to Maung Than. His wife Ma Aye Yi gave very cogent evidence in regard to them when she said "These belonged to my husband andhe was using these with the shirt (Exhibit 34) when he left home. I do not know when he bought these, but each stud has the mark 'T' at the back. Both he and I made these marks after he had bought the same four or six months before he left home. We made these marks so that there might be no mistake when we pledged the same when we needed loans of money." At the identification of properties held on the 4th September 1946 under the supervision of U Hla (P.W. 25), Ma Aye Yi mentioned to the Magistrate, the special mark of identification alluded to by her in her evidence. (*See* Exhibit Q.) Therefore the learned trial Judge was quite justified in coming to the conclusion that the exhibit gold studs were property obtained by dacoity. The appellants of course denied having sold them to Maung Tin Maung (P.W. 34) but Maung Tin Maung from whose possession these studs were seized by the police is supported on the point by Maung Win (P.W. 31) and Maung Kyone (P.W. 32). The seller gave their names as Maung Aye, Maung Kyi and Tin Maung, *vide* the receipt, Exhibit Z-1. These were the fictitious names assumed by the two appellants and Sein Aung, Khaw Taw calling himself as Maung Aye and Tun Kyaing calling himself as Tin Maung. The

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evidence on record is therefore sufficient to establish as against the appellants the offence of dishonestly receiving stolen property knowing or having reason to believe the same to have been obtained by dacoity. The fact that the two appellants absconded from Ma-U soon after the dacoity was committed, that they were again in association with the confessors Shwe Thein and Sein Aung at Dabein when Shwe Thein put up at the house of Ba Khaing (P.W. 38) and his wife Ma Than Nyunt (P.W. 39), and again at Amarapura, and the facts that Khaw Taw was the brother-in-law of Shwe Thein clearly indicate that, at the very least, the appellants Khaw Taw and Tun Kyaing knew perfectly well that Shwe Thein and Sein Aung were involved in the dacoity near Ma-U and that the exhibit gold studs were dacoited property. The fact that when the police went to seize these studs from Maung Tin Maung (P.W. 34), Shwe Thein accompanied the police is significant. Shwe Thein must also have been in the know as regards the place where the studs were sold by the appellants and Sein Aung. According to U Soe Min (P.W. 37), Sub-Inspector of Police, Dabein, it was Shwe Thein who took him to the house of Maung Tin Maung at Tada-U.

As against the appellant Khaw Taw there is a further piece of evidence implicating him of the offence under section 412 of the Penal Code. This relates to the finding in his possession of the umbrella (Exhibit 12) which has been identified to be that of Maung Than by Ma Aye Yi (P.W. 26) and Maung Gyi (P.W. 27). Although the identification of this property cannot be considered to be so satisfactory as that of the gold studs, there seems nothing to disbelieve the story of Ma Aye Yi and Maung Gyi that they could recognize the umbrella. The appellant Khaw Taw claimed the umbrella to be his and his wife Ma Kyin U

(D.W. 1) gave evidence to the effect that it was purchased by Khaw Taw at Rangoon at the Pagoda Bazaar. However, we are more inclined to believe Ma Aye Yi and Maung Gyi as there seems no reason why they should tell a lie in regard to this umbrella, which was insignificant in value. Ma Aye Yi (P.W. 26) in particular refused to say that the gold ear-rings set with white stones (Exhibit 7) were hers and these ear-rings must have far exceeded the umbrella in value.

For these reasons we consider that the appellants should have been convicted of the offence punishable under section 412 of the Penal Code.

It has been contended on behalf of the appellants that the order of the Special Judge (U Hla Nyun) contained in the Diary entry dated 14th November 1947 to the effect that since the Special Judge's (Third Amendment) Act, 1947 (Burma Act LXVII of 1947), had come into force he could make use of the evidence of witnesses Nos. 1, 4, 13, 14, 17, 19, 21, 22, 24, 27, 29, 30, 33 to 39 examined by his predecessor U Tha Mya was wrong and that U Hla Nyun should have recalled and examined these witnesses. This contention is untenable. U Hla Nyun as a successor of U Tha Mya was clearly entitled, under sub-section (*3*) of section 5 of the Special Judge's Act, 1946, as inserted by Burma Act LXVII of 1947, read with section 350 of the Criminal Procedure Code to act on the evidence partly recorded by his predecessor and partly recorded by himself. U Thein Pe who succeeded U Hla Nyun could also act on the evidence recorded by U Tha Mya and U Hla Nyun.

For these reasons we would set aside the convictions under section 396 of the Penal Code and the sentence of death passed on the appellant Khaw Taw and Tun Kyaing and direct that instead these appellants be convicted under section 412 of the Penal Code and

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sentenced to transportation for life. The maximum penalty provided by that section is clearly merited by them, when the circumstances of the whole case are taken into consideration.

U THEIN MAUNG, C.J.—I agree.

APPELLATE CIVIL.

Before U Tun Byu and U Aung Tha Gyaw, JJ.

C. AH FONG AND ONE (APPELLANTS)

v.

EPHRAIM SOLOMON AND OTHERS (RESPONDENTS).*

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Mar. 8.

Intermeddler—Renting property to third party—Payment of rent—Whether a defence against rightful owner.

The appellants, 2nd respondent and 3rd respondent and one Tanner were sued for compensation for use and occupation of a house. The 3rd respondent had taken possession of the same and let it out to appellants and 2nd respondent. The trial Court had decreed the claim against all. On appeal it was contended that the appellants were not liable for the period that rent was paid to the 3rd respondent.

Held: Rejecting such claim that such a plea cannot be set up against the rightful owner. Upon the admission that the property was taken from an unauthorized person the occupants are liable to pay standard rent.

U Zeya for the appellants.

M. Ahmed for the 1st respondent.

T. K. Boon for the 2nd respondent.

The judgment of the Bench was delivered by

U AUNG THA GYAW, J.—The two appellants C. Ah Fong and Sun Vin Leong and the 2nd respondent Chin Hone On and one J. S. Tanner, the 3rd respondent were sued in the City Civil Court by the 1st respondent, Ephraim Solomon, for recovery of Rs. 4,500 as compensation for the use and occupation of House No. 297/305, Godwin Road.

The plaint alleged that the 3rd respondent wrongfully and without the knowledge and consent of the

* Special Civil 1st Appeal No. 77 of 1947 against the decree of the Chief Judge of Rangoon City Civil Court in Civil Suit No. 2239 of 1947, dated the 11th November 1947.

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1st respondent took possession of the said properties and let out the same to the appellants and the 2nd respondent for the purpose of running a school known as Hwa Sha Chinese School. The appellants and the 2nd respondent admitted renting the properties from the 3rd respondent on his representation that the premises were in his charge through the President of the Jewish Trust, Rangoon, and that a monthly rent of Rs. 250 up to 31st March 1947 had been paid to the said respondent. They also pleaded that although the Rent Controller had fixed the standard rent at Rs. 500 per mensem they were liable to pay Rs. 470 only per month as from the 1st April 1947 as part of the premises known as No. 305, Godwin Road, was separately let out to one, Mr. A. Majee for a monthly rent of Rs. 30 by the 1st respondent.

The 3rd respondent filed a written statement stating that he was looking after the premises with a view to obtaining a lease from the owner when contacted and that he had conducted certain necessary repairs and paid all taxes due on the property from October 1945 to December 1946. He also admitted letting out the properties to the appellants and the 2nd respondent.

On the 11th November 1947, the date on which the judgment appealed from was passed the 3rd respondent did not put in his appearance, while Mr. Boon for the appellants and the 2nd respondent made certain admissions on behalf of his clients with the result that the judgment and decree now appealed against were passed. The brief Diary Order records that the written statement filed on behalf of the appellants and the 2nd respondent disclosed no defence and that all Mr. Boon wanted the Court to do was to exempt his clients from payment of rent for the period for which payment had already been made to the 3rd respondent, Mr. Tanner. This Mr. Tanner having admitted that

he was merely an intermeddler of the property of the 1st respondent, the appellants and the 2nd respondent who hired the premises from him for the purpose of running their school would appear to be rightly liable to pay compensation to the 1st respondent for the use and occupation of these premises. The right to a refund of the rent paid to an intermeddler cannot in law be pleaded against the rightful owner who claims this compensation for use and occupation from those who are in wrongful possession of the property.

Exception has been taken to the statement in the judgment passed by the lower Court to the effect that the written statement of the appellants and the 2nd respondent did not disclose any defence and attention is drawn to paragraph 4 of the written statement where they allege that they were liable to pay Rs. 470 monthly with effect from the 1st April 1947 on the ground that part of the premises known as No. 305, Godwin Road, was let out by the 1st respondent to a Tea Shop owner called Mr. A. Majee. On this point Mr. M. Ahmed for the 1st respondent has filed a certificate issued by the Rent Controller wherein it is stated that the rent fixed for the premises known as No. 297, Godwin Road, is Rs. 500 per mensem. The premises Nos. 297 and 305 appear to be separate from each other and the rent received from the tenant of No. 305, Godwin Road, cannot be taken into account in considering the application of the standard rent fixed for the separate premises known as No. 297, Godwin Road.

It might be that the act of trespass committed by the 3rd respondent was antecedent to and independent of his subsequent letting of the property to the appellants and the 2nd respondent. The question of his joint liability with the appellants and the 2nd respondent in respect of compensation claimed by the 1st respondent is a matter which does not call for

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consideration in this appeal. The appellants and the 2nd respondent admitted that they have rented the 1st respondent's property from an unauthorized person and that they are liable to pay the standard rent fixed by the Rent Controller whose certificate was produced before the learned Judge of the lower Court by Mr. M. Ahmed appearing for the 1st respondent.

There are therefore no substantial grounds whatsoever for interfering with the judgment and decree of the lower Court. This appeal will accordingly be dismissed with costs.

APPELLATE CIVIL.

Before U Tun Byu and U San Maung, JJ.

MA OHN NU (APPELLANT)

v.

MA NYUN (RESPONDENT).*

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Mar. 8.

Succession Act, s. 298—Burmese Buddhist—Representation of—Discretion of Court to refuse.

Ma Ohn Nu applied for letters to the estate of her aunt, a Burmese Buddhist, who died on 5th August 1926. She claimed as *kittima* adopted daughter. The application was refused on the ground of delay and as she would still have to sue for possession.

Held on appeal: That representation for Burmese Buddhist is not compulsory under the Succession Act.

Observations of E Maung J. in *Maung Sein* v. *U Po Toke and others* (Civil 1st Appeal No. 28 of 1946 of the High Court of Judicature at Rangoon), referred to.

Held further: That under s. 298 of the Succession Act where the deceased was a Buddhist the Court has a discretion to refuse letters. The application in this case was made 20 years after the death of Daw Kyin and 10 years after the applicant's marriage and the applicant had not explained the delay.

U Hla Tun Pru for the appellant.

M. Eunoose for the respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 1 of 1947 of the High Court of Judicature at Rangoon the appellant, Ma Ohn Nu, applied for letters of administration to the estate of her aunt, Daw Kyin, a Burmese Buddhist spinster, who died on the 5th of August, 1926. Ma Ohn Nu claimed that, as the *kittima* adopted daughter of Daw Kyin, she was the heir of Daw Kyin to the exclusion of everybody else and was entitled to letters of administration of Daw Kyin's property which was in the possession of the defendant Ma Nyun, widow of U Nyo, who was Daw Kyin's younger brother.

* Civil 1st Appeal No. 52 of 1947 against the decree of the High Court of Rangoon in Civil Regular Suit No. 1 of 1947, dated the 17th June 1947.

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U SAN MAUNG, J.

In the objections and the affidavit filed in support thereof the defendant, Ma Nyun, alleged that the plaintiff, as a daughter of U Nyun in Civil Regular Suit No. 315 of 1928 of the High Court of Judicature at Rangoon, obtained a share in the estate of her paternal aunt Daw Tsee, that in Civil Regular Suit No. 316 of the same Court she also obtained a share of the estate of her paternal grandmother Daw Sone, and that she was therefore precluded from pleading that she was not the daughter of U Nyun. The fact that the plaintiff did receive the shares aforesaid was admitted, but the plaintiff stated that, by reason of her minority and of fraud on the part of U Nyo and others, the decrees in the suits were not binding upon her. Two preliminary issues, as set out in the judgment appealed against, were framed, and both were decided in favour of the plaintiff. The learned trial Judge (Kyaw Myint J.) however refused to grant the plaintiff's application for letters of administration on the ground that there was inordinate delay on her part in making her application, and that, even if the plaintiff had been granted letters of administration, she would still have to sue for the possession of the estate. In taking this course of action the learned Judge relied upon a dictum of E Maung J. in the case of *Maung Sein* v. *U Po Toke and others* (1) where the learned Judge observed :

> " The representation of a Burman Buddhist is not compulsory under the Succession Act, and the application appeared to have been made to have a decision on the disputed claims of Maung Sein and also of Daw Hnit settled in a cheap way. I am not prepared to encourage this method, especially in the circumstances of the present case."

Gledhill J., who was a party to that decision, also agreed. In this appeal by Ma Ohn Nu against the

(1) Civil 1st Appeal No. 28 of 1946 of High Court, Rangoon.

dismissal of her suit it is urged that the learned trial Judge erred in law in going beyond the issues that fell for determination, that the learned Judge had overlooked the reasons for the delay which was stated in Ma Ohn Nu's application and affidavits in support thereof, and that the circumstances in this case were entirely different from the case of *Maung Sein* v. *U Po Toke and others* (1).

Now, section 298 of the Succession Act provides that:

> " Notwithstanding anything hereinbefore contained, it shall, where the deceased was a Buddhist, be in the discretion of the Court to make an order refusing, for reasons to be recorded by it in writing, to grant any application for letters of administration made under this Act."

The application made by Ma Ohn Nu 20 years after the death of Daw Kyin is *prima facie* belated. It is therefore incumbent upon Ma Ohn Nu to state clearly in her petition and in the affidavits in support thereof the reasons for such a delay. In paragraphs 5 and 6 of her affidavit Ma Ohn Nu states that when her adopted mother Ma Kyin died at Takaw she was only 11 years old, that since then her uncle U Nyo kept her at a school in Rangoon and thereafter at his house at Pazundaung for a number of years, and that U Nyo advised her not to press for her share in Daw Kyin's estate as he feared that she might dissipate it. He also told her that it was his intention to give it to her sometime, but that, if she sued him for it, he would oppose her in Court, which would not recognize her adoption as it was unregistered. It is therefore incumbent on us to consider whether this explanation sufficiently accounts for the delay in making the

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application for letters of administration. According to her own affidavit Ma Ohn Nu was 31 years old at the time of making her application. Therefore, she must have attained majority ten years ago. Furthermore, it is admitted by her counsel, U Hla Tun Pru, that she became married since before she attained majority, and that her husband is still alive. Therefore even assuming that she was under U Nyo's tutelage before she attained majority or before she became married, there seems no reason why she should not have asserted her rights after she attained majority, or after she married her husband. There is a delay of at least ten years to be accounted for, and the facts stated in paragraph 4 of her reply to Ma Nyun's objection that U Nyo was a much married man only tends to weaken her case. Obviously the longer Ma Ohn Nu waited for the assertion of her rights, the lesser would be the chances of her ultimate success. Surely neither Ma Ohn Nu nor her husband could have been blind to such a fact. Therefore, the delay on the part of Ma Ohn Nu in the making of her application for letters of administration is, in my opinion, sufficient ground for refusal under section 298 of the Succession Act. The fact that no issue was framed by the learned trial Judge in regard to this delay is not quite material in this case as Ma Nyun had taken objection to it at the very first opportunity, and Ma Ohn Nu herself in her reply to the objection says that the reasons for the delay in filing her application were to be found in paragraph 5 of her affidavit. In any event, where an application for letters of administration is *prima facie* belated, it is incumbent upon the applicant to give full reasons for the delay. Otherwise, this alone may be a sufficient ground for the refusal of the Court to grant letters of administration as provided in section 298 of the Succession Act.

In the result the appeal fails, and must be dismissed with costs. Advocate's fees five gold mohurs.

U TUN BYU, J.—I agree.

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MA OHN NU v. MA NYUN.

U SAN MAUNG, J.

APPELLATE CRIMINAL.

Before U Thaung Sein, J.

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Mar. 29.

MAUNG SEIN AND ONE (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

Penal Code, s. 304A (2)—Joint attack with sticks—Mutual fight—Right of private defence—No common intention—Cause and injury likely to cause death—Real offence committed.

The appellants had jointly assaulted with sticks one R who died as a result of the injuries received. Only one of such injuries was a fatal wound and there was no evidence as to who struck the fatal blow. There had been a fight between the deceased and the appellants.

They were convicted under s. 304A (2) of the Penal Code for doing a rash act with knowledge that it was likely to cause death. The lower Court found that there was no common intention to cause the death of R.

Held : That the conviction under s. 304A (2) was not sustainable as it could not be said that those who did not strike the fatal blow contemplated such a blow by others and they were not guilty under s. 302.

Gouridas Namasudra v. *Emperor*, 36 Cal. 659, applied.

Sulaiman v. *The King*, (1941) Ran. 258, followed.

The common intention was to cause grievous hurt and the accused was guilty under s. 324, Penal Code.

U Mya Thein (Government Advocate) for the respondent.

U THAUNG SEIN, J.—The two appellants Maung Sein and Maung Lun have been convicted of offences under section 304A (2) of the Penal Code and were sentenced to four years' rigorous imprisonment each by the learned Special Judge (U Po On), Mergui.

The case against them was that they had taken part in a joint assault with sticks on one Maung Ret who died as a result of the injuries received. No less than five injuries were found on the deceased but only one

* Criminal Appeals Nos. 171-2 of 1948 being appeal from the order of Special Judge of Mergui, dated the 26th January 1948, in Criminal Regular Trial No. 22 of 1947.

of these was a fatal wound and it is not known as to who actually struck that fatal blow.

The incident in question arose out of a quarrel between the spectators at a game of top-spinning in the village of Kyauktaung in the Palaw Township on the 7th September 1947. It appears that several children were engaged in the game and among the onlookers were the deceased Maung Ret, the appellants Maung Sein and Maung Lun and several others. Suddenly one Maung Ba Tun went up to the deceased Maung Ret and slapped him on the face. The latter ran into a neighbouring house, apparently with a view to arm himself. He came out a few moments later with a stick in his hand and attacked Maung Ngwe Tin, the brother of the appellants. As might be expected, there was an exchange of blows on both sides and a free fight ensued in which the appellants joined in on the side of Maung Ngwe Tin. The fight ended with the appearance of the mother of the deceased at the scene, but by then Maung Ret had fallen to the ground with several injuries in the head and was speechless. There can be little doubt that the injuries on Maung Ret were the result of the blows delivered by the appellants by means of sticks. The deceased was rushed to the hospital, but unfortunately for him he died a day after his admission.

Although five injuries were found on the deceased, *i.e.* three on the head and the remainder on the arm and shoulders, only one of those injuries on the head, which had resulted in the fracture of the skull and concussion of the brain, was necessarily fatal.

The evidence on record leaves no room for doubt that there had been a fight between the deceased on the one side and the appellants on the other. Death was the direct result of the injuries inflicted by the two appellants. But as there was nothing to suggest that

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the appellants had any common intention to cause the death of Maung Ret the learned trial Judge correctly refrained from convicting them of murder or culpable homicide not amounting to murder. However, the learned trial Judge states that the deceased Maung Ret had attacked an unarmed man Maung Ngwe Tin and as such the appellants who were standing nearby were entitled to defend Ngwe Tin. The learned trial Judge next held that in causing the death of Maung Ret the appellants had exceeded the right of defence of Ngwe Tin by causing more harm than was necessary in the circumstances of the case. He accordingly convicted them under section 304A (2) of the Penal Code, *i.e.* of having caused the death of Maung Ret by doing a rash act with knowledge that it was likely to cause death.

Now, in the first place, the learned Special Judge is apparently unaware that where there is a mutual fight none of the parties involved in the fight are entitled to plead the right of private defence. In the present case the fight started with the slapping of Maung Ret's face and was a continuous transaction till the mother of Maung Ret arrived on the scene. The appellants cannot therefore plead that they acted in the defence of Maung Ngwe Tin when they assaulted Maung Ret.

Next the learned Special Judge has remarked that there was no common intention on the part of the appellants to cause the death of Maung Ret. I am therefore at a loss to understand how he was able to convict the appellants of having caused the death of Maung Ret by means of a rash and negligent act with full knowledge that it was likely to cause death. The attack was, no doubt, a joint one, but the appellants do not appear to have intended to cause the death of Maung Ret. Death did, of course, ensue and the question that arises is as to the offences for which the appellants should have been convicted. The

assaults on the deceased were concentrated mainly on the head and the appellants should at least have known that severe blows delivered on the head are likely to result in grievous injuries. In my opinion it would be reasonable to presume that the appellants did have a common intention to cause grievous hurt when they assaulted the deceased. I note that the learned Special Judge referred to the ruling in *Gouridas Namasudra* v. *Emperor* (1) where it was laid down as follows :

" Where several accused persons struck the deceased several blows, one of which only was fatal, and it was not found who struck the fatal blow, it was held that, in the circumstances, it could not be said that those who did not strike the fatal blow contemplated the likelihood of such a blow being struck by the others in prosecution of the common object, and that they were all guilty under section 326, and not under section 302, of the Penal Code."

But, unfortunately, the learned trial Judge did not apply it correctly to the facts before him and merely relied on it as authority for the view that the appellants could not be convicted of murder or culpable homicide not amounting to murder. The ruling clearly explains that the appellants should have been convicted of causing grievous hurt. The same principles are also expressed in the case of *Sulaiman* v. *The King* (2). I quote below from the head-note as follows :

" If the common intention of the accused and his associates by committing an assault was not to cause injury known to be likely to cause death, but to cause grievous hurt, though the combined effect of the injuries actually caused was likely to cause death, the accused is guilty of the offence of causing grievous hurt and not of culpable homicide not amounting to murder."

Applying these principles to the case under consideration the two appellants should have been convicted of causing grievous hurt under section 325, Penal Code.

(1) 36 Cal 659.

(2) (1941) Ran. 258.

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U THAUNG SEIN, J.

I accordingly alter the convictions to ones under section 325 of the Penal Code. As regards the sentence meted out to the appellants, in view of their youth I am of opinion that four years' rigorous imprisonment is too severe. I accordingly reduce the sentence on the two appellants to three years' rigorous imprisonment each.

CRIMINAL REVISION.

Before U Thaung Sein, J.

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THE UNION OF BURMA (APPLICANT)

v.

SAN TIN (RESPONDENT).*

Apl. 26.

Arms Act, s. 19 (f)—Sanction filed during the course of trial—Evidence previously recorded if admissible—S. 29, Arms Act—Proceedings instituted : meaning.

Maung San Tin was found in possession of a hand-grenade on 6th October 1947 and was sent up for trial under s. 20, Arms Act. The Magistrate after recording evidence felt that a *prima facie* case under s. 19 (*f*), Arms Act, had been made out. He adjourned the hearing and the sanction was produced from the District Magistrate later. A charge under s. 19 (*f*) was framed and the accused pleaded guilty. He was convicted and an appeal to the Sessions Judge was dismissed ; but the proceedings were submitted to the High Court.

Held : That the proceedings were instituted when the police drew up a charge sheet and sent the accused for trial. S. 29, Arms Act, forbids institution except with sanction of the District Magistrate. As no such sanction was obtained before the accused was sent up the proceedings were void. The defect is not cured by filing the sanction later. *In re Po Chein, Magunia, Po Aung* v. *King-Emperor*, 8 L.B.R. 452, followed.

Kaka v. *King-Emperor*, 4 L.B.R. 247, not followed.

The proceedings are therefore entirely without jurisdiction and invalid.

The evidence recorded prior to the filing of the sanction could not therefore be used subsequently.

U Ba Sein (Government Advocate) for the applicant.

U THAUNG SEIN, J.—The respondent Maung San Tin was found in possession of a hand-grenade on the 6th October 1947 and was sent up for trial before the learned Special Judge, Henzada (Mr. Q. Htean Hoe), charged with an offence under section 20, Arms Act.

The learned Special Judge, after recording the evidence of the prosecution witnesses, felt that a *prima facie* case had been made out against the respondent

* Criminal Revision No. 25B of 1948 being review of the order of Special Judge of Henzada, dated the 6th December 1947, passed in Special Judge Trial No. 44 of 1947.

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under section 19 (*f*) and not section 20 of the Arms Act. Now, under section 29 of the Arms Act, a prosecution for an offence under section 19 (*f*) can only be lodged with the previous sanction of the District Magistrate. The learned Special Judge, instead of discharging the respondent on the ground that no formal sanction for the prosecution had been obtained from the District Magistrate, Henzada, called upon the Court Prosecuting Officer to produce the necessary sanction and adjourned the trial. On a subsequent date the Court Prosecuting Officer produced the sanction of the District Magistrate, Henzada, and a charge was framed against the respondent under section 19 (*f*) of the Arms Act, and as he pleaded guilty, was convicted and sentenced to two years' rigorous imprisonment. The respondent appealed against the conviction and sentence to the learned Sessions Judge. But unfortunately, as he had pleaded guilty to the charge in the trial Court, no appeal lay except as to the extent or legality of the sentence, *vide* section 412, Criminal Procedure Code. The learned Sessions Judge held that the sentence passed on the respondent was legally appropriate and dismissed the appeal. However, the learned Sessions Judge was of the opinion that there had been material irregularity in the proceedings before the learned Special Judge and that there was no legal evidence on which the respondent could have been convicted. The proceedings were then submitted to the High Court under section 439, Criminal Procedure Code, with the recommendation that the conviction and sentence passed on the respondent be set aside and a retrial ordered.

The real question in this case is whether the learned Special Judge could act on the evidence recorded by him prior to the filing of the sanction of the District Magistrate for the prosecution of the respondent under

section 19 (*f*) of the Arms Act. If the learned Special Judge was not entitled to refer to such evidence, then there was no material on which the respondent could have been convicted. Section 29 of the Arms Act reads as follows :

> "No proceedings shall be instituted against any person in respect of an offence punishable under section 19, clause (*f*), without the previous sanction of the District Magistrate."

The whole question turns on the meaning of the word "instituted" in that sanction. Ordinarily, to "institute" proceedings against an accused person means to originate or commence legal proceedings, *i.e.* to set the law in motion against the person concerned. If this definition is accepted, then the institution of the proceedings against the respondent in the present case must be deemed to have begun when the police drew up a charge sheet against him and sent him up for trial. It matters very little what section the police quoted in the charge sheet if in fact the real charge against the respondent was one under section 19 (*f*) of the Arms Act. The learned Special Judge has held that the offence made out against the respondent was one under section 19 (*f*) of the Arms Act and therefore the police must be deemed to have instituted proceedings against the respondent under that section notwithstanding the mistakenly quoted section 20. Section 29 expressly forbids the institution of proceedings against an accused person under section 19 (*f*) except with the sanction of the District Magistrate. As no such sanction was obtained before the case was sent up, the proceedings were void *ab initio*. This defect is not cured by filing the sanction of the District Magistrate during the proceedings. Sanction of the District Magistrate is a prerequisite for the initiation of the proceedings. I am fortified in this view by the

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U THAUNG SEIN, J.

ruling in *In re Po Chein, Magunia, Po Aung* v. *King-Emperor* (1), where it was laid down by a Full Bench of the Chief Court of Lower Burma that in a case under section 19 (*f*) of the Arms Act, when no sanction of the District Magistrate has been obtained a Court is not competent to take cognizance of or to hold any proceedings in respect of such offence, and if it does so its proceedings are entirely without jurisdiction and invalid. There is, of course, a contrary view in *Kaka* v. *King-Emperor* (2) which lays down that in prosecutions under section 19 (*f*) of the Arms Act the sanction of the District Magistrate may be filed at any stage of the proceedings. The latter case was earlier in date to the former and was decided by a single Judge. With all due respect I am of the opinion that the decision by the Full Bench correctly lays down the law and I propose to follow it. Applying the principles laid down in the former ruling, it would appear that the learned Special Judge was not entitled to refer to or act on the evidence recorded by him before the sanction of the District Magistrate was filed. The correct procedure which the learned Special Judge should have adopted was to have discharged the respondent and then started a trial afresh.

There seems to be no other alternative in the present case except to set aside the conviction and sentence passed on the respondent and to order a retrial.

I accordingly set aside the conviction and sentence passed on the respondent Maung San Tin by the learned Special Judge, Henzada (Mr. Q. Htean Hoe), and direct that he be retried by another Special Judge to be selected by the Sessions Judge, Henzada.

(1) 8 L.B.R. 452. (2) 4 L.B.R. 247.

APPELLATE CIVIL.

Before U Thaung Sein, J.

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Mar. 5.

MA KHIN (APPELLANT)

v.

MA PU AND TWO OTHERS (RESPONDENTS).*

Order II, Rule 2, Civil Procedure Code and s. 11—Res judicata—*Conditions to be satisfied—First suit for rent—Second for title against tenant and other persons—Whether suit barred.*

Appellant-plaintiff claimed to be adoptive daughter of Daw Thon in Civil Regular No. 9 of 1944 of the Additional Court, Mandalay. Her claim as adopted daughter was upheld and she was declared one of the heirs. In Civil Regular No. 4 of 1945 of the Assistant Judge, Mandalay, she sued for rent alleging that respondents 1 and 2 were her tenants. This was dismissed. She later filed Civil Regular No. 27 of 1946 of the 2nd Assistant Judge, Mandalay, for possession of those lands, and she impleaded the alleged tenants and two others. Respondents 1 and 2 contended that the suit was barred as *res judicata* but the suit was decreed; the District Court reversed the decision of trial Court on appeal.

On second appeal held that the only question that need have been gone into in the first suit was whether respondents 1 and 2 were tenants. The first suit was only for rent and the second for title. The parties were also different. To constitute *res judicata* five conditions must be satisfied:

(1) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was *directly and substantially in issue* either actually or constructively in the former suit.

(2) The former suit must have been a suit between *the same parties or between parties under whom they or any of them claim.*

(3) The parties as aforesaid must have *litigated under the same title* in the former suit.

(4) The Court which decided the former suit must have been a Court *competent to try the subsequent suit* or the suit in which such issue is subsequently raised.

(5) The matter directly and substantially in issue in the subsequent suit must have been *heard and finally* decided by the Court in the first suit.

Mulla's Civil Procedure Code, 10th Edn., p. 40, followed.

Held: That in a suit for rent, the question of title was not directly and substantially in issue either actually or constructively. In the subsequent suit based on title the question of title could not be held to be *res judicata*. Further as the parties were different there cannot be any *res judicata*.

* Civil 2nd Appeal No. 98 of 1947 against the decree of the District Court of Mandalay in Civil Appeal No. 10 of 1947, dated the 12th May 1947.

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Dwarkanath Roy v. *Ram Chand Aich and others*, 26 Cal. 428, followed and applied.

A. C. Rodriguez for the appellant.

A. N. Basu for the respondents.

U THAUNG SEIN, J.—This is an appeal against the judgment and decree of the District Court, Mandalay, in Civil Appeal No. 10 of 1947, setting aside the decree of the 2nd Assistant Judge, Mandalay, in his Civil Regular Suit No. 27 of 1946. The facts involved in the case are as follows.

In or about the year 1944, one Daw Thon died leaving a considerable estate of landed properties among which was alleged to have been included a piece of land known as Holding Nos. 78, 81 (*a*) and 81 (*b*) in Nanda Myauk *Kwin* No. 451 and measuring 12 acres. The appellant-plaintiff who claims to be an adoptive daughter of Daw Thon then filed Civil Regular Suit No. 9 of 1944 of the then Divisional Court, Mandalay, for the administration of her adoptive mother's estate. It appears that in that suit she was able to establish her adoption by Daw Thon and was declared one of the heirs to the estate. This was followed by another suit—Civil Regular Suit No. 4 of 1945 of the Assistant Judge, Mandalay—in which the appellant-plaintiff, both on behalf of herself and her minor son Maung Tun Maung, sued the 1st and 2nd respondents (Ma Pu and Maung Hla Maung) for the recovery of 215 baskets of paddy or their value as rent due in respect of the above-mentioned lands. It was alleged that these respondents had worked the lands as tenants of the appellant-plaintiff. The learned Assistant Judge, Mandalay, held that the appellant-plaintiff had failed to prove that the lands had been leased by her to the two respondents and accordingly dismissed the suit. The appellant-plaintiff then sued once again in Civil Regular Suit

No. 27 of 1946 of the 2nd Assistant Judge, Mandalay, for possession of those lands. She impleaded the respondents Ma Pu, Maung Hla Maung and U Ye, and Ma Ngwe Myaing in that suit and claimed that she was the sole heir of the lands in question. It was admitted however that U Ye, Ma Ngwe Myaing and herself were the heirs of Daw Thon's estate. But the appellant-plaintiff alleged that U Ye and Ma Ngwe Myaing had signed a certain deed of release and as such she was the sole heir to those lands. She went on to say that the respondents Ma Pu and Maung Hla Maung were tenants of Daw Thon on those lands and as such she was entitled to possession. The suit was contested mainly by the 1st and 2nd respondents (Ma Pu and Maung Hla Maung) and they asserted that the appellant-plaintiff was not an heir of Daw Thon and further that the present suit was barred by the principles of *res judicata* and under the provisions of Order II, Rule 2, of the Civil Procedure Code, in view of the decision in the former suit (Civil Regular Suit No. 4 of 1945 of the Assistant Judge, Mandalay) between the same parties. Other defences were also set up, *e.g.* that the respondents were in adverse possession, and the trial Court framed a number of issues which I do not propose to reiterate.

As regards the contention that the suit was barred by the principles of *res judicata* and under Order II, Rule 2, of the Code of Civil Procedure, the learned 2nd Assistant Judge framed the following issue: "Whether the suit is barred by Doctrine of Estoppel by section 11 and Order II, Rule 2, Civil Procedure Code, for reasons mentioned in paragraph 9 of the 1st defendant's amended written statement?" The trial Court held that the suit was not barred by *res judicata* or under the provisions of Order II, Rule 2, of the Civil Procedure Code, and proceeded to try it on

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its merits and passed a decree in appellant-plaintiff's favour. On appeal to the District Court, Mandalay, this decree was set aside by the learned District Judge on the ground that the trial Court had erred in its findings on the principles of *res judicata*.

In order to understand whether the subsequent suit (Civil Regular Suit No. 27 of 1946 of the 2nd Assistant Judge, Mandalay) was in fact barred by *res judicata* or Order II, Rule 2, Civil Procedure Code, it is essential to study Civil Regular Suit No. 4 of 1945 of the Assistant Judge, Mandalay, in a little more detail. In the latter suit, *i.e.* Civil Regular Suit No. 4 of 1945 of the Assistant Judge, Mandalay, two plaints were filed under the following circumstances. In her first plaint the appellant-plaintiff who was suing on behalf of herself and her son claimed that she was an adoptive daughter of Daw Thon and that the suit lands had been gifted to her orally by the adoptive mother. Later she transferred these lands to her minor son Maung Tun Maung by means of a registered deed in accordance with Daw Thon's wishes before her death. The respondents Ma Pu and Maung Hla Maung were said to be tenants of Daw Thon and the appellant-plaintiff prayed for a declaration that she was an heir of the deceased Daw Thon and for recovery of a rental of 215 baskets of paddy or their value. The two respondents filed written statements denying that the appellant-plaintiff was an heir of Daw Thon, and pleaded that the real heirs were U Ye and Ma Ngwe Myaing and as such these persons should be added as parties to the suit. The learned Assistant Judge by a preliminary order dated the 12th February 1946 held that as the appellant-plaintiff was suing as an heir of Daw Thon the other heirs, namely U Ye and Ma Ngwe Myaing, should also be brought on to the record as parties. But the learned trial Judge remarked, "However if

plaintiffs (appellants) state that defendants are their tenants and not that of Daw Thon the other heirs of Daw Thon would have no say in the matter." The appellant-plaintiff acted on this remark and finally in the amended plaint she claimed that the respondents were her tenants and prayed for the payment of the rent due or its value. The whole nature of the suit was thus changed and as it was now a simple rent suit the other heirs of Daw Thon were not added as parties. However, the respondents contended that these heirs were necessary parties and U Ye also filed an application to be made a party. The trial Court then framed no less than six issues while in fact one main issue would have settled the case. The only question that need have been gone into was whether the respondents Ma Pu and Maung Hla Maung were the tenants of the appellant-plaintiff. If they were found to be the tenants of the appellant-plaintiff, then they could not have questioned the title of the appellant-plaintiff (*vide* section 116, Evidence Act). This was, no doubt, in the mind of the Assistant Judge when he remarked in his preliminary order that in the event of the appellant-plaintiff claiming to have leased out the lands, the other heirs of Daw Thon would not be necessary parties. The learned Assistant Judge then went into the question as to who was the owner of the lands and whether the appellant-plaintiff had leased them to the respondents. He held that the lands were part of the estate of Daw Thon and that appellant-plaintiff had failed to prove that she had leased them to the respondents, and accordingly dismissed the suit. In my opinion, the issue as to who was the owner of the land was quite unnecessary as the ownership was immaterial if the appellant-plaintiff was able to prove that she had leased the lands to the respondents Ma Pu and Maung Hla Maung. Another fact which should be

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noted is that U Ye and Ma Ngwe Myaing were not added as parties after the amended plaint.

Civil Regular Suit No. 27 of 1946 of the 2nd Assistant Judge, Mandalay, out of which the present appeal has risen was of an entirely different nature to that of Civil Regular Suit No. 4 of 1945 of the Assistant Judge, Mandalay. The appellant-plaintiff, having failed to prove that she had leased the lands to the respondents, now sued to establish her title to the property as an heir of Daw Thon and for possession of the same. The learned District Judge has remarked that the land in both the suits is the same, that appellant-plaintiff had by her amendment of the plaint in the former suit (*i.e.* Civil Regular Suit No. 4 of 1945 of the Assistant Judge, Mandalay) abandoned her claim as an alleged heir, and that the question whether the suit lands had been gifted to her son should have been the subject of an issue, and hence under explanation 4 to section 11, Civil Procedure Code, the latter suit (*i.e.* Civil Regular Suit No. 27 of 1946 of the Assistant Judge, Mandalay) was barred by the principles of *res judicata*.

I propose to take up first the question whether the subsequent suit, *i.e.* Civil Regular Suit No. 27 of 1946 of the Assistant Judge, Mandalay, was barred by the principles of *res judicata*, and then go on to consider whether the appellant-plaintiff had abandoned her claim to the lands as an heir, *vide* Order II, Rule 2, Civil Procedure Code.

The principles of *res judicata* are well known and they are enumerated under section 11, Civil Procedure Code. In order to constitute a matter *res judicata* the following conditions must be satisfied. I quote below from page 40 of Mulla's Code of Civil Procedure, 10th Edition :

"(1) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was

directly and substantially in issue either actually or constructively in the former suit.

(2) The former suit must have been a suit between *the same parties or between parties under whom they or any of them claim.*

(3) The parties as aforesaid must have *litigated under the same title* in the former suit.

(4) The Court which decided the former suit must have been a Court *competent to try the subsequent suit* or the suit in which such issue is subsequently raised.

(5) The matter directly and substantially in issue in the subsequent suit must have been *heard and finally decided* by the Court in the first suit.

Now, Civil Regular Suit No. 4 of 1945 of the Assistant Judge, Mandalay, was essentially a suit for rent whereas Civil Regular Suit No. 27 of 1946 of the 2nd Assistant Judge, Mandalay, was one for possession based on title. The question is whether "the matter directly and substantially in issue" in the latter suit was "directly and substantially in issue either actually or constructively" in Civil Regular Suit No. 4 of 1945 of the Assistant Judge, Mandalay. The learned District Judge has held that the question whether the appellant-plaintiff transferred the lands to her son Maung Tun Maung should have been in issue and must be deemedto have been in issue by explanation 4 to section 11, Code of Civil Procedure. I have read Civil Regular Suit No. 4 of 1945 of the Assistant Judge, Mandalay, and it was essentially a suit for rent and though the appellant-plaintiff repeated in her amended plaint that she was the adoptive daughter of Daw Thon and had received the lands in gift and had in turn transferred them to her son no issue was in fact necessary on these matters. As I have pointed out earlier the real issue between the parties was whether the relationship of landlord and tenant existed between them. Questions of title to the lands could not have been litigated, *vide* section 116 of the Evidence Act.

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The learned Assistant Judge framed an issue, "Who is the owner of the land?" and decided that they were owned by Daw Thon. The question of appellant-plaintiff's title in the lands was not gone into. If this question was not dealt with, I fail to see how "the matter directly and substantially in issue" in Civil Regular Suit No. 27 of 1946 of the 2nd Assistant Judge, Mandalay, could be said to be identically the matter which was in issue in Civil Regular Suit No. 4 of 1945 of the Assistant Judge, Mandalay.

Next, were the parties in Civil Regular Suit No. 4 of 1945 of the Assistant Judge, Mandalay, the same as those in Civil Regular Suit No. 27 of 1946 of the 2nd Assistant Judge, Mandalay? The learned District Judge, Mandalay, appears to have missed this point altogether. The parties in Civil Regular Suit No. 4 of 1945 of the Assistant Judge, Mandalay, were the appellant-plaintiff Ma Khin and her son Maung Tun Maung *versus* Ma Pu and her son Maung Hla Maung (1st and 2nd respondents). An attempt was made in that suit to bring U Ye (3rd respondent) and Ma Ngwe Myaing on the record as parties, but as pointed out by the learned 2nd Assistant Judge, Mandalay, the suit being one for rent based on a tenancy, they were not necessary parties. These two individuals were not in fact parties to that suit and no written statements were filed by them. They were added as parties in Civil Regular Suit No. 27 of 1946 of the 2nd Assistant Judge, Mandalay, only. Where the parties are different there cannot be any *res judicata*. This is laid down in the ruling *Dwarkanath Roy* v. *Ram Chand Aich and others* (1). The head-note of that ruling reads as follows:

"A decision in a suit for rent brought by a plaintiff against a person who is alleged to have been his tenant in respect of

(1) 26 Cal. 428.

certain land, does not operate as *res judicata* in a subsequent suit brought by the same plaintiff for establishment of his title to the land, not only against the alleged tenant but also against the person whose title as landlord the tenant-defendant has set up in the rent suit."

There is, in my opinion, a striking resemblance between the case under consideration by me and the ruling referred to above. The ruling refers to a case in which the plaintiff brought a suit for rent against a defendant who was said to be his tenant. The defendant pleaded that the plaintiff was not the landlord and referred to some other person as the owner of the lands. The plaintiff brought another suit against the alleged tenant and the person who was said to be the owner in order to establish his title to the land. It was held that the subsequent suit was not barred by *res judicata*.

Finally, the learned District Judge held that the appellant-plaintiff had by the amendment of her plaint in Civil Regular Suit No. 4 of 1945 of the Assistant Judge, Mandalay, abandoned her claim to the suit lands as an heir of Daw Thon. Learned counsel for the respondents has laid great stress on this and says that as the appellant-plaintiff withdrew part of her claim without leave of the Court to file a fresh suit, under Order XXIII, Rule 3, of the Civil Procedure Code, she is precluded from filing any fresh suit in respect of those lands. The answer to this is that the appellant-plaintiff had been declared an heir to the estate of Daw Thon in Civil Regular Suit No. 9 of 1944 of the then Divisional Court, Mandalay, and so far as the respondents U Ye and Ma Ngwe Myaing are concerned it was not open to them to re-open this question again. It was quite unnecessary for her to establish her title as an heir and she therefore apparently decided to sue for rent alone in Civil Regular Suit No. 4 of 1945

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of the Assistant Judge, Mandalay. I am in agreement with the learned Assistant Judge, Mandalay, that by altering the nature of the suit the appellant-plaintiff did not in fact abandon her title as an heir to the estate of Daw Thon. Accordingly, I am of the opinion that the learned District Judge, Mandalay, erred in holding that Civil Regular Suit No. 27 of 1946 of the 2nd Assistant Judge, Mandalay, was barred by the principles of *res judicata* and the appeal will accordingly be allowed.

I note that the learned District Judge decided the appeal on a point of law and set aside the decree of the lower Court. He has not dealt with the case on its merits. It will therefore be necessary to return the appellate proceedings to the District Judge in his Civil Appeal No. 10 of 1947 for a fresh hearing on the facts. The decree of the District Court is therefore set aside and Civil Appeal No. 10 of 1947 of the District Court, Mandalay, will be remanded to that Court to be dealt with on the merits and according to law. Costs will abide by the final decision in that appeal.

APPELLATE CIVIL.

Before U Thaung Sein, J.

NAZIR KHAN AND ONE (APPELLANTS)

v.

MA MA LAY (RESPONDENT).*

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Mar. 18.

Owner of land—Structure on the land—Onus of proof regarding ownership of—Difference between English Law and law in India and Burma—Burden of proof in ejectment suit—Stamp Act, s. 36—Unstamped documents admitted by trial Court—Effect.

The respondent was the owner of Holding No. 2. On the land was a building occupied by appellants. The respondent sued for possession of the house and land. The appellants asserted that the house belonged to them but that they were tenants of the land.

The Subordinate Judge held under s. 110 of the Evidence Act, as the appellants were in possession, the burden of proving title lay on the plaintiff. Trial Judge admitted in evidence, Exhibits 2 and 4, two unstamped documents referring to an agreement to pay rent and a receipt for rent On appeal the District Judge placed the burden of proving ownership of the house on the defendant and he rejected Exhibits 2 and 4 as inadmissible in evidence and held that the defendants had not discharged the burden which lay on them.

When the defendant in possession of a house on a land belonging to the plaintiff which the defendant claims he has taken on rent and built the house, the District Judge erred in placing the burden of proving the title of the house on the defendant In England no doubt the owner of the land would be the owner of whatever is affixed to the soil on the principle of "*Quicquid plantatur solo solo credit*" but in India and Burma this principle does not apply.

Thakoor Chunder Poramanick and others v. *Ramdhone Buttacharjee*, 6 W.R. 228 (F.B.), *Narayan Das Khettry* v. *Jatindra Nath Roy Chowdhury and others*, I.L.R. 54 Cal. 669 (P.C.) and *Vallabhdas Naranji* v. *Development Officer, Band. a*, 53 Bom. 589 (P.C.), followed.

Held further : That under s. 36 of Stamp Act if documents insufficiently stamped are admitted in evidence in trial Court such admission could not be challenged in appeal.

Pedda Venkatta Reddi and another v. *Vitta Hussain Setti*, I.L.R. 57 Mad. 779; *Venkatakrishna Reddi* v. *Batcha Reddi*, I.L.R. 57 Mad. 783, referred to.

A sale deed though unregistered was admissible in evidence to prove the nature of the possession of the house though it may confer no title.

P. K. Basu for the appellants.

U Tun Aung for the respondent.

* Civil 2nd Appeal No. 108 of 1947 against the decree of the District Court of Mandalay in Civil Appeal No. 30 of 1947, dated the 21st August 1947.

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NAZIR KHAN AND ONE v. MA MA LAY.

U THAUNG SEIN, J.—The respondent Ma Ma Lay *alias* Mediyan Bi is the owner of a piece of land known as Holding No. 2, Block Nos. 322—24, Sein-Ban Quarter, Mandalay. On that land there is a building occupied by the appellants Nazir Khan and Josami *alias* Josephine. The respondent claims that this building belongs to her and that the appellants trespassed into it and she accordingly sued in the Court of the 1st Subordinate Judge, Mandalay, for the possession of the house and land and for the payment of Rs. 180 as compensation for the use and occupation of the building. The appellant-defendants contested the suit and asserted that the house in question belonged to them and not to the respondent-plaintiff. They went on to say that they were the tenants of the respondent-plaintiff in respect of the land only and that they had been paying ground-rent at Rs. 60 per month. Another plea put forward was that the land and house are worth more than Rs. 1,000 and hence the 1st Subordinate Judge had no jurisdiction to entertain the suit. The appellant-defendants then denied that the respondent-plaintiff had any right to oust them from the possession of the house.

The suit went to trial and the learned Subordinate Judge framed a preliminary issue as regards the value of the suit properties and held that this did not exceed one thousand rupees and hence he had jurisdiction to try the suit. I note that in the present second appeal one of the grounds raised is as to the jurisdiction of the learned Subordinate Judge, but this matter was not pressed during the argument. It may be taken, therefore, that the jurisdiction of the Subordinate Judge to entertain the suit is not questioned in this appeal.

The real issue between the parties was whether the respondent-plaintiff is the owner of the house in

question and whether the appellant-defendants are trespassers therein. The learned Subordinate Judge held that the respondent-plaintiff is the owner of the house and that the appellant-defendants are mere trespassers and accordingly decreed the suit as prayed for by respondent-plaintiff.

On appeal, the learned District Judge, Mandalay, confirmed the decree of the Subordinate Judge. The reasons advanced by the Subordinate Judge and the District Judge for holding that the plaintiff-respondent is the owner of the house are not quite the same and it has been urged in the present appeal that the learned District Judge erred in placing the burden of proving the ownership of the house on the appellant-defendants.

Now, the admitted facts in the case are that the land on which the disputed house stands is the property of the respondent-plaintiff. According to the respondent-plaintiff this house was built by one M. T. Ali with materials supplied by her and that she paid him Rs. 1,000 as building charges. After completion the house was rented out to M. T. Ali for a certain period and later to one Khalique. In support of this allegation the respondent-plaintiff filed the agreement, Exhibit A in the trial record and said to have been entered into between herself and M. T. Ali for the erection of the building. The appellant-defendants, on the other hand, stated that they bought the house from M. T. Ali and Khalique for a sum of Rs. 2,000 by means of an unregistered sale deed filed as Exhibit 3 in the trial record. They also filed a document, Exhibit 2, said to be an agreement between the respondent-plaintiff and M. T. Ali for the ground-rent of the land on which the house stands. Finally, in order to prove that they had been paying ground-rent to the respondent-plaintiff, the appellant-defendants filed Exhibit 4, a receipt for the sum of Rs. 60.

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In considering the issue as to the ownership of the house the learned Subordinate Judge pointed out that under section 110 of the Evidence Act, as the appellant-defendants were in possession the burden of proving the title to the property lay on the respondent-plaintiff. However, he went on to say, that since the appellant-defendants allege that they bought it from one M. T. Ali and Khalique they should also prove this assertion. After discussing the evidence led by both sides the learned Subordinate Judge held that the agreement, Exhibit A, between the respondent-plaintiff and M. T. Ali was of a "fraudulent nature" and refused to rely on it. As regards the appellant-defendants' story that they had bought the house from M. T. Ali and Khalique the learned Subordinate Judge has correctly pointed out that the unregistered sale deed, Exhibit 3, confers no title whatsoever on the buyer. But these were not the only documents relied upon by the parties. The appellant-defendants filed Exhibit 2 and Exhibit 4—the former an alleged agreement as regards ground-rent and the latter a receipt for such rent—to prove the nature of their possession of the house, *i.e.* that they were not the lessees of the respondent-plaintiff. Both these documents are liable to stamp duty but unfortunately neither of them bear any stamp. The learned Subordinate Judge did not place much reliance on these documents on the ground that the respondent-plaintiff did not admit her signature on them. On the whole, the learned Subordinate Judge held that the respondent-plaintiff was the owner of the suit house and that the appellant-defendants were not her tenants and accordingly decreed the suit as prayed for.

The appellant-defendants appealed to the District Court, Mandalay, against the decree of the trial Court. The learned District Judge did not discuss the evidence led in any great detail. According to him, the burden

of proving the ownership of the house lay on the appellant-defendants and not on the respondent-plaintiff as the land on which the building stands admittedly belongs to the respondent-plaintiff. Coming to the question of the alleged tenancy of the land by the appellant-defendants, the learned District Judge remarked that as Exhibit 2 and Exhibit 4 were unstamped documents they were clearly inadmissible in evidence. The lower appellate Court was satisfied that the appellant-defendants had not discharged the burden placed on them by law and accordingly confirmed the decree of the trial Court.

In the present second appeal the main ground urged by the learned counsel for the appellant-defendants are as follows. In the first place, it has been stressed that the learned District Judge erred in placing the burden of proving the ownership of the suit house on the appellant-defendants. It was also argued that the learned District Judge was apparently unaware of the provisions of section 36 of the Stamp Act which clearly lay down that once an unstamped document has been admitted in evidence its admissibility cannot be questioned again on the ground that it has not been duly stamped. The learned counsel for the appellant-defendants therefore contends that the documents, Exhibit 2 and Exhibit 4, were wrongly rejected by the lower appellate Court.

Now, in placing the burden of proof on the appellant-defendants as regards the ownership of the house, the learned District Judge was undoubtedly under the impression that houses standing on any land belong to the owner of that land. No doubt, in England the general principle of *Quicquid plantatur solo solo credit* is applied to lands and buildings and "whatever is affixed to the soil belongs to the soil." But in India and Burma this principle is not applied to

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the fullest extent as is obvious from the following passage in the case of *Thakoor Chunder Poramanick and others* v. *Ramdhone Buttacharjee* (1) :

" . . . 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; and we think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession under any *bona fide* title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil."

This case has been followed by the Calcutta and Bombay High Courts in the rulings of *Narayan Das Khettry* v. *Jatindra Nath Roy Chowdhury and others* (2) and *Vallabhdas Naranji* v. *Development Officer, Bandra* (3) and the same principles were laid down therein. In the former ruling the head-note reads,

" 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 property as the soil itself."

As far as I am aware there is no direct ruling on this point in Burma, but there can be little doubt that in this country also the same principle as are laid down in the above rulings are applicable.

In the present case the learned District Judge undoubtedly erred when he placed the burden of proving the ownership of the disputed house on the appellant-defendants. The learned Subordinate Judge, on the other hand, remarked that though the burden of proof is on the respondent-plaintiff yet the appellant-defendants must also prove their ownership in the property. In his judgment the learned Subordinate

(1) 6 W.R. 228 (F.B.). (2) 54 Cal. 669.
(3) 53 Bom. 589.

Judge pointed out that both parties had failed to prove the ownership of the house, but finally held that the respondent-plaintiff was the owner. For instance, the learned Subordinate Judge referred to the Exhibit *A* agreement and refused to accept it as genuine, and so also he rejected Exhibit 3 unregistered sale deed filed by the appellant-defendants. There can be little doubt that he was correct in his findings on those documents. It is indeed strange and noteworthy that neither the respondent-plaintiff nor the appellant-defendants cited M. T. Ali and Khalique who were alleged to have built the house and later transferred it to the appellant-defendants. The burden of proving the ownership of the disputed house lay on the respondent-plaintiff and if she failed to discharge that burden there was no need to consider the plea put forward by the appellant-defendants, as the respondent-plaintiff could not succeed in the suit unless she was able to prove her title to the property. On the evidence led and the documents filed in the case it was clear that the respondent-plaintiff was not the owner of the suit house.

The appellant-defendants had also sought to establish that they had been paying ground-rent to the respondent-plaintiff or in other words that they were her tenants in respect of the land. They filed an alleged agreement between the respondent-plaintiff and M. T. Ali as regards the ground-rent, which is filed as Exhibit 2 in the trial record. A receipt for rent paid was also filed as Exhibit 4. Both these documents are said to bear the signature of the respondent-plaintiff. The learned Subordinate Judge failed to realize that these documents ought to have been stamped and should not have been admitted in evidence. However, he did admit them in evidence, and the lower appellate Court was not competent to question the admissibility: *vide* section 36 of the Stamp Act and the rulings in

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U THAUNG SEIN, J.

Pedda Venkatta Reddi and another v. *Vitta Hussain Setti* (1) and *Venkatakrishna Reddi* v. *Batcha Reddi* (2). The respondent-plaintiff did not specifically deny that she had signed the document Exhibit 2, but she denied the signature on the document Exhibit 4. The respondent-plaintiff ought to have known her own signature and if she did not sign Exhibit 2 she should have said so. It is futile for her to say, "I do not know whether the signature made on Exhibit 2 document belongs to me." As regards Exhibit 4 there was no clear proof that the respondent-plaintiff did in fact sign the alleged receipt.

A reference to the Exhibit 3 unregistered sale deed and Exhibit 2 agreement clearly shows that the appellant-defendants were not trespassers on the land. Exhibit 3 sale deed though unregistered was admissible in evidence, *vide* section 49 of the Registration Act, to prove the nature of the possession of the house by the appellant-defendants. It should be remembered, of course, that this unregistered deed confers no title whatsoever on the appellant-defendants. The learned District Judge does not appear to have realized this point and held that the Exhibit 3 sale deed should have been summarily rejected.

On the whole, both the lower Courts erred in placing the burden of proving the ownership of the house on the appellant-defendants. It was for the respondent-plaintiff to have proved the ownership as explained by me above. The respondent-plaintiff failed to discharge the burden of proving the ownership of the house, and in addition, there is no reason to hold that the defendant-appellants were trespassers in the house in question. The respondent-plaintiff's suit should therefore have been dismissed and the lower Courts erred in passing a decree in her favour.

(1) 57 Mad. 779. (2) 57 Mad. 783.

The appeal is accordingly allowed, the judgment and decree of both the lower Courts are hereby set aside and the respondent-plaintiff's suit will stand dismissed with costs.

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NAZIR KHAN AND ONE v. MA MA LAY.

U THAUNG SEIN, J.

CRIMINAL REVISION.

Before U Aung Tha Gyaw, J.

H.C. 1948

Mar 8.

THE UNION OF BURMA (APPLICANT)

v.

AYE MAUNG (RESPONDENT).*

Penal Code, s. 64—Imprisonment in default of fine—S. 35, Criminal Procedure Code—Power of Court to direct sentences to run concurrently.

The accused was found guilty of three separate offences under s. 409, Penal Code. He was sentenced in respect of each offence to undergo one and a half years' rigorous imprisonment and to pay a fine of Rs. 150 or six months' imprisonment in default. The Magistrate directed the sentences of imprisonment including one in lieu of fine to run concurrently.

Held: That this is clearly opposed to s. 64, Penal Code. The additional sentence must be in excess of any other imprisonment. Under s. 35, Criminal Procedure Code, the criminal Court is not competent to direct that such sentences should run concurrently.

Kanda Moopan (a) *Gopal Naicker*, I.L.R. (1937) Mad. 362; *King-Emperor* v. *Subrao Sesharao*, A.I.R. (1926) Bom. 62, followed.

Ebrahim v. *King-Emperor*, Cr.L.J., Vol. XXXII (1931) 637; *The Crown* v. *Chanan Singh*, I.L.R., Vol. XXI, Lah (1940) 143, referred to.

U AUNG THA GYAW, J.—This is a reference made by the District Magistrate, Rangoon, in his Criminal Miscellaneous No. 2 of 1948, calling attention to the three sentences of imprisonment and fine passed against the respondent by the 5th Additional Magistrate, Rangoon, in his Criminal Regular Trial No. 334 of 1947. The respondent was found guilty in respect of three separate offences under section 409, Penal Code, and was sentenced in respect of each offence to undergo one and a half years' rigorous imprisonment and to pay a fine of Rs. 150 with the option of undergoing six months' rigorous imprisonment in default.

* Criminal Revision No. 10-B of 1948 being review of the order of the 5th Additional Magistrate, Rangoon, dated the 15th December 1947, passed in Criminal Regular Trial No. 334 of 1947.

The Magistrate further directed that the substantive sentences of imprisonment were to run concurrently as also the sentences of imprisonment passed in default of payment of fine.

There is no doubt that the latter part of the learned Magistrate's sentences directing the terms of imprisonment imposed in default of payment of fine to run concurrently is clearly opposed to the spirit of the terms of section 64 of the Penal Code. Section 64 of the Penal Code reads :

"In every case of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable with imprisonment or fine, or with fine only, in which the offender is sentenced to a fine, it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence."

This provision of law declares that the Court is competent to impose a sentence of imprisonment in default of payment of fine and that such terms of imprisonment shall be in excess of any other imprisonment to which the accused may have been sentenced. Under section 35, Criminal Procedure Code, a criminal Court is not competent to direct that sentences of imprisonment imposed for default in payment of fine should run concurrenly. [See *Kanda Moopan* (alias) *Gopal Naicker* (1), and *King-Emperor* v. *Subrao Sesharao* (2).] In the latter case the accused was convicted under section 380, Indian Penal Code, in respect of two acts of theft, and he was sentened to suffer rigorous imprisonment for one day and to pay a

(1) I.L.R. (1937) Mad. 362. (2) A.I.R. (1926) Bom. 62.

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THE UNION OF BURMA v. AYE MAUNG.

U AUNG THA GYAW, J.

fine of Rs. 50, or in default to suffer rigorous imprisonment for three months, for each of the two offences. The Magistrate further directed that the two sentences should run concurrently.

This case appears to be on all fours with the one now in question and must be regarded as good authority for the view now put forward that the sentences passed against the respondent are illegal. Similar views were held in the cases of *Ebrahim* v. *King-Emperor* (1) and *The Crown* v. *Chanan Singh* (2). I accordingly set aside the sentences upon the respondent so far as they relate to concurrent sentences of imprisonment in default of payment of fines imposed upon him and direct that the said sentences of imprisonment passed by the learned Magistrate in default of payment of fines shall run consecutively.

(1) Cr. L.J., Vol. XXXII (1931) 637. (2) I.L.R., Vol. XXI, Lah. (1940) 413.

CRIMINAL REVISION.

Before U Aung Tha Gyaw, J.

THE DIRECTORS OF THE SOORATEE BARA BAZAAR COMPANY, LIMITED (APPLICANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

H.C. 1948

Apl. 5.

Criminal Procedure Code, s. 144—No mention of material facts in order—Invalidity—Succession of temporary orders—If can be imposed—Object of s. 144—Principles for exercise of discretion by Magistrates.

On the 24th January 1948 the District Magistrate passed an *ex-parte* order prohibiting applicants from opening "B" Block of the Sooratee Bara Bazaar. The order was silent as to the material facts of the case on which it was based, namely, the dispute between the Bazaar Company and the Bazaar Unity Council.

Held: That an order under s. 144 of the Code of Criminal Procedure where no mention has been made of the material facts of the case is invalid. The mere fact that the order is drawn up in the form provided in the schedule to the Criminal Procedure Code does not amount to a sufficient excuse for non-compliance with this requirement of law and such defect is fatal to its validity.

Aung Bala v. *District Magistrate*, (1939) Ran. 294, followed and applied.

Held further: That the conditions set out in s. 144 (2), Criminal Procedure Code, for the making of an order *ex parte* are (1) in case of emergency and (2) when the circumstances do not admit of getting respondents served with notice. Neither of these conditions existed in the present case.

Held further: That it was not in consonance with the spirit of the section to impose a restriction of indefinite duration by successive temporary orders.

Govinda Chetti and eight others v. *Perumal Chetti and another*, 38 Mad. 489; *F. E. Christian* v. *Carter*, (1939) A.I.R. Pat. 512, referred to.

The order under s. 144 is a necessary encroachment on personal liberty for preventive purposes. The duty of the Magistrate is not to deprive a man of his lawful rights but to restrain illegal interference with the same. The action should be taken against potential law-breakers and not against peaceful citizens.

R. E. Blong v. *King-Emperor*, A.I.R. (1924) Pat. 767; *Khazan Chand* v. *The Crown*, A.I.R. (1927) Lah. 430, applied.

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* Criminal Revision No. 7-B of 1948 being review of the order of the District Magistrate of Rangoon, dated the 24th January 1948, passed in Criminal Misc. No. 2 of 1948.

H.C. 1948

THE DIRECTORS OF THE SOORATEE BARA BAZAAR COMPANY, LIMITED v. THE UNION OF BURMA.

Foucar for the applicant.

U Tin Maung (Government Advocate) for the respondent.

U AUNG THA GYAW, J.—In this application the petitioners, who are the Directors of the Sooratee Bara Bazaar Company, Limited, Rangoon, seek the revisional interference of this Court with an order, dated the 24th January 1948, passed by the District Magistrate, Rangoon, under section 144 of the Criminal Procedure Code, prohibiting them from opening the "B" Block of the Sooratee Bazaar. The order complained against has since ceased to have effect through efflux of time, the statutory limit of two months during which it could operate having expired on the 24th March 1948 during the pendency of this matter in this Court. A number of grounds have been urged on behalf of the petitioners against the justice and validity of the said order and it is therefore necessary to go briefly into the facts leading to the unfortunate impasse before dealing with the points so raised.

This "B" Block of the Bazaar, which has formed the subject of the prohibition, had been under repairs in the early part of last year and the completion certificate from the Corporation of Rangoon was said to have been obtained in about the month of April 1947. Arrangements were then made for letting out the stalls to the Company's tenants. The stalls in this "B" Block numbered only 407 while the applications received from prospective tenants numbered nearly 2,000 and in about June 1947 the unsuccessful and dissatisfied applicants thought that the Company had shown racial bias in the allotment of their stalls and a number of them with some outsiders constituted themselves into a

council of action known as The Bazaar Unity Council and proceeded to lay their numerous demands before the Directors of the Company, one of these demands being a right to allot the stalls. Some anonymous threats with which these demands were accompanied made the Directors hesitate in their proposal to open out the said "B" Block of their Bazaar and persuaded them to appeal to the Commissioner of Police, Rangoon, for his protection. The Commissioner of Police was unable to afford the protection asked for and advised the petitioners to put off the opening of the Bazaar to a later date, which was to be intimated to them. On the 28th June 1947 the petitioners wrote again and asked as to when they should open their Bazaar under police protection. They were again told that pending the setting up of a Joint Board of Enquiry and the negotiations between the petitioners and the Bazaar Unity Council it was not advisable to open the "B" Section of the Bazaar. In July petitioners placed the matter in the hands of their lawyers, who again wrote to the Commissioner of Police on the subject and hinted that if the authorities could not guarantee the safety of the Bazaar and the tenants, the petitioners would be driven to institute legal proceedings in Court. The next communication made by the petitioners' lawyers to the Commissioner of Police, Rangoon, on the 17th July 1947, dealt with a proposed public meeting to be held by the Bazaar Unity Council in the Bazaar premises and the need of police protection for the safety of the Bazaar buildings. The unfortunate events of July last then intervened and the petitioners were advised to withhold their hand in the matter till public excitement should subside. Petitioners were informed that should they decide to open the "B" Section of their Bazaar, a prohibitory order would be served upon them under section 144 of the Criminal Procedure Code. In

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subsequent communications made to the Commissioner of Police in September the petitioners exhibited their impatience with the restraint imposed on their liberty of action in the matter and as a result of their talks with the authorities at a higher level, they decided to open the "B" Bazaar in the week following the 27th September 1947. The petitioners were again advised to withhold action and on the 8th October 1947 they were served with an order under section 144 of the Criminal Procedure Code prohibiting them from opening the "B" Block of their Bazaar. Meanwhile, the differences between the petitioners and the Bazaar Unity Council remained unresolved and finally on the 13th January 1948 petitioners wrote to the Commissioner of Police stating that as the order of the District Magistrate, Rangoon, under section 144, Criminal Procedure Code, had elapsed they saw no reason why they should not proceed forthwith to reopen the Bazaar. They however did not wish to take any course which would embarrass the authorities and accordingly asked whether the latter were prepared to allow them to open the "B" Bazaar. In consequence of this communication the order now complained of was passed by the District Magistrate, Rangoon, in these terms :

"Whereas it has been made to appear before me that the opening of the 'B' Block, Sooratee Bara Bazaar, Rangoon, will tend to cause a breach of the peace or disturbance of the public tranquillity or a riot or an affray, I, U Po Kye, B.A., District Magistrate, Rangoon, do hereby prohibit you, under section 144 of the Code of Criminal Procedure, 1898, from opening the said 'B' Block, Sooratee Bazaar, Rangoon."

This order as it appears is silent as to the material facts of the case on which it was passed, namely the dispute between the petitioners and the Bazaar Unity Council. On the face of it the order in question

requires the petitioner to abstain from doing what is evidently a lawful act, namely management of their own private property, in the way which best serves their convenience. An order of the kind now passed where no mention has been made of the material facts of the case has been held to be invalid in the case of *Aung Bala* v. *District Magistrate* (1). The mere fact that the order has been drawn up on the lines of the form provided in the schedule annexed to the Code of Criminal Procedure does not amount to a sufficient excuse for non-compliance with this requirement of law. This defect in the order is fatal to its validity.

The order passed against the petitioners on the 24th January 1948 is an *ex-parte* order which can be passed only under two circumstances, namely (1) in cases of emergency, and (2) when the circumstances do not admit of getting the respondents served with notices of the action proposed against them. The facts disclosed in the affidavits filed in this case and in the correspondence which passed between the petitioners and the Commissioner of Police, Rangoon, do not indicate that these circumstances existed at the time the order in question was passed. The petitioners were in constant communication with the authorities concerned on the question of the reopening of the Bazaar, and there could have been no question that they could not have been served with the requisite notice regarding the order proposed to be passed against them. Nor could the communication they made with the authorities on the 13th January be made the basis of the finding that subsequent to the making of the same an emergency had arisen to justify the passing of the order. In the letter of the 13th January the petitioners merely pointed out that

(1) (1939) Ran. 294

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U AUNG THA GYAW, J.

there were no possible obstacles in the way of the reopening of the Bazaar, and as they were anxious to avoid causing embarrassment to the authorities they wanted to know whether the latter had any objections to the course of action proposed by them. The contents of this letter can hardly be described as a threat of immediate action on their part. They did not mention anywhere in their letter that whatever be the consequences they were determined to reopen their Bazaar. In these circumstances, it cannot be said that the conditions set out in sub-section (2) of section 144 of the Criminal Procedure Code have been satisfied.

The order passed on the 24th January 1948 was preceded by an earlier one passed on the 8th October 1947 and this fact renders it more necessary on the part of the authority issuing the order to state clearly his reasons for the continuance of the emergency on which he had first acted in issuing the previous order. It would not be in consonance with the spirit of the section to impose upon the petitioners a restriction of indefinite duration by means of successive temporary orders of the kind complained against. See *Govinda Chetti and eight others* v. *Perumal Chetti and another* (1) and *F. E. Christian* v. *Carter* (2).

Again the making of an order under section 144 of the Criminal Procedure Code is a necessary encroachment upon the personal liberty of the person or persons affected thereby for the preventive purposes set out therein. As pointed out in the case of *R. E. Blong* v. *The King-Emperor* (3) "the object of section 144, Criminal Procedure Code, is to enable a Magistrate in cases of emergency to make an immediate order for the purpose of preventing an imminent breach of the peace ; but it is not intended to relieve the Magistrate

(1) 38 Mad. 489. (2) (1939) A.I.R. Pat. 512.
(3) (1924) A.I.R. Pat. 767.

of the duty of making a proper enquiry into the circumstances which made it likely that such breach of the peace would occur, if it is found that a man is doing that which he is legally entitled to do and that his neighbour chooses to take offence thereat and to create a disturbance in consequence, it is clear that the duty of the Magistrate is not to continue to deprive the first of the exercise of his legal right, but to restrain the second from illegally interfering with that exercise of his legal right."

"When a breach of the peace is anticipated, action is to be taken against the potential law-breakers and not against the peaceful citizens whom, it is expected, that the law-breakers will molest." [*See* the case of *Khazan Chand* v. *The Crown* (1).]

These then are the principles by which the discretion of the Magistrate issuing an order under section 144 of the Code has to be guided. It cannot be said that on the facts and circumstances disclosed in the present case, that discretion of the learned District Magistrate has been so wisely guided, and if the order complained of was still in operation, it would require to be set aside. However, since it has lapsed this application will be dismissed.

(1) (1927) A.I.R. Lah. 430.

SUPREME COURT.

BO SAN LIN (APPLICANT)

v.

THE COMMISSIONER OF POLICE AND ONE (RESPONDENTS).*

† S.C. 1948

July 12.

[On appeal from the High Court.]

Public Order (Preservation) Act, 1947—S. 5 (a) and (b)—*S. 9* (1)—*Power of Court—Whether invalid, Telephone message by Commissioner of Police to Police Station Officer to arrest if an order—Subsequent order in writing whether can validate previous illegal arrest—Order enumerating 71 persons—Necessity for individual consideration.*

Held: (1) That if the orders made by the Commissioner of Police under s. 5 (*a*) and (*b*) of Public Order (Preservation) Act, 1947, were invalid and not in accordance with the requirements of the Act they were not made in exercise of a power conferred by the Act.

King-Emperor v. *Vimlabai Deshpande*, 73 I.A. 144 at p. 155, referred to.

By Article 25 of the Constitution the right conferred on a citizen is indefeasible and none of the contingencies contemplated by sub-s. (3) of Article 25 arose and the provisions of s. 9 of Public Order (Preservation) Act, 1947, if it purports to exclude the jurisdiction of the Supreme Court, is void as being repugnant to the Article 25 of the Constitution. In a proceeding under Article 25 of the Constitution in spite of s. 9 (*1*) of Public Order (Preservation) Act, 1947, it is competent for the Supreme Court to consider whether the action taken by the Commissioner of Police is legal or not;

(2) That though the Commissioner of Police might have had good and sufficient grounds for what he did, law requires that he should proceed in a certain manner. Unless the procedure adopted was in accordance with law the detention would be illegal. The order contemplated by s. 5 (*a*) and (*b*) must be one in writing and in this case at the outset there was no such order and consequently the arrest and detention were illegal.

Held further: The jurisdiction of the Commissioner of Police under s. 5 (*a*) of the Act arose only on his being satisfied of certain circumstances and the order in the case dated 30th June 1948 mentions "I hereby direct . . . . detention with effect from" previous dates. *Ex-post-facto* detention under s. 5 (*a*) of the Act is clearly illegal.

A single order in respect of 71 persons arrested at different places on different dates deprecated.

Thein Moung for the applicant.

Chan Tun Aung (Assistant Attorney-General of the Union of Burma) for the respondents.

* Criminal Misc. Application No. 11 of 1948.

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

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BO SAN LIN v. THE COMMISSIONER OF POLICE AND ONE.

The judgment of the Bench was delivered by

E MAUNG, J.—Maung Mya Maung, who was produced before the Court on the 8th day of July 1948 in pursuance of a writ of *habeas corpus*, was on that date directed to be released and we now proceed to give our reasons for the order then made.

On the 26th June 1948 at about 12-45 a.m., as appears from the affidavits in the case, Maung Mya Maung, a member of the People's Volunteer *Aphwe*, Tamwe Circle, was taken into custody by U Ba Than, Police Station Officer of Tamwe. He had since that date been in custody. The present application for directions in the nature of *habeas corpus* was made on his behalf by Bo San Lin, President of the People's Volunteer *Aphwe*, Tamwe Circle. It was claimed on behalf of Maung Mya Maung that his arrest and subsequent detention were illegal and not in accordance with law and that therefore this Court should, in exercise of the powers vested in it by Article 25 of the Constitution, direct his release.

On opportunity being given to the Commissioner of Police and the Superintendent of Jail (Annexe), Insein, to show cause why directions should not be made as sought on behalf of Maung Mya Maung, four affidavits were filed. From these four affidavits it is clear that the case for the respondents is that the arrest and detention of Maung Mya Maung were purported to have been made in exercise of the powers under section 5A (*1*) (*b*) of the Public Order (Preservation) Act, 1947.

The initial question that arises for consideration is the operation of section 9 (*1*) of that Act. It reads :

"No order made in exercise of any power conferred by or under this Act shall be called into question in any Court."

Does this provision bar the jurisdiction of this Court ?

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E MAUNG, J.

In the first place it may be fairly argued, and was in fact argued, on the authority of *King-Emperor* v. *Vimlabai Deshpande* (1) that if the orders made by the Commissioner of Police were invalid and not in accordance with the requirements of the Act, they were not made in exercise of a power conferred by the Act. It is not necessary to consider the validity of this contention as, in any event, the right conferred on the citizen by Article 25 of the Constitution is one which is indefeasible except in the contingencies contemplated in sub-section (3) thereof. There is no question here of the contingencies contemplated by sub-section (3) of Article 25 and accordingly, even if the view taken by the Privy Council in the above case cannot under ordinary rules of interpretation be supported, it is clear that section 9 of the Public Order (Preservation) Act, 1947, if it can be read as purporting to exclude the jurisdiction of this Court, is, to the extent it is repugnant to the provisions of Article 25 of the Constitution, void. We are clearly of the opinion therefore that in a proceeding taken under Article 25 of the Constitution it is competent for this Court to consider whether the action taken by the Commissioner of Police in purported exercise of the powers under the Public Order (Preservation) Act, 1947, is legal or not.

As stated above, the arrest of Maung Mya Maung was effected at 12-45 a.m. on the 26th June 1948. U Aung Chein, the Commissioner of Police, in his affidavit states: "At about 7-40 p.m. after due consideration I directed U Ba Than on the telephone to arrest the said Maung Mya Maung under section 5A of the Public Order (Preservation) Act, 1947." U Ba Than, the Police Station Officer concerned,

(1) 73 I.A. 144 at p. 155.

in his affidavit states: "I say that at about 7-40 p.m. I was directed by the Commissioner of Police to arrest Maung Mya Maung under section 5A of the Public Order (Preservation) Act, 1947." It is clear therefore, and indeed as the learned Assistant Attorney-General has told us, it is no part of the case for the respondents that U Ba Than in arresting Maung Mya Maung exercised any independent judgment of his own to bring the arrest within the purview of section 5 (*1*) of the Public Order (Preservation) Act.

The detention, if it is to be justified at all, will have to be justified solely as one made under section 5A of the Act. Section 5A reads as follows:

> "5A. (*1*) If the President is satisfied with respect to any particular person 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 so to do, the President may make an order—
>
> . . . . . .
>
> (*b*) directing that he be detained . . . ."

By section 7 of the Act the President may delegate the powers under section 5A to such officer or authority as he may specify and the Commissioner of Police, Rangoon, is one of the officers so specified.

It has been said on behalf of the respondents that from the affidavits and the documents filed before us it is clear that the Commissioner of Police had before him materials from which he, as a reasonable person, could have come to the conclusion that public safety and the maintenance of public order required the detention of Maung Mya Maung and that though it may be that we cannot agree with him on that finding, our powers as a Court issuing directions in the nature of *habeas corpus* are not those of an appellate authority so that we can substitute our own findings on facts for those of the Commissioner of Police.

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BO SAN LIN v. THE COMMISSIONER OF POLICE AND ONE.

E MAUNG, J.

We are in agreement with the contention raised on behalf of the Commissioner of Police to this extent that unless we can find that the action taken was one demonstrably groundless or in ignorance or at random or influenced by considerations extraneous to the subject-matter before him, we must accept the findings of the Commissioner of Police. We have to remember that he is the officer responsible for the maintenance of public safety and public order and, once we are satisfied on the materials before us that he has acted in good faith and that the materials before him were such as would move any reasonable person to act as he did, we should not go any further into the matter.

But that, however, is not the end of the matter in this case. The Commissioner of Police might have had good and sufficient reasons for what he did, but the law requires that he should proceed in a certain manner and unless the procedure adopted by him in detaining Maung Mya Maung was in accordance with law the detention order would be illegal. We are clearly of the opinion that in the present case, whatever may have been the merits, the methods adopted were not such as could have been defended and that the detention of Maung Mya Maung must therefore be held to be illegal from its very inception.

What the law authorizes the Commissioner of Police in the circumstances relevant to the present case is to make an order directing that a certain person be detained. Instead what he has done is to send a telephone message to U Ba Than, the Police Station Officer, to arrest Maung Mya Maung. On that verbal message Maung Mya Maung was arrested and on the 28th June 1948 he was delivered to the custody of the Superintendent of Jail (Annexe), Insein. It was not till the 30th June 1948 that U Aung Chein proceeded

to make the order necessary under section 5A of the Public Order (Preservation) Act. The opening words of the order must here be reproduced for reasons which will become apparent later :

"I, Aung Chein, Commissioner of Police, Rangoon, being satisfied that it is necessary to do so to prevent them from acting in any manner prejudicial to the public safety and maintenance of public order hereby direct that the following persons be detained in Insein Central Jail until further orders with effect from the dates mentioned against their names . . . ."

Then followed 71 names and it appears that the arrests were on various dates between the 25th and the 29th June 1948.

It was claimed by the learned Assistant Attorney-General on behalf of the respondents that U Aung Chein must be deemed by his telephone message to U Ba Than in the evening of the 25th June 1948 to have made the order of detention of Maung Mya Maung. That argument overlooks two things. In the first place the scheme of sections 5A and 5B of the Public Order (Preservation) Act, 1947, makes it clear that the order contemplated must be one in writing ; for, it is impossible to contemplate a verbal order in relation to any of the matters specified in these sections. In the second place, the order of the 30th June 1948 was the only operative order of detention as is apparent from the words "I hereby direct." The affidavits of U Aung Chein and U Ba Than make it clear that the order communicated by the former to the latter on the telephone was to arrest Maung Mya Maung. It is clear therefore that when in the early morning of the 26th June 1948 Maung Mya Maung was arrested by U Ba Than, that arrest was illegal. Maung Mya Maung's detention from that time till the issue of the order of the 30th June 1948 was beyond question consequently illegal.

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E MAUNG, J.

That brings us to the question whether, when the original arrest was manifestly illegal and not in due course of law, the subsequent order of detention of the 30th June 1948 would legalize the detention of Maung Mya Maung to this date. The learned Assistant Attorney-General concedes that the order cannot have that effect. It is clear that it must be so. The jurisdiction of the Commissioner of Police to act under section 5A of the Public Order (Preservation) Act is dependent on and arises only on his being satisfied of the existence of the circumstances set out in that section. Till then any order of detention would be without jurisdiction. The detention of Maung Mya Maung must be taken as a whole, beginning with his arrest in the early hours of the 26th June and continuing to this date. Moreover, the order of the 30th June 1948 in that it purported to authorize *ex-post-facto* the detention under section 5A of the Act from the 25th June 1948 when the Commissioner of Police gave a verbal order on the telephone to the Police Station Officer, Tamwe, to effect the arrest of Maung Mya Maung, is clearly illegal.

Though we are prepared to accept the assurance of the learned Assistant Attorney-General on behalf of the Commissioner of Police that the case of each individual *détenu* received separate consideration, we think it our duty to record here that the order of detention, which has been brought to our notice in this case, is apt to give rise to a suspicion that in such an important matter as the liberty of a citizen, the Commissioner of Police has not given each case the individual attention it deserves. A single order in respect of 71 persons arrested at different places and on different dates is clearly to be deprecated.

APPELLATE CRIMINAL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

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MAUNG MYINT (APPELLANT)

v.

Apl. 9.

THE UNION OF BURMA (RESPONDENT).*

Penal Code, s. 302 read with s. 34—Common intention necessary inference—Alteration of sentence on appeal.

Held by the Bench : Essence of joint liability under s. 34 of the Penal Code is the existence of a common intention leading to doing of a criminal act in furtherance of such intention. Such inference of common intention should not be reached unless it is a necessary inference. "Necessary inference" must mean the only reasonable inference possible, not merely the probable inference; from the mere fact that the accused were all armed it cannot be said that the only necessary inference was that they intended to kill as well as rob passengers.

Mahbu Shah v. *King-Emperor*, 72 I.A. 148, applied.

King-Emperor v. *Nga Aung Thein and another*, 13 Ran. 210 (F.B.), referred to.

Barendra Kumar Ghosh v. *Emperor*, 52 Cal. 197 (P.C.), referred to.

Held further : Though conviction under s. 302 read with s. 34 could not stand the accused could be convicted under s. 394, Penal Code, as jointly concerned in committing robbery in which hurt was caused by fellow robbers. The accused could have been separately charged under ss. 323, 392 and 394. It would be permissible to alter the offence to one under s. 394 of the Penal Code and the appellate Court may alter the charge or finding.

Lala Ojha v. *Queen-Empress*, 26 Cal. 863, followed.

Conviction altered into one under s. 394 of the Penal Code and accused sentenced for transportation for life.

Held per Chief Justice : The true test for alteration of conviction is whether the facts are such as to give the accused notice of offence for which he is going to be convicted though not charged and that the accused is not prejudiced by the mere absence of a specific charge.

Meher Sheikh and others v. *Emperor*, A.I.R. (1931) Cal. 414, applied.

Wallu v. *The Crown*, (1923) I.L.R. 4 Lah. 373, distinguished.

Begu v. *King-Emperor*, (1925) I.L.R. 6 Lah. 226 (P.C.), referred to.

Ba Soe for the appellant.

Ba Sein (Government Advocate) for the respondent.

*Criminal Appeal No. 217 of 1948 being appeal from the order of 3rd Special Judge of Insein, dated the 28th February 1948, passed in Criminal Regular Trial No. 120 of 1947.

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U SAN MAUNG, J.—The appellant, Maung Myint was convicted by the 3rd Special Judge (U Thein Pe) of Insein for an offence punishable under section 392 of the Penal Code and was sentenced to ten years' rigorous imprisonment. He was also convicted for an offence punishable under section 302 read with section 34 of the Penal Code and was sentenced to death.

The robbery and the murder which took place in the course of the same transaction occurred in a railway carriage at about 3 p.m. on the 21st February 1947, while the 2-Down train from Mandalay to Rangoon was travelling between Pegu and Dabein. Ma Khin Shwe (P.W. 9), one of the passengers of that carriage, was seated near the rear end of that carriage with her face in a southerly direction, when she heard voices and the sound of firing at a spot behind her. She turned round to look and saw three men whom she took to be *lusoes* standing close to each other. One was armed with a dagger and a hand grenade while another had a revolver with him. She did not know what the third *lusoe* had. One of the *lusoes* ordered the passengers to raise their hands and she was one of those who obeyed that command. She was robbed of three rings and Rs. 65 in cash by the accused who was armed with a hand grenade at the time he robbed her. When the train subsequently slowed down, two of the robbers escaped from the train and one of them was subsequently shot dead by the police who were in the train. The *lusoe* who remained hiding in the front part of the carriage was arrested and he was recognized by her as the accused who had robbed her.

Maung Chit (P.W. 10) was also seated near the rear end of the carriage when the incident occurred. He did not recognize any of the *lusoes* as he dared not look at them, but he knew that one *Hamid* who was

seated behind him was stabbed and shot. Ali Meah (P.W. 11), who was seated face to face with Ma Khin Shwe (P.W. 9) near the rear end of the carriage, recognized the accused as the *lusoe* who robbed him of his shirt containing Rs. 180 in cash. According to him, the accused was armed with a revolver at that time, while of the two companions of the accused one was armed with a hand grenade and the other, a revolver. Mutu Rahman (P.W. 12), who was seated near Ali Meah (P.W. 11), saw three *lusoes* of whom one was armed with a revolver, the other a hand grenade, and the third, a dagger. The *lusoe* with the revolver shot Hamid, while the *lusoe* with the dagger, whom he recognized as the accused, robbed him of Rs. 165. When the train slowed down, two *lusoes* jumped down from the back part of the carriage in an attempt to escape, while the third who sat down near a door in the front part of the carriage and was later arrested, was the accused. In cross-examination, this witness varied the statement made in his examination-in-chief, by saying that the accused was armed with a revolver as well as a dagger, that the second *lusoe* was armed with a hand grenade and that he did not know what the third *lusoe* had.

Jawalal Shariar (P.W. 13) was seated near the latrine in the middle part of the carriage when, on hearing the sound of firing from the rear part of the train, he ran to the front part of the carriage, which was a long one, in an attempt to get as far away from the scene of incident as possible. Being too fat, he could not follow the example of those who sought safety under the seats. He saw an Indian fall down from his seat, on being attacked by *lusoes*. He also saw this Indian get up and come to the front part of the carriage, bleeding, and fall down again on reaching

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near him. Two of the three *lusoes* who were in the carriage were armed with revolvers, and one of them, who appeared to be the leader, went on firing his revolver, while his two companions robbed the passengers. He himself was robbed of his money by the accused. His coat containing a cheque was also taken away by one of the *lusoes* and it was subsequently found on the person of the *lusoe* who was shot dead as he attempted to escape. The *lusoe* who fired his revolver all the time escaped, while the *lusoe* who robbed him of his money was found hiding in the carriage and was arrested. This was the accused. He (witness) cannot say whether the accused was armed with a revolver or a dagger.

One witness whose evidence was not made use of by the trial Judge (U Thein Pe) is Maung Kyaw Soe (P.W. 2) who was examined by his predecessor U Hla Pe. This witness, who was seated by the side of the murdered Indian (Hamid) at the time of the occurrence and who said that he was roused from sleep on hearing the sound of firing, at first gave evidence which goes to suggest that the accused was one of the two *lusoes* who were seen struggling with the Indian. Later, he changed his statement and said, "I am unable to say if the accused was the *lusoe* who held the revolver and struggled with the Indian near me. I saw one man with a revolver in his hand struggling with the injured Indian. Another *lusoe* who struggled with the injured Indian was armed with a dagger and a hand grenade. This *lusoe* robbed my properties. He is not the accused." He was not even definite as to whether the accused was one of the three robbers. All he could say definitely was that the accused who was later found hiding in the carriage was denounced by the passengers as the *lusoe* with the revolver.

As already mentioned above, when the train slowed down, two of the robbers jumped from the carriage and made an attempt to escape. This was seen by Maung Po Thit (P.W. 1), Special Sub-Inspector of Police, Dabein, who was on patrol duty near Railway Bridge No. 32 known as Kyonta Bridge, with his Special Police Reserves, Maung San Dok (P.W. 23), the Head Constable of the Mandalay Armed Police, and the Armed Police Railway escort under him, as well as by Havildar Saw Aung Bwint (P.W. 3) of the Frontier Constabulary Battalion, Taunggyi, and the men under him, who were travelling from Thazi to Rangoon. The combined fire of the railway escorts, the police reserves patrolling the area, and the Frontier Constabulary had the effect of bringing down and killing one of the two robbers who attempted to escape, at a spot about 100—150 yards from the train. With the robber was found the coat belonging to Jawalal Shariar (P.W. 13) and a Shan-bag (Exhibit 1) containing among other things some of the property robbed from Ma Khin Shwe (P.W. 9), Maung Chit (P.W. 10), Ali Meah (P.W. 11) and the deceased Hamid. Two railway tickets for the journey from Pegu to Dabein, and a handkerchief were also found near the dead robber.

The injured passenger (Hamid) was brought to the General Hospital, Rangoon, in a semi-conscious state and he later died of the injuries received by him. These consisted of six gunshot wounds (of which three were entrance wounds and three exit wounds) and a stab wound which penetrated the chest cavity and injured the middle lobe of the right lung. Death was due to the stab wound and the gunshot wound on the chest, each of which was sufficient in the ordinary course of nature to cause death.

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On the evidence on record there is no doubt whatsoever that three robbers attacked the carriage in which the deceased Hamid, and the witnesses Ma Khin Shwe (P.W. 9) and others were travelling, and that the accused Maung Myint was one of them. His defence that he was an innocent passenger, who had boarded the train at Htongyi and who was wrongly accused by his fellow passengers, has been rightly rejected by the learned trial Judge. It is a matter, however, for consideration whether the accused has been rightly convicted of the offence punishable under section 302/34 of the Penal Code for the murder of Hamid in furtherance of common intention. There is no evidence, whatsoever, to show that he was one of the two robbers who actually attacked Hamid with a revolver and a dagger. (Hamid was obviously shot three times with a revolver and stabbed once with a dagger.) The witnesses are also at a variance as to the nature of the weapon with which the accused was armed, at the time of the robbery. Ma Khin Shwe (P.W. 9) said that he was armed with a hand grenade at the time he robbed her, while according to Ali Meah (P.W. 11), who sat opposite her, the accused was armed with a revolver at the time he robbed him. Mutu Rahman (P.W. 12) who was seated near Ali Meah said that he saw a dagger with the accused at the time the accused robbed him. As it was highly improbable for the accused to have changed his weapon in quick succession while he robbed these three persons, the most that can be said from the evidence on record is that the accused was armed with some such weapon as a hand grenade, or a revolver, or a dagger, at the time of the robbery. No weapon was found on him at the time of his arrest, but he had with him four Sten-gun cartridges, which could be used with a ·38 bore revolver [*see* the evidence of Maung San Dok (P.W. 23)].

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Now, the question involved is whether in these circumstances it is necessary for the Court to infer that there was a common intention on the part of the accused and the two other robbers who actually committed the murder of Hamid, not only to rob the passengers in the carriage, but also to murder them if necessary. As held by their Lordships of the Privy Council in the case of *Mahbub Shah* v. *King-Emperor* (1), the essence of joint liability under section 34 of the Penal Code is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention, and to convict the accused of an offence applying the section, it should be proved that the criminal act was done in concert pursuant to a pre-arranged plan. Their Lordships also pointed out therein, that the inference of common intention within the meaning of the term in section 34 should never be reached unless it is a *necessary* inference drawn from the circumstances of the case.

The words "necessary inference" must mean the only reasonable inference possible, not merely a "probable" inference from the facts appearing in evidence. Bearing this fact in mind, it is to be considered whether on the evidence on record, the only possible inference is that the accused in common with his two companions intended to murder the passengers as well as to rob them. There is no evidence to show that the accused came into the carriage at the same time as his companions. Furthermore, there is nothing to show that he had abetted the murder of Hamid either by words or by deed. No doubt the robbers were armed with such lethal weapons as revolver, dagger and hand grenade.

(1) 72 I.A. 148.

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However, from this fact alone, it cannot be said that the only necessary inference is that they intended to kill as well as to rob the passengers. Some robbers do carry such lethal weapons with no other intention than to overawe.

No doubt, in the case of *King-Emperor* v. *Nga Aung Thein and another* (1), a Full Bench of the Rangoon High Court while holding that no presumption, either of fact or in law, arises in such cases and that each case must be decided on its own facts, thought fit to observe that the ascription of a common intention to add murder, if necessary to robbery is not easily avoided, where all, or some to the, knowledge of the rest, of those engaged in the enterprise are found to have carried firearms and firearms have been used with fatal effect. However, it will be noticed that the language used was guarded and that the learned Judges merely said that "the ascription of a common intention to murder is not easily avoided." This is quite a different thing from saying that the existence of such a common intention must necessarily be inferred—which is the standard of proof which the law now requires for this purpose. The circumstances in the case of *Barendra Kumar Ghosh* v. *Emperor* (2), relied upon in *King-Emperor* v. *Nga Aung Thein and another* (1), are much stronger than those in the present. There, the accused who was one of the men who attempted to rob the postmaster at Sankaritolla Post Office, was one of the three men who entered the room and fired at the postmaster, and might be the man who actually fired the fatal shot.

For these reasons, we hold that the conviction of the accused under section 302 read with section 34 of

(1) 13 Ran. 210 (F.B.). (2) 52 Cal. 197 (P.C.).

the Penal Code for the alleged murder of Hamid in furtherance of common intention cannot be allowed to stand.

The accused should have been convicted of an offence punishable under section 394 of the Penal Code as one jointly concerned in committing a robbery in which hurt was caused by his fellow robbers, as there can be no doubt that besides receiving the fatal wounds Hamid received injuries which amounted to hurt and to grievous hurt. The question is whether the conviction of the accused under section 302/34 of the Penal Code, can, in the circumstances of this case, be altered in appeal to one under section 394 of the Penal Code. Now, from illustration (*m*) to sub-section (3) of section 235 of the Code of Criminal Procedure, it is clear that if a person commits robbery on another, and in doing so voluntarily causes hurt to him, that person may be separately charged with and convicted of offences under sections 323, 392 and 394 of the Penal Code although, of course, he cannot, under section 71 of the Penal Code, be punished with a more severe punishment than the Court which tries him can award for any one of such offences. Therefore, as in this case, the accused was wrongly charged and convicted of murder in furtherance of common intention, committed in the course of a robbery in which he was concerned, it would be permissible to alter the offence under section 302/34 of the Penal Code to one under section 394 of the Penal Code. As held by a Bench of the Calcutta High Court in the case of *Lala Ojha* v. *Queen-Empress* (1), if the prosecution establishes certain acts constituting an offence and the Court misapplies the law by charging and convicting an accused person for an offence other than that for

(1) 26 Cal. 863.

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which he should have been properly charged and if notwithstanding such error the accused has by his defence endeavoured to meet the accusation of the commission of these acts, then the appellate Court may alter the charge or finding and convict him for an offence which those acts properly constitute, provided the accused be not prejudiced by the alteration in the finding.

The learned counsel for the appellant who accepted notice of the proposed alteration of the finding by this Court and was given an opportunity of adducing arguments against it, said that he had nothing to say in the matter. In our opinion, the accused cannot be considered to be prejudiced by the alteration in the finding of the offence under section 302/34 of the Penal Code to one under section 394, because, even if a charge under section 394 had been framed by the trial Court, his defence could not have been otherwise than that raised in that Court.

In the result, the appeal of the accused Maung Myint succeeds in part. The conviction under section 302/34 of the Penal Code is altered to one under section 394 of the Penal Code and the sentence of death is altered to transportation for life. The conviction under section 392 of the Penal Code is confirmed, but the sentence of ten years' rigorous imprisonment thereunder is set aside as the appellant cannot be sentenced both under section 394 of the Penal Code and under section 392 of the Penal Code, *vide* section 71 of the Penal Code.

U THEIN MAUNG, C.J.—I agree. I am of the opinion that the alteration of the conviction under section 302/34 of the Penal Code to one under section 394 thereof is warranted by the Code of Criminal Procedure inasmuch as the murder with

which the appellant was charged under section 302/34 was really a part of the same transaction with the robbery for which the appellant has also been charged under section 392 of the Penal Code. As has been pointed out in *Meher Sheikh and others* v. *Emperor* (1), "The true test is whether the facts are such as to give the accused notice of the offence for which he is going to be convicted though he was not charged with it, so that he is not prejudiced by the mere absence of a specific charge."

In this particular case there can be no doubt that the accused had notice of the offence for which he is going to be convicted, that is, of the offence of robbery in the course of which one of the robbers committed murder.

It has been held in *Wallu* v. *The Crown* (2) that where an accused person has been charged only with murder and has been convicted and the conviction is set aside by the High Court on appeal that Court cannot alter the conviction to one under one of the sections of the Penal Code dealing with offences against property. However, that case is distinguishable inasmuch as the accused there had been charged only with murder, whereas in the present case the appellant has been charged not only with murder but also with the offence of robbery in the course of which the murder was committed. [See also *Begu* v. *King-Emperor* (3).]

(1) A.I.R. (1931) Cal. 414. (2) (1923) I.L.R. 4 Lah. 373.
(3) (1925) I.L.R. 6 Lah. 226 (P.C.).

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

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May 3.

KO SAN MYA AND ONE (APPELLANTS)

v.

A.R.S.A. FIRM (RESPONDENT).*

Money-lenders' Act, 1945—S. 13, clause (a)*—Whether final mortgage decree for sale could be reopened under—Interest after 8th December 1941—Whether s. 3, Accrual of Interest (War-Time Adjustment) Act, 1947, applies to decrees.*

Held : That British subjects in India did not become alien enemies of the people in Burma when Burma was occupied by the Japanese.

V.E.R.M. Krishnan Chettyar v. *M.M.K. Subbiya Chettyar*, 1948 Bur. L.R. 278, followed.

S. 13 (*a*) of the Money-lenders' Act, 1945, provides that in an appeal arising out of a final decree in a mortgage suit whether filed before or after the commencement of the Act, the court may reopen the transaction ; in so doing the court can reopen the preliminary decree also.

Renula Bose, Srimati v. *Rai Manmatha Nath Bose and others*, L.R. 72 I.A. 156, followed and applied.

Held further : That in respect of the two transactions, dated 30th October 1929 and 12th December 1930, which had been settled on 14th June 1936 and the appellant agreed to pay in annual instalments, it would not be fair to reopen the same as appellant cannot be allowed to benefit by his own wrong.

In reopening the transaction, the Accrual of Interest (War-Time Adjustment) Act, 1947, could not be considered as disallowing interest after 8th December 1941, as the said Act does not apply to a decree.

Bank of Chettinad, Limited v. *Chuah Bun Hock*, Civil Misc. No. 69 of 1947, followed.

Thein Moung for the appellant.

P. K. Basu for the respondent.

U THEIN MAUNG, C.J.—This is an appeal from a final decree for sale of mortgaged properties passed in Civil Regular Suit No. 6 of 1944 of the Divisional Court of Myaungmya which was originally Civil Regular Suit No. 2 of 1941 in the District Court of Myaungmya.

* Civil 1st Appeal No. 69 of 1947 against the decree of the Divisional Judge's Court of Myaungmya in Civil Regular Suit No. 6 of 1944, dated the 5th August 1944.

The appeal itself was pending in the Supreme Court of Burma as Civil 1st Appeal No. 21 of 1944 ; at the time of the liberation of Burma it has been treated as Civil 1st Appeal No. 69 of 1947 of this Court.

The principal grounds of appeal are to the effect that the respondent became an enemy alien within the mischief of section 83 of the Code of Civil Procedure as soon as Burma declared war on the British Empire, and that the Divisional Court erred in granting him the final decree as if he still had a *locus standi* for the same.

However, in view of the recent ruling by this Bench in *V.E.R.M. Krishnan Chettyar* v. *M.M.K. Subbiya Chettyar* (1) which is to the effect that Indian British subjects in India did not become alien enemies and the contracts of agency between them and their agents in Burma were not abrogated in spite of the said declaration of war and the enemy occupation of Burma, the learned advocate for the appellants does not press the appeal on this ground at all.

He has merely submitted that we should reopen the decree and relieve the appellants of all liability in respect of any interest in excess of 12 per cent per annum under clause (*a*) of section 13 of the Money-lenders' Act, 1945.

We have entertained his verbal application to reopen the decree under the Act as the learned advocate for the respondent admits that he has had notice of the intention to make the application. In fact the learned advocate for the respondent has not objected to the application having been made orally. He has merely contended that the Court has no power to reopen a final decree at all.

Section 13, clause (*a*), of the Act provides that in any appeal arising out of any suit or proceeding, whether

(1) 1948 Bur. L.R. 278.

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filed before or after the commencement of the Act, in respect of a loan advanced before the commencement of the Act, the Court may reopen the transaction, take an account between the parties, and relieve the debtor of all liability in respect of any interest in excess of 12 per cent simple per annum in the case of a secured loan. Now this is an appeal arising out of a suit on loans which were advanced on two mortgages before the commencement of the Act. So *prima facie* this Court has power to reopen the transaction which forms the basis of the final decree and to relieve the debtor of all liability in respect of any interest in excess of 12 per cent per annum.

The learned advocate for the respondent has contended that the Court has no power to reopen a final decree for sale inasmuch as decrees are not mentioned in clause (*a*) and the transaction which the Court may reopen has been merged in the final decree. However, he realizes that the provision that transactions can be reopened in appeals arising out of suits or proceedings relating to them would be meaningless since all transactions must have been merged in decrees so far as appellate Courts are concerned. So he concedes that this Court would have had power to reopen the transaction if the appeal before it were an appeal from the Preliminary Decree for Sale of mortgaged properties and not from a Final Decree for Sale thereof. For this distinction he relies on section 97 of the Code of Civil Procedure. However this section merely provides, "Where any party aggrieved by a Preliminary Decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the Final Decree." In asking the Court to reopen the transaction or rather the Final Decree under section 13 of the

Money-lenders' Act, 1945, the learned advocate for the appellants is not disputing the correctness of the Preliminary Decree. He merely asks that the appellants may be allowed to have the benefit of the Act which has come into force since the Preliminary Decree and the Final Decree were passed.

For the above reasons, we are of the opinion that for the purpose of reopening a transaction in exercise of the power under clause (*a*) of section 13 of the Money-lenders' Act, 1945, an appellate Court can reopen the decree of which the transaction forms the basis and in which the transaction may have merged. The fact that the decree to be reopened is a final one does not make any difference to the power of the Court although the fact that there was no appeal from a Preliminary Decree may have to be taken into consideration in connection with the question whether the Court should exercise its discretion to reopen a transaction or a decree in a case where The Money-lenders' Act came into force before the Final Decree was passed. In *Renula Bose, Srimati* v. *Rai Manmatha Nath Bose and others* (1) their Lordships of the Privy Council held that sub-section 1 of section 36 of the Bengal Money-lenders' Act, 1940, empowered the appellate Court to reopen a decree although the sub-section did not specifically mention judgment or decree as one of the matters which the Court may reopen. One of the reasons which weighed with their Lordships was that "the second proviso to the sub-section enacted that in the exercise of its powers the Court shall not do anything which affects any decree of a Court other than a decree in a suit to which this Act applies . . . . ." And section 13 of The Money-lenders' Act, 1945, contains a similar proviso which reads, "Provided that in the

(1) 72 I.A. 156.

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exercise of these powers the Court shall not . . . : (ii) do anything which affects any decree of a Court in a previous suit."

There is a *prima facie* case for reopening the final decree inasmuch as only Rs. 8,000 out of the decretal amount of Rs. 22,759-8 is the principal.

To begin with there were two mortgages, one dated the 30th October 1929 for Rs. 15,000 with interest at one and a half per cent per mensem compoundable with 12 months' rests, and the other dated the 12th December 1930 for Rs. 10,000 with interest at one and a half per cent per mensem compoundable annually. However, according to the written statement of the defendants-appellants, the said loans entered a new phase on the 14th June 1936. On that date, the defendants-appellants paid Rs. 5,000 towards the principal amounts due on the two mortgages and the plaintiff-respondent agreed to forego such interest as may accrue thereafter if the defendants-appellants would repay Rs. 20,000, *i.e.* the balance of the principal amounts of the two mortgages, by four or five yearly instalments of Rs. 5,000 or Rs. 4,000 each. Besides, it is common ground that all interest due on the two mortgages up to the 2nd April 1935 has been paid. The plaintiff-respondent has had to file the suit, out of which the present appeal has arisen, on the 25th October 1941, as the defendants-appellants failed to pay the balance of the principal amounts in four or five yearly instalments as stated above. (*Cf.* the finding of the learned District Judge at page 62 of the trial record.)

Under these circumstances, the transaction falls into two parts. The first part has been closed with a liberal offer on the part of the plaintiff-respondent to forego interest after the 14th June 1936 altogether which was accepted by the defendants-appellants; and

the second part of the transaction is really the part which form the basis of the decree now under appeal. It will not be fair to reopen the first part of the transaction inasmuch as the defendants-appellants cannot be allowed to have any benefit in respect thereof on account of their own failure to perform their part in connection with the second part of the transaction, *i.e.* by their own failure to pay the balance of the principal amounts by yearly instalments. It is a well-known rule of law that no man can take advantage of his own wrong. Besides, in this particular case, if the defendants-appellants had not undertaken to repay the principal amounts by four or five yearly instalments, the plaintiff-respondent might have taken immediate steps for recovery thereof instead of waiting for about five and a half years.

With reference to the second part of the transaction, which we are reopening, the plaint itself shows that the plaintiff-respondent's claim of Rs. 20,000 consists of the claim for Rs. 8,000 only as principal and Rs. 12,000 as interest. Although the interest claimed in the plaint is only Rs. 12,000 the total amount of interest which has accrued due on the two mortgages from the 2nd April 1935 to the 25th October 1941 is Rs. 17,259. The amount of interest has been reduced to Rs. 12,000 only, as the plaintiff-respondent has waived his claim to Rs. 5,259 out of the said amount of interest.

Rs. 17,259 is the amount of interest calculated at one and a half per cent per mensem ; so, interest at one per cent per mensem will be Rs. 11,506 only and the amount claimed as interest by the plaintiff-respondent is in excess thereof by a sum of Rs. 494.

Besides, the lower Court has allowed interest at the contract rate of one and a half per cent per mensem on the principal amount of Rs. 8,000 from the date of the institution of the suit, *viz.* the 25th October 1941 up to

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the 31st July 1942, *i.e.* the date on or before which payment of the amount declared due under the preliminary decree is to be made in accordance with the provisions of Order 34, Rule 6 of the Code of Civil Procedure. Interest so allowed amounts to Rs. 1,104. Calculated at the rate of one per cent per mensem only such interest will amount to Rs. 736 only. So the amount that has been allowed by the lower Court in this respect must be reduced by the sum of Rs. 368 only.

Thus the total amount of interest in respect of which we shall relieve the defendants-appellants from liability under clause (*a*) of section 13 of the Money-lenders' Act, 1946, is Rs. 494 *plus* Rs. 368, *i.e.* Rs. 862 in all.

The amount in respect of which they are relieved of liability may appear at first sight to be somewhat small. However, it must be remembered that the plaintiff-respondent has already waived his claim to Rs. 5,259 out of the interest due on the two mortgages.

The preliminary decree must be modified as follows : (1) by reduction of Rs. 862 from the amounts mentioned in the Schedule A thereto as due for principal and interest on the two mortgages, and (2) by consequential reduction of the amount of the costs of the suit which has been allowed to the plaintiff, item 3 in the schedule to the preliminary decree only so far as the advocate's fee is concerned, *i.e.* by reducing the advocate's fees from Rs. 750 to Rs. 735 and by reducing the costs of the suit from Rs. 1,655-8 to Rs. 1,640-8 only, the plaintiff-respondent being entitled to the full amount of Court fee that he had to pay under the circumstances of the case and (3) by reduction of the aggregate of the principal, interest and costs due to the plaintiff from Rs. 22,759-8 to Rs. 21,882-8 only.

The final decree also must be amended accordingly. We can reopen the transactions and the decrees which

are based on them only for the purposes mentioned in section 13 of the Money-lenders' Act, 1945. So we cannot take advantage of their having been reopened and proceed to consider whether the decrees require any further amendment in the light of the Accrual of Interest (War-Time Adjustment) Act, 1947, as regards interest after the 8th December 1941. Besides, it has been held in the *Bank of Chettinad, Limited* v. *Chuah Bun Hock* (1) that section 3 of the Accrual of Interest (War-Time Adjustment) Act, 1947, does not apply to a decree.

The lower Court has allowed interest at the Court rate, *i.e.* at nine per cent per annum, from the 1st August 1942 up to the date of realization on the principal amount of Rs. 8,000 only and not on the aggregate amount of the principal, the interest and the costs. However, under Order 34, Rule 6 (*b*), of the Code of Civil Procedure, the lower Court had a discretion in the matter and there is no cross appeal or objection by plaintiff-respondent that the lower Court should have allowed subsequent interest on the said aggregate. So we do not propose to interfere with the lower Court's order as regards subsequent interest.

There will be no order as to the costs of this appeal as the appeal on the grounds set out in the memorandum of appeal has really failed, we have granted relief on a verbal application under the Money-lenders' Act, 1945, which came into force long after the passing of the final decree, the amount in respect of which we have granted relief is comparatively small and the final decree is to be amended only so far as the said amount is concerned.

U SAN MAUNG, J.—I agree.

(1) Civil Misc. No. 69 of 1947 of this Court.

APPELLATE CIVIL.

လွှတ်တော်တရားဝန်ကြီးချုပ် ဦးသိမ်းမောင်နှင့် လွှတ်တော်တရားဝန်ကြီး ဦးစံမောင်၊ ရှေ့။

၁၉၄၈ ခုနှစ်၊ မေလ ၅ ရက်။

စောဘသိန်း၊ တရားမဝန်ထောက်နှင့် ပဌမအထူး တရားသူကြီး၊ သထုံမြို့ နှင့် ဦးကိုကိုလေး၊ အယ်ဒီတာနှင့် ထုတ်ဝေသူ၊ ဗမာ့ခေတ်သတင်းစာ၊ ရန်ကုန်မြို့။*

တရားရုံးတော်များကို မထီမဲ့မြင်ပြုလုပ်ခြင်း၊ အက်ဥပဒေ ပုဒ်မ ၃—သတင်းစာ ပုံနှိပ်ထုတ်ဝေသူနှင့် အယ်ဒီတာ၏ တာဝန်ဝတ်တရား—သတင်းရေးချိုသွေ့သော သတင်းထောက်၏ တာဝန်ဝတ်တရား။

ရုံးတော်ကို မထီမဲ့မြင်ပြုရာရောက်သော အပြုအမူ၊ အပြောအဆို၊ အရေးအသားကို သတင်းစာတွင် ထည့်သွင်းဘော်ပြသော်၊ သတင်းရေးချိုသွေ့သော သတင်းထောက်မှာလည်း အပြစ်ရှိ၏။ ထည့်သွင်းဘော်ပြသော သတင်းစာအယ်ဒီတာနှင့် ပုံနှိပ်ထုတ်ဝေသူမှာလည်း အပြစ်ရှိ၏။

အယ်ဒီတာနှင့် ပုံနှိပ်ထုတ်ဝေသူက၊ မိမိသည် စင်ဆိုင်ရာတရားသူကြီးကို သိပင်မသိခဲ့ပါ။ သူ၏အပေါ်တွင် မကောင်းသောစိတ်စေတနာမရှိခဲ့ပါ။ သတင်းထောက်က ရေးသားပေးပို့လိုက်၍သာ၊ သဘောရိုးနှင့် မှန်လိမ့်မည်ထင်ကြိုး အမှတ်တမဲ့ ထည့်လိုက်မိပါသည်ဟု ထုချေသော်လည်း၊ အပြစ်ဒဏ်မှ မလွတ်နိုင်ချေ။ (ဘုရင်ကောဇာဖွင့်နှင့် မောင်တင်စောနှင့် အခြားတယောက်၊ I.L.R. 6 Ran. 43.)

လွှတ်တော်တရားဝန်ကြီးချုပ်ဦးသိမ်းမောင် နှင့် တရားဝန်ကြီးဦးစံမောင်။ ။

ဤအမှုသည် ၁၃၀၉ ခုနှစ်၊ တပေါင်းလဆုတ် ၁၃ ရက် (၁၉၄၈ ခု၊ မတ်လ ၇) ရက်နေ့ထုတ် ဗမာ့ခေတ်သတင်းစာတွင်၊ ''ဆွဲချတော့ မတင်တာပေါ့ဟု'' ဟူသော ခေါင်းစဉ်ဖြင့် ထည့်သွင်းစာတွင် ပါရှိသော အပိုဒ်သုံးပိုဒ် အတွက် ရုံးတော်များကို မထီမဲ့မြင် ပြုလုပ်ခြင်း အက်ဥပဒေ (Contempt of Courts Act) ပုဒ်မ ၃ အရ၊ မည်သည့်အတွက် အပြစ်ဒဏ် မပေးထိုက်ကြောင်း အကြောင်းပြ၍ ထုချေရှင်းလင်းရန်၊ ဗမာ့ခေတ်သတင်းစာ ပုံနှိပ်ထုတ်ဝေသူနှင့် အယ်ဒီတာကို ဆင့်ဆိုရိုးထားသောအမှုဖြစ်သည်။

* Civil Misc. Application No. 13 of 1948.

ထို့ဥပဒေနယ်အတွင်း သက်ဆင်းကျရောက်သော စာပိုဒ်များမှာ—

၁၉၄၈ ခုနှစ်၊

(က) "အင်္ဂလိပ်ခေတ်သို့ရောက်ပြန်ရာ၊ ဒေါ်ရင်မေက မိမိပိုင်အိမ်ကို ပြန်၍ရွေး လိုကြောင်းဖြင့်၊ ဦးစောဘသိန်းရုံးတွင် လျှောက်ထားရာ၊ အမှုကိုလက်ခံ ပြီးမှ ဒေါ်ရင်မေမှာ ငွေမရှိ၍၊ အိမ်ကိုပြန်ရွေးယူနိုင်မည်မဟုတ်ဟု ဆိုပြီး အမှုကိုပိတ်လိုက်သဖြင့် ရွေးရန်အသင့်ပြင်လျက် မရွေးနိုင်အောင်လုပ်ထား ကြောင်း။"

(ခ) "တရားမရုံးမှလည်း ၂၄ နာရီအတွင်း အိမ်ပေါ်မှဆင်းပေးရန်ကို၊ နို့တစ် ပေးပြီး အတင်းဆွဲချရာ။"

(ဂ) "အဆိုပါအိမ်ကို အတင်းရိုက်ဖွင့်ပြီး တော်လှန်ရေးအလံလွှင့်ထူ၍ မူလ အိမ်ပိုင်ရှင်ကိုပြန်၍တင်ပြီးလျှင်၊ ဓနရှင်အလိုကျဖန်တီး ပြုမူသည့် ဖက်ဆစ် ဆန်သည့် တရားမရုံးနှင့် ဘီးလစ်တို့ကို အလိုမရှိဆို၏။"

စောဘသိန်း၊ တရားမဝန်ထောက်နှင့် ပဌမအထူးတရားသူကြီး၊ သထုံမြို့နှင့် ဦးကိုကို လေး၊ အယ်ဒီတာ နှင့် ထုတ်ဝေသူ၊ ဗမာ့ခေတ် သတင်းစာ၊ ရန်ကုန်မြို့။

(က) နှင့် (ခ) စာပိုဒ်များသည် လုံးဝမမှန်ချေ။ စာပိုဒ် (က) တွင် ရည်ညွှန်းသောအမှုသည် သထုံမြို့တရားမဝန်ထောက်ရုံး၊ ၁၉၄၆ ခုနှစ်၊ တရားမ ကြီးမှုအမှတ် ၁၅ ဖြစ်သည်။ တရားမဝန်ထောက် ဦးစောဘသိန်းက ထိုအမှုကို အပြီးတိုင်ကြားနာစစ်ဆေးပြီးမှ၊ သက်သေထွက်ချက်များနှင့်ဥပဒေအရ၊ ဒေါ်ရင်မေ ပါနှစ်ဦးကို အရှုံးပေး၍၊ စီရင်ချက်နှင့် ဒီဂရီချမှတ်လိုက်သည်။ ထိုစီရင်ချက်နှင့် ဒီဂရီကိုမကျေနပ်၍ ဒေါ်ရင်မေပါနှစ်ဦးက သထုံစီရင်စုတရားမရုံးတော်သို့ အယူခံ ဝင်ရာ၊ သူတို့၏အယူခံမှုကို ထိုရုံးတော်က ၁၉၄၇ ခုနှစ်၊ ဩဂုတ်လ ၂၀ ရက် နေ့တွင် စရိတ်နှင့်တကွ ပလပ်ခဲ့၏။ (သထုံစီရင်စုတရားမရုံးတော် ၁၉၄၇ ခုနှစ်၊ တရားမအယူခံမှု အမှတ် ၁၉ ကိုကြည့်ပါ။)

စာပိုဒ် (ခ) တွင် ရည်ညွှန်းထားသောအမှုသည် သထုံတရားမဝန်ထောက် ရုံး၊ ၁၉၄၇ ခုနှစ်၊ ဇာရီမှု အမှတ် ၂၀ ဖြစ်၏။ ထိုအမှုမှာ ဒေါ်ခန္တီသည် ၁၉၄၁ ခုနှစ်၊ နိုဝင်ဘာလ ၂၄ ရက်နေ့ကပင်၊ ဒေါ်ရင်မေပါနှစ်ဦး၏အပေါ်တွင် ရရှိထားသောဒီဂရီကို ဇာရီပြုလုပ်ရန် လျှောက်ထားသော အမှုဖြစ်၏။ ထိုဒီဂရီ အရ ဒေါ်ရင်မေပါ နှစ်ဦးသည် မြေရောဂကွက်နှင့် ထိုမြေရောပေါ်ရှိ အဆောက် အဦးများကို ဒေါ်ခန္တီအား ပေးအပ်ရမည်ဖြစ်ခဲ့၏။ သို့ပါလျက် ထိုဒီဂရီကျပြီး သည့်နောက် စစ်ကြီးပြီးသည့်အတွက်ဝင်း၊ ဒေါ်ရင်မေပါနှစ်ဦးတို့က ဒေါ်ခန္တီ၏ အပေါ်တွင်အထက်တွင်ဘော်ပြခဲ့သောတရားမကြီးမှုအမှတ် ၁၅ ကိုစွဲချနေခဲ့သည့် အတွက်ဝင်း၊ ဒေါ်ခန္တီသည်ထိုမြေရောဂကွက်နှင့်အဆောက်အဦးများကို လက်ရောက် မရဘဲနေခဲ့၏။ သို့အတွက် ဒေါ်ခန္တီသည် ထိုမြေရောဂကွက်နှင့်အဆောက်အဦးများ ကို မိမိအား တရားမကျင့်ထုံးအမိန့် ၂၁၊ နည်းဥပဒေ ၃၅ နှင့် ၃၆ အရ၊ အပ် ပေးပါရန်၊ အဆိုပါဇာရီမှုတွင် လျှောက်ထားခဲ့ရ၏။ ဒေါ်ခန္တီသည် ထိုလျှောက်

၁၉၄၈ ခုနှစ်၊ လွှာကို ၁၉၄၇ ခုနှစ်၊ ဒီဇင်ဘာလ ၆ ရက်နေ့တွင်တင်ခဲ့၏။ သို့ရာတွင် ဒေါ်ရင်မေ

ဒေါ ဘ သိန်း၊ တရား မ ဝန် ထောက်နှင့် ပဌ မ အထူး တရား သူကြီး၊ သထုံမြို့ နှင့် ဦးကို ကို လေး၊ အယ်ဒီတာ နှင့် ထုတ် ဝေ သူ၊ ဗမာ့ ခေတ် သ တင်း စာ၊ ရန် ကုန်မြို့။

၏ရှေ့နေက ရက်ဆိုင်းရန် တောင်းဆိုခဲ့သည့်အတိုင်း၊ ရုံးတော်က လိုက်လျောပြီး ရက်ဆိုင်းထပ်ခါထပ်ခါ ခြောက်ကြိမ်တိုင်တိုင်ပေးခဲ့ပြီး၊ ၁၉၄၈ ခု၊ ဖေဖော်ဝါရီလ ၁၄ ရက်နေ့တွင်မှ ထိုမြေရာကွက်နှင့်အဆောက်အဦးများကိုပေးအပ်ရန် ဝရမ်းကို ထုတ်ပေးရန် အမိန့်ချမှတ်ခဲ့၏။ ထိုအမိန့်မှာလည်း ၂၄ နာရီအတွင်း ပေးအပ်ရန်မဟုတ်၊ နောက် ၁၄ ရက်အကြာ ၁၉၄၈ ခု၊ ဖေဖော်ဝါရီလ ၂၈ ရက်နေ့ ကျမှသာ ပေးအပ်ရန်ဖြစ်သည်။

သို့ဖြစ်၍ စာပိုဒ် (က) နှင့် (ခ) ပါ စွပ်စွဲချက်များသည်၊ မမှန်သောစွပ်စွဲချက်များဖြစ်သည်။ ထိုမှတပါး၊ ၎င်းတို့သည် တရားရုံးတော်၏ ဂုဏ်ကြွက်သရေကို ထိခိုက်သော တရားရုံးတော်၏အပေါ်တွင်၊ အထင် အမြင်မှားယွင်းသေးသိမ်စေနိုင်သော စွပ်စွဲချက်များ ဖြစ်သည်။ တရားရုံးတော်၊ သို့မဟုတ် တရားသူကြီးကို အထင်အမြင် သေးသိမ်စေနိုင်သော၊ သို့မဟုတ် ၎င်းတို့၏ ဂုဏ်တန်ခိုးကို နိမ့်ကျစေနိုင်သော၊ သို့မဟုတ် တရားဖြောင့်မှန်ရေးကို နှောင့်ယှက်နိုင်သော၊ သို့မဟုတ် တရားသဖြင့်ထုတ်သောအမိန့်ဆင့်စာ၊ ဝရမ်းစသည်တို့ကို အတည်ပြုရာတွင်နှောင့်ယှက်နိုင်သော အပြုအမူ အပြောအဆို အရေးအသားသည် ရုံးတော်ကိုမထီမဲ့မြင်ပြုခြင်း ပြစ်မှုဖြစ်၏။ (" Any act done or writing published which is calculated to bring a Court or a Judge into contempt, or to lower his authority, or to interfere with the due course of justice or the lawful process of the Court, is a contempt of Court "—Halsbury's Laws of England, 2nd Edition, Volume 7, pages 6-7.) တရားရုံးတော်၏ဂုဏ်ကြွက်သရေကိုထိပါးသော၊ သို့မဟုတ် တရားဖြောင့်မှန်ရေးလမ်းစဉ်ကို နှောင့်ယှက် နိုင်သော အရေး အသား၊ အပြောအဆို အားလုံး ရုံးတော်ကို မထီမဲ့မြင် ပြုခြင်းများဖြစ်သည်။ (All publications which offend against the dignity of the Court or are calculated to prejudice the course of justice constitute contempts—Oswald's Contempt of Court, 3rd Edition, page 91.)

စာပိုဒ် (ဂ) တွင် ပါရှိသည့်အတိုင်းအခြေးသူများပြုလုပ်ခဲ့ကြကောင်း ပြုလုပ်ခဲ့ကြပေလိမ့်မည်။ ပြောဆိုခဲ့ကြကောင်း ပြောဆိုခဲ့ကြလိမ့်မည်။ သို့ရာတွင်တရားမရုံးတရုံးကို " ဓနရှင်အလိုက်၊ ဖန်တီး ပြုမူသည့်၊ ဖက်စစ် ဆန်သည့် တရားမရုံး " ဟုဆိုလျှင်၊ ထိုရုံးသည် အဂတိ တရားလိုက်စားသော ရုံးဟုဆိုရာ ကျသဖြင့်၊ ဆိုသူသည်တရားရုံးတော်ကို မထီမဲ့မြင်ပြုခြင်းပြစ်မှုကို ကျူးလွန်သူဖြစ်၏။ ထိုသူပြောဆိုသောစကားကို တဆင့်ပြောကြားသော၊ သတင်းဖြန့်သော သူသည်လည်း ထိုသူကဲ့သို့ပင် ထိုပြစ်မှုကိုကျူးလွန်သောသူဖြစ်၏။ ရုံးတော်၏ ဂုဏ်ကြွက်သရေကို

ထိခိုက်သော စကားပင်ဖြစ်သော်လည်း၊ တပါးသူ ပြောဆိုခဲ့၍ မိမိက တဆင့်ပြော ကြားရေးသားခြင်းမျှသာဖြစ်ပါသည်ဟုဆိုသော်လည်း အပြစ်ဒဏ်မှမလွတ်နိုင်ချေ။

ရုံးတော်ကိုမထိမဲ့မြင်ပြုရာရောက်သော အပြုအမူ အပြောအဆိုအရေးအသား ကို သတင်းစာတွင် ထည့်သွင်း ဖော်ပြသော်၊ သတင်းရေးရှုပ်သော သတင်း ထောက်မှာလည်း အပြစ်ရှိ၏။ ထည့်သွင်းဖော်ပြသော သတင်းစာအယ်ဒီတာနှင့် ပုံနှိပ်ထုတ်ဝေသူမှာလည်းအပြစ်ရှိ၏။ ဤအမှုမှာကဲ့သို့ အယ်ဒီတာနှင့်ပုံနှိပ်ထုတ်ဝေ သူက မိမိသည် စပ်ဆိုင်ရာ တရားသူကြီးကို သိပင်မသိခဲ့ပါ။ သူ၏အပေါ်တွင် မကောင်းသော စိတ်စေတနာ မရှိခဲ့ပါ။ သတင်းထောက်က ရေးသား ပေးပို့လိုက် ၍သာသဘောရိုးနှင့်မှန်လိမ့်မည်ထင်ပြီး အမှတ်တမဲ့ထည့်လိုက်မိပါသည်ဟု ထုချေ သော်လည်း အပြစ်ဒဏ်မှ မလွတ်နိုင်ချေ။ [ဘုရင်ကေရာဇ်နှင့် မောင်တင်စောနှင့် အခြားတယောက်တို့၏အမှုစီရင်ထုံး (1928) I.L.R. 6 Rar. 43 ကိုကြည့်ပါ။]

၁၉၄၈ ခုနှစ်၊

စော ဘ သိန်း၊ တရား မ ဝန် ထောက်နှင့် ပဌမ အထူးတရား သူကြီး၊ သထုံမြို့ နှင့် ဦးကို ကိုလေး၊ အယ်ဒီတာ နှင့် ထုတ် ဝေ သူ၊ ဗမာ့ ခေတ် သတင်း စာ၊ ရန်ကုန်မြို့။

သို့အတွက် ဤအမှုတွင် ဗမာ့ခေတ်သတင်းစာ ပုံနှိပ် ထုတ်ဝေသူနှင့် အယ်ဒီတာ ဦးကိုကိုလေး၏အပေါ်တွင် ရုံးတော်များကိုမထိမဲ့မြင်ပြုလုပ်ခြင်း အက် ဥပဒေပုဒ်မ ၃ အရပြစ်မှုထင်ရှားသည်။

သို့ရာတွင် သူသည် ဤရုံးတော်နှင့် အောက်ရုံးတရားသူကြီးကို ချွင်းချက်မရှိ ဝန်ချတောင်းပန်သည်။ သို့ဝန်ချတောင်းပန်ကြောင်းကိုလည်း ပြည်သူပြည်သား လူအများသိအောင် မိမိ၏သတင်းစာတွင် ကျေညာရန် တာဝန်ခံယူသည်။ ထိုမှ တပါးတရားရုံးတော်များကိုမထိမဲ့မြင်ပြုလုပ်ခြင်းဆိုင်ရာတရားဥပဒေကို အများပိုမိုရှိ သိနားလည်ကြစေရန်၊ဤရုံးတော်၏စီရင်ချက်ကို အစမှအဆုံးအထိ မိမိ၏သတင်း စာတွင် ထည့်သွင်းဖော်ပြရန်လည်း တာဝန်ယူသေးသည်။

ဤရုံးတော်ကလည်း ဦးကိုကိုလေးသည် အောက်ရုံးတော်ကို မထိမဲ့မြင်ပြုမိ သည့်အတွက် တကယ်ပင်ဝမ်းနည်းပြီး ဝန်ချတောင်းပန်သည်ဟုယူဆသည်။ ထိုမှ တပါး၊ ဤအမှုကိုအကြောင်းပြု၍ သတင်းထောက်၊သတင်းစာ အယ်ဒီတာနှင့်ပုံနှိပ် ဖြန့်ဝေသူတို့သည်၊ တရား ရုံးတော်များကို မထိမဲ့မြင် ပြုလုပ်ခြင်း ဆိုင်ရာဥပဒေ ကိုငင်း၊ ထိုဥပဒေနှင့်စပ်ဆိုင်သော မိမိတို့၏ တာဝန်ဝတ်တရားများကိုငင်း၊ ပိုမိုရှိ သိနားလည် ကြပြီးလျှင်၊ ဤကဲ့သို့သော ပြစ်မှုကို မကျူးလွန် မိအောင် ပိုမိုရှိ သတိထားကြလိမ့်မည်။ တရားရုံးတော်များကို ပိုမို လေးစားကြလိမ့်မည်ဟူ၍လည်း ဤရုံးတော်ကယုံကြည်မြော်လင့်သည်၊

သို့အတွက် ဤအမှုတွင်ဦးကိုကိုလေးကိုအာဒိကမိုကပုဂ္ဂိုလ်ဟု အမှတ်ထားပြီး လျှင်၊ သူ၏ချွင်းချက်မရှိ ဝန်ချတောင်းပန်ချက်နှင့် တာဝန်ခံယူချက်တို့ကို အဆိုပါ အက်ဥပဒေပုဒ်မ ၃၊ပဌမချွင်းချက်အရ၊ ဤရုံးတော်က လက်ခံလိုက်သည်။ သူ့ကို လည်း ဤအမှုတွင် အပြစ်ဒဏ်မစီရင်ဘဲလွှတ်လိုက်သည်။

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

H.C. 1948

May 19.

A.L.M. CHETTYAR FIRM (APPELLANT)

v.

MA SINT AND THREE OTHERS (RESPONDENTS).*

Limitation Act, s. 28—Whether extinguishes rights or bars remedies to regain possession after court sale and delivery—Specific Relief Act, s. 42—Whether co-owners should sue for possession—Execution sale—Whether third parties' rights affected—Burmese Buddhist Law—Nissaya *and* Nissita.

In execution of a money decree obtained by the appellant against the husband of the 1st respondent, property in dispute which belonged to the couple was sold by court on the 30th July 1930 and purchased by appellant and he obtained possession through court. At the time of the sale the Full Bench decision of *Ma Paing* v. *Maung Shwe Hpan and others*, I.L.R. 5 Ran. 478, determined the rights of Burmese Buddhist husband and wife. According to that decision an execution sale against husband conveyed wife's interest as well. This decision was later overruled by the Special Bench decision of *N.A.V.R. Chettyar Firm* v. *Maung Than Daing*, I.L.R. 9 Ran. 524, and the effect of that decision was to restore the old law under which execution sale in a decree against the husband did not convey wife's interest. The appellant remained in possession of the disputed properties till evacuation. After evacuation the respondents got into possession. After the British re-occupation, when the appellant tried to regain possession, the respondents filed a suit for declaration of title over the whole property and obtained a decree for 11/12th share. This decision was set aside by the District Court but in second appeal trial Court's decision was restored. In further appeal under s. 31 of Union Judiciary Act it was contended—

(*a*) that no suit for declaration having been filed within six years of the court sale, a suit under s. 42, Specific Relief Act, was barred.

(*b*) as the plaintiff could have claimed further relief, the suit for bare declaration was not maintainable,

(*c*) that the entire property had passed by reason of the ruling in *Ma Paing's* case,

(*d*) that in any case, the share granted by the trial Court was not correct and that the claim could be only for one-half as the property brought to the marriage by the wife had changed character and been sold and the price had been employed in money lending.

Held: That though plaintiff-respondent's right to sue for a declaratory decree before the war had been time-barred yet title in the property was not extinguished and when the plaintiff-respondent regained possession within

* Special Civil Appeal No. 2 of 1948 under s. 31 of the Union Judiciary Act against the decree of the Hon'ble Mr. Justice Blagden in Civil 2nd Appeal No. 112 of 1947 of the High Court of Judicature at Rangoon.

12 years there was a fresh cause of action for a declaratory decree when the defendant disputed her title.

Rajah of Venkatagiri v. *Isakapalli Subbiah and others*, (1903) I.L.R. 26 Mad. 410, referred to.

The relief by way of partition is not a consequential relief. A suit for declaration of title alone lies without a claim for partition.

Joy Narayan Sen Ukil v. *Srikantha Roy*, 26 C.W.N. 206, followed.

Held further: That as the wife was not a party to the auction sale her rights cannot be affected and the ruling in *Abdul Aziz Khan Sahib* v. *Appayasami Naicker and others*, (1904) L.R. 31 I.A. 1, has not the effect of affecting the rights of third parties.

Held further: That though the wife's *payin* had changed character, it will not make any difference in the application of the principle of *Nissaya* and *Nissita*.

May Oung's Buddhist Law, p. 60, referred to.

The children of the marriage had no interest during the parents' lifetime and the decree-holder's share was accordingly held to be one-third and not one-twelfth.

K. R. Venkatram for the appellant.

Kyaw Din for the respondents.

The judgment of the Bench was delivered by

U THEIN MAUNG, C.J.—This is really a Letters Patent Appeal from the judgment and decree of Blagden J. in Civil 2nd Appeal No. 112 of 1947 in the High Court of Judicature at Rangoon, but it has been treated under section 31 of the Union Judiciary Act, 1948, as an appeal under section 20 thereof as it was pending immediately before the coming into operation of the Constitution.

In the said Civil 2nd Appeal, Blagden J. set aside the decree of the District Court of Magwe in Civil Appeal No. 16 of 1947 and restored the decree of the First Assistant Judge, Magwe, in Civil Regular Suit No. 3 of 1947.

In the said suit, the plaintiffs-respondents asked for a decree under section 42 of the Specific Relief Act declaring that they are owners in possession of oil wells

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U THEIN MAUNG, C.J.

Nos. 337 and 2922; and the learned Assistant Judge granted them a decree declaring that they are owners of 11/12th of the said oil wells.

The learned Assistant Judge found (1) that the principle of *Nissaya* and *Nissita* applied as the 1st respondent Daw Sint brought considerable property to her marriage with the late U Se whereas the latter did not bring any property to it at all, (2) that oil well No. 1643 which was among the properties brought by her to her marriage with U Se was sold for over Rs. 40,000 and that the said oil wells and other properties were purchased with the sale proceeds thereof, (3) that by purchase at the Court sale as per sale certificate dated the 31st July 1930, Exhibit I, the appellant acquired only U Se's share in the oil wells, (4) that the said share was only 1/12th inasmuch as Daw Sint's share therein under the principle of *Nissaya* and *Nissita* was two-thirds and Ma Thein Tin's *orasa* share therein was one-fourth and (5) that the suit is not barred by limitation as the defendant-appellant had not been in possession of the oil wells for six years before the 8th December 1941 when limitation ceased to run till the 1st April 1947 under section 7 of the Courts (Emergency) Provisions Act, 1943.

On appeal from the decree of the Assistant Judge the District Court held that the suit was time-barred inasmuch as the defendant-appellant presumably got possession of the oil wells shortly after the Court sale, *i.e.* more than six years before the 8th December 1941. However, the learned District Judge also observed in the course of his judgment, "It is clear from the evidence of the plaintiff Daw Sint and her witnesses that the plaintiff Daw Sint did bring an oil well to her marriage but the same was later sold and other properties such as oil wells and a house were bought out of the money realized from the sale of this well." He also pointed

out in the course of his judgment " that oil well No. 337 Twingon was acquired through a money-lending transaction and not bought outright with the money solely belonging to Daw Sint as alleged by them."

In the Civil 2nd Appeal Mr. Justice Blagden confirmed the findings of fact by the Court of first instance and held that the suit was not barred by limitation.

With reference to the question of limitation he observed,

" It is true that the right to bring the suit for a declaration, or, more properly, a suit for possession, may have arisen in 1930, when the respondents, as auction purchasers, were put in possession. When, however, the plaintiff-appellant succeeded in getting back possession, there was no point in their bringing a suit for possession, because they had already got it. Nor was there any point in their bringing a suit for a declaration, when, at the moment, no one was challenging their title. They never have had, subsequently, occasion to bring a suit for possession, because it is common ground that they are at the moment in possession. Their right to sue for a declaration only arose when the respondent firm challenged their title by making an application for mutation of names to the Warden of the Oil-fields : that was well within six years, indeed it was only a few months. before suit was brought."

We are in entire agreement with him on the question of limitation. The plaintiffs-respondents may have lost their right to sue for a declaratory decree after the expiry of six years from the date on which the defendant-appellant obtained possession of the oil wells, but it is quite clear from the evidence, and in fact it is admitted by the learned advocate for him, that he had not been in possession for over twelve years before the 8th December 1941. Even though the plaintiffs-respondents' right to sue for a declaratory decree before the war had been time-barred, that bar would affect only the remedy or relief by way of declaration. It

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cannot extinguish their right, title, and interest in the oil wells. [See *Rajah of Venkatagiri* v. *Isakapalli Subbiah and others* (1).] The operation of section 28 of the Limitation Act is limited to cases in which the bar of limitation applies to suits for the possession of property ; and a suit for a declaratory decree under section 42 of the Specific Relief Act is not such a suit. The plaintiffs-respondents' title to the property subsisted in spite of the time-bar against relief by way of declaration, and when they regained possession of the oil wells they again became owners in possession with all the rights and privileges of such owners including the right to sue for a declaratory decree if anyone denies that they are owners in possession. So they have a fresh cause of action for a declaratory decree when the plaintiffs-respondents challenged their title by making an application for mutation of names to the Warden of the Oil-fields after they have regained possession of the oil wells and their full ownership thereof had revived with all the rights and privileges incidental thereto.

The learned advocate for the defendant-appellant has also contended that even if the suit be not barred by limitation it is not maintainable as the plaintiffs-respondents did not ask for further relief, that is, for partition, although they were able to seek further relief than a mere declaration of title. He relies on the proviso to section 42 of the Specific Relief Act, which reads :

"Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

However, the proviso is applicable only to such relief as is appropriate to and consequent on the right

(1) (1903) I.L.R. 26 Mad. 410.

asserted. As has been pointed out by Mookerjee J. in *Joy Narayan Sen Ukil* v. *Srikantha Roy* (1) :

"The further relief must consequently be relief in relation to the legal character or right as to property which the Plaintiff is entitled to and whose title to such character or right the Defendant denies or is interested in denying; it must also be relief appropriate to and necessarily consequent on the right of title asserted."

In the present case the plaintiffs-respondents' claim, to begin with, was that they are the full owners in possession of the said oil wells. So they could not very well ask for partition in the same suit. The relief by partition is not appropriate to and consequent on the right asserted by them and denied by the defendant-appellant. The expression "further relief" in the proviso means additional relief which the plaintiff would be in a position to claim by virtue of the title he seeks to establish or be declared. It does not mean a relief in the alternative.

Besides, it has been held in the same case, *Joy Narayan Sen Ukil* v. *Srikantha Roy* :

"Where the plaintiff is in joint possession of immovable property, whether such possession be actual possession of his share of the whole or actual possession of a part coupled with a constructive possession of the remainder, he is entitled to maintain a suit for declaratory relief with a view to remove a cloud on his title created by the act of the defendant disputing his share; in a suit so framed, a declaration of title is all that the plaintiff needs and he is consequently not called upon to ask for consequential relief by way of partition."

The learned advocate for the defendant-appellant has further contended that inasmuch as the ruling in *Ma Paing* v. *Maung Shwe Hpan and others* (2) had not been overruled at the time of the Court sale of the oil wells in execution of the decree against U Se, the right,

(1) 26 C.W.N. 206. (2) (1927) I.L.R. 5 Ran. 478.

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title, and interest of his wife Daw Sint therein also passed to his client who was the purchaser thereat. The said ruling has been overruled in *N.A.V.R. Chettyar Firm* v. *Maung Than Daing* (1), but according to the learned advocate for the defendant-appellant it does not make any difference in view of the ruling in *Abdul Aziz Khan Sahib* v. *Appayasami Naicker and others* (2). However, as Blagden J. has pointed out in the course of his judgment :

> " It is not competent for this Court to legislate and alter the law, and when a Full Bench overrules a previous decision of the Court, it is laying down what the law of Burma was from the beginning of time, whatever views about it may have been previously held. * * * *
>
> Their Lordships did not say that, because an erroneous view of the law prevailed at a given date, and was held by all the parties concerned in execution proceedings, the property of a third party, not impleaded in those proceedings, can be taken to pay the judgment-debtor's debts, but only, following *Lloyd* v. *Guibert* (3), that the quantum of the vendor's interest in a given piece of property must, for the purpose of construing that contract, be measured by the contemporary view of what the law was."

The plaintiffs-respondents were not parties to the execution proceedings in the course of which the oil wells were sold and their right, title, and interest thereof cannot be affected by what was done behind their back. Besides, their Lordships' decision in *Abdul Aziz Khan Sahib*'s case did not affect the right of any one who was not a party to the proceedings in execution. As a matter of fact it had the effect of protecting the rights of a third party, namely, the brother of Bangaru, the judgment-debtor, who constituted an undivided Hindu family with Bangaru, inasmuch as it declared that what passed under the

(1) (1931) I.L.R. 9 Ran. 524. (2) (1904) L.R. 31, I.A. 1.
(3) (1865) 6 B & S 100.

Court sale was only the life interest of Bangaru in the zemindari, and not the entire estate therein.

Up to this stage we have written our judgment as if we agree that the plaintiffs-respondents are entitled to 11/12th of the oil wells for the sake of simplicity, but we do not agree that all the plaintiffs-respondents have shares therein and that their shares do aggregate to 11/12th thereof.

The 2nd, 3rd and 4th plaintiffs-respondents are the children of U Se and the 1st plaintiff-respondent Daw Sint. During the lifetime of U Se and Daw Sint none of them is entitled to any share in the properties belonging to U Se and Daw Sint. It has been claimed that the 2nd plaintiff-respondent Ma Thein Tin is their *orasa* daughter and that as such she is entitled to a quarter share of the oil wells. However, she cannot be an *orasa* daughter nor can she claim any share as such inasmuch as her mother Daw Sint is still alive and has not contracted any marriage since the death of her father U Se.

Daw Sint alone is entitled to a share in the said oil wells and both the Assistant Judge and Blagden J. have held that she is entitled to a two-thirds share therein according to the doctrine of *Nissaya* and *Nissita*. The learned advocate for the defendant-appellant has contended that the doctrine cannot apply inasmuch as Daw Sint's *payin* has changed its character. It is true that the oil well which was brought by her as *payin* has been sold, but the Court of first instance has held that the oil wells in suit and other properties were purchased with the sale proceeds thereof. The District Court has also held that oil wells and a house had been bought with the money realized from the sale of her oil well. With reference to oil well No. 337, there is some dispute as to whether it was bought with the sale proceeds of Daw Sint's oil well or was transferred to

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Daw Sint and U Se by a person who was unable to repay debts due to them. However, as Mr. Justice Blagden has rightly pointed out in the course of his judgment, it will not make any difference even if the oil well was acquired in the course of the money-lending business inasmuch as the capital for the business was contributed by Daw Sint out of the sale proceeds of her oil well. "A wife is said to be the *nissaya* and her husband *nissita* when the wife at the time of the marriage possesses large property which may increase by being used as principal in trade." (*See* May Oung's Buddhist Law at page 60.)

So the appeal succeeds so far as the alleged *orasa* share of the 2nd plaintiff-respondent Ma Thein Tin is concerned and the decree in favour of the plaintiffs-respondents must be modified accordingly.

Let there be a decree declaring that the 1st plaintiff-respondent is the owner of a two-thirds share of the two oil wells and dismissing the suit so far as the other plaintiffs-respondents are concerned.

Previous orders as to costs will stand. However, all parties must bear their own costs so far as this appeal is concerned.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

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May 31.

KUPPARAKUTTI ADAMMEERA (APPELLANT)

v.

ESOOF (*a*) S. M. MOHAMED ESOOF AND ONE (RESPONDENTS).*

Suits for mesne profits—Subsequent suit for possession—Whether barred by Order 2, Rule 2, Code of Civil Procedure—Cause of action for possession and for mesne profits considered—Urban Rent Control Act, order under—Whether Controller can review or cancel.

Plaintiff-appellant sued for mesne profits and obtained decrees against the 1st defendant-respondent. After the passing of the decree the 1st defendant-respondent applied to the Controller of Rents and made the house owner a party only but did not make the plaintiff a party and obtained an order from the Controller of Rents for occupation under s. 12 of the Urban Rent Control Act. When the plaintiff-appellant became aware of the order he applied to the Controller of Rents and asked for vacating of the order and the order was vacated. Plaintiff-appellant then filed a suit for possession. The defendants-respondents contended that—

(1) the suit was barred under Order 2, Rule 2, of the Code of Civil Procedure as the rights to mesne profits rested on the same cause of action as for possession and

(2) that the first order of the Controller of Rents was final and he had no jurisdiction to review his earlier order.

Held: That suit for possession and suit for mesne profits do not arise out of the same cause of action. Causes of action of two suits are different and therefore the suit was not barred under Order 2, Rule 2, of the Code of Civil Procedure. In a suit for possession the plaintiff-appellant need only to prove possession within 12 years and defendants' occupation without right. For mesne profits he has in addition to prove the duration of the dispossession, its termination and the amount he is entitled to as damages. So far as Burma is concerned this question has been settled in *D. K. Dubash Kader and two others* v. *T. K. Fakeer Meera*, (1910) 3 B.L.T. 56 at p. 59, and the same cannot be deemed to have been overruled by the Privy Council case, A.I.R. (1931) P.C. 221. The case law on the point reviewed and considered. Moreover the case of *D. K. Dubash Kader and two others* v. *T. K. Fakeer Meera* was decided in 1910 and has been followed for about 40 years—therefore in any case the principle *stare decisis* should apply.

* Civil 1st Appeal No. 80 of 1947 against the decree of Civil Regular No. 214 of 1947 of the High Court of Judicature at Rangoon, dated the 25th November 1947.

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Ma Myaing and one v. *Maung Po Chit and three others*, (1926) I.L.R. 4 Ran. 103 ; *Lalessor Babui* v. *Janki Bibi*, (1892) I.L.R. 19 Cal. 615 ; *Ponnammal* v. *Ramamirda Iyer*, (1915) I.L.R. 38 Mad 829 ; *R. A. Agarwale* v. *L. G. Bhadbhunji*, 26 Bom. L.R. 288 ; *R. K. Pujari* v. *S. S. Pujari*, (1935) I.L.R. 59 Bom. 454 at p. 456 ; *C. L. Singh* v. *C. D. Singh*, (1931) I.L.R. 10 Pat. 329 at p. 331 ; *R. K. Singh and others* v. *N. C. Ahir*, (1931) I.L.R. 53 All. 951 at pp. 956-7 ; *Saghir Hasan* v. *Tayab Hasan*, (1940) All. 781 at p. 782 ; *Channappa Girimallappa* v. *Bagalkot Bank*, (1943) Bom. 43 at p. 53 ; *Naba Kumar* v. *Radhashyam*, (1931) A.I.R. (P.C.) 229 ; *Nagendrabala Dasi and another* v. *Dinanath Mahish and another*, (1924) I.L.R. 51 Cal. 279 ; *T. Ramiah* v. *M. Thathiah and another*, (1937) A.I.R. Mad. 849 ; *V. Pillai and others* v. *T. Ammal*, (1940) 2 M.L.J. 42, referred to.

Held further : That the first order of the Controller of Rents was final and could not be questioned except under proviso to s. 12 (2) and s. 13 (1) of the Act. He had no power to cancel his order in the present case and his subsequent order was a nullity.

P. K. Basu for the appellant.

Dr. Ba Han for respondent No. 1.

U THEIN MAUNG, C.J.—The plaintiff-appellant sued the defendants-respondents for possession of room No. 1 in 225, Fraser Street, Rangoon. His case is that he rented the said room from one G. M. D. Dinath, agent of the 2nd defendant-respondent, who is the owner thereof at a rent of Rs. 3-4 per day in May 1942, that during his temporary absence between the 7th May 1945 and the 4th June 1945, the 1st defendant-respondent trespassed into and took possession of the premises, that 1st defendant-respondent in collusion with the 2nd defendant-respondent obtained a permit under section 12 of the Urban Rent Control Act, 1946, from the Controller of Rents, Rangoon, on the 10th May 1947, and that on his application for review the said Controller passed an order cancelling the permit on the 4th June 1947.

Both the defendants-respondents deny that there was any collusion between them and state that the 1st defendant-respondent has entered into a written

tenancy agreement with the 2nd defendant-respondent on the 23rd May 1947, *i.e.* after the date of the said permit and that the Controller has no jurisdiction to review his own order granting the permit. The 1st defendant-respondent further contends that the suit is barred under Order II, Rule 2, of the Code of Civil Procedure inasmuch as the plaintiff-appellant's rights to the mesne profits in three previous suits, *viz.* Civil Regular No. 819 of 1946, Civil Regular No. 262 of 1947 and Civil Regular No. 1865 of 1947 of the City Civil Court of Rangoon rested on the same foundation of facts and law as the right that he claims in the present suit.

The learned Judge on the Original Side has dismissed the suit both on the ground that it is barred under Order II, Rule 2, of the Code of Civil Procedure and on the ground that the Controller had no jurisdiction to pass the order of the 4th June 1947 cancelling the said permit. Hence this appeal.

The appeal must fail if we agree with the learned Judge on the Original Side that the suit is barred under Order II, Rule 2, of the Code of Civil Procedure or that the Controller had no power to cancel the permit; and it is really unnecessary to give our decision on both questions for the purposes of this appeal. However, the learned advocates have discussed both questions so thoroughly that we feel that we should give our decision on both.

With reference to the objection under Order II, Rule 2, of the Code of Civil Procedure, the main questions for consideration are (1) whether the cause of action for recovery of possession of immovable property is distinct and separate from the cause of action for mesne profits and (2) whether the claims for recovery of possession of immovable property and mesne profits therefor are just two claims for relief

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arising out of one and the same cause of action; and these questions are not *res integra*.

"Cause of action" having not been defined in the Code of Civil Procedure, it will be fair to gather its meaning from the next rule but one in the same Order, *i.e.* Order II, Rule 4, which reads:

"No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, except—

(*a*) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof;

(*b*) claims for damages for breach of any contract under which the property or any part thereof is held; and

(*c*) claims in which the relief sought is based on the same cause of action."

So Bell J. of the late Chief Court of Lower Burma observed in *D. K. Dubash Kader and two others* v. *T. K. Fakeer Meera* (1):

"There has been inserted a new clause (*c*) which to my mind shows clearly that the Courts are not in future to treat the relief sought in any of the claims mentioned in the preceding clauses of the new Rule 4 as based upon the same cause of action as that on which a suit for the recovery of the immovable property is based. If this were not the intention of the Legislature, either clauses (*a*) and (*b*) would have been omitted as superfluous, or their contents would have been brought into the present clause (*c*) as specific instances of the claims therein generally referred to, or else clause (*c*) must have begun with some such words as 'all other claims.'

* * * *

It seems to me, therefore, that, in cases governed by the new Code of Civil Procedure, the relief sought in a claim for arrears of rent or mesne profits of immovable property must be regarded as based upon distinct and separate causes of action, and hence the restrictive provisions of Order II, Rule 2, do not affect the claimant's right to bring two separate suits for the recovery of the property and for arrears of rent or mesne profits which became

(1) (1910) 3 B.L.T. 56 at p. 59.

due before the suit for the recovery of the immovable property was instituted."

Bell J.'s decision in the said case has been approved by a Bench of the late High Court of Judicature at Rangoon in *Ma Myaing and one* v. *Maung Po Chit and three others* (1).

The decision in *Ma Myaing*'s case (1) is in accordance with the ruling of the Calcutta High Court in *Lalessor Babui* v. *Janki Bibi* (2) and the Full Bench Ruling of the Madras High Court in *Ponnammal* v. *Ramamirda Iver* (3) which was approved by the Bombay High Court in *R. A. Agarwale* v. *L. G. Bhadbhunji* (4).

The Full Bench observed with reference to Order II, Rule 4 :

> " . . . . when the rule says that no cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property
>
> except (*a*) claims for mesne profits or arrears of rent in respect of the property claimed, or any part thereof, it is quite clear that the Legislature considered that claims for the recovery of land and claims for mesne profits were separate causes of action, ..."

Beaumont C.J. observed in *R. K. Pujari* v. *S. S. Pujari* (5) :

> "The language of Order II, Rule 4, which provides that no cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, except '(*a*) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof' certainly suggests that the Legislature regarded a claim for possession of immovable property and a claim for mesne profits in respect of that property as being separate causes of action."

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(1) (1926) I.L.R. 4 Ran. 103.
(2) (1892) I.L.R. 19 Cal. 615.
(3) (1915) I.L.R. 38 Mad. 829.
(4) 26 Bom. L.R. 288.
(5) (1935) I.L.R. 59 Bom. 454 at p. 456.

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N. J. Wadia J. also observed therein :

"The cause of action for the claim for future mesne profits cannot be said to be the same as the cause of action for partition and possession. . . . . If Mr. Jahagirdar's contention that the cause of action for future mesne profits was the same were accepted, the provisions of Rule 4 of Order II would become meaningless. That rule expressly provides that a claim for mesne profits can be joined in a suit for the recovery of possession of immovable property. If a claim for mesne profits could only be made along with a claim for possession, there would have been no need whatever for the provisions of Rule 4."

In *C. L. Singh* v. *C. D. Singh* (1) Jwala Prasad J. observed :

"The right to eject the defendant arises the moment the possession of the defendant becomes unlawful. The right to mesne profits arises at different times when the profits accrue to the defendant. The date of the cause of action for ejectment is one fixed date, whereas the dates of the cause of action for mesne profits are several. Order II, Rule 4, to my mind distinctly recognizes that the cause of action for ejectment is distinct from the cause of action for mesne profits, for unless they were two distinct and separate entities there was no necessity for providing in the aforesaid rule for their uniting together in one single claim against the defendant."

A Full Bench of the Allahabad High Court also observed in *R. K. Singh and others* v. *N. C. Ahir* (2) :

"It seems to us that the cause of action for recovery of possession is not necessarily identical with the cause of action for recovery of mesne profits. The provisions of Order II, Rule 4, indicate that the Legislature thought it necessary to provide specially for joining a claim for mesne profits with one for recovery of possession of immovable property, and that but for such an express provision, such a combination might well have been disallowed. A suit for possession can be brought within twelve years of the date when the original dispossession took place and the cause of action for recovery of possession accrued.

(1) (1931) I.L.R. 10 Pat. 329 at p. 331.

(2) (1931) I.L.R. 53 All. 951 at. pp. 956-7.

The claim for mesne profits can only be brought in respect of profits within three years of the institution of the suit and the date of the cause of action for mesne profits would in many cases be not identical with the original date of the cause of action for the recovery of possession. Mesne profits accrue from day to day and the cause of action is a continuing one, and arises out of the continued misappropriation of the profits to which the plaintiff is entitled. * * * * It is also clear that the bundle of facts which would constitute the cause of action in favour of the plaintiff would not necessarily be identical in a suit for recovery of possession and in a suit for mesne profits. In a suit for possession the plaintiff need only prove his possession within twelve years and the defendant's occupation of the property without right. In a suit for mesne profits he has, in addition, to prove the duration of the whole period during which the dispossession continued, including the date on which it terminated, as well as the amount to which he is entitled by way of damages. Evidence to prove these latter facts would undoubtedly be different from that which would be required to prove the first set of facts."

However a Bench of the same High Court held in *Saghir Hasan* v. *Tayab Hasan* (1) :

"If a person is wrongfully kept out of possession of immovable property he is entitled to sue for possession and for mesne profits, and under the provisions of Order II, Rule 2 (3), he is bound to include both claims in one suit. If he sues only for mesne profits he cannot in a subsequent suit sue separately for possession. In other words he is no longer entitled to possession ; and if he is not entitled to possession he is not entitled to any further mesne profits. A subsequent suit for mesne profits is therefore barred."

It distinguished the said Full Bench case on the ground that it merely decided that where the plaintiff sued for possession of lands, but did not claim mesne profits accruing after the institution of the suit, and when mesne profits were not refused by the Court, it was open to him to bring a subsequent suit for future mesne profits.

(1) (1940) All. 781.

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Beaumont C.J. also has stated in *Channappa Girimallappa* v. *Bagalkot Bank* (1) :

" It seems to me that it may well be that the expression ' cause of action ' in Order II, Rule 2, has a wider meaning than the expression in Order II, Rule 4. Moreover the provision in the latter rule may have been inserted *ex abundanti cautela* without intending to lay down that the causes of action for possession and for mesne profits or arrears of rent accruing were distinct."

The judgment of the Privy Council in *Naba Kumar* v. *Radhashyam* (2) seems to me to support that view. His Lordship appears to have resiled from the view that he had expressed in *Pujari's* case, but it is remarkable that he has done so without referring to that case at all. Besides, with due respect to His Lordship the language used by him in the above extract indicates that he is not sure of his ground. He says " It seems to me that it may well be that the expression ' cause of action ' in Order II, Rule 2, has a wider meaning than the expression in Order II, Rule 4. However Order II, Rule 2, which is in the nature of a penal clause must be construed strictly and it is inconceivable that the same expression would have been used with a wider and a narrower meaning in Rules 2 and 4 of the same Order. As has been pointed out in Broom's Legal Maxims, 10th Edition, page 395, " if any section be intricate, obscure, or doubtful the proper mode of discovering its true meaning is by comparing it with the other sections, and finding out the sense of one clause by the words or obvious intent of another. This, as Sir E. Coke observed, is the most natural and genuine method of expounding a statute ; and it is, therefore, a true principle, that . . . . reference should be made to a subsequent section in order to explain a previous clause of which the meaning is doubtful." His Lordship also has stated " The

(1) (1943) Bom. 43 at p. 53. (2) (1931) A.I R. (P.C.) 229.

judgment of the Privy Council in *Naba Kumar* v. *Radhashyam* (1) seems to me to support that view. However, that was a case in which a pleader, who had acted for the mortgagors in a suit to enforce a mortgage, and his wife were sued by his former clients for retransfer of part of the mortgaged property which he had purchased and the suit was decreed in accordance with the principle underlying section 88 of the Indian Trusts Act, 1882. [See *Nagendrabala Dasi and another* v. *Dinanath Mahish and another* (2).] There was an appeal from the decree in that suit to the High Court and "by their memorandum of appeal (the plaintiffs) specifically asked also for the conveyance of the properties with necessary accounts." However, the High Court made no order for accounts, the claim for which seems to have been abandoned or, at all events, not to have been pressed. [*See* (1931) A.I.R. (P.C.) 229 at p. 230.] The subsequent suit was based upon the allegation that after the purchase the defendants were for some time in receipt of the rents and profits for which they had not accounted and the prayer of the plaint was for account and payment. So Their Lordships of the Privy Council held :

> "The cause of action in the present suit is, their Lordships think, clearly the same as in the previous suit ; the right to the rents and profits vested on the same foundation of facts and law as the right to have the purchases of the decree and of the properties declared to be purchases for the mortgagors."

They also held that the defendants became trustees not only for the plaintiffs but also for their co-mortgagors in virtue of the decision in the previous suit. (See *ibid.*)

So that case is distinguishable as one in which the "beneficiaries" who had sued their "trustees" for

(1) (1931) A.I.R. (P.C.) 229. (2) (1924) I.L.R. 51 Cal. 279.

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declaration that the latter held certain properties for their benefit and also for recovery of possession of the said properties—abandoning or at all events without pressing their claim for accounts—were held to be debarred from filing a subsequent suit for accounts.

With reference to the contention that the Privy Council decision in *Naba Kumar*'s case must be held to have overruled all the decisions of the Madras High Court as well as the other High Courts, Venkataramana Rao J. observed in *T. Ramiah* v. *M. Thathiah and another* (1) :

". . . . The basis for their Lordships' opinion was that by reason of the purchase of the decree and the property the purchaser became a trustee for the judgment-debtors and the claim for rents and profits formed part of the claim arising out of the cause of action in the former suit. The action was not construed as one for mesne profits. There was no question of wrongful possession by the purchaser, because he must be deemed to have been in possession on behalf of the judgment-debtors and his possession was their possession. The claim was in substance to recover the property which was held by the purchaser on their account and the claim for profits was only a part of the claim for restoration of their property. It is one and the same claim and the cause of action was considered to be one and the same."

In *V. Pillai and others* v. *T. Ammal* (2) a Bench of the same High Court endorsed Venkataramana Rao J.'s reasons for repelling the contention and distinguishing the Privy Council decision. (*See* p. 430 thereof.)

For the above reasons we are of the opinion that the ruling of the High Court of Judicature at Rangoon in *Ma Myaing and one* v. *Maung Po Chit and three others* (3) and similar rulings of other High Courts cannot be deemed to have been overruled by the Privy Council. Although these rulings are based mainly on the interpretation of "cause of action" in Order II, Rule 2, with

(1) A.I.R. (1937) Mad. 849. (2) (1940) 2 M.L.J. 42.
(3) (1926) I.L.R. 4 Ran. 103.

reference to the provisions of Order II, Rule 4, they are consistent with the definition of mesne profits in section 2 (12) of the Code of Civil Procedure itself as those profits which the person in wrongful possession of the property actually received or might with ordinary diligence have received therefrom. Mesne profits as defined in section 2 (12) accrue from day to day; and the cause of action which arises out of the continued misappropriation of the profits is a continuing one, whereas the cause of action for recovery of possession of the property arises as soon as the plaintiff is dispossessed. The causes of action do not arise at the same time and the periods of limitation for suits on the causes of action are not the same. (*See* Articles 142 and 144 of the Limitation Act as regards suits for recovery of possession of immovable property and Article 109 thereof as regards suits for mesne profits.) These rulings are also consistent with the definition of "Cause of Action" as a bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in his suit or as the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. As has been pointed out in *R. K. Singh and others* v. *N. C. Ahir* (1) in a suit for possession the plaintiff need only prove his possession within twelve years and the defendant's occupation of the property without right. In a suit for mesne profits he is in addition to prove the duration of the period during which the dispossession continued as well as the amount to which he is entitled by way of damages. Evidence to prove these latter facts would undoubtedly be different from that which would be required to prove the first set of facts. [Cf. *D. Ramiah* v. *M. Thathiah and another* (2) at page 851.] Besides a cause of action must be antecedent to the institution of

(1) (1931) I.L.R. 53 All. 95 at pp. 956-7. (2) A.I.R (1937) Mad. 849.

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the suit and as Beaumont C.J. has pointed out in *R. K. Pujari* v. *S. S. Pujari and another* (1) at page 456, the plaintiff cannot strictly be said to have a cause of action for something which does not exist at the date of the institution of the suit and future profits must necessarily be in that position. So the claim for mesne profits does not rest on the same foundation of facts and law as that for possession although these two different causes of action may arise from the same transaction [Cf. *Payana Reena Saminathan and another* v. *Pana Lana Palaniappa* (2)]. The provisions of the Code of Civil Procedure and the Limitation Act, which have been referred to above and according to which causes of action for possession and for mesne profits are different, may have had their origin in the ancient and technical view that the action for mesne profits was an action for trespass and not on the case, as pointed out by the learned Judge on the Original Side. However, whatever their origin may be, we must administer them as we find them.

The question as to whether the cause of action for possession and the cause of action for mesne profits are one and the same or whether they are separate and distinct is a question on which there has been considerable difference of opinion ; and the above review of the case law reveals that there still is considerable difference of opinion among the Indian High Courts. However, so far as Burma is concerned, the question has been settled by the judgment in *D. K. Dubash Kader and two others* v. *T. K. Fakeer Meera* (3) as long ago as 1910 ; and we are of the opinion that this is a matter in which the principle of *stare decisis* should be applied. "It is, then, an established rule to abide by former precedents, *stare decisis*, where the same points

(1) (1935) I.L.R. 59 Bom. 454 at p. 456. (2) 41 I.A. 142 at p. 148.
(3) (1910) 3 B.L.T. 56 at p. 59.

come again in litigation, as well to keep the scale of justice steady, and not liable to waver with every new Judge's opinion, as also because, the law in that case being solemnly declared, what before was uncertain and perhaps indifferent, is now become a permanent rule." (*See* Broom's Legal Maxims, 10th Edition, page 90.)

"... Whenever a decision is departed from, the certainty of the law is sacrificed to its rational development, and the evils of uncertainty thus produced may far outweigh the very trifling benefit to be derived from the correction of the erroneous doctrine. The precedent, while it stood unreversed, may have been counted on in numerous cases as definitely establishing the law. Valuable property may have been dealt with in reliance on it, important contracts may have been made on the strength of it; it may have become to a great extent a basis of expectation and the ground of mutual dealings. Justice may therefore imperatively require that the decision though founded in error, shall stand inviolate none the less, *communis error facit jus*. 'It is better,' said Lord Eldon, 'that the law should be certain than that every Judge should speculate upon improvements in it.'" (Salmond's Jurisprudence, page 194, 7th Edition.)

To turn now to the second question, *i.e.* the question as to whether the Controller had power to cancel the order which he had passed under section 12 (*1*) of the Urban Rent Control Act, 1946, granting permission to the 1st defendant-respondent to continue in occupation of the premises. Sub-section (*2*) of the section provides :

"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."

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The Act contains no other provision for cancellation of the order granting permission to continue in occupation. So it must remain in force for so long as the provisions of section 12 apply to the area in which the premises are situated or the class of premises within which the said premises come and for three months afterwards, unless in the meanwhile a Court passes an order for ejectment of the occupant under section 13 (*1*) of the Act or the Controller cancels it under the proviso to section 12 (*2*) thereof on the ground that the occupant has voluntarily vacated the premises. The Controller has no power to cancel it on any other ground.

With reference to the argument that the Controller should have wider power to cancel the order, the learned Judge on the Original Side has rightly observed in the course of his judgment :

> " Mr. Joseph also contends in support of his case on this point that if the Controller is not entitled to set right what obviously was wrong, a miscarriage of justice will remain unremedied. That may be so. But this is a matter which should be rectified by legislation and not by this Court."

We are in entire agreement with the learned Judge on the Original Side that the plaintiff-appellant cannot remove the 1st defendant-respondent from the present possession of the premises. We accordingly dismiss the appeal with costs.

U SAN MAUNG, J.—I agree.

APPELLATE CRIMINAL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

MAUNG SHIN AND TWO OTHERS (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

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June 1.

Confession—Evidence Act, s. 30—S. 32 (3), Admissibility of—Murder committed in effecting safe retreat if in the course of dacoity—Sentences.

Held : That the confession of an accused person who is dead implicating himself and an accomplice in a crime is admissible under s. 32 (3) of the Evidence Act and is not excluded by illustration (*b*) to s. 30. But where the alleged confession does not expose the confessor to a criminal prosecution though it may contain "admission of a gravity incriminating fact or even a conclusively incriminating fact", it is not a confession.

Nga Po Yin v. *King-Emperor*, (1904—06) 1 U.B.R. 3 (Ev.), referred to and *Pakala Narayana Swami* v. *Emperor*, A.I.R. (1939) P.C. 47 at p. 52, followed.

Held : That where murder is committed in the course of effecting a safe retreat it is committed in the course of the dacoity

Tha Nge Gyi and Nga Mya v. *The King*, (1946) R.L.R. 229, referred to and followed.

Sentence of appellant Maung Pay who was only 17 years old at the time of the commission of the offence and played a very minor part by keeping watch, was reduced from death to ten years' rigorous imprisonment.

Hla San v. *The King*, (1941) R.L.R. 595, followed.

A. N. Basu for the appellants.

Tin Maung for the respondent.

U THEIN MAUNG, C.J.—The appellants Maung Shin (*a*) Shwe-thitsa-mandaing Mahamyaing Aung Maung, Maung Pay and Ohn Sein have been found guilty of an offence under section 396 of the Penal Code and all of them have been sentenced to death by the First Special Judge, Thayetmyo.

The case for the prosecution is as follows. A gang of 15 dacoits, each of whom was armed with a rifle and

* Criminal Appeal No. 358 of 1948; appeal from the order of First Special Judge of Thayetmyo, dated the 10th April 1947, in Criminal Regular Trial No. 84 of 1947.

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whose leader was armed with a revolver also, arrived at Ahtetkyi village a little after midnight on the 7th *lasan* of *Nayon* 1309 B.E. (25th May 1947) and asked the villagers to supply them with mats and blankets. So six of the villagers, namely, Maung Po Htin (P.W. 6), Maung Me (P.W. 7), Maung Ngwe Khe (P.W. 8), Maung Tha Htan, Maung Nyi Nge and Maung Kya Khet supplied them with 3 mats and 12 blankets at their camp outside the village. At about 8 a.m. on the following morning, the same villagers, with the exception of Maung Kya Khet, had to go to the dacoits' camp and supply them with morning meal as required by them. Thereafter the dacoits proceeded to Thazi which is a few miles to the west of Ahtetkyi. They arrived at Thazi before 10 o'clock in the same morning and their leader ordered the villagers thereof to bring Rs. 200 to him at Sanywa on the same day. The dacoits also wrote a letter to the villagers of Ywatha-hla and Zeebyukwin which are within a short distance from Thazi asking them to bring Rs. 200 to Sanywa on the same day. The dacoits left Thazi for Sanywa *via* Shangone which is only about a call away from Thazi shortly after they had ordered the villagers of Thazi and written to the villagers of Ywatha-hla and Zeebyukwin as stated above.

The dacoits arrived at Shangone at about 10 o'clock the same morning. There they called upon all the villagers to parade in the middle of the village; ransacked all the houses in the village and also took a gold ring from U Po Hla (P.W. 1). Thereafter their leader told U Po Hla that he must raise a sum of Rs. 200 from his villagers and pay it to him in the course of the day at Sanywa. They then left the village taking away Ma San Yi (since deceased), Ma Ngwe Sein (since deceased), Ma Ya Lay (since deceased), and Ma Than Kyi (P.W. 4) as hostages.

When they got to Sanywa, the dacoits put up in the house of the late Maung Tun Yan's widow Ma Pha. They kept three of the hostages, namely, Ma San Yi, Ma Ngwe Sein and Ma Ya Lay tied up together with a rope under a tamarind tree between Ma Pha's house and the next house thereto. However, Ma Than Kyi, the remaining hostage, who was only 12 years of age, was required by the leader of the dacoits to massage him in Ma Pha's house.

The villagers of Thazi who could raise only Rs. 100 deputed Maung Tun Yin (P.W. 5) and Maung Kan (P.W. 25) to go and pay the money on their behalf to the leader of the dacoits. Tun Yin and Maung Kan accordingly went and offered Rs. 100 to the leader of the dacoits in Ma Pha's house at Sanywa, but the latter said that he was astonished to have been offered such a small sum when he was such a notorious leader and that he would attack Thazi if the villagers failed to pay the full amount of Rs. 200. So Maung Tun Yin had to go back to Thazi to get another sum of Rs. 100 leaving Maung Kan "as security". Maung Tun Yin succeeded in raising another sum of Rs. 100; so he came and paid the money to the leader of the dacoits and the latter allowed him to take his companion Maung Kan away with him. On their way back to Thazi, Tun Yin and Maung Kan came across four or five dacoits who were on *kin* duty on a hillock in the north of Sanywa. The dacoits detained them there for a while and asked them whether they had paid the money to the leader.

The villagers of Ywatha-hla and Zeebyukwin also raised Rs. 50 each and deputed Tun Han, Po Han and Maung Khin (P.Ws. 10, 11 and 12) to go and pay the money to the leader of the dacoits at Sanywa. Tun Han, Po Han and Maung Khin accordingly went and offered the money to the leader of the dacoits at Ma Pha's house

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in Sanywa. However, the latter was dissatisfied as the amount was small and threatened "to show his ability". So Tun Kyi, one of the dacoits had to take them away from the leader saying that he would "show his own ability". Tun Kyi then detained them at a place about 20 cubits away from the three women captives. However, they managed to escape when the *Yebaws* arrived at the village.

The villagers of Shangone also raised a sum of Rs. 45 and deputed Maung Kyaw Hla (P.W. 2), Maung Kya Zwe (P.W. 3) and Maung San Aye (since deceased) to go and pay the money to the leader of the dacoits at Sanywa. When they got to Ma Pha's house in Sanywa village, Kyaw Hla alone went up and offered the money to the leader of the dacoits and his companions, Kya Zwe and San Aye, remained near the three captives, Ma Ya Lay, Ma San Yi and Ma Ngwe Sein ; Ma San Yi being Kya Zwe's wife and Ma Ngwe Sein being San Aye's wife. The leader of the dacoits being dissatisfied, Maung Kyaw Hla had to explain to him that his villagers had become poor on account of several demands which had been made by other dacoits. Just as he was giving the said explanation, some dacoits outside the house shouted to their comrades that *Yebaws* had arrived and that they should take cover. Then there was a commotion. Kyaw Hla ran away from the house and Ma Than Kyi climbed up a shelf in the house. San Aye, however, went up to his wife Ma Ngwe Sein and tried to untie the rope around her hands. Just then the leader of the dacoits came down from the house and shot at San Aye and the three women captives with the result that they all died on the spot. Kya Zwe then ran away and there was a fight between the *Yebaws* and the dacoits in the course of which two *Yebaws*, namely, Saw Maung and Paik Tin were shot dead by one of the dacoits. The

rest of the *Yebaws*, *i.e.* Kya Thi, Po Thaw, Tin Myint (P.Ws. 18, 19 and 20) and others retreated after Saw Maung and Paik Tin had fallen, with the result that the rifles with which Saw Maung and Paik Tin were armed, fell into the possession of the dacoits. The rifle with which Saw Maung was armed was a U.S.A. rifle of ·303 bore bearing the No. 95C1846. It was issued by U Thein Aung, Police Station Officer (P.W. 13) to Po Thaw (P.W. 19) and according to both Po Thaw and U Thein Aung it was in the joint charge of Po Thaw and Saw Maung.

After the incident, 9 of the dacoits including the same leader as before went from Sanywa to Shangone. They then had the two rifles which they had seized from Saw Maung and Paik Tin. So they were armed with 11 rifles and the leader was armed with a revolver also as before. When they arrived at Shangone, they collected villagers and ordered them to carry the looted properties to Ywatha-hla and among the villagers who had to carry the looted properties to Ywatha-hla, as required by them, were U Po Hla, Kyaw Hla and Kya Zwe (P.Ws. 1, 2 and 3). Maung Tun Yin (P.W. 5) who happened to be in Shangone village, then, also had to carry some of the looted properties from Shangone to Ywatha-hla.

The dacoits arrived at Ywatha-hla at about 4-30 p.m. on the same day and the leader called upon the villagers to provide them with food and water. Po Han and Maung Khin (P.Ws. 11 and 12) were among the villagers who had to give them food and water in compliance with their order. The dacoits left Ywatha-hla after having their meals and went towards Monda.

In the meanwhile some villagers of Shangone went and saw the dead bodies of San Aye, Ma San Yi, Ma Ngwe Sein, Ma Ya Lay, Maung Saw Maung and Paik Tin. Ma Than Kyi came down from the shelf

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where she had been hiding when she saw the villagers of Shangone and accompanied them back to Shangone.

Then, some villagers of Sanywa sent the dead bodies of those 6 victims to the Civil Hospital at Mindon, and Dr. Singh (P.W. 15) has testified that they all died of gunshot wounds.

About the time of the incident, dacoities were so rampant that there was a reign of terror in the locality and U Po Nwe (P.W. 26), the headman of Thazi village-tract, was living at Kama as he dared not live at Thazi. However, Maung Kan, Tun Yin, Tun Han, Maung Khin and Po Hla reported to him of the incident ; and he made notes of their reports and sent them to the police station (*see* Exhibits Q, R, S and T).

Po Kunt, the 1st accused in the case was arrested on the 13th June 1947 and he gave a confession before the Township Magistrate, Thayetmyo, on the 16th June 1947 (*see* Exhibit U). However, he died on the 25th October 1947 before the trial commenced. Ohn Sein, the 3rd appellant, was arrested on the 12th June 1947 and he confessed before the same Magistrate on the 20th August 1947 (*see* Exhibit V).

The first two appellants Maung Shin and Maung Pay were arrested at Mokkha village, Ingabu Township, by Saw Khun Doe and Maung Tun Aye (P.Ws. 21 and 22). The circumstances, under which Maung Shin and Maung Pay were arrested, have been described by Maung Shin, who has given evidence on oath in his own defence, as follows. His party consisting of 12 men and 3 women left Thayetmyo District for Henzada District. When they arrived at Theingon village in Kyangin Township, they had an encounter with a party of P.Y.T. headed by Bo Sun Nyo in the course of which the P.Y.T. seized three members of his party, namely, San Kyi, Kyaw Shein and Tun Ngwe

and five firearms. He and the other members of his party managed to escape and went to Mokkha village. On the way to that village they left their firearms, namely, seven rifles and his own revolver hidden on a hill. The member of his party who actually hid them was Tun Tin. All the members of his party were arrested at Mokkha and all the hidden firearms and ammunition were seized by U Hla Bu, Subdivisional Police Officer, Myanaung (P.W. 24), as they were pointed out by Tun Tin himself. Among the rifles so seized was the American rifle bearing No. 95C1846, *i.e.* one of the rifles which fell into the possession of the dacoits on the death of *Yebaw* Saw Maung and *Yebaw* Paik Tin.

The evidence on which the learned First Special Judge has convicted Maung Shin consists of (1) the evidence of the villagers of Ahtetkyi, Thazi, Shangone, Ywatha-hla and Zeebyukwin, including Ma Than Kyi, who have identified him as the leader of the dacoit gang; (2) the confession of Po Kunt; and (3) the discovery of the said American rifle.

Po Htin, Maung Me, Maung Ngwe Khe and three other villagers of Ahtetkyi, namely Maung Tha Htan, Maung Lu Ngo and Maung Kya Khet, identified Maung Shin as the leader of the dacoits at an identification parade which was held on the 26th August 1947 under the supervision of U Maung Gyi (P.W. 16). Maung Shin then told U Maung Gyi that they could identify him as he had once lived in their village Ahtetkyi. However, neither Po Htin, nor Maung Me, nor Maung Ngwe Khe, has been asked in cross-examination if it was not a fact that Maung Shin had lived in their village, and if he had really lived there at all these witnesses would have had all the more reason to be able to recognize him. Moreover, they had ample opportunity to see who the leader of the dacoits was when the

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gang came and commandeered for mats, blankets and breakfast.

Tun Yin and Maung Kan of Thazi have also testified that Maung Shin was the leader of the dacoits and Maung Kan has added that Maung Shin had been known to him about two months before the occurrence as he had to supply him on a previous occasion with some rice and a fowl.

U Po Hla, Kyaw Hla and Kya Zwe of Shangone village have also identified Maung Shin as the leader of the dacoits.

It will be seen from what has been stated above that the villagers of Thazi and Shangone had ample opportunity to see who the leader of the dacoits was.

Ma Than Kyi, who was one of the hostages taken away by the dacoits from Shangone to Sanywa and who had to massage their leader at Sanywa, has also identified Maung Shin as the man whom she had to massage. She has also added that she actually saw Maung Shin fire at San Aye, Ma San Yi, Ma Ngwe Sein and Ma Ya Lay, when an alarm was raised about the arrival of *Yebaws* and when San Aye tried to untie the hands of his wife, Ma Ngwe Sein. There can be no doubt whatsoever of Ma Than Kyi having had a good opportunity to observe who the leader of the dacoits was.

In this connection it may also be noted that Ma Than Kyi's statement that it was Maung Shin who fired at San Aye and others is corroborated by Kya Zwe although this part of their evidence must be received with caution as neither of them has stated to the police that it was the leader who shot at San Aye and three others.

Tun Han of Zeebyukwin and Po Han and Maung Khin of Ywatha-hla have also identified Maung Shin as the leader of the dacoits to whom they

had to go and pay the money. Maung Shwe Saing (P.W. 27) has also identified Maung Shin as the leader of the dacoits, who came to Ywatha-hla village in the afternoon of the 27th May 1947, and explained that he had also seen Maung Shin definitely when Maung Shin and his gang visited his village on a previous occasion about five or six months before the occurrence.

The learned advocate for the appellants has laid stress on the fact that a parade for identification of Maung Shin was held in the Jail of Thayetmyo under the supervision of U San Dun (P.W. 13) on the 25th August 1947, that Kyaw Hla (P.W. 2) alone identified him in that parade and that Po Hla, Ma Than Kyi, Tun Yin, Po Han and Maung Khin did not identify him then. However, the said witnesses have explained that they dared not identify Maung Shin then as prisoners, who ushered them to the parade had intimidated and asked them not to identify him. In this connection, U San Dun has deposed, "The jail atmosphere is rather exciting. I myself felt excitement and some uneasiness. I felt rather timid over seeing the jail population." Mr. Mahmood (P.W. 17) who took the witnesses to the jail, has also deposed that the witnesses told him after the parade, "they did find Maung Shin in the parade but that they purposely refrained from identifying him as some of the convicts inside the jail had threatened them with death if they ventured to point out Maung Shin." The learned Special Judge has accepted the explanation of the witnesses and we do not see any reason to differ from him. The witnesses had ample opportunity to observe who the leader of the gang was and they are all definite in their evidence that Maung Shin was the leader. We cannot believe that as many as 13 witnesses have given their false evidence against Maung Shin or that they had made a mistake about the identity of the leader.

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Yebaw Kya Thee (P.W. 18) has indirectly corroborated their evidence. He has stated that two men who were watching at the western gate of Sanywa fired at the *Yebaws* calling out "Shwe-thit-sa-mandaing Mahamyaing Aung Maung's gang." His statement may be taken together with the statement of Tun Yin (P.W. 5) that when he offered Rs. 100 only, the leader who got offended by the smallness of the amount said that he was Maung Shin otherwise known as Shwe-thitsa-mandaing Mahamyaing Aung Maung and that he was astonished to have such a small sum offered to him when he was such a notorious leader. In this connection, it must also be noted that Maung Shin admits having given his name as Maung Shin (*alias*) Shwe-thitsa-mandaing Mahamyaing Aung Maung to the Magistrate at Ingabu.

The influence of Maung Shin and his gang can be gathered from the evidence of headman U Po Nwe, who dared not live in his own village-tract. He says, "Maung Shin's gang of dacoits was operating recklessly at that time. We dared not mention his name to the authorities at that time." Maung Shin himself has stated that he went to Thayetmyo District in consultation with Tun Shwe, a dacoit leader of Taungsagaing, that he organized a party of his own and collected firearms and ammunitions to revolt against the British, that he remained in the jungles with the followers, about 60 men, for about a year, that 40 to 60 of his followers had surrendered to the police as directed by him and that some more of his men surrendered to the police on the eve of his departure from Thayetmyo District for Henzada District. Under these circumstances, it may well be that there were prisoners in Thayetmyo jail who did not want any witness to identify him.

The learned advocate for the appellants has contended that the alleged confession of Po Kunt is

not admissible in evidence under section 30 of the Evidence Act as Po Kunt was not being tried together with the present appellants and that the learned Special Judge erred in admitting it in evidence under section 32 (*3*) of the Evidence Act inasmuch as Po Kunt had been arrested before he made the confessional statement. It has been held in *Nga Po Yin* v. *King-Emperor* (1) that the confession of an accused person, who is dead, implicating himself and an accomplice in a crime is admissible under section 32 (*3*), Evidence Act, and is not excluded by illustration (*b*) to section 30 thereof.

According to sub-section (*3*) of section 32 of the Evidence Act, statements of relevant facts made by a person, who is dead, are themselves relevant facts when the statements, if true, would have exposed him to a criminal prosecution. So for a statement to be admissible under the sub-section, it must be a statement of relevant facts and it must be of such a nature as to expose the person who made the statement to a criminal prosecution. The alleged confession of Po Kunt does not comply with these requirements. His statement relates (1) to his having gone round with some members of Bala's gang and "collected" money from some villagers for Bala, (2) to his having accompanied Maung Shin, Maung Pay, Ohn Sein, and others to Monda, Ahtetkyi and Thazi (3), to his having pleaded with Maung Shin at Sanywa to release the captive women and (4) to his having run away from Sanywa when the *Yebaws* came there. Even if his "collection" of money from other villagers for Bala may be inferred to amount to an offence of dacoity or robbery, he has not expressly stated that he committed any such offence and the question as to whether he committed any such

(1) (1904—06) 1 U.B.R. 3 (Ev.).

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offence at the instance of Bala, is not relevant to this case at all. Their Lordships of the Privy Council have observed in *Pakala Narayana Swami* v. *Emperor* (1):

". . . . in their Lordships' view no statement that contains self-exculpatory matter can amount to a confession if the exculpatory statement is of some fact which, if true, would negative the offence alleged to be confessed. Moreover, a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession, *e.g.* an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession."

With reference to his statement that he accompanied Maung Shin and others up to Thazi village, he has not stated what was the object of their visit to Thazi village, nor has he stated whether any offence was committed at Thazi village at all. It is quite clear from his statement that he stayed behind at Thazi village and did not know what happened at Shangone village. It is true that he has stated that he went on subsequently to Sanywa and pleaded with Maung Shin when he found that Ma Ngwe Sein and others had been brought as hostages; but this statement like the previous statement about his having accompanied Maung Shin to Thazi cannot expose him to a criminal prosecution. So we are of the opinion that the alleged confession of Po Kunt is not a confession at all so far as this case is concerned and that it is not admissible in evidence against the appellant under section 32 (3) of the Evidence Act.

With reference to the discovery of the American rifle Maung Shin himself admitted in his evidence on oath, "It is true that on our way to Mokkha,

(1) A.I.R. (1939) P.C. 47 at p. 52.

we left our firearms, 7 rifles and my own revolver, hidden on a hill. It was Tun Tin who actually concealed them . . . . It is true that all the hidden firearms and ammunition were traced as pointed out by Tun Tin subsequent to our statements made before U Hla Bu, the S.D.P.O., of Myanaung." So the discovery of this rifle is of considerable corroborative value.

With reference to the question of sentence, the learned advocate for the appellants has submitted that Maung Shin should not have been sentenced to death inasmuch as Maung Kya Zwe and Ma Than Kyi had admitted that they did not tell the police that it was Maung Shin who shot San Aye, Ma San Yi, Ma Ya Lay, and Ma Ngwe Sein, dead. However, section 396 of the Penal Code provides that if anyone of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or transportation for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine. Besides it has been held in *Tha Nge Gyi and Nga Mya* v. *The King* (1) 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 is an essential part of the common criminal purpose of the dacoits. Moreover, the dacoity committed by Maung Shin's gang was a continuing one which was still in progress when the villagers of Thazi, Ywatha-hla, Zeebyukwin, and Shangone, came and paid moneys to Maung Shin in Ma Pha's house at Sanywa. It was still in progress when the *Yebaws* arrived at Sanywa and the dacoits had to fight the *Yebaws* for the purpose of effecting a safe retreat. Under these circumstances, Maung Shin

(1) (1946) R.L.R. 229.

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is liable to be punished under section 396 of the Penal Code, even if it was some other dacoits who shot San Aye and others dead.

We are satisfied on the evidence that he was the leader of the gang, all the members of which were armed with rifles; and since the gang is responsible for having murdered four villagers and two *Yebaws* in the course of dacoity, we are of the opinion, there can be only one sentence and that the sentence of death for the leader.

To come, now, to the case against the 2nd appellant Maung Pay, he has been convicted as Tun Yin (P.W. 5) has identified him at an identification parade held under the supervision of U Sint (P.W. 14) on the 28th of August 1947 as one of the dacoits who detained him and his companion Maung Kan on their way back from Sanywa where they had gone to give money to Maung Shin. U Sint has testified that Maung Pay was identified by Tun Yin in a fair and proper manner. As a matter of fact, Maung Pay himself does not allege that the identification parade was not held in a fair and proper manner. He merely told U Sint that Tun Yin could identify him as Tun Yin had known him since the time he lived at Ahtetkyi village. Tun Yin was not asked in cross-examination as to whether Maung Pay had not been known to him since Maung Pay lived at Ahtetkyi village. However, if it be a fact that Tun Yin had known him as alleged, there would have been all the more reason for Tun Yin to be able to identify him. Besides, the circumstances under which Maung Pay was arrested together with Maung Shin, an account of which is given by Maung Shin himself as set out above as well as the discovery of the American rifle as stated above, corroborate the evidence of Tun Yin to a certain extent. Maung Pay himself has stated in his evidence

on oath, "I was at large for over one year. . . . . During the time of our remaining at large, we had been living on the money we collected from different villages." It appears from the evidence that "collection" of money from different villages is only a euphemism for extortion, robbery or dacoity. Maung Pay's conviction must be confirmed. However, he was only 18 years of age on the 25th of March 1948. So he must have been only 17 years of age at the time of the commission of the offence. Besides he appears to have played a very minor part by keeping watch at a hillock near Sanywa. He did not do any harm to Tun Yin and his companion. He let them go after retaining them for a while to ask them if they had paid the money to his leader. Under these circumstances, we are of the opinion that the sentence of death is uncalled for and that the sentence of ten years' rigorous imprisonment will meet the ends of justice in his case. [Cf. *Hla San* v. *The King* (1).]

With reference to the case against the 3rd appellant Ohn Sein, no prosecution witness has identified him as one of the dacoits. He has been convicted entirely on his own retracted confession and the so-called confession of Po Kunt. However, he was arrested on the 12th June 1947, and he "confessed" only on the 20th August 1947. Apart from being somewhat belated, his "confession" is no confession at all. He has merely stated that his companions asked for some money at Ywatha-hla and the neighbouring villages. He does not know the names of the villages nor does he know how much money was obtained. He does not say that his companions committed any offence nor does he incriminate himself in any way. He cannot be convicted on such a statement even if it has not been retracted and we have already held that

(1) (1941) R.L.R. 595.

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the so-called confession of Po Kunt is not admissible in evidence. In fairness to the learned Government Advocate, we must add that he has fairly and frankly admitted that he cannot support Ohn Sein's conviction and sentence at all.

We accordingly: (1) confirm the conviction of the 1st appellant Maung Shin and the 2nd appellant Maung Pay under section 396 of the Penal Code; (2) confirm the sentence of death that has been passed on Maung Shin, the 1st appellant; (3) set aside the sentence of death on the 2nd appellant Maung Pay and sentence him instead to ten years' rigorous imprisonment; and (4) set aside the conviction and sentence passed on the 3rd appellant Ohn Sein and acquit him so far as this case is concerned.

It must however be remembered that according to Ohn Sein's statement on oath he is undergoing a sentence of seven years' rigorous imprisonment as he has been found guilty of having committed dacoity at Damathaw.

U SAN MAUNG, J.—I agree.

CIVIL REFERENCE.

Before U Thein Maung, Chief Justice, and U San Maung, J.

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1948

June 7.

ABDUL GHAFOOR ABDUL SHAKOOR
(APPLICANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Defence of Burma Act—Defence of Burma Rules—Rules 89A and 96—Requisition under—Defence of Burma (Repealing) Act (Act IV of 1947)—Requisitioning (Claims and Compensation) Order, 1947—Paragraphs 6 and 7 and 13—Meaning of compensation in clause (d), *paragraph 2—Arbitrator—Functions of—Requisition—Order in writing—Whether essential.*

The applicant claimed compensation for his motor-car seized on 22nd January 1942 by a Police Sergeant without granting a receipt. Applicant claimed before the Collector, Rangoon, that this was a requisition under 89A, Defence of Burma Rules. The Collector of Rangoon forwarded it to the Registrar, City Civil Court, Rangoon, for submission to the Arbitrator in accordance with the Requisitioning (Claims and Compensation) Order, 1947, who referred two questions to the High Court:

(1) Whether the application was maintainable before the "arbitrator" under paragraph 6 of the Claims and Compensation Order, 1947, as the car was not requisitioned by the Governor by order in writing as required by sub-s. (*1*) of s. 2 of the Requisitioning (Emergency Provisions) Act, 1947 (Burma Act No. XXXVIII of 1947).

(2) Whether the application was maintainable before the "arbitrator" under paragraph 6 of the Claims and Compensation Order, 1947, in view of the fact that Rule 89A of the Defence of Burma Rules does not appear in paragraph 7 of the said order.

Held: With reference to the second question the answer was in the affirmative. The Requisitioning (Claims and Compensation) Order, 1947, was made by the Governor under the powers conferred by Rule 96 of Defence of Burma Rules read with s. 5, Defence of Burma (Repealing) Act, 1947. Compensation in clause (*d*) of paragraph 2 of that order is compensation payable under Rule 96 which authorizes payment of compensation under Rule 89A. Therefore though Rule 89A is mentioned either in paragraph 4 or 7 of the Order yet claim for compensation under Rule 89A of the Defence of Burma Rules is not excluded from the operation of paragraph 6 of the Order.

Held: With reference to the first question, that Requisitioning (Emergency Provisions) Act (Burma Act XXXVIII of 1947) is not applicable at all. The case is governed by Rule 89A and Rule 96 of the Defence of Burma Rules.

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* Civil Reference No. 3 of 1948 made under clause 13 of the Requisitioning (Claims and Compensation) Order, 1947.

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As the alleged requisition was not by an order in writing as required by Rule 89A the Claim for compensation before "arbitrator" under paragraph 6 of the order, is not maintainable.

M. E. Dawoodjee for the applicant.

Chan Tun Aung (Assistant Attorney-General of the Union of Burma) for the respondent.

U SAN MAUNG, J.—This is a reference under paragraph 13 of the Requisitioning (Claims and Compensation) Order, 1947, by the Chief Judge of the Rangoon City Civil Court who is an "arbitrator" appointed under paragraph 6 of the said Order. The circumstances giving rise to this reference by the "arbitrator" are these:

By an application, dated the 31st of October, 1947, to the Collector of Rangoon, the applicant Abdul Ghafoor Abdul Shakoor, a merchant of No. 246, Edward Street, Rangoon, claimed Rs. 3,000 as compensation for his Chevrolet motor-car No. RC 786 which was alleged to have been seized on the 22nd January, 1942, by Police Sergeant No. 21, in Canal Street, Rangoon, without giving any receipt or other acknowledgment for the same, and which subsequently remained in the possession of the Commissioner of Police, Rangoon, up to the time of the evacaution of Rangoon in February, 1942, as a result of the Japanese invasion. The applicant claimed that this was a requisition under section 89A of the Defence of Burma Rules and that he was therefore entitled to compensation under Rule 96 of the aforesaid rules. The application was forwarded by the Collector of Rangoon on the 1st February 1948 to the Registrar of the City Civil Court of Rangoon for submission to the "arbitrator" in accordance with the Requisitioning (Claims and Compensation) Order, 1947. The matter

was laid before the Chief Judge of the Rangoon City Civil Court who, after hearing the advocate for the applicant A. G. Abdul Shakoor and the Government Advocate for the Government of the Union of Burma (respondent), referred a question of law to this Court for the reasons set out in his order of reference dated the 5th April 1948 in his Civil Arbitration Case No. 5 of 1948. The question referred may be resolved into two parts as follows:

(1) Whether the application was maintainable before the "arbitrator" under paragraph 6 of the Claims and Compensation Order, 1947, as the car was not requisitioned by the Governor by order in writing as required by sub-section (*1*) of section 2 of the Requisitioning (Emergency Provisions) Act, 1947 (Burma Act No. XXXVIII of 1947).

(2) Whether the application was maintainable before the "arbitrator" under paragraph 6 of the Claims and Compensation Order, 1947, in view of the fact that Rule 89A of the Defence of Burma Rules does not appear in paragraph 7 of the said Order.

Now, the Requisitioning (Claims and Compensation) Order, 1947, published under Notification No. 109, dated the 28th March 1947, of the Defence Department, Miscellaneous I Branch of the Government of Burma, was made by the Governor in exercise of the powers conferred upon him by Rule 96 of the Defence of Burma Rules, read with section 5 of the Defence of Burma (Repealing) Act, 1947 (Burma Act No. IV of 1947). Clause (*d*) of paragraph 2 of that Order provides that unless there is anything repugnant in the subject or context "compensation" means the compensation payable under Rule 96 of the rules, but does not include compensation payable in respect of "damage caused by war operations" as defined in clause (*e*) of the same paragraph. Therefore, it is clear

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that unless there is anything repugnant in the subject or context "compensation" means and includes such compensation as may be fixed in accordance with the provisions of Rule 96 for any vehicle or animal requisitioned under Rule 89A of the Defence of Burma Rules. We have scrutinized all the paragraphs of the Requisitioning (Claims and Compensation) Order, 1947, and we are of the opinion that there is nothing in the context of that Order to justify an inference that compensation payable for vehicles and animals requisitioned under Rule 89A of the Defence of Burma Rules should be excluded from the meaning of the term "compensation" as defined in clause (*d*) of paragraph 2 of that Order. It is no doubt true that this rule is not mentioned in paragraph 7 which reads,

"In determining the amount of compensation payable as a result of the operation of an order made under Rules 49, 66, 76, 78, 79 and 80 of the rules, as the case may be, regard shall be had to any expenses incurred, or services rendered, by such owner in complying with such order."

Similarly Rule 89A does not appear in paragraph 4 of the Order, which reads,

"Where the amount of compensation in respect of any property removed, destroyed, rendered useless, used, requisitioned or acquired by, or otherwise placed at the disposal or under the control of the Governor by an order under Rules 49, 66, 76, 78, 79 and 80 of the rules, as the case may be, has been agreed upon between the Governor or the military authorities and the owner of the said property and such agreement has been reached on the basis of a condition that the said property is to be restored to such owner in a specified state of repair, any claim for compensation on the ground that the said property is not returned in the state of repair agreed upon, shall be made in writing and shall be presented to the Collector as soon as possible after the said property is restored to such owner."

However, it is clear that the exclusion of Rule 89A from these paragraphs does not mean that compensation payable for vehicles and animals requisitioned under Rule 89A has not been provided for in this Order. All that it means is that for the specific purposes mentioned in paragraphs 4 and 7 no provision is made in regard to requisitions under Rule 89A of the Defence of Burma Rules. Notwithstanding this omission machinery is provided for in the Order for the adjudication of a claim to compensation payable under Rule 96 of the Defence of Burma Rules including that payable for vehicles and animals requisitioned under Rule 89A thereof. For example, paragraph 3 provides that every claim for compensation shall be made in writing and shall be presented to the Collector as soon as possible after the right to compensation accrues; paragraph 5 provides that every claim made under paragraphs 3 and 4 should state *inter alia* (*a*) how the claim has arisen, (*b*) the amount of compensation claimed, and (*c*) the reasons for claiming such an amount; and paragraph 9 provides for the determination of compensation payable in respect of any moveable property for which compensation is liable to be paid.

When sub-rule (1) of Rule 96 says that the owner of the property requisitioned under Rule 89A shall be paid such compensation as may be fixed in accordance with the provisions of this rule and sub-rule (2) thereof provides that in default of agreement between Government and the owner of the property the Governor shall by general or special order specify the authority or person by whom the claim for compensation should be adjudged and awarded, it is idle to contend that the Governor in making an order, purporting to have been made under Rule 96 of the Defence of Burma Rules, for the payment of compensation payable under Rule 96, has omitted to provide for compensation

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payable in respect of vehicles and animals requisitioned under Rule 89A. If such had been the intention of the Governor, it would have been specified in the order that the instructions contained therein did not relate to compensation payable in respect of vehicles and animals requisitioned under this rule; instead, he has, by the definition of the word "compensation" given in clause (*d*) of paragraph 2, categorically asserted that it means compensation payable under Rule 96 of the rules. That can only mean compensation in respect of property "removed, destroyed, rendered useless, used, requisitioned or acquired by or otherwise placed at the disposal or under the control of the Governor" in pursuance of any of the Rules 49, 66, 72, 76, 78, 79, 80 and 89A.

Therefore, our answer to the second part of the question propounded by the Chief Judge of the City Civil Court of Rangoon is in the affirmative.

Before answering the first part of the question propounded by him we shall have to consider whether the "arbitrator" mentioned in paragraph 6 of the Requisitioning (Claims and Compensation) Order, 1947, is a person who has jurisdiction to adjudicate the admissibility of a claim for compensation besides determining the amount of compensation payable to the owner of the property. Paragraph 6 of the Requisitioning (Claims and Compensation) Order, 1947, is not happily worded as it conveys the impression that the sole function of the "arbitrator" is to determine the amount of compensation payable to the owner in respect of claims for compensation forwarded to him by the Collector to whom the same have been presented under paragraph 3. However, from the language of sub-rule (2) of Rule 96 of the Defence of Burma Rules it is clear that a person appointed by the Governor under the rule has power not only to determine the

amount of compensation payable but also to adjudicate on the admissibility of claims for compensation. By Notification No. 110, dated the 28th March 1947 of the Defence Department, Miscellaneous I Branch, of the Government of Burma, the Chief Judge of the Rangoon City Civil Court has been appointed by the Governor under sub-rule (2) of Rule 96 of the Defence of Burma Rules, read with paragraph 6 of the Requisitioning (Claims and Compensation) Order, 1947, as a person by whom claims for compensation under sub-rule (1) of the said rules in respect of properties situated in the area within the jurisdiction of the Collector of Rangoon Town District shall be adjudged and awarded in default of agreement between the Governor or the military authorities and the owner of the property as to the amount of compensation. Consequently, the Chief Judge of the Rangoon City Civil Court, who has been appointed "arbitrator" under paragraph 6 of the Requisitioning (Claims and Compensation) Order, 1947, being one and the same person as the authority appointed under sub-rule (2) of Rule 96 of the Defence of Burma Rules to adjudicate claims as well as to make awards thereon, he has the power not only to determine the amount of compensation payable to the owner of the property but also to determine the admissibility of his claim.

Now, for a claim to be admissible to compensation under Rule 96 of the Defence of Burma Rules, read with Rule 89A thereof, it is clear that the vehicle or animal requisitioned under Rule 89A must be made by the Governor by order in writing because sub-rule (1) of Rule 89A is emphatic in that the requisition of any vehicle or animal for any purpose by the Governor must be "by order in writing". No doubt, sub-section (4) of section 2 of the Defence of Burma Act, 1940, provides that the Governor may by order direct that

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any power or duty which by rule under sub-section (*1*) is conferred or imposed upon the Governor shall in such circumstances and under such conditions, if any, as may be specified in the direction, be exercised or discharged by any officer or authority subordinate to the Governor. However, even if, for the sake of argument, it is said that the power to requisition animals and vehicles under Rule 89A of the Defence of Burma Rules has been delegated by the Governor to a subordinate officer or authority, the officer or authority to whom the power is delegated cannot do what the Governor himself cannot do, *i.e.* requisition a vehicle or animal without giving an order in writing for such a purpose. It is the applicant's case that no such order was given to him at the time of the seizure of his car.

For these reasons, we would answer the first part of the question propounded to us in the following sense, *viz.* that the application is not maintainable before the "arbitrator" under paragraph 6 of the Claims and Compensation Order, 1947, in view of the fact that the applicant's car was not requisitioned by the Governor by an order in writing as required under sub-rule (1) of Rule 89A of the Defence of Burma Rules. The reference made by the learned Chief Judge of the Rangoon City Civil Court in his order of reference to the Requisitioning (Emergency Provisions) Act, 1947 (Burma Act No. XXXVIII of 1947), is entirely irrelevant as that Act deals with requisition by the Governor of land, building, part of a building, or other premises, together with any fixtures, fittings, furniture or other things therein, or any water-supply system connected or pertaining to such land or premises.

U THEIN MAUNG, CtJ.—I agree.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

BISHWA NATH RAI (APPELLANT)

v.

KASHI NATH RAI (RESPONDENT).*

H.C.
1948
June 7.

Money-lenders' Act, 1945, s. 2 (6)—Carrying on the business of money-lender —Plea not raised in written statement or at the time of framing of issues— But raised in argument—Consideration of in appeal.

Held : That if there are facts either admitted or proved beyond controversy, a new plea could be entertained on appeal.

Connecticut Fire Insurance Company v. *Kavanagh,* (1892) A.C. 473 at p. 480, followed.

M. E. Moolla Sons, Limited (In Liquidation) v. *Burjorjee* (1932) I.L.R. 10 Ran. 242 (P.C.) at p. 255 ; *Papa Ammal* v. *Panchavarnam Ammal and others,* (1936-7) I.L.R. 14 Ran. 738 at p. 742, referred to.

Held further : That under s. 2, clause 6, of the Money-lenders' Act, money-lender means a person who carries on the business of advancing loans as defined in the Act. A person who lends money on two or three occasions a year to his friends while doing some other business cannot be regarded as a money-lender.

M. Ahmed for the appellant.

E. C. V. Foucar for the respondent.

U THEIN MAUNG, C.J.—This is an appeal from the judgment and decree of the Pangoon City Civil Court in Civil Regular Suit No. 224 of 1947. In that suit the plaintiff-respondent sued the defendant-appellant for recovery of Rs. 2,240 on a promissory note dated the 29th September 1946. The defence of the defendant-appellant was one of pure denial of execution and consideration. However, at the time of argument the learned advocate for the defendant-appellant submitted that there was some evidence on record to show that the

* Special Civil 1st Appeal No. 76 of 1947 against the decree of the City Civil Court of Rangoon in Civil Regular Suit No. 224 of 1947.

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plaintiff was in the habit of lending money to others with interest, that the plaintiff should therefore be treated as a money-lender as defined in the Money-lenders' Act, 1945, and that no decree should be passed in his favour as he had not been registered under that Act. The learned Second Judge of the Rangoon City Civil Court held that the matter could not be disposed of on mere argument as the question as to whether a person is a money-lender within the purview of the Money-lenders' Act is a mixed question of law and fact and no evidence had been led on the question since no specific issue had been settled with reference thereto.

The learned Second Judge of the Rangoon City Civil Court has decreed the plaintiff-respondent's suit with costs relying on the evidence of two respectable witnesses, namely, Babanjee Panday (P.W. 1) and Inderjig Shukla (P.W. 2). After a careful examination of their evidence, we are of the opinion that the learned Second Judge is right in accepting their evidence and in holding that the defendant-appellant did execute the exhibit promissory note and receive consideration therefor. The defendant-appellant's case that the plaintiff-respondent has filed a false suit simply because he refused to give evidence for the plaintiff-respondent in Lakshmanan Panday's suit against the plaintiff-respondent for recovery of Rs. 100 only does not sound convincing. Besides, we are not at all impressed with the contention of the learned advocate for the defendant-appellant that the plaintiff-respondent who had taken the loan of Rs. 100 in 1938 and had not repaid it in 1946 could not have been in a position to advance Rs. 2,000 to the defendant-appellant on the exhibit promissory note. The plaintiff-respondent has explained why the loan of Rs. 100 was not repaid earlier, and we are satisfied on the evidence that the said loan remained outstanding in 1946 not because plaintiff-

respondent could not, but because he would not, repay it for certain reasons.

The learned advocate for the defendant-appellant has submitted that this Court can go into the question as to whether the plaintiff-respondent is a money-lender even though the defendant-appellant has not pleaded in the Court of first instance that the plaintiff-respondent was a money-lender and there was no issue on the question at all. He relies on the following extract from the judgment of Lord Watson in *Connecticut Fire Insurance Company* v. *Kavanagh* (1) :

" When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain, the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea.

[Cf., *M. E. Moolla Sons, Limited (In Liquidation)* v. *Burjorjee* (2) and *Papa Ammal* v. *Panchavarnam Ammal and others* (3).]

So we have to consider whether there are facts either admitted or proved beyond controversy to show that the plaintiff-respondent is a money-lender as defined in section 2 (*6*) of the Money-lenders' Act, 1945.

In this connection the learned advocate for the defendant-appellant has invited our attention to the

(1) (1892) A.C. 473 at p. 480. (2) (1932) I.L.R. 10 Ran. 242 (P.C.) 255.
(3) (1936-7) I.L.R. 14 Ran. 738 at p. 742.

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following passages in the evidence of the plaintiff-respondent:

"During the Japanese occupation period I did have money dealings with the defendant. * * * * Besides the present defendant I have lent out some money to other persons on promissory notes and I have got those promissory notes which I now produce for the inspection of the court. I am not the professional money-lender. I have only lent out some money to my friends. Interest is also mentioned in my pronotes when I lent out the money. * * * * As I do not keep any accounts of my transactions all monies that I did lend are embodied in those pronotes now produced by me."

The money dealings which the plaintiff-respondent had with the defendant-appellant might not have been of such a nature as to bring the plaintiff-respondent within the purview of the Money-lenders' Act, 1945. If they were of such a nature, the defendant-appellant would have pleaded in his written statement that he was a money-lender and as such was not entitled to a decree under the Money-lenders' Act, 1945. With reference to the loans to his friends, the plaintiff-respondent has produced three promissory notes, dated the 26th June 1946, the 4th October 1946 and the 7th October 1946. His witness Babanjee Panday has also deposed that he had seen him lend out money on two or three occasions between 1946 and 1947. The learned advocate for the defendant-appellant has contended that a man who lends money on promissory notes with interest must be deemed to be a money-lender within the meaning of the Act even though he lends money to his friends only. However, according to section 2 (6) of the Act, "money-lender" means a person who carries on the business of advancing loans as defined in the Act and a person who lends money on two or three occasions a year to his friends, while he is doing some other business, cannot be regarded as a person who

carries on the business of advancing loans, even though he charges interest on such loans. Besides, the plaintiff-respondent has definitely stated that he is not a professional money-lender and that he does not keep any books of account. Under these circumstances it cannot be said that there are facts either admitted or proved beyond controversy to show that the plaintiff-respondent is a money-lender within the mischief of the Money-lenders' Act, 1945, and that he is not entitled to a decree on the promissory note as he has not been registered under that Act. The evidence on the record is quite consistent with the view that he is only a person who accommodates his friends with two or three loans in a year.

The appeal fails and is dismissed with costs.

U SAN MAUNG, J.—I agree.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

H.C. 1948

June 23.

DR. T. CHAN TAIK (APPELLANT)

v.

ARIFF MOOSAJEE DOOPLY AND ONE (RESPONDENTS).*

Final decree for redemption not drawn up by Court—Order 21, Rule 1—Order 34, Rule 4 (2) and (3) of Code of Civil Procedure—Deposit of Japanese Currency Notes—Its effect—Whether discharges decree—Appeal filed—Leave to file Written Statement on appeal—Considerations governing.

A mortgage by deposit of title deeds was effected in favour of the appellants by the respondents' predecessor in 1941. After the death of the mortgagor the respondents as executors sent a crossed cheque on the Burma State Bank on 20th August 1944 which was not accepted. A suit was filed on 31st January 1945 in the City Court and the sum of Rs. 35,250 in Japanese currency was paid into Court. On 23rd April 1945 the Court passed a judgment for final decree for redemption but no decree was drawn up. The defendant filed an appeal for permission to amend the written statement stating that the appellant could not then raise the issue that he was entitled to receive in British currency only.

Held on appeal per U THEIN MAUNG, C.J.—The fact that the final decree was not drawn up does not make any difference. Under Order XX, Rule 7, of the Code of Civil Procedure, the decree shall bear the date on which the judgment was pronounced and "an act of the Court shall prejudice no man" is a well-known legal maxim.

Broom's Legal Maxims, 10th Edn., p. 73; *Turner* v. *London* and *South-Western Railway Company*, L.R. (1873-4), Vol. XVII, Equity Cases, 561 at pp. 566—9, referred to.

Order XXXIV, Rule 4 (2) and (3), Code of Civil Procedure, shows that preliminary decree shall merely declare that on payment plaintiff can obtain a final decree. The Court could take judicial notice of the necessary amount having already been paid and pass a final decree.

Tata Iron and Steel Company, Limited v. *Baidyanath Laik*, (1923) I.L.R. 2 Pat 754; *Laxminarayan Ganesdas* v. *Ghasiram Dulchand Palliwal*, A.I.R. (1939) Nag. 191; *Mahomed Rahimtulla* v. *Ismail Allarakhia*, 51 I.A. 236, considered.

Order XXI, Rule (1), is not applicable to cases of mortgage decrees.

Ambi (alias) *Subramaniam Pattar* v. *P. A. V. Sridevi*, A.I.R. (1924) Mad. 102, referred to.

The Japanese so-called currency was never lawful currency in Burma.

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* Special Civil 1st Appeal No. 18 of 1947 against the decree of the City Civil Court of Rangoon in Civil Regular Suit No. 13/30 of 1945—48.

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Maung Sein Kho v. *Maung Hla Din*, Civil 2nd Appeal No. 3 of 1947; *Ko Maung Tin and eight others* v. *U Gon Man*, 1947 Ran. L.R. 1947, (1947) R.L.R. 149; *J. K. Behara* v. *Lee Shein Yu*, Special Civil 1st Appeal No. 18 of 1946; *U San Wa* v. *U Ba Thin*, Civil 1st Appeal No. 23 of 1947; *U Ba San and one* v. *U Hoke Wan and one*, Civil 2nd Appeal No. 37 of 1947; *U Pe Shein* v. *S.R.M.A.R. Ramanathan Chettyar*, Civil 1st Appeal No. 3 of 1948, referred to and considered.

Acceptance of a payment by Court and the discharge resulting therefrom are subject to the right of appeal by the opposite party and till the right of appeal has become barred or the decree confirmed on appeal the payment cannot be said to have been finally accepted.

The real defence in the case that the defendant was entitled to payment in British currency could not be raised during the Japanese occupation and amendment of the written statement is necessary to enable the real question in issue between the parties to be decided. Final decree set aside.

Held per U SAN MAUNG, J.—The question whether Japanese Military notes were lawful currency in Burma is not *res integra*. The contrary has been decided in *Maung Sein Kho* v. *Maung Hla Din*, Civil 2nd Appeal No. 3 of 1947; *Ko Maung Tin and eight others* v. *U Gon Man*, Civil Reference No. 5 of 1947; McNair's Legal Effect of War, 2nd Edn., p. 337; *Jack Thorington* v. *William B. Smith & John H. Hartley*, S.C.S. 8 Wall 1—14, referred to.

If the question was *res integra* it was entirely beyond the competence of the Japanese Military Authorities under Article 43 of Hague Regulations to issue Burma Monetary Arrangements Ordinance, 1942, equating their currency to the lawful currency of the country. The right of the appellant was a right to be repaid in lawful money and the order of the City Court purporting to direct satisfaction of that liability in currency which was not lawful cannot be upheld in appeal.

U Ba San's case, Civil Reference No. 5 of 1907, relied on.

The Hague Regulations must be treated by the Courts in Burma as part of the Municipal Law.

King v. *Maung Hmin and three others*, (1946) R.L.R. 1 referred to.

The payment had not been accepted in the terms of the Japanese Currency (Evaluation) Act, 1947, s. 4. What is contemplated by s. 4 is the voluntary acceptance of a payment by the creditor, not appropriation by an order of the Judge.

No question of acceptance of payment by anybody would arise in the case of a payment into Court under Order 34, Rule 4, sub-rule 3, of the Code of Civil Procedure. The Legislature has not extended the application of s. 4 of the Japanese Currency (Evaluation) Act, 1947, to decrees.

U Pe Shein v. *S.R.M.A.R. Ramanathan Chettyar*, Civil 1st Appeal No. 3 of 1948, distinguished.

E. C. V. Foucar (with *T. P. Wan*) for the appellant.

P. K. Basu for the respondents.

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U THEIN MAUNG, C.J.—This is an appeal from the final decree for redemption of an equitable mortgage of the properties known as Nos. 204—208, Fraser Street, Rangoon, and Nos. 180—182, 32nd Street, Rangoon, which was passed by the late City Court of Rangoon on the 23rd April 1945.

The facts which are material for the purposes of this appeal are as follows.

M. E. Dooply, since deceased, effected an equitable mortgage of the said properties to the present appellant Dr. T. Chan Taik for the principal sum of Rs. 30,000 with interest at 6 per cent per annum on the 10th April 1941. He died on the 16th June, 1944, leaving a will in which he appointed the present respondents A. M. Dooply and M. M. Dooply to be executors. So, on the 28th September, 1944, M. M. Dooply, as one of the executors to the estate, sent a crossed cheque on the Burma State Bank for Rs. 35,250 in full settlement of the mortgage debt with interest from November 1941 to 30th September, 1944, to Dr. T. Chan Taik, with a forwarding letter (Exhibit F). Dr. Chan Taik, who was then at Mudôn, came back to Rangoon only on the 29th October 1944, and M. M. Dooply appears to have had an interview with him on the following day. According to Dr. Chan Taik he informed M. M. Dooply at the said interview that he could not accept the cheque. He then returned it to M. M. Dooply but the latter left the house after throwing the cheque down. M. M. Dooply does not admit the return of the cheque nor does he admit that he threw it down before he left the house. However, he admits that Dr. Chan Taik told him to redeem the mortgage with British currency as the money he advanced on the mortgage was in British currency. There was some correspondence between the parties after the said interview. (*See* Exhibits H to K2.) A. M. Dooply and M. M. Dooply

then filed the suit for redemption of the mortgage in their capacity as heirs and executors, claiming that under section 213, sub-section (2), of the Succession Act, it is not necessary for them to apply for probate or letters of administration with the will annexed. Dr. Chan Taik's defence in the written statement was that he did not know whether A. M. Dooply and M. M. Dooply were heirs and executors as alleged by them and that he had received information of there being others in India who were entitled to the mortgaged properties, and that A. M. Dooply and M. M. Dooply had no right to redeem them. So, the principal issue in the suit was as to whether A. M. Dooply and M. M. Dooply had the right to redeem the mortage at all.

On the 8th March, 1945, *i.e.* while the suit which had been instituted on the 31st January, 1945, was pending, the plaintiffs paid Rs. 35,250 only into Court for payment to the defendant in redemption of the said mortgage and the case-diary for that date shows they produced a chalan for that amount in Court. The case-diary for the 13th March, 1945, also shows that when the case was called on that date the plaintiffs informed the learned advocate for the defendant that they had paid the said amount into Court.

On the 23rd April, 1945, the Court passed judgment for a final decree in the presence of U Kyaw Myint who held the brief for the learned advocate for the defendant. In the said judgment, the Chief Judge has explained that he passed a final decree for redemption instead of a preliminary decree therefor inasmuch as (1) the plaintiffs had already paid the amount of principal and interest into Court and (2) the defendant did not dispute the correctness of the said amount.

A final decree was then prepared in the said Court but it was not completed probably because of the

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British re-occupation of Rangoon on the 5th May, 1945, and a final decree for the purpose of this appeal has been prepared by this Court only on the 22nd March, 1948.

The appeal was filed on the 19th March, 1947, with an application for permission to amend the written statement for the purpose of raising the real question in issue between the parties, which, according to the affidavits in support thereof, is whether the defendant could insist upon the mortgage being redeemed in British currency.

The memorandum of appeal does not contain any objection to the City Court of Rangoon having stated in the course of its judgment that there was no dispute as to the amount of principal and interest which was due on the mortgage. Nor does it contain any objection to the said Court having passed a final decree straightaway instead of passing a preliminary decree in the first instance.

The respondents have filed an objection to the appellant's application for permission to amend the written statement, stating *inter alia* that the Japanese currency was a legal tender in those days and that the appellant could not then raise "the issue that he was entitled to receive in British currency alone."

The principal questions for consideration in this appeal are as to what are the legal consequences of the City Court of Rangoon having accepted payment of the amount of principal and interest due on the said mortgage although the payment was in Japanese currency, and of its having passed a final decree for redemption after accepting the said payment.

We are of the opinion that the final decree, having not been fully drawn up till after the present appeal was filed, cannot make any difference at all. Order XX, Rule 7, of the Code of Civil Procedure provides that

the decree shall bear the date on which the judgment was pronounced. Besides, *actus curiæ neminem gravabit* (An act of the Court shall prejudice no man) is a well-known legal maxim.

"This maxim 'is founded upon justice and good sense; and affords a safe and certain guide for the administration of the law.' In virtue of it, where a case stands over for argument on account of the multiplicity of business in the Court, or for judgment from the intricacy of the question, the party ought not to be prejudiced by that delay, but should be allowed to enter up his judgment retrospectively to meet the justice of the case; and, therefore, if one party to an action die during a *curia advisari vult*, judgment may be entered *nunc pro tunc*, for the delay is the act of the Court, for which neither party should suffer." (1)

In *Turner* v. *London and South-Western Railway Company* (2), Sir Charles Hall V.C. observed,

"In Chitty's Archbold's Practice, Queen's Bench, the rule at law is stated thus: 'The Court will in general permit a judgment to be entered *nunc pro tunc*, where the signing of it has been delayed by the act of the Court.' Therefore, if a party die after a special verdict, or after a special case has been stated for the opinion of the Court, or after a motion in arrest of judgment, or for a new trial, or after a demurrer set down for argument, and pending the time taken for argument, or whilst the Court are considering their judgment, the Court will allow judgment to be entered up after the death *nunc pro tunc* in order that a party may not be prejudiced by a delay arising from the act of the Court." * * * *

"Suffice it to say that the object is to put the party on the one side or the other, Plaintiff or Defendant, exactly in the same position as if judgment had not been delayed by the Court. Therefore, I shall order this judgment to be entered as of the day when the argument terminated, and that will avoid all difficulty."

Besides, "equity looks on that as done which ought to have been done" (3).

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(1) Broom's Legal Maxims, 10th Edition, p. 73.

(2) L.R. (1873-4), Vol. XVII, Equity Cases, 561 at pp. 566—9.

(3) Snell's Principles of Equity for Indian Students, p. 16.

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Although as I have stated above there is no objection in the memorandum of appeal to a final decree having been passed straightaway, the learned advocate for the defendant has contended at the hearing before us that according to Order XXXIV, Rule 4 (2), of the Code of Civil Procedure the Court could pass a final decree only if it appeared that nothing was due to the defendant on the mortgage or that he had been overpaid, and that the Court was bound to pass a preliminary decree for redemption in the first instance although the moneys had been paid into Court. However, sub-rule (3) of the said Rule and the Form of the preliminary decree for redemption (No. 8 at page 258 of Vol. VII of the Burma Code) show that the preliminary decree can merely declare that on payment into Court of the necessary amount the plaintiff shall be entitled to apply for and obtain a final decree for redemption. That being so, we are of the opinion that the Court could take judicial notice of the necessary amount having been already paid into Court for payment to the defendant and that the Court could not pass an order declaring that on payment into Court of the necessary amount the plaintiffs shall be entitled to obtain a final decree for redemption when to its own knowledge the necessary amount had already been paid in. Even in a case where the provisions of Order XXI, Rule 1, of the Code of Civil Procedure applies it has been held in *Tata Iron and Steel Company, Limited* v. *Baidyanath Laik* (1) that payment of the decretal amount into Court operates as a satisfaction of the decree though no notice of payment is given to the decree-holder as provided by sub-rule (2) thereof. Compare *Laxminarayan Ganesdas* v. *Ghasiram Dulchand Palliwal* (2) and *Mahomed Rahimtulla* v. *Ismail*

(1) (1923) I.L.R. 2 Pat. 754. (2) A.I.R. (1939) Nag. 191.

Allarakhia (1) at page 240 of which their Lordships of the Privy Council observed, "Their Lordships are clearly of opinion that while the condition would have been satisfied by a payment to the appellant in person, which he accepted, it was equally satisfied by a payment into Court, and that the latter was, in the circumstances, the appropriate mode of satisfying the condition."

Order XXI, Rule 1, is not applicable to cases of mortgage decrees which are governed by Order XXXIV. See *Ambi* alias *Subramaniam Patter* v. *P. A. V. Sridevi* styled *Vala Thamburatti* (2). Besides, if there had been a preliminary decree for redemption under Order XXXIV at all it would have required the respondents to pay the moneys into Court. So there can be no doubt of payment into Court being the appropriate mode of satisfying the decree. It has however been strenuously contended by the learned advocate for the appellant that payment into Court, or rather deposit into Court followed by the appropriation of the money by the Court towards the satisfaction of the mortgage debt for the purpose of a final decree for redemption cannot in this case have the same effect as in ordinary cases of payment into Court inasmuch as the payment was in Japanese currency.

Several rulings, both for and against the above contentions, have been cited before us; but none of them is an exact precedent. *Maung Sein Kho* v. *Maung Hla Din* (3) and *Ko Maung Tin and eight others* v. *U Gon Man* (4), both in the late High Court of Judicature at Rangoon, which were decided before the Japanese Currency Evaluation Act, 1947, came into force, relate to the principles to be followed in arriving at the amount (in British currency) to be decreed after

(1) 51 I.A. 235.
(2) A.I.R. (1924) Mad. 102.
(3) Civil 2nd Appeal No. 3 of 1947.
(4) (1947) Ran. L.R. 149 F.B.

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liberation of Burma, *i.e.* after the Burma Monetary Arrangements Ordinance, 1942, has expired and Japanese notes have become worthless, in respect of debts contracted in Japanese notes during the period of Japanese occupation. *J. K. Behara* v. *Lee Shein Yu* (1) in the same Court relates to a debt contracted during the period of Japanese occupation ; but it is not clear whether it was contracted in Japanese notes or British currency and one of the learned Judges who decided it accepted the plaintiff-appellant's case that the work done by him must be paid for in Indian rupees.

U San Wa v. *U Ba Thin* (2) in the same Court relates to the legal effect of the amount decreed during the period of Japanese occupation having been deposited in Court in Japanese notes during the same period. It was held therein that the liability under the decree was discharged by such deposit even though the opposite party never withdrew it. However, the decree itself was in respect of liability incurred under an agreement during the period of Japanese occupation and the learned Judges had no doubt of both parties having contemplated payment in Japanese notes. Sharpe J. (one of the learned Judges who decided it) observed in the course of his judgment :

"The agreement to which I have referred, that is to say of the 10th July 1944, was an agreement made almost a whole year before the return of the British and there can be no doubt—and it is not contented otherwise—that both parties were thinking in terms of the notes which were then in circulation in Burma and which had been put into circulation by and with the approval of Japanese authorities. I mention this aspect of the case now because the appellant says that he should now receive British currency in lieu of these Japanese notes which have been deposited in Court."

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(1) Special Civil 1st Appeal No. 18 of 1946.

(2) Civil 1st Appeal No. 23 of 1947.

U Ba San and one v. *U Hoke Wan and one* (1) in the same Court is a case in which it was held that there was a latent ambiguity in the decree which had been passed during the period of Japanese occupation in respect of a debt incurred before the war inasmuch as it was silent as to whether the claim was to be satisfied in British currency or Japanese notes and that under section 47 of the Code of Civil Procedure the executing Court was competent to interpret the decree in the light of surrounding circumstances. In the present case there is no such ambiguity at all. The deposit in Japanese currency was made on the 8th March 1945 and the Court passed the final decree for redemption on the 23rd April, 1945, stating expressly in the judgment that the plaintiffs had already deposited in Court the amount of principal and interest due on the mortgage.

U Pe Shein v. *S.R.M.A.R. Ramanathan Chettyar* (2) in this Court is a case in which it was held that payment into Court during the period of Japanese occupation of Rs. 12,000 in Japanese notes towards the satisfaction of a preliminary mortgage decree passed before the war satisfied the said decree to the extent of the face value of the Japanese notes although they were never withdrawn by the decree-holder. However, the learned Judges decided the case relying mainly on a special clause in the preliminary (consent) decree which provides "That all payments must be made in Court and certified at once and any payment made outside shall not be recognized." They observed in the course of their judgment,

"The deposit of the decretal amount of Rs. 12,000 in Court will, in the circumstances, have to be considered as payment to the respondent decree-holder, and such payment ought accordingly

(1) Civil 2nd Appeal No. 37 of 1947. (2) Civil 1st Appeal No. 3 of 1948.

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to be considered to be payment which had been accepted by the decree-holder as required under the provisions of section 4 of the Japanese Currency (Evaluation) Act, 1947, because that payment was made into Court, in the only way in which payment under the decree could be made effective."

In administering the law during the period of the Japanese occupation, the City Court of Rangoon which, by the way, had been established by the Japanese Military Ordinance No. 6 of 1942, was bound by force of circumstances to treat the Burma Monetary Arrangements Ordinance, 1942, as valid. It was not open to that Court to consider whether the Japanese, who according to public International Law, could make only such changes in the law and in the administration as were temporarily necessitated by his interest in the maintenance and safety of his army and the realization of the purposes of the war, had power to introduce a new system of currency or to make Japanese currency legal tender at par with British currency.

However, since the final decree was passed by the City Court of Rangoon, the Japanese occupation has come to an end and it has been held by a Full Bench of the then High Court of Judicature at Rangoon in *Ko Maung Tin and eight others* v. *U Gon Man* (1) that the Japanese so-called currency was never lawful currency in Burma and that the Japanese military authorities acted in excess of their authority under the International Law in issuing a parallel system of currency to the currency established by the lawful Government. The Legislature has also enacted the Japanese Currency (Evaluation) Act, 1947, acting on the recommendation of the Full Bench to legislate fixing the value of Japanese notes during different

(1) (1947) Ran. L.R. 149 F.B.

periods of Japanese occupation. Section 4 of the said Act provides :

" Notwithstanding anything contained in any other law for the time being in force, where any debt or obligation, whether contracted or incurred before or during the Japanese occupation of Burma, had been paid or discharged wholly or partially in Japanese currency notes during the Japanese occupation of the area where the payment was made and the payment had been accepted, such payment shall be deemed to be payment in legal currency notes of the same face values, as if the Japanese currency notes were legal currency notes at the time the payment was made."

The City Court of Rangoon was bound, as I have said above, to accept the deposit of and payment in Japanese currency. It was also competent to give a valid discharge on payment of the full amount. However, acceptance of a payment by a Court and the discharge resulting therefrom are subject to the right of appeal by the opposite party. The payment cannot be said to have been finally accepted and the discharge cannot be said to have become absolute until the right of appeal has become time barred or the decree has been confirmed on appeal. Payment which has been accepted by the City Court of Rangoon is not a payment which has been accepted by the mortgage-appellant. It is only an acceptance by the Court subject to the mortgagor's right of appeal and it cannot be regarded as a payment which had been accepted within the meaning of the said section.

We cannot confirm the acceptance of the payment by that Court as (1) the Full Bench has decided that the Japanese so-called currency was never lawful currency in Burma and (2) according to the Schedule to section 3 (*1*) of the Japanese Currency (Evaluation) Act, 1947, the Japanese currency was worth only 5 per cent of its face value in legal currency in the year 1945,

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i.e. when that Court accepted the payment and passed the final decree for redemption.

With reference to the application for permission to amend the written statement it is quite clear that the appellant had objected all along to redemption in Japanese currency. His lawyer wrote to the lawyer for the respondents on the 6th January 1945,

"there has as yet been made no monetary arrangements nor settlements as regards the value of the Burmese and British currencies ; and as such it is most inequitable and unjust for your clients to force payment now and ask for redemption, of a debt contracted on a mortgage, previous to the 8th of December 1941, in British currency (vide *Trimbak* v. *Sakharam*—16 Bom. 599)." [*See* Exhibit K2.]

He filed the written statement, which contained a plea similar to the above extract from Exhibit K2, after drawing lines and writing the word "cancelled" across the plea ; and he and his lawyers have explained that the plea had to be cancelled as one of his lawyers (Mr. T. P. Wan) was intimidated by the Kempeitai and it was obvious that no Court in Burma functioning under the Japanese régime could have entertained the defence that he was entitled to have his mortgage redeemed in British currency. Besides the 2nd respondent M. M. Dooply has admitted in the course of his evidence that the appellant told him to redeem the mortgage with British currency as the mortgage itself was in British currency.

Having regard to all the circumstances of the case we are satisfied that the real defence of the appellant has all along been that he is entitled to payment in British currency, that he and his lawyers had sufficient reason for not raising that defence during the period of Japanese occupation, that the application for amendment of the written statement has been made in good faith on appeal after the liberation of Burma, that the

amendment is necessary to enable the real question in issue between the parties to be decided, and that no further evidence will be necessary after amendent of the written statement. Besides the amendment has become more or less formal and technical in view of the Full Bench ruling and the Japanese Currency (Evaluation) Act, 1947. So we allow the proposed amendment under Order 6, Rule 17, of the Code of Civil Procedure read with section 107 thereof subject to the order as to costs which we are going to pass in this appeal.

The final decree for redemption which was passed by the lower Court on the basis of payment in Japanese currency having been payment in legal currency at par with British currency must be set aside, as we (1) cannot confirm the acceptance of that payment, (2) must allow amendment of the written statement and (3) hold that the appellant is entitled to have the mortgage redeemed with legal currency.

At the same time we must let the respondents have the benefit of the Accrual of Interest (War-Time Adjustment) Act, 1947, just as we have let the appellant have the benefit of the Full Bench ruling. They have sued for redemption offering to pay Rs. 5,250 as interest at the contract rate of 6 per cent per annum from the 1st November, 1941, up to the 30th September, 1944; but according to section 3 of the said Act the appellant is not entiled to any interest from the 8th December, 1941, to the 31st March, 1947.

We accordingly set aside the final decree for redemption and order that there shall be the usual preliminary decree for redemption. The principal amount of the mortgage-debt is Rs. 30,000 and interest thereon is to be calculated at 6 per cent per annum from the 1st November, 1941, only up to and exclusive of the 8th December, 1941. The decretal amount shall carry interest at 1½ per cent per annum from the

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1st April, 1947, up to the date of payment or realization.

Both parties have been victims of circumstances. The decision of the City Court of Rangoon has to be set aside on account of subsequent developments, the respondents have practically lost the money which they paid into Court ; and the appellant has had to ask for permission to amend the written statement on appeal. So we are of the opinion that the parties should bear their own costs in both courts.

U SAN MAUNG, J.—As the facts have been fully set out in the judgment of my Lord, the Chief Justice, it is not necessary for me to recapitulate them here. As the learned Chief Judge of the City Civil Court of Rangoon had passed judgment for a final decree for redemption on the ground that the sum of Rs. 35,250 in Japanese currency which had been deposited into the Court by the plaintiff-respondents was sufficient to pay the amount due to the defendant-appellant Dr. Chan Taik on the equitable mortgage of the properties in suit, the question which arises for determination in this appeal is whether the finding of the learned Chief Judge of the City Civil Court of Rangoon on this point should be confirmed by this Court. Therefore, in my opinion, it is impossible to decide this appeal without considering the question whether the Japanese notes which were deposited in Court by the plaintiff-respondents in payment of the amount due to the defendant-appellant on the aforesaid mortgage should be considered as legal currency in Burma.

Now, the Burma Monetary Arrangements Ordinance, 1942, being an ordinance to provide for adjustment of value of and to render legal tender currency in circulation with the Japanese Government Military currency notes in Burma was promulgated by

the Prime Minister of the Japanese-sponsored Burmese Government on the 15th of September, 1942. By this Ordinance the currency, which was legal tender in Burma on the 8th of December, 1941, was ordained to continue to be current in Burma in the same manner and to the same extent as before and was to be of the same value as the Japanese Government Military currency notes. So, the Japanese Military notes were equated to the currency which was legal tender in Burma on the 8th of December, 1941, namely, British currency which was the legal currency for Burma. Regarding the measure thus taken by the Japanese-sponsored Burmese Government, E Maung J. observed in *Maung Sein Kho* v. *Maung Hla Din* (1):

"The Japanese Military Forces which occupied Burma and the administration set up by them in the name of the Burmese Independent State never had, under International Law, any authority to set up a currency system of their own. The legislation, either of the Military administration or of the Civil administration sponsored by the Military authorities during the occupation of Burma, equating the Japanese Military notes to the legal currency of the country is not within the competence of the occupying power. In law, therefore, the Japanese Military notes which were handed over by the appellant to the respondent on the 2nd of March 1945 could not be considered as legal currency."

In the case of *Ko Maung Tin and eight others* v. *U Gon Man* (2) where a Full Bench of the late High Court had occassion to consider whether the Japanese Military notes were lawful currency in Burma, the learned Chief Justice agreed with the dictum of E Maung J. in *Maung Sein Kho* v. *Maung Hla Din* (1) that the Japanese so-called currency was never lawful currency in Burma. While Sir Ba U J. considered that it was unnecessary to go into the question whether or not the Japanese Military Commander-in-Chief had

(1) Civil 2nd Appeal No. 3 of 1947. (2) (1947 Ran. L.R. 149 F.B.).

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power under the Law of Nations to change the currency law of Burma during the time of occupation, Blagden J. observed that he was in entire agreement with the opinion of E Maung J. as to the illegality under International Law, of the conduct of the occupier in relation to the currency of occupied Burma. What E Maung J. observed in that case was this :

"In holding that the Japanese military authorities in occupation of Burma acted in excess of its legitimate authority at international law in setting up a parallel system of currency relating the same to the system established by the lawful Government of Burma, I was not unmindful of the precedents set in the War of 1914—18 by Germans in France and Belgium and the Austrians in Serbia repeated in the War of 1939 onwards by Germany and powers associated with her. German jurists and the Reighsgericht sought to justify these actions on the theory that in an effective occupation of enemy territory the power of the occupying country totally excludes and replaces the State power of a lawful Government. This theory has not received general acceptance and is not in consonance with modern views on the status of the occupying power.

The right of an occupant in occupied territory is merely a right of administration. McNair in his Legal Effects of War, 2nd Edition, at page 337, has stated the rule to be that :

> 'The occupant being under a duty to maintain order and to provide for the preservation of the rights of the inhabitants and having a right recognized by international law to impose such regulations and make such changes as may be necessary to secure the safety of his forces and the realization of the legitimate purpose of his occupation, his acts, whether legislative, executive, or judicial, so long as he does not overstep these limits will be recognized by the British Government and by British Courts of law.'

Articles 42 to 56 of the Hague Regulations of 1907 clearly cannot be invoked in support of the exercise of the occupying power of effecting a change in the currency system of the occupied territory and to make that change binding on the lawful Government.

The decision in the *Bank of Ethiopia* v. *National Bank of Egypt and Liguori* (1) does not militate against the view that the acts of the *de facto* Government of the occupying power must, in the circumstances of the present case, be tested by such acts being necessary for preserving peace, order and good government."

The observations made by the learned Judges in the case cited above are worthy of the greatest respect. Furthermore it is interesting to note that the decision arrived at by them in that case was on the same lines as the decision of the Supreme Court of the United States in the case of *Jack Thorington* v. *William B. Smith & John H. Hartley* (2), a copy of which was produced before us by the learned advocate for the respondents. In that case it was held that the confederate notes issued by the Confederate States in rebellion against the United States must be regarded as a currency imposed on the community by irresistible force, that that currency must be considered in courts of law in the same light as if it had been issued by a foreign government, temporarily occupying a part of the territory of the United States, and that the party entitled to be paid in confederate dollars can recover their actual value at the time and place of the contract, in lawful money of the United States.

Thus, the question as to whether or not the Japanese Military notes were ever lawful currency in Burma is not *res integra*. However, even if such a question had arisen for the first time now, I would, while conceding that it was within the competence of the Japanese Military Authorities to issue their own military notes in order to supplement the lawful currency of the country as a measure to restore and

(1) (1937) 1. Ch. 513. (2) S.C.S. 8 Wall. 1—14.

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ensure public order as required of an occupying power by Article 43 of the Hague Regulations, it was entirely beyond their competence to issue an Ordinance such as Burma Monetary Arrangements Ordinance, 1942, equating their currency to the lawful currency of the country. While the occupation lasts, their currency although worthless or practically worthless is imposed on the community by irresistible force. It has purchasing power for the time being but like all uncontrolled currency the purchasing power will be rapidly on the wane. Therefore, to hold that the Japanese Military Authorities had power to ordain that their currency should be at par for all times with the legal currency of the country would be to admit that the occupying power can by legislation take away from the subjects of the enemy whose territory they occupy, valuable substantive rights such as the right to repayment of debts in lawful currency. While it may be necessary for the military authorities of an occupying power to issue their own currency to supplement the lawful currency of the country it is quite unnecessary for them to ordain that their currency must be at par at all times with the legal currency of the country occupied by them.

In the case under appeal the learned Chief Judge of the City Civil Court no doubt was impelled to come to the conclusion that the amount due to the defendant-appellant on the equitable mortgage could be satisfied by the sum of Rs. 35,250 in Japanese currency which the plaintiff-respondents had deposited in the Court. But the questions which now arise is whether he was right in coming to that conclusion and whether his conclusion should be affirmed in appeal. Having held that the Japanese Military Authorities were not competent to issue an ordinance equating the Japanese Military notes with the lawful currency of the country,

I would now refer to the case of *U Ba San and one* v. *U Hoke Wan and one* (1) where the facts are briefly these: In Civil Regular Suit No. 1 of 1944 of the Subdivisional Court of Tharrawaddy, during the Japanese occupation period a decree was passed in favour of the appellants against the respondents in the sum of Rs. 5,325-8, the sum of 8 annas being described in the decree in terms then current, namely, 50 cents. The suit was based on a promissory note dated the 28th of November, 1936, the consideration for the note being a loan in terms of the lawful currency of the country. The suit was instituted on the 5th of January, 1944, and the decree was passed on the 6th of November, 1944. On the 27th of February, 1945, the respondents paid into the Court Rs. 5,325/50 cents in terms of Japanese military notes towards a purported satisfaction of the decree. On the 4th of June, 1946, the appellants applied to the Assistant Judge of Tharrawaddy in Civil Execution Case No. 3 of 1946 to have the decree in Civil Regular Suit No. 1 of 1944 enforced. The respondents claimed that they having deposited Rs. 5,325/50 cents in Japanese Military notes in the Court on the 27th of February, 1945, the decree had been fully satisfied. This plea was accepted by the learned Assistant Judge who held that the decree had been fully satisfied and that the application for execution should be rejected. On appeal to the District Court of Tharrawaddy the order of the Assistant Judge was upheld and on a second appeal being preferred to the High Court of Judicature at Rangoon, E Maung J. observed :

"The learned District Judge has taken the view that the decree in Civil Suit No. 1 of 1944 of the Subdivisionl Court of Tharrawaddy during the Japanese occupation of Burma was a decree in terms of Japanese currency. That view is clearly wrong.

(1) Civil 2nd Appeal No. 37 of 1947.

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A Court which was set up by the military authorities of the occupation was merely the machinery through which the rights of parties could be enforced. The right of the appellants under the promissory note in this case was a right to be repaid in lawful money. It is impossible to hold that the Subdivisional Court of Tharrawaddy by its decree directed the judgment-debtors to satisfy that liability by a repayment in what was not lawful currency. In fairness to the learned District Judge it must be said that when he took the view he did, he did not have the advantage of my decision in *Ko Maung Tin and eight others* v. *U Gon Man* (1). In that case I have given my reasons for holding that the occpaution authorities had no right in law to set up a parallel system of currency and that Japanese military notes which were in circulation during the Japanese occupation do not satisfy the test of money lawfully current. This view which I expressed was accepted by my Lord the Chief Justice and my learned brother Blagden.

Once it is granted that the decree is one for payment of Rs. 5,325-8 as in lawful currency it is clear that this decree cannot be discharged by a deposit into Court of Rs. 5,325/50 cents in comparatively worthless Japanese paper. That payment into Court can at best discharge the judgment-debtor's liability *pro tanto* only and the decision of this Court in *Ko Maung Tin and eight others* v. *U Gon Man* (1) above referred to will indicate the principles to be followed in assessing to what extent the decree has been satisfied by that payment into Court."

These observations of E Maung J. seem apposite to the case now under consideration. The City Civil Court set up by the Japanese-sponsored Burmese Government was merely the machinery through which the rights of party could be enforced. The right of the defendant-appellant under the equitable mortgage was a right to be repaid in lawful money and the order of the learned Judge of the City Civil Court purporting to direct the plaintiff-respondents to satisfy that liability by a repayment in what was not lawful currency cannot possibly be upheld in appeal.

(1) 1947 Ran. L.R. 149 F.B.

No doubt, E Maung J. in the later part of his judgment in *U Ba San*'s case proceeded to observe :

"Of course, if, after the deposit, the Subdivisional Court of Tharrawaddy before the reoccupation of Burma by the lawful Government and its armed forces had under section 47 of the Civil Procedure Code adjudged that the payment made into Court effected a comple discharge of the liability under the decree the position would have been different ; different consideration then would apply. The payment might not have been, in my opinion it could not have been, in full discharge of the decree but the adjudication by the executing Court under section 47 of the Code of Civil Procedure, whether that adjudication be right or wrong, is binding *unless set aside on appeal in due course of law*."

However, the portion italicized clearly indicates that where in a case like the present the appellate Court has *seizin* of the whole matter in appeal it can go into the question whether the court functioning during the Japanese occupation period was right in coming to the conclusion that the liability in respect of a debt contracted before the Japanese occupation period could be discharged by payment of Japanese currency of the same face value.

In this view of the case I am clearly of the opinion that it is competent for this court in appeal to say that the learned Judge of the City Civil Court was wrong in coming to the conclusion that the amount due to the defendant-appellant Dr. Chan Taik on the equitable mortgage in suit could be discharged by appropriation of the sum of Rs. 35,250 in Japanese currency which was on deposit in that Court. No doubt the learned Judge of the City Civil Court had, at the time he delivered the judgment, no option but to come to the decision arrived at by him. But this does not mean that we are bound to say in appeal that his decision on this point should not be disturbed. The position, in my opinion, is analogous to a case where a court of

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original jurisdiction had passed an order in accordance with an Act of Legislature which the appellate Court in an appeal against that order declares to be *ultra vires* of the Legislature. The decision of the Chief Judge of the City Civil Court that a final decree for redemption should be passed in the suit under appeal because the amount on deposit was sufficient to repay the debt due to the defendant-appellant Dr. Chan Taik cannot therefore be upheld.

As pointed out by Dunkley A.C.J. in the *King* v. *Maung Hmin and three others* (1), the Hague Regulations must be treated by the Courts in Burma as incorporated into the Municipal Law of Burma to such extent as they are not inconsistent with the ordinary law of the country and so long as the courts constituted by the occupying power in accordance with the Municipal Law of the occupied country administered the Municipal Law of that country, their decisions are valid and binding on the lawful government and the inhabitants of the country, and should be given effect to. Therefore, I hold that the Burma Monetary Arrangements Ordinance, 1942, in so far as it purported to equate the Japanese Government Military currency notes to the British currency was never, in fact, the Municipal Law of Burma during the Japanese occupation period as it was *ultra vires* the Japanese military authorities. Consequently, effect should not be given to the decision of the City Civil Court that the amount of Japanese currency in deposit in that Court was sufficient to repay the amount due to the defendant-appellant Dr. Chan Taik on the equitable mortgage in suit.

However, this is not sufficient to dispose of the matter. Since the decision of the late High Court in

(1) (1946) R.L.R. 1 at p. 11.

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Ko Maung Tin and eight others v. *U Gon Man* (1) became known to the Government, the Japanese Currency (Evaluation) Act, 1947 (Burma Act No. XXXVI of 1947), being an Act to fix the value of the Japanese currency notes in terms of Burma notes and coins for certain purposes specified therein, was enacted by the Governor of Burma who had assumed to himself all powers vested by or under the Government of Burma Act, 1935, in the Legislature of Burma. So far as is relevant to this case, section 4 of that Act provides that notwithstanding anything contained in any other law for the time being in force, where any debt contracted before the Japanese occupation of Burma had been paid wholly or partially in Japanese currency notes during the Japanese occupation of the area where the payment was made, *and the payment had been accepted*, such payment shall be deemed to payment in legal currency notes of the same face value as if the Japanese currency notes were legal currency notes at the time the payment was made. Now, in order to attract the provisions of this section, it is necessary to show not only that payment was made in Japanese currency notes for a debt contracted before the Japanese occupation period of Burma but *that the payment had been accepted*. Therefore, it is a matter for consideration as to whether the amount of Rs. 35,250 in Japanese currency notes had been accepted in the manner contemplated in section 4 of the Japanese Currency (Evaluation) Act, 1947, in payment of the debt due to the defendant-appellant Dr. Chan Taik. The answer, in my opinion, is clearly in the negative. This amount was deposited into Court by the plaintiff-respondents during the pendency of the suit under appeal and appropriated towards the mortgage debt due

(1) 1947 Ran. L.R. 149 F.B.

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to the defendant-appellant Dr. Chan Taik by the order of the learned Chief Judge of the City Civil Court in his judgment dated the 23rd of April 1945, wherein he directed that a final decree for redemption should be passed in favour of the plaintiff-respondents. What section 4 of the Japanese Currency (Evaluation) Act, 1947, really contemplates is payment by a debtor to his creditor, in Japanese currency notes, for a pre-occupation debt, and the voluntary acceptance of the payment by the creditor. In such circumstances, the creditor would, by section 4 of the Act, be estopped from challenging later the validity of the payment on the ground that he was paid in Japanese currency notes where he was entitled to be repaid in legal currency. In the case now under consideration, no question of acceptance of the payment of the amount deposited in Court in Japanese currency ever arose, because, in a suit for redemption, if the account is in favour of the defendant the Court is bound to pass a preliminary decree declaring the amount found due by the plaintiff to the defendant and further declaring that on payment into Court of the said amount on or before a date to be fixed by the said decree the plaintiff shall be entitled to apply for and obtain a final decree directing the defendant to deliver to the plaintiff the mortgage property in the possession of the defendant and to execute an acknowledgment in writing that all rights created by the mortgage have been extinguished, and so forth (*see* sub-rule 3 of Rule 4, Order XXXIV, of the Code of Civil Procedure). Therefore, when the Court passes a preliminary decree in these terms and the defendant has deposited into Court the amount mentioned in the decree, all the legal consequences as set out in the decree automatically follow. No question of the acceptance of payment by the Court or by anybody would ever arise in such a case as the Court

is bound to accept the deposit thus made by the defendant.

Statutes which encroach on the rights of the subjects, whether as regards person or property, should be subject to a strict construction. A person who has lent money to another in legal currency is clearly entitled to be repaid in legal currency. Since section 4 of the Japanese Currency (Evaluation) Act, 1947, limits this right, it must be strictly construed. If it is intended by the Legislature that in regard to pre-occupation debts payment into Court in pursuance of a decree passed during the Japanese occupation period should operate as a valid discharge of the debt, one would have expected the Legislature to say so in unmistakeable terms. As it is, on a plain reading of section 4 of the Act it is apparent that the payment in Japanese currency notes in discharge of a pre-occupation debt and acceptance thereof must be between parties or their agents duly authorized in this behalf.

In coming to this conclusion I am not unmindful of the decision of U Tun Byu and U Aung Tha Gyaw JJ. in *U Pe Shein* v. *S.R.M.A.R. Ramanathan Chettyar* (1). However, the present case is clearly distinguishable from that decided by these learned Judges because in that case the compromise decree contained a clause "that all payments must be made in Court and certified at once and that the payment made outside shall not be recognized." In these circumstances, the learned Judges considered that under that clause of the preliminary mortgage decree the Court must be considered to be an agent of the respondent-decree-holder for the purpose of receiving payments under the decree. I am prepared to concede that, in these circumstances, from the very nature of the compromise effected between

(1) Civil 1st Appeal No. 3 of 1948.

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the parties, the Court was constituted a duly authorized agent of the creditor for the purpose of receiving payments due to him under the terms of the consent decree.

For these reasons, I consider that the judgment of the learned Chief Judge of the City Civil Court directing that a final decree for redemption be passed in the suit under appeal on the ground that the amount of Japanese currency notes in deposit was sufficient to repay the debt found due to the defendant-appellant Dr. Chan Taik is wrong and should be set aside. Instead, there should be an order directing that a preliminary mortgage decree in the usual form be passed for the redemption of the properties in suit for the amount found due to the defendant-appellant on the date of the suit, bearing in mind the provisions of the Accrual of Interest (War-Time Adjustment) Act, 1947 (Burma Act No. XI of 1947).

I agree in the order proposed by my Lord.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

MAUNG KHIN MAUNG (APPELLANT)

v.

DAW HLA YIN AND ONE (RESPONDENTS).*

1948

June 24.

Transfer of Property Act, s. 108, clauses (o) *and* (p), *contravention of—Urban Rent Control Act, 1946, s. 11* (c)*—Notice to quit under s. 106, Transfer of Property Act.*

The plaintiff-1st respondent granted lease of a piece of land and a dry dock to remain in force till repair of a motor-launch is completed. The defendants-appellants gave back possession of the dry dock but not of the piece of land on which they put up a permanent building, pulling down the hut which was there. In a suit for ejectment the defendants-appellants claimed there were separate leases for the land and the dock and that the defendants-appellants put up the building with plaintiff-1st respondent's permission. The trial Court held that the plaintiff-1st respondent was not entitled to eject the defendant-appellant but only to get the permanent structure demolished.

Held on appeal : That under s. 11 (*a*) of the Urban Rent Control Act the obligations of the tenancy implied therein under s. 108, clauses (*o*) and (*p*), of the Transfer of Property Act had been broken by the tenants and the lease had been terminated in accordance with law under s. 111 (*h*) of the Transfer of Property Act and the plaintiff-1st respondent was entitled to eject the appellant and 2nd respondent. Decree made for ejectment and for removal of the permanent structure.

K. Singh v. *Holasi and others*, A.I.R. (1914) All. 285, referred to.

Tun I for the appellant.

Dr. Ba Han for the respondents.

U THEIN MAUNG, C.J.—This is an appeal arising out of a suit for recovery of possession of a piece of land known as No. 140 (old No. 138), "I" Lane, Singapore Quarter, Pazundaung, Rangoon, for ejectment of the defendants, namely, the present appellant Maung Khin Maung and the 2nd respondent Maung Hoke Yu, from the said land, and for removal of the building they had erected on it.

* Civil 1st Appeal No. 12 of 1948 against the decree of the Fourth Judge of the Rangoon City Civil Court in Civil Regular No. 2355 of 1947.

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The case of the plaintiff Daw Hla Yin, who is now the 1st respondent, is that she granted a lease of the said piece of land and a dry dock to the defendants at a monthly rental of Rs. 80 as they wanted them for the sole purpose of repairing their motor-launch, and that the lease was to remain in force till the repair thereof was completed and no longer. Since the said lease was granted the motor-launch has been completely repaired and the defendants have given back possession of the dry dock, but they have not given her possession of the said piece of land. On the other hand, they have put up a permanent building on the land in spite of her protest, and they have also pulled down her hut which was there at the time of the lease. The defendants have been guilty of breaches of the obligations of the tenancy by putting up the said permanent building and pulling down her hut. She is therefore entitled to a decree for their ejectment and for the demolition of the said permanent building under section 11 (*a*) of the Urban Rent Control Act, 1946.

The defence was that there were two separate leases, one for the land and the other for the dry dock, that there was no hut on the land at the time of the lease, and that the defendants have put up the building on the land with the plaintiff's permission.

The learned Fourth Judge of the City Civil Court of Rangoon has found on the evidence that there were two separate leases as alleged by the defendants, that there was a hut belonging to the plaintiff on the suit land at the time of the lease and that the defendants have put up the new building on the land and pulled down the plaintiff's hut thereon. He has actually held that the defendants have committed breaches of the obligations of the tenancy inasmuch as they had pulled down the plaintiff's hut and put up a permanent structure on the land without the plaintiff's consent in

contravention of clauses (*o*) and (*p*) of section 108 of the Transfer of Property Act.

However, he has held on the authority of *K. Singh* v. *Holasi and others* (1) that the plaintiff is not entitled to eject the defendants from the land and that she is entitled only to get the permanent structure demolished. He has passed a decree directing that the structures erected by the defendants on the suit land be demolished by the defendants within two months, and that, in default, the said structures be demolished through an officer of the Court. He has also ordered that the rest of the plaintiff's claim be dismissed.

Maung Khin Maung, one of the defendants' has appealed from the above decree making the other defendant a party respondent on the grounds—

(1) that the building which has been put up by the defendants did not amount to a permanent structure ;

(2) that there has been no breach of any obligation of the tenancy ;

(3) that section 108 (*o*) and (*p*) of the Transfer of Property Act did not apply ; and

(4) that the case should have been decided with reference to section 11 (*c*) of the Urban Rent Control Act, 1946.

The plaintiff-respondent has also filed a cross-appeal on the ground that she is entitled to a decree for recovery of possession of the suit land and for ejectment of the detendants therefrom.

There can be no doubt of the building which has been put up by the defendants on the land being a permanent structure. The defendants themselves have stated in their written statement that it has been put

(1) A.I.R. (1914) All. 285.

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up and extended at a total cost of Rs. 3,800 and, according to the appellant's own evidence, it took them three months to complete the building. Nor can there be any doubt of the defendants having erected it or at least of their having proceeded to complete it without the plaintiff-respondent's consent and in spite of her express protest. Both U Tun Nyun (P.W. 1) and U San Ni (P.W. 2) were cited by both parties, and they have given evidence of the plaintiff having come to them and protested against the construction of a building, of their having informed the defendants of her objection to the building, of their having tried to bring the parties to terms and of their failure to do so. It is also clear from their evidence that the building was not yet complete at the time of their intervention and that the defendants proceeded to finish it thereafter.

Maung Khin Maung alone of the two defendants has given evidence in the case. He has alleged that the new building was put up and extended with the consent of the plaintiff, but his evidence is not corroborated at all. Besides he has made two statements which are obviously false. One statement is that he took the lease of both the land and the dock from Daw Hla Yin and Daw Gauk. He made this statement deliberately because it was his case at the hearing of the suit that Daw Gauk and his witness, Daw Sein, showed him the place where he should place the poles for the building. However, he had to admit under cross-examination " It is not true that I took lease of it from Daw Hla Yin and Daw Gauk. I took it from Daw Hla Yin alone." as he was confronted with his own written statement. The other statement is the statement in paragraph 4 of the written statement : " Defendants deny that there was any hut of the plaintiff at the place where the defendants have built their structure." Under cross-examination Maung

Khin Maung had to admit "There was a small hut on the suit land at the time I took lease of it. With the consent of the plaintiff the hut standing on the suit land was pulled down and I erected my first hut. * * * * After the new structure was completed I destroyed the original hut which had been enveloped." His witness, Daw Sein, does not say that the plaintiff gave her consent to the new building being put up by the defendants. She merely says that Daw Gauk informed her that she had made a new lease to the defendants, and it is not the defendants' case that they ever got a new lease or that Daw Gauk was their lessor.

With reference to the demolition of the plaintiff's hut by the defendants, Maung Khin Maung has stated that it was done with the consent of the plaintiff. However, in view of the fact that the defendants denied even the existence of the hut in their written statement and that there is no evidence other than that of Maung Khin Maung to show that the plaintiff consented to its demolition, we are of the opinion that the lower Court is right in preferring the evidence of the plaintiff-respondent to that of Maung Khin Maung and in holding that her hut was demolished without her consent.

So the only question that remains for consideration is whether the plaintiff-respondent is entitled not only to have the permanent structure on her land demolished, but also to eject the defendants therefrom.

Now, section 11, clause (*a*), of the Urban Rent Control Act, 1946, 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 or given unless—

any * * * * obligation of the tenancy, whether under the contract of tenancy or under this Act, so far as the

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same is consistent with the provisions of this Act, has been broken or not performed ; * * * * "

The obligations of the tenancy which are implied therein under section 108 (*o*) and (*p*) of the Transfer of Property Act have been broken by the tenants as we have stated above and these obligations are quite consistent with the provisions of the Urban Rent Control Act, 1946. Besides, as the appellant Maung Khin Maung himself has stated in the course of his evidence, " no time was fixed for the duration of the lease "; the 1st respondent has given the appellant and the 2nd respondent a notice to quit under section 106 of the Transfer of Property Act; and the receipt thereof has been admitted by the appellant and the 2nd respondent. (*See* paragraph 7 of the plaint, paragraph 7 of the written statement and Exhibits C and D.) So the lease has been terminated in accordance with law under section 111 (*h*) of the Transfer of Property Act and the 1st respondent is entitled to eject the appellant and the 2nd respondent from her land.

For the above reasons we dismiss the appeal with costs ; and we not only confirm the decree of the lower Court but also direct that the decree should also provide for ejectment of the appellant and the 2nd respondent from the 1st respondent's land. The 1st respondent is entitled to her costs in both Courts, advocate's fee in this Court five gold mohurs.

U SAN MAUNG, J.—I agree.

APPELLATE CIVIL.

Before U Tun Byu and U Aung Tha Gyaw, JJ.

DAW SEIN YIN (APPELLANT)

v.

U ON KHIN (RESPONDENT).*

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May 4.

Appointment of receiver—Grounds—Application for interim *receiver dismissed—Subsequent appointment of receiver—Whether discretion properly exercised according to guiding principles—Powers of appellate Court.*

Held: That in an application for appointment of a receiver the Court has to consider whether special interference with the possession of a defendant is required, there being a well-founded fear that the property in question will be dissipated or that irreparable mischief may be done unless the Court gives its protection.

Benoy Krishna Mukherjee and others v. *Satis Chandra Giri and others*, I.L.R. 55 Cal. 720 (P.C.), followed.

Power conferred by the Code on court for appointment of receiver should be exercised with greatest care and caution. Violent and wholesale charges by plaintiff of waste and malversation by the defendant in possession is not sufficient, unless facts averred and established show that there has been an abuse or danger of abuse by the defendant in possession.

S. B. Devi and another, v. *B. N. Rai and another*, I.L.R. 5 All. 556, followed.

Held further: That an order for appointment of a receiver is discretionary, and the discretion is that of the court in which the suit itself is pending. But where the trial Court did not exercise its discretion in accordance with legal principles the court of appeal can exercise its discretion in the matter.

Benoy Krishna Mukherjee and others v. *Satis Chandra Giri and others*, I.L.R. 55 Cal. 720 (P.C.), applied and followed.

Where application for *ad interim* receiver is dismissed and no new facts or circumstances are brought forward for appointment of a receiver, the court will not disturb person rightly in possession unless there is an equitable ground for interference.

Mere fact that person in possession is poor is not adequate reason for appointing a receiver.

Muhammad Askari v. *Nisar Husain*, I.L.R. 43 All. 311 at p. 313, referred to.

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* Civil Misc. Appeal No. 17 of 1947 against order of Additional Divisional Court of Pyapôn in Civil Misc. No. 14 of 1944, dated the 5th February 1945.

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DAW SEIN YIN v. U ON KHIN.

E. C. V. Foucar for the appellant.

Theing Moung for the respondent.

U TUN BYU, J.—This is an appeal against an order of the then Additional Divisional Court of Pyapôn passed during the Japanese Military occupation of Burma, appointing the respondent U On Khin as receiver pending the decision of Civil Regular Suit No. 17 of 1944 of the same Court, in which he sued for the possession of certain properties, moveable and immovable, belonging to the estate of Daw Sein Tin who died at Dedaye on the 6th June 1944, on the ground that Daw Sein Tin continued to be the wife of the respondent U On Khin up to the time of her death. It is an admitted fact that Daw Sein Tin and the respondent U On Khin were at one time husband and wife, and the case of U On Khin in the Civil Regular Suit No. 17 of 1944 is that, as husband of the deceased Daw Sein Tin, he is entitled to all the properties left by the said deceased Daw Sein Tin at the time of her death. The respondent, at the time he filed the Civil Regular Suit No. 17 of 1944, also filed an application for the appointment of an *interim* receiver, pending the decision of the Civil Regular Suit No. 17 of 1944. The case of the appellant Daw Sein Yin, who was the defendant in the Civil Regular Suit No. 17 of 1944, was, in brief, that there was a divorce between U On Khin and the deceased Daw Sein Tin, that a divorce deed was executed and that the deceased Daw Sein Tin died at Dedaye in the house of Daw Sein Yin after the divorce had been effected between the respondent U On Khin and the deceased Daw Sein Tin, and accordingly U On Khin was not entitled to any property left by the deceased Daw Sein Tin at the time of her death.

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U TUN BYU, J.

It will not, at this stage, be proper to make any observation which might affect the merits of the case of either party when the Civil Regular Suit No. 17 of 1944 comes for trial. The application filed on the 15th August, 1944, for the appointment of an *interim* receiver was dismissed on the 22nd August, 1944, and, impliedly, it must be considered that the reasons as disclosed in the application and in the affidavits filed with that application were not sufficient to induce the Court to appoint a receiver. After the application for the appointment of an *interim* receiver was dismissed, the respondent U On Khin made a fresh application for the appointment of a receiver in respect of the properties involved in the Civil Regular Suit No. 17 of 1944, and an additional affidavit by U On Khin was also filed with this new application. After notice was issued to Daw Sein Yin, and after affidavits had been filed on her behalf, and after hearing the parties, U On Khin's subsequent application was granted and, by an order dated the 26th February, 1944, the respondent U On Khin was appointed receiver of the properties belonging to the estate of the deceased Daw Sein Tin.

Daw Sein Yin is a sister of Daw Sein Tin, and she is the appellant in this appeal. The affidavits that had been filed on behalf of Daw Sein Yin show that after a deed of divorce was executed between the respondent U On Khin and the deceased Daw Sein Tin, Daw Sein Tin left Pyapôn, where she had previously resided with U On Khin, and that Daw Sein Tin went and lived in Daw Sein Yin's house in Dedaye, where she subsequently died. It is clear, without going into the merits of the case, that the sisters and brothers of Daw Sein Tin are her nearest relatives, and they could not be said to be persons who could have no interest in the estate left by the deceased Daw Sein Tin,

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if the deed of divorce, which had been executed by U On Khin and Daw Sein Tin, is not proved to be fictitious, or if it is not proved that there was a reunion between U On Khin and the deceased Daw Sein Tin after the deed of the divorce had been executed.

The application for appointment of a receiver was based on the ground that Daw Sein Yin, who was the defendant in the Civil Regular Suit No. 17 of 1944, was a woman, that she did not possess sufficient property to be able to replace all the properties belonging to the estate of the deceased Daw Sein Tin, if those properties were dissipated or lost pending the decision of the case, and that there was a likelihood of loss and dissipation of the properties belonging to the estate of the deceased Daw Sein Tin, if the properties were allowed to remain in the hands of Daw Sein Yin pending the decision of the case, in that there were also valuable jewelleries belonging to the estate of the deceased Daw Sein Tin. It has been contended on behalf of the respondent U On Khin that the appointment of a receiver, under Order XLI, Rule 1, of the Code of Civil Procedure is discretionary, that the discretion which the lower Court had exercised in favour of the respondent U On Khin ought not to be interfered with without good reasons and that there were no good reasons in this case for interference with the discretion which had been exercised in favour of the respondent U On Khin. It has to be remembered that the Court should, under Order XLI, Rule 1, act on certain legal principles when appointing a receiver, and, if the discretion in appointing a receiver is not exercised in accordance with such legal principles, it could be set aside on appeal. The fact that the application of the respondent U On Khin for the appointment of an *interim* receiver was first dismissed by the same learned Judge is undoubtedly a circum-

stance which will have to be considered in attempting to see whether the discretion, which had been exercised subsequent to the dismissal of the first application, had been properly exercised and, particularly in view of the fact that the reasons which were urged for the appointment of a receiver in the subsequent application were substantially the same as those that had been made in the first application for the appointment of an *interim* receiver, which was dismissed.

It might be mentioned here that the respondent U On Khin does not now contend that he himself ought to be appointed a receiver, if the Court should think fit to consider that this is a proper case in which a receiver ought to be appointed. The main reason given in the order appointing the respondent U On Khin as receiver appears to be that, if the appellant Daw Sein Yin were allowed to continue to be in possession of the properties belonging to the estate of Daw Sein Tin, it was possible for her to mortgage or sell those properties, and, if Daw Sein Yin were to do that, it would give rise to more complications and that U On Khin was, if successful, likely to be defeated in obtaining possession of all the properties belonging to the estate of Daw Sein Tin. It ought to be stated at once that no facts or circumstances have been brought forward in this case, either in the two affidavits made by U On Khin or in the supporting affidavit of Sein Thaung, to indicate or suggest that there was any well-founded or reasonable apprehension that any of the properties, which form part of the estate of the deceased Daw Sein Tin, would be dissipated or lost, or that Daw Sein Yin was a person who was likely to do away with any of the properties, or that she was a person who was not likely to deal honestly with those properties pending the decision of the Civil Regular Suit No. 17 of 1944.

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Daw Sein Yin in paragraph 11 of her affidavit stated as follows :

"11. I would not have changed by fair or foul means the original appearance of jewelleries used by my younger sister, nor would I have converted, lessened, changed places, changed with others and done to the same in any other manner, nor had I planned to do so. The truth is : The said articles have already been given to me. We jointly own the same. Under the said circumstances there is no reason that I should have done something to lessen the said articles. The articles being mine, I would not have done any acts of stealthy concealment, as I according to our religious principles have fear and shame."

And no reply affidavit was filed against the affidavit of Daw Sein Yin. In the case of *Benoy Krishna Mukherjee and others* v. *Satis Chandra Giri and others* (1), Viscount Sumner, who delivered the judgment of their Lordships of the Privy Council, at page 722, observed as follows :

"On an *interim* application for a receivership such as this, the Court has to consider whether special interference with the the possession of a defendant is required there being a well-founded fear that the property in question will be dissipated, or that other irreparable mischief may be done unless the Court gives its protection. Such an order is discretionary, and the discretion is, in the first instance, that of the Court in which the suit itself is pending. When, as in this case, the order of that Court is altered on appeal it becomes necessary to consider whether the Court below had before it the evidence required to support such an order and considered it in accordance with the principles on which judicial discretion must be exercised. If the Court of review rightly concludes that proper discretion was not used below, it is free to exercise its own discretion in the matter."

It might be observed that the facts alleged in that case, which are stated at page 723 of the Report, appear to be stronger than the facts which are alleged in the case

(1) I.L.R. 55 Cal. 720.

under consideration now. It is difficult, on the materials which are now before the Court, to see how U On Khin could be said to have honestly entertained a well-founded or reasonable apprehension that Daw Sein Yin would do away with the properties dishonestly, if she were allowed to retain them pending the decision of the Civil Regular Suit No. 17 of 1944. It is not also shown anywhere in any of the affidavits filed on behalf of U On Khin that Daw Sein Yin was a lady of unreliable character, or that she was an avaricious lady who would not hesitate to do away with the properties if she were to realize that the decision of the Court in the main case would be against her.

There was another ground which was raised on behalf of U On Khin for the appointment of a receiver, and it would be found in paragraphs 5 and 6 of U On Khin's affidavit filed with the application for the appointment of an *interim* receiver, which were as follows :

"5. Out of the jewelleries I sue for, some, if not all, have been transferred from Dedaye where they originally were and kept in a safe in Higher Grade Pleader U San U's house Pyapôn.

6. In order to save the said articles from being transferred further, I have to seal (the safe) asking the assistance of Police Officers, Pyapôn, through the Divisional Commissioner, Pyapôn."

The suggestion is that Daw Sein Yin was, in any case, likely to do away with certain jewelleries which belong to the estate of Daw Sein Tin, but that there is no substance in this contention is clear from the statements contained in paragraphs 11 and 12 of the affidavit of Ko Tin Maung, who was sent by Daw Sein Yin to bring back the box, in which the jewelleries were kept, from U San U's house ; and

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paragraphs 11 and 12 of Ko Tin Maung's affidavit are as follows :

"11. As regards the business on which Daw Sein Yin sent me to Pyapôn to bring the box from U San U, it is true that I went to Pyapôn in a hired sampan. When I reached U San U's house at about 8-00 a.m., I met therein a rich Chinaman of Rangoon as well. When I said that Daw Sein Yin's box would be taken to Dedaye, U San U said that the box might be taken if I liked, that he dared not go along and take it to Dedaye as instructed by Ma Sein Yin, and that he, having no key with him, found it hard to him if he was asked to open and show (the things in the box) on meeting with various *kins* (watchmen) on the way. He added that he could go along and tell the reasons to Daw Sein Yin. While he was sayirg so, my sampan men came and told again that *kins* (watchmen) had stopped (lit : prohibited) the sampan. As U On Khin himself once urged to take back the box to Dedaye, saying that the safety of the box which was kept in the possession of U San U was not certain, it is true that I told U On Khin at about 10-00 a.m. (about the box) in order to get some help from him. At 4-00 p.m. police party sealed the box which was still in the possession of U San U.

12. The box belongs to Daw Sein Yin. It does not belong to Daw Sein Tin. It is nothing but take the box publicly at the request of U On Khin and at the earnest request of all the relatives and not to do any injustice to the box."

It is unlikely that Ko Tin Maung would have gone to consult the respondent U On Khin, or to ask for his advice or aid at the time Ko Tin Maung went to bring back the box from U San U's house, if there was any dishonest intention on the part of Daw Sein Yin because, it is only reasonable to presume that Daw Sein Yin would only employ a person in whom she had absolute reliance to bring back the valuable jewelleries from U San U's house. There is nothing to suggest that Tin Maung was a man who had betrayed the confidence placed in him by Daw Sein Yin, or that Tin Maung was a person who was, at that time, acting in collusion with U On Khin

against the interest of Daw Sein Yin. It will be observed from paragraph 11 of Tin Maung's affidavit quoted above that the box in which the jewelleries were kept was sealed by the Police on the day he went to Dedaye to take away the box from U San U's house, and apparently the box in which the jewelleries were, was sealed at the initiative of the respondent U On Khin. After the box had been sealed by the Police, Daw Sein Yin applied for permission to the then Supreme Court during the Japanese Military occupation of Burma, to take away the jewelleries which had been left in U San U's house at Pyapôn, and her application was, after hearing the parties, granted. The fact that the then Supreme Court had permitted Daw Sein Yin to remove the jewelleries from U San U's house rather implies that the then Supreme Court was not satisfied that Daw Sein Yin was a person who would dishonestly do away with the jewelleries, if they were allowed to remain in her possession during the pendency of Civil Regular Suit No. 17 of 1944.

It might be added that no new fact or circumstance has been brought forward, after the respondent U On Khin's application for the appointment of an *interim* receiver had been dismissed, to suggest that the properties belonging to the estate of Daw Sein Tin were likely to be dissipated or lost if they were allowed to remain in the possession of Daw Sein Yin. The observation made in the case of *S. B. Devi and another* v. *B. N. Rai and another* (1) might be usefully quoted here :

"The discretion given by s. 503 of the Code, to the High and District Courts alone be it observed, is one that should be used with the greatest care and caution. Because a plaintiff in his plaint makes violent and wholesale charges of waste and

(1) I.L.R. 5 All. 556 at p. 561.

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malversation against a defendant in possession of property as executrix under a will or as a tenant for life, and upon this basis applies for a receiver to be appointed, it is not a necessary consequence that such appointment should be made. If any such doctrine or principle were to be recognized, s. 503, instead of serving the useful purpose for which it was framed, would give unscrupulous and rancorous litigants an engine for the most unjustifiable interference with the rights of properties under the pretence and protection of legal sanction. In the case before us defendant 1 is rightly in possession of the estate of her deceased husband under the express provisions of his will, and in such cases Court of Equity will pay a just respect to such legal and equitable rights and interests of the possessor of the fund, and will not withdraw it from him by the appointment of a receiver, unless the facts averred and established in proof show that there has been an abuse, or is danger of abuse, on his part. For the rule of such Courts is not to displace a *bona fide* possessor from any of the just rights attached to his title unless there be some equitable ground for interference."

Section 503 of the old Code is equivalent to Order XL, Rule 1, of the present Code of Civil Procedure, and the observations made in the above passage are pertinent to the present case. No facts or circumstances have been proved or stated in the affidavits filed on behalf of the respondent on which it could properly be said that the discretion had been reasonably or properly exercised when making the subsequent order appointing a receiver, particularly when the learned Judge had on the same facts at first refused the application for the appointment of an *interim* receiver. If any authority is required, it will be found in the case of *Benoy Krishna Mukherjee and others* v. *Satis Chandra Giri and others* (1), that the Court on appeal can exercise its own discretion in considering whether the appointment of a receiver ought or ought not to be made where the facts and circumstances that had been brought out do not show

(1) I.L.R. 55 Cal. 720.

that the discretion had properly been exercised by the Court appointing the receiver.

It might also be observed that no attempt has been made by the respondent U On Khin in the present case to obtain a list of the jewelleries alleged to have been in the box kept at U San U's house from Daw Sein Yin, after the box had been allowed to be taken away by her under an order of the then Supreme Court, and his inaction in this respect rather militates against the suggestion that he had a reasonable apprehension to think that Daw Sein Yin was a person who was likely to do away with the jewelleries which were in her possession.

It has also been urged that Daw Sein Yin is a woman, and that she is not sufficiently rich to be in a position to repay the full value of the properties involved in the case if they were lost or dissipated while in her possession. We do not think that the sex of a person, in whose possession the properties are, ought to be taken into consideration in considering whether a receiver ought or ought not to be appointed, and no case has been cited to show that this is a circumstance which might properly be taken into consideration. The affidavits show that Daw Sein Yin owns, at least, one hundred acres of paddy land and that she also possesses a wooden house and some jewelleries; and it is thus clear that Daw Sein Yin cannot strictly be said to be a poor lady. However, it does not appear that the poverty of a person affords a ground for the appointment of a receiver in respect of the properties in the possession of that person. In the case of *Muhammad Askari* v. *Nisar Husain* (1), it was observed :

"The allegation that the trustee in actual possession of the property in suit as manager is himself a poor man, from whom

(1) I.L.R. 43 All. 311 at p. 313.

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personally a decree for mesne profit in the event of such a decree being passed might prove difficult of realization is not an adequate reason for passing the order under appeal."

The order referred to in the above quotation is an order appointing a receiver.

There is one other point which has been urged on behalf of the respondent U On Khin, and that is the word "appears" in Order XL, Rule 1, Code of Civil Procedure, is very significant that no proof of any act of dishonesty is necessary for the purpose of having a receiver appointed under Order XL, Rule 1, and that the object of the appointment of a receiver is to preserve the property for the protection of the rights of the successful litigant. The words which follow the word "appears" are "just and convenient", and these latter words cannot be construed to mean that a receiver could properly be appointed where the Court thought that it was convenient to do so, and it is obvious that the word "just" must also be given a meaning.

It might also be mentioned that the properties in this case are not *in medias res*, that is to say, they are not in the possession of a third party who has no ostensible right to the properties in the suit, because, if the divorce is proved, it is obvious that it will not be the respondent but Daw Sein Tin's nearest relatives who will be entitled to the possession of the properties left by the deceased Daw Sein Tin. In the circumstances, the appeal will be allowed with costs, ten gold mohurs, and the order of the lower Court appointing the respondent U On Khin as receiver is set aside.

U AUNG THA GYAW, J.—I agree.

APPELLATE CIVIL.

Before U Tun Byu, J.

MAUNG HLA GYAW AND ONE (APPELLANTS)

v.

DAW CHIT (RESPONDENT).*

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May 25.

Suit for redemption—Whether competent without mortgage deed—S. 59 of Transfer of Property Act—Abortive mortgage—Suit on title—When lies.

Plaintiff-respondent sued for recovery and possession of a piece of land on the strength of title on payment of Rs. 800 and defendant-appellants contended that the original owners mortgaged the land usufructorily to plaintiff and her husband and that after the death of her husband the plaintiff-respondent sold it to the appellants-defendants. Plaintiff-respondent's suit was decreed in both the lower Courts.

On second appeal it was contended that the suit was really one for redemption and as such was not maintainable.

Held: Though a suit for redemption cannot lie in the absence of a valid deed of mortgage, as a mortgage for Rs. 100 or upwards can be effected only by a registered instrument under s. 59 of the Transfer of Property Act, this did not prevent a person who made an abortive mortgage from suing for possession relying on title.

U Thet Pan and another v. *Ma Phu Saing*, (1937) R.L.R. 442 ; *Maung Lu Pe and others* v. *Maung San Mya*, (1939) R.L.R. 645 ; *Maung Daw Na and another* v. *Maung Wa Maung and others*, (1941) R.L.R. 706.

The prayer in the plaint for recovery on payment of Rs. 800 should be read in the light of other circumstances of the case ; as the defendant claimed title as vendee, the plaintiff must be allowed to state how the land went into defendant's possession. This claim of adverse title distinguished the case from the case of *Maung Daw Na and another* v. *Maung Wa Maung and others*, (1941) R.L.R. 708.

Ma Kyi v. *Ma Thon and another*, 13 Ran. 274, referred to.

A. N. Basu for the appellants.

Tun Maung for the respondent.

U TUN BYU, J.—The plaintiff-respondent, Daw Chit filed a suit, being Civil Regular Suit No. 19 of 1946

* Civil 2nd Appeal No. 95 of 1947 against the decree of District Court of Mandalay in Civil 1st Appeal No. 9 of 1947, dated the 7th May 1947.

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of the Court of the Second Assistant Judge, Mandalay, for possession of a piece of land measuring about 14·04 acres. The plaint is headed " Suit for possession on the strength of title " and the prayer asked for possession on payment of Rs. 800.

The defendant-appellants' case is that the land in dispute originally belonged to Ko Maung Gale and his wife, Daw Khin Chit, that they mortgaged the land in question in the form of a usufructuary mortgage to the plaintiff-respondent Daw Chit and her deceased husband, Ko Ya Po, and that in June, 1943, after the death of her husband, the plaintiff-respondent Daw Chit sold the land in dispute to the defendant-appellants for Rs. 800. No registered deed was, however, effected.

The plaintiff-respondent's suit was decreed by the Court of the Second Assistant Judge, Mandalay. The defendant-appellants filed an appeal to the District Court, Mandalay, and the appeal was dismissed in Civil Appeal No. 9 of 1947.

The only point which has been argued in this case is that the suit, as framed, was in reality a suit for redemption, and, as such, the suit was not maintainable for want of registration as required under section 59 of the Transfer of Property Act, and the cases of *Ma Kyi* v. *Ma Thon and another* (1), *U Thet Pan and another* v. *Ma Phu Saing* (2), *Maung Lu Pe and others* v. *Maung San Mya* (3), and *Maung Daw Na and another* v. *Maung Wa Maung and others* (4) had been cited in support of that proposition of law. It is not disputed on behalf of the plaintiff-respondent, and it cannot be disputed, that a suit for redemption cannot lie in the absence of a valid deed of mortgage, and the relevant

(1) 13 Ran. 274.
(2) (1937) R.L.R. 442.
(3) (1939) R.L.R. 645.
(4) (1941) R.L.R. 706.

portion of section 59 of the Transfer of Property Act is as follows :

"Where the principal money secured is Rs. 100 or upwards, a mortgage other than a mortgage by deposit of title deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses."

It is, however, clear from the cases which have been referred to above that a person who had made an abortive mortgage is not prevented from suing for possession of the land relying on his title. It will be necessary in each case to examine the full circumstances obtaining in that case before it can properly be decided whether the suit is one for redemption, or whether it is a suit for possession relying on title. In the case of *U Thet Pan and another* v. *Ma Phu Saing* (1) the plaintiff there sued for delivery of possession of a certain piece of land on repayment of the amount borrowed, and the headnote of that case is as follows :

"A person cannot sue for redemption of his land on the strength of an abortive or invalid usufructuary mortgage, but he can sue for delivery of possession of the land and he is entitled to give evidence of the factum of the abortive mortgage, though not of its terms, for the collateral purpose of showing the character of defendant's possession, *viz.* that it was not adverse to the plaintiff. It is open to the defendant also to give such kind of evidence to show that his possession is adverse."

The case of *U Thet Pan* (1) was referred to in two subsequent Full Bench cases, namely, *Maung Lu Pe and others* v. *Mcung San Mya* (2) and *Maung Daw Na and another* v. *Maung Wa Maung and others* (3), and *U Thet Pan*'s case (1) had not been overruled.

It is not disputed that the circumstances of the present case are similar to those of *U Thet Pan*'s

(1) (1937) R.L.R. 442. (2) (1939) R.L.R. 645.
(3) (1941) R.L.R. 706.

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case (1). It might be mentioned that the plaintiff-respondent does not appear to rely on the abortive mortgage to the defendant-appellants for the purpose of proving her title to the land in dispute. It is urged on behalf of the plaintiff-respondent that the statement about the abortive mortgage in the plaint was necessary for the purpose of disclosing the real nature of the possession of the defendant-appellants, who were claiming to be the owners of the land in dispute under a contract of sale, which they alleged was made in June 1943, and who alleged that they were, under the provisions of section 53A of the Transfer of Property Act, entitled to retain possession. It cannot, it appears to me, in the circumstances of this case, be said that because the plaintiff-respondent had in her plaint described how the defendant-appellants came into the possession of the land in dispute the suit was in reality a suit for redemption, when especially the suit was described as a "Suit for possession on the strength of title."

It is contended on behalf of the defendant-appellants that the fact that the prayer to the plaint mentions a payment of Rs. 800 should also be considered as indicating that the suit was, in reality, a suit for redemption. The prayer ought I think to be read in the light of the other circumstances obtaining in this case. In the case under appeal it is not disputed that the defendants were setting up an adverse title to the land in dispute on the ground that it had been sold to them, although not under a registered deed, for a sum of Rs. 800 and that they had been in possession of the land as owners thereof since the date of the alleged sale. In the circumstances, it is obvious that the plaintiff must be allowed to state in her plaint how the land in dispute went into the possession of the

(1) (1937) R.L.R. 442.

defendant-appellants. It is unfortunate that the plaint was not too well drafted, but I do not think that it can, in the circumstances of this case, be said that the present case was obviously a suit for redemption, and not a suit for possession, relying on title.

In the case of *Maung Daw Na and another* v. *Maung Wa Maung and others* (1) it does not appear that the defendants set up any title adverse to the plaintiff, as in the present appeal. The circumstances in this case are not, therefore, exactly the same as in the case of *Maung Daw Na and another* v. *Maung Wa Maung and others* (1). The decisions of the lower Courts are therefore correct, and the appeal is dismissed with costs.

It might be added that it is not necessary in this case to decide whether the plaintiff-respondent had been in adverse possession of the land in dispute as against Ko Maung Gale and Daw Khin Chit who were the original owners of the land in that the latter persons are not parties to the present proceeding. The plaintiff-respondent Daw Chit, even if she was only a mortgagee in possession, would obviously be entitled to sue for possession of the land in dispute, relying on her possessory title, which would be good against all other persons except the real owner.

(1) 1941) R.L.R. 706.

APPELLATE CIVIL.

Before U On Pe, U San Maung and U Aung Tha Gyaw, JJ.

H.C. 1948 — *May 13.*

IN THE MATTER OF U KHIN MAUNG, HIGHER GRADE PLEADER, AS AN ADVOCATE OF THE HIGH COURT.*

Advocates' Admission Rules, 1930—Rule 5 (1)—Advocate enrolled by Supreme Court—Whether enrolment valid—No notice to Bar Council—Effect.

Applicant was enrolled by the Supreme Court. He applied under Advocates' Admission Rules, 1930. The Bar Council was not functioning then, and no notice was possible to them, but the admission of advocates was considered by the Hon'ble Judges.

Held : That the Supreme Court was a duly constituted court exercising the functions and powers of the High Court including enrolment of advocates.

The Fing v. *Maung Hmin and three others*, (1946) R.L.R. 1, followed and applied.

Everything possible seemed to have been done in conforming to the rules governing admission of advocates, and applications were carefully considered by the Hon'ble Judges of the Supreme Court. Compliance with the statutory requisite to give a notice to the Bar Council would not be possible and the Court could do nothing except dispense with the performance of what is impossible.

Maxwell on Interpretation of Statutes, 9th Edn. p. 387, referred to.

Held further : That orders made by the Supreme Court are followed in all respects and have the same effect as if they had been made by the High Court of Judicature at Rangoon.

Criminal Reference No. 2 of 1947, referred to.

The present court, the successor of the Supreme Court, has no power of sitting in judgment over the official act of the said Court.

The judgment of the Special Bench was delivered by

U ON PE, J.—This is an application by one U Khin Maung, a Higher Grade Pleader at Paungdè, for admission as an advocate of the High Court. The application is dated the 22nd November 1947, and contains all the particulars as required under Rules 3 and 4 of the Advocates' Admission Rules, 1930, of the

* Civil Misc. Application No. 11 of 1948.

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High Court. It is supported by testimonials of good character and conduct and also certificate of his conduct as a pleader. The required notice of this application under Rule 5 (1) of the Advocates' Admission Rules, 1930, has been given to the Bar Council.

The Bar Council is represented by its member U Aung Min, *Barrister-at-Law*, and the Assistant Attorney-General also appears.

A question of considerable importance has been raised in the next case (the case of U Tin Toon, *Barrister-at-Law*) before this Special Bench to-day, the question being whether or not it is necessary for a person to whom the then Supreme Court had issued a Certificate of Admission and Enrolment as an advocate to apply again for admission as an advocate of the High Court. This question is relevant to this case, although the point has not been raised by U Khin Maung, inasmuch as U Khin Maung's name was admittedly on the Roll of Advocates as prepared and published by the then Supreme Court up to April 1944, his name being No. 125 on that roll. In our view, if the answer to the question is that it is not necessary for such a person to apply again for admission as an advocate of the High Court, the other points raised in U Khin Maung's application will not require consideration for the disposal of his application.

We therefore propose to consider this question now. To determine this question the following points present themselves for consideration, *viz.* whether the then Supreme Court was a duly constituted Court exercising functions and powers of the High Court which it displaced during the occupation period and whether, in particular, enrolment of advocates by it as contemplated in section 8 of the Bar Council Act was valid. The solution of these points rests on whether

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the Supreme Court was a duly constituted Court. The status of the Supreme Court was brought out in *The King* v. *Maung Hmin and three others* (1), in which it was held that the Japanese Commander-in-Chief by his order styled " Military Ordinance No. 6 " continued in force the old laws and the old Courts. Mootham J.'s comment on Article 43 of the Hague Regulation, which defines the duty of an occupying power to re-establish and ensure public order and safety, respecting at the same time the laws in force of the occupied country, is apposite :

" This Article imposes upon the occupying power the duty of taking such measures as are necessary to restore and maintain public order, employing for this purpose, so far as it is possible to do so, the ordinary law of the country of which it is in occupation. The object of the Article, as I understand it, is to prescribe a rule of conduct for an invader which, while not hampering him in the carrying out of any legitimate operation of War, will, as far as possible alleviate the consequences of the inevitable disruption of ordinary life caused by the occupation. This object will however be but partially achieved if the Government of the invaded State on its return refuses to recognize as valid acts of the invader done by him under the authority of Article 43. The effect of such a refusal would be to cause much unnecessary confusion and distress."

Sir Ba U sums up his view in these words :

" The laws and procedure followed by the Supreme Court were the same as was followed by the High Court in exercise of its Appellate Jurisdiction. Therefore I am of opinion that the Courts that functioned during the time of the Japanese occupation were Courts of competent jurisdiction * * * * ."

The Supreme Court being thus held to be a duly constituted Court, it follows that it was functioning as the High Court did, during the Japanese occupation in matters relating to admission and enrolment of advocates. It carried out the provisions of

(1) (1946) R.L.R. 1.

section 8 (2) of the Bar Council Act by preparing and maintaining a Roll of Advocates and of section 8 (5) of the Act by issuing certificates of enrolment. Apparently everything possible seemed to have been done in the way of conforming to the rules governing the admission of advocates. A statement has been made from the Bar that, as the Bar Council was not functioning then, the admissions of advocates made would not be valid. This is asking us to sit in judgment over the official act of the said Court which, we do not think, we have the power to do. We cannot, however, pass without mentioning that it is on record that applications for admission of advocates made to the Court were carefully considered by the then Hon'ble Judges, one of whom was no less a person than the Chief Justice of the Union of Burma.

On the other hand, it is admitted that the Bar Council could not meet in any case, the majority of its members being away from Rangoon. The Chairman and the Secretary were in India, and the rest were all away from Rangoon except one or two. A war was on and the Court had to take steps—in fact it was its duty—to enrol advocates to make possible the functioning of Courts. The Hon'ble Judges of the then Supreme Court could not have overlooked that compliance with the statutory requisite to give a notice to the Bar Council in the case of each admission under the Admission Rules, would not be possible. In those circumstances what could the Court do except to dispense with "the performance of what is prescribed when performance of it is idle or impossible." Maxwell on Interpretation of Statutes says (1) :

" Enactments which impose duties on conditions, when these are not conditions precedent to the exercise of a jurisdiction

(1) Maxwell, 9th Edn., p. 387.

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IN THE MATTER OF U KHIN MAUNG, HIGHER GRADE PLEADER, AS AN ADVOCATE OF THE HIGH COURT.

U ON PE, J.

* * * * are understood as dispensing with the performance of what is prescribed when performance of it is idle or impossible."

Those were the circumstances in which the then Supreme Court admitted advocates, issued certificates of admission and maintained a Roll of Advocates as required under section 8 of the Bar Council Act.

When the said Court was again displaced by the High Court on the re-occupation by the British, the question arose as to the validity of the admissions and enrolments of advocates by the then Supreme Court. The answer is found in the judgment of the Special Bench of the High Court in Criminal Reference No. 2 of 1947 (1), and the relevant portion of it is in these words :

"There can, therefore, be no doubt in my mind but that the Supreme Court established in Burma by the Japanese authorities during their occupation was a duly constituted Court of law, that decrees and orders made by it are now valid in all respects and are of the same effect as if they had been made by the High Court of Judicature at Rangoon either before or after the Japanese occupation here, and that we are successors to the Supreme Court."

It follows that the act of admission of advocates by the then Supreme Court remains valid to-day in this Court which has succeeded the said Supreme Court. It will therefore not be necessary for U Khin Maung, whose name, being No. 125, is on the Roll of Advocates of the then Supreme Court, to apply again for admission as an advocate of this High Court.

(1) Criminal Reference No. 2 of 1947, High Court Rangoon.

APPELLATE CIVIL.

Before U Aung Tha Gyaw, J.

MAUNG TUN MIN (APPELLANT)

v.

MA TIN NYUN AND THREE OTHERS (RESPONDENTS).*

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May 27.

Suit for possession alleging invalid mortgage in favour of defendants—S. 91, Evidence Act—How far a bar to oral evidence—Plea of adverse possession by the defendant—Whether sustainable.

The plaintiff-respondent alleged that defendant-appellant was in possession of a land under a mortgage from plaintiff's grandparent Daw Yu. The said mortgage was not registered. The properties were admittedly in defendant's possession for 15 years before the suit. Consequently the burden rested on the plaintiff to show how the said property passed into defendant's possession. In proof of the mortgage oral evidence was led and objection was raised that such evidence was inadmissible.

Held: That the factum of possession under an invalid mortgage could be proved orally. S. 91 of the Evidence Act did not stand in the way of such evidence. The plea of adverse possession, therefore, which rested on this was not sustainable.

Maung Sin and another v. *Maung So Min*, 8 Ran. 556; *U Thet Pan and another* v. *Ma Phu Saing*, (1937) Ran. 442, referred to.

Ma Kyi v. *Ma Thon*, 13 Ran. 274, followed.

U Ni for the appellant.

A. N. Basu for the respondents.

U AUNG THA GYAW, J.—The defendant-appellant is in possession of the lands in suit which, according to the plaintiff-respondents, their grandparent Daw Yu had mortgaged for a debt of Rs. 400 in the year 1296 B.E. (1934). Alleging further that the said mortgage was invalid owing to the failure of the parties thereto to comply with the provisions of the Registration Act and the Transfer of Property Act, they, the plaintiff-respondents, contended that the defendant-appellant was not entitled to remain in further possession of the land, and

* Civil 2nd Appeal No. 135 of 1947 against the decree of the District Court of Meiktila in Civil Appeal No. 36 of 1947, dated the 22nd September 1947.

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on this ground they claimed recovery of possession of the same from the defendant-appellant.

The defendant-appellant denied that he was in possession as Daw Yu's mortgagee, and alleged that he bought the property outright under an unregistered deed some 30 years ago from one U Po Saung.

On the evidence produced in the case, both the Courts below found that the defendant-appellant obtained possession of the property under the invalid mortgage executed by Daw Yu, to whom the property originally belonged, and accordingly granted the decree for possession claimed by the plaintiff-respondents.

In this appeal it has been contended that the respondents, having pleaded that the defendant-appellant was a trespasser, cannot prefer the present claim after the lapse of the statutory period of 12 years adverse possession in favour of the defendant-appellant. He has further put forward the plea that the invalid mortgage having been executed under an unregistered deed, the same is incapable of legal proof, and on this ground the plea of adverse possession should have prevailed against the respondents' claim.

That the title to the property originally rested with the respondents' grandparent Daw Yu has been conclusively found in their favour by both the Courts below and, in view of the nature of the evidence adduced by them in this regard, it is not possible for this Court to disagree on the point in question. The force of oral evidence, combined with the entries in the revenue registers, afford sufficient ground for the findings arrived at by the trial Court and the lower appellate Court in regard to this important question of Daw Yu's original title to the properties in suit.

The suit properties, according to the respondents, had been in the defendant-appellant's possession for

15 years before the present suit was brought by them. According to the latter, this possession came to him some 30 years ago in a manner different from that alleged by the respondents. Having succeeded in showing that the property had once been part of their grandmother's estate, the burden rested then with the plaintiff-respondents to show in what manner the suit properties passed into the defendant-appellant's possession. In this connection, the respondents have set up the story about the usufructuary mortgage in favour of the defendant-appellant for a mortgage debt of Rs. 400. In proof of this transaction they have led some oral evidence, to the admission of which the defendant-appellant has now lodged his protest. The objection so raised by the defendant-appellant cannot have any force by reason of the existence of a number of decisions of this Court in which it was held that in claims preferred in the manner now shown in this case, it was admissible for the plaintiffs to lead oral evidence of the abortive mortgage for the collateral purpose of showing the circumstances under which the defendant obtained possession of the property in suit. *Maung Sin and another* v. *Maung So Min* (1) is one of the cases in point.

In the present case, however, the usufructuary mortgage set up by the plaintiff-respondents was said to have been executed by means of an unregistered mortgage bond and, according to the appellant, although the plaintiff-respondents would be entitled to adduce evidence of this mortgage in order to prove the nature of the defendant-appellant's possession of the suit property, they would not, in view of the terms of section 91 of the Evidence Act, be entitled to adduce oral proof of the said mortgage. Witness

(1) 8 Ran. 556.

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U AUNG THA GYAW, J.

U Maung Nge (P.W. 6) has deposed that it was he who wrote the deed of mortgage, and U Ba Sin (P.W. 5) has stated that he had attested the document as a witness. Nothing however has been said in the evidence of the other witnesses for the plaintiff-respondents to explain the non-production of this unregistered deed and, in the absence of any such explanation, it is urged that secondary evidence in proof of the contents of the said mortgage would be inadmissible.

The decision in *Maung Sin and another* v. *Maung So Min* (1) was followed in the case of *U Thet Pan and another* v. *Ma Phu Saing* (2), where it was said that a person can sue for delivery of possession of the land which had been transferred to another under an abortive usufructuary mortgage and may give evidence of the factum of the abortive mortgage, though not of its terms, for the collateral purpose of showing the character of the defendant's possession, *viz.* that it was not adverse to the plaintiff. The decision given in *Maung Sin and another* v. *Maung So Min* (1) did not in fact go to the extent of permitting the plaintiff to adduce inadmissible oral evidence in proof of the abortive mortgage for the collateral purpose of showing the circumstances under which a change of possession took place in the defendant's favour.

But the leading case of *Ma Kyi* v. *Ma Thon* (3) does afford an effective answer to the defendant-appellant's objection, as from the facts set out in the referring judgment of Dunkley J. it clearly appears that the transactions in question with which the decision dealt were oral ones, and the objection regarding the admissibility of evidence taken under section 91 of the Evidence Act possibly arose in the circumstances and was considered in that case. The

(1) 8 Ran. 556. (2) (1937) Ran. 442.
(3) 13 Ran. 274.

plaintiff-respondents in this case are thus undoubtedly entitled to produce oral proof of the usufructuary mortgage executed by Daw Yu, their grandmother, and such evidence would not, according to the authorities above cited, offend the provisions of section 91 of the Evidence Act. Since the mortgage alleged by the plaintiff-respondents can thus be properly proved, the plea of adverse possession raised on the defendant-appellant's behalf cannot prevail despite the admitted fact that he had been in possession of the suit property for more than 12 years.

Accordingly, this appeal is dismissed with costs.

APPELLATE CIVIL.

Before U San Maung, J.

H.C. 1948

May 26.

MAUNG MYAING (APPELLANT)

v.

U PO AUNG (RESPONDENT).*

Judgment of appellate Court—Contents of—Order XLI, Rule 31, Code of Civil Procedure—Requisites.

The District Judge on appeal stated that he had gone through the judgment and the evidence of the witnesses, and agreed that there was real substance in the claim of the plaintiff and confirmed the decree of the trial Court.

Held: That the judgment did not give any reasons for coming to the conclusion. Under Order XLI, Rule 31, the judgment of the appellate Court should state (1) the points for determination, (2) the decision thereon and (3) the reasons for the decision. The judgment did not comply with these conditions and was not judgment as contemplated by the Code of Civil Procedure.

Ma Saw and others v. *Ma Bwin Byu*, I.L.R. 6 Ran. 66; *Dharam Das* v. *Shankar Ahir*, I.L.R. 53 All. 528; *Sitarama Sastrulu and others* v. *Suryanarayana Sastrulu*, I.L.R. 22 Mad. 12; *Sohawan and another* v. *Babu Nand*, I.L.R. 9 All. 29, followed.

A. N. Basu for the appellant.

Saw Hla Pru for the respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 15 of 1944 of the Township Court of Thazi, during the Japanese occupation period, the plaintiff-respondent Maung Po Aung sued the defendant-appellant Maung Myaing and one Ma Nge Ma for recovery of possession of the land in suit. His case was that about 20 years ago he had given possession of the land to his sister, the defendant Ma Nge Ma, and that unknown to him the land had gone into the possession of Maung Myaing. The defendant Ma Nge Ma admitted the plaintiff's claim, but Maung Myaing contested the suit

* Civil 2nd Appeal No. 97 of 1947 against the decree of the District Court of Meiktila in Civil Appeal No. 11 of 1947, dated the 12th May 1947.

on the ground that he had obtained possession of the suit land by mortgage from one Maung Chit Paing over 20 years ago and that later Maung Chit Paing's wife and child had made an outright transfer of the same to him. The learned trial Judge framed two issues as to whether the suit land was one given by the plaintiff to Ma Nge Ma as alleged by the plaintiff or whether it belonged to Maung Chit Paing as alleged by the defendant Maung Myaing and whether the suit land was mortgaged to the defendant Maung Myaing and later transferred to him in the manner alleged in his written statement. The plaintiff Maung Po Aung and the defendant Maung Myaing and the witnesses cited by them were examined. However, the case was not concluded as one of the witnesses cited by Maung Myaing was absent; an adjournment was given to the 9th March 1945 for the purpose of examining this witness. On the date fixed, the plaintiff Maung Po Aung appeared but neither the defendant Maung Myaing nor his witness appeared before the Court and another adjournment was given till the 28th March 1945, when the defendant and his witness again failed to appear. Thereupon the trial Judge, purporting to act under Order IX, Rule 11, Civil Procedure Code, read with Order XVII, Rule 2, proceeded to dispose of the suit and passed judgment and decree in favour of the plaintiff.

After re-occupation by the British, an application was made by the defendant Maung Myaing under Order IX, Rule 13, of the Code of Civil Procedure, to set aside the *ex-parte* decree against him. This application was unsuccessful, but the learned Subordinate Judge observed that the then learned Judge of the Township Court who tried Civil Regular Suit No. 15 of 1944 was apparently in error in disposing of the suit under Order XVII, Rule 2; read with Order IX,

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U SAN MAUNG, J.

Rule 11, of the Code of Civil Procedure, as Rule 3 of Order XVII of the Code of Civil Procedure was the rule which should have been applied to the case. The defendant Maung Myaing then appealed to the District Court of Meiktila against the judgment and decree of the Township Court of Thazi in Civil Regular Suit No. 15 of 1944. The learned District Judge, after setting out the undisputed facts before him, proceeded as follows

"However, a perusal of his grounds in his memorandum of appeal will show that he has not given any reason why the judgment and decree should be disturbed. In the grounds, he simply reiterated the same points which he had raised in the application under Order IX, Rule 13, of the Code. I have gone through the judgment and the evidence of the witnesses tendered by both sides and I agree that there was real substance in the claim of the plaintiff to title to this land. In these circumstances, I am bound to uphold the judgment and decree passed by the Court during the occupation period.

Accordingly, I confirm the decree and dismiss the appeal with costs."

Hence, the appeal to this Court by the defendant Maung Myaing.

One of the grounds raised by the learned advocate for the appellant is that the judgment of the learned Judge of the District Court should be set aside because it failed to comply with the provision of Order XLI, Rule 31, of the Code of Civil Procedure. In my opinion, this ground of appeal should be allowed to prevail. Rule 31 of Order XLI provides that the judgment of the appellate Court should be in writing and should state (1) the points for determination, (2) the decision thereon, and (3) the reasons for the decision. In the judgment of the District Judge appealed against, the learned District Judge has not given any reasons for coming to the conclusion that the judgment and

decree of the trial Court should be upheld. It is not sufficient for the learned Judge to say that he had perused the judgment and the evidence of the witnesses tendered by both sides and that he agreed that there was real substance in the claim of the plaintiff to the land in suit. In the case of *Ma Saw and others* v. *Ma Bwin Byu* (1) it was held that even when an appellate Court dismisses an appeal under Order XLI, Rule 11, of the Civil Procedure Code, the duty is cast upon an appellate Court to write a judgment in compliance with the requirements of Order XLI, Rule 31, and that failure to conform to the provisions of law would justify the setting aside of the judgment of the appellate Court. The decision in *Dharam Das* v. *Shankar Ahir* (2) is to the same effect. In *Sitarama Sastrulu and others* v. *Suryanarayana Sastrulu* (3) a Bench of the Madras High Court held that the judgment of the appellate Court should show on the face of it that the points in dispute were clearly before the mind of the Judge and that he exercised his own discrimination in deciding them. In *Sohawan and another* v. *Babu Nand* (4), where the judgment of the lower appellate Court, after setting forth the claim, the defence, the nature of the decree of the first Court, and the effect of the pleas in appeal, concluded with the following words, "The point to be determined on appeal is whether or not the decision is consistent with the merits of the case. This Court, having considered the evidence on the record and the judgment of the Munsif, which is explicit enough, concurs with the lower Court. . . . . The finding arrived at by the Munsif, that the plaintiff's claim is established, is correct and consistent with the evidence. The pleas urged in appeal are therefore

(1) 6 Ran. 66.
(2) 53 All. 528.
(3) 22 Mad. 12.
(4) 9 All. 26.

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U SAN MAUNG, J.

undeserving of consideration", a Bench of the Allahabad High Court held that there was no judgment according to law inasmuch as the judgment did not satisfy the requirements of section 574 of the Civil Procedure Code (corresponding to Order XLI, Rule 31) and that the decree of the lower appellate Court should be set aside.

I would therefore set aside the judgment and decree of the District Court of Meiktila and remand the case to the District Court to pronounce judgment according to law after hearing the pleaders for both parties. I note that the present District Judge is not the same as the one who wrote the judgment now being set aside. For the guidance of the learned District Judge I would observe that the question as to whether the trial Court was justified in not disposing of the suit under Order XVII, Rule 3, of the Civil Procedure Code, is a point which should be considered by him. Costs of this appeal with advocate's fees at two gold mohurs should follow the final result of the appeal before the District Judge of Meiktila.

APPELLATE CRIMINAL.

Before U Thaung Sein, J.

SAN KYI AND ONE (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

H.C. 1948

June 3.

Code of Criminal Procedure, ss. 366, 367 and 537—Judgment written after sentence passed—Whether such defect cured by s. 537.

Held : That though ss. 366 and 367 require that judgments in every criminal trial of original jurisdiction should be pronounced in open Court and signed and dated at the time of pronouncing it yet the omission to write a judgment before sentence is pronounced does not vitiate the conviction and is an irregularity covered by s. 537 and is curable unless it has occasioned a failure of justice.

Queen-Empress v. *Hargobind Singh and others*, 14 All. 242, not followed.

Tilak Chandra Sarkar and others v. *Baisagomoff*, 23 Cal. 502 ; *Ata Muhammad* v. *Emperor*, 25 Cr.L.J. 705, followed.

Judges and Magistrates should comply with the express provision of ss. 366 and 367 of the Code. Failure to obey such provisions is deprecated.

Mya Thein (Government Advocate) for the respondent.

U THAUNG SEIN, J.—The two appellants, Maung San Kyi and Maung Kyan, were convicted of offences under section 392, Penal Code, and sentenced to five years' rigorous imprisonment each by the learned Special Judge, Kyaukse (U Tha Kyaw), on the 7th February 1948. On that date the learned Special Judge had not written his judgment though he noted in the diary of the proceedings as follows :

"7-2-48. Called. * * * *
The judgment passed. It is directed that they do suffer 5 years' R.I. each. When the sentence is pronounced the accused

* Criminal Appeal No. 225 of 1948 being appeal from the order of the Special Judge of Kyaukse in Criminal Regular Trial No. 10 of 1947, dated the 7th February 1948.

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U THAUNG SEIN, J.

San Kyi requested the Court to add 2 more years to his sentence. I propose to take time to write the judgment.
Put up on 9-2-48."

It was only on 9th February 1948 that the judgment was written and signed, but it bore the date 7th February 1948. The learned Special Judge had made the following audacious note in the diary of 9th February 1948 to exonerate himself for the delay in writing the judgment:

"Later, it is to be observed that the omission to write the judgment at the time of pronouncing the sentence is curable under s. 537, C.P.C."

At the outset, I should like to point out that a Special Judge who resorts to the evil practice of writing judgments after pronouncing sentences on accused persons is certain to arouse grave suspicions against his character and integrity and before long is likely to find himself in very serious trouble.

Now, the first question that arises in the present appeal is whether the failure to write a judgment at the time of pronouncing sentence on the appellants is an illegality which vitiates the conviction and sentence, or merely an irregularity curable under section 537, Criminal Procedure Code. It is clearly laid down in sections 366 and 367, Criminal Procedure Code, that "the judgment in every trial in any criminal Court of original jurisdiction" should be pronounced in open Court and signed and dated by the presiding officer at the time of pronouncing it. I need hardly stress that it is extremely desirable that Special Judges and Magistrates should obey the express provisions of these two sections in the Criminal Procedure Code, *viz.* that they must write their judgments before pronouncing sentences on accused persons. Any Special Judge or

Magistrate who fails to comply with these provisions may render himself liable to disciplinary action being taken against him.

As regards the effect of the omission to write a judgment before pronouncing sentence, it appears that there are conflicting decisions of some of the Indian High Courts on this point. In *Queen-Empress* v. *Hargobind Singh and others* (1) the Allahabad High Court ruled :

"Inasmuch as the sentence in the case of a conviction, and the direction to set the accused at liberty in the case of an acquittal, can only follow on the decision and cannot precede it and inasmuch as the decision must be contained in the written judgment which is read out in open Court, and in such judgment only, it must necessarily follow that, where there is no written judgment when the sentence is passed, the sentence is illegal."

However, a contrary view was laid down by the Calcutta High Court in *Tilak Chandra Sarkar and others* v. *Baisagomoff* (2) as per the following head-note :

"In this case, after the evidence was adduced on both sides, the Assistant Magistrate fixed a day for hearing argument and passing judgment. On that day argument was heard, and the case adjourned to another day for judgment, when the Magistrate pronounced sentence, though he had not written his judgment. The judgment was, however, written on the evening of the same day.

Held, the judgment of the Assistant Magistrate was not in accordance with the provisions of sections 366 and 367 of the Criminal Procedure Code. In the circumstances of the case the omission of the Magistrate in recording a judgment before pronouncing his sentence was an omission or irregularity which fell within the purview of section 537 of the Code. The sentence itself by reason of this irregularity was not an illegal sentence so as to render the trial nugatory."

(1) 14 All. 242. (2) 23 Cal. 502.

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SAN KYI AND ONE v. THE UNION OF BURMA.

U THAUNG SEIN, J.

It is interesting to note that the case of *Queen-Empress* v. *Hargobind Singh and others* (1) was discussed in the latter case, and it was pointed out that the learned Judges who dealt with the former case do not appear to have considered the provisions of section 537, Criminal Procedure Code.

The same view as that of the Calcutta High Court was expressed by the Lahore High Court in *Ata Muhammad* v. *Emperor* (2) in the following terms :

"The omission of a Magistrate to write a judgment before sentence is pronounced is an omission or irregularity which is covered by section 537 of the Criminal Procedure Code and is curable except where it has occasioned a failure of justice."

As far as I am aware, there is no ruling by the Rangoon High Court directly on the matter under consideration.

With all due respect, I am in agreement with the views of the Calcutta and Lahore High Courts that the omission to write a judgment before pronouncing a sentence is merely an irregularity curable under section 537, Criminal Procedure Code, except where there has been a failure of justice or where the accused has been prejudiced. Applying these principles to the present case, I fail to see how there has been a failure of justice or how the appellants have been prejudiced in any way. The appellants confessed before a competent Magistrate of having taken part in the dacoity for which they were convicted, and they made no attempt to resile from those confessions. Apart from these confessions, the two appellants were also seen and recognized by the passengers of the bullock carts which were attacked. The two appellants could have been convicted on their confessions alone, and apparently they anticipated a severer sentence than

(1) 14 All. 242. (2) 25 Cr.L.J. 705.

five years' rigorous imprisonment. According to the diary entry of 7th February 1948 the appellant San Kyi requested the learned Special Judge to enhance the sentence passed on him by two years.

Under the circumstances, I have no doubt that the two appellants were rightly convicted of offences under section 392, Penal Code, and deserved the sentences meted out to them. The appeal is dismissed.

ORIGINAL CIVIL.

Before U Bo Gyi, J.

H.C. 1948

July 14.

U KYAW DIN (PLAINTIFF)

v.

HIS BRITANNIC MAJESTY'S GOVERNMENT OF THE UNITED KINGDOM AND ANOTHER (DEFENDANTS).*

Denial scheme—Suit for value of goods destroyed against His Britannic Majesty's jurisdiction—Ss. 9 and 86, Code of Civil Procedure—International Law.

The plaintiff filed a suit for Rs. 15,000 value of goods said to have been destroyed under the denial scheme. The 1st defendant was His Britannic Majesty. Written intimation was sent to the British Ambassador, who declined to accept it on the ground that no suit lies in Burma court against His Britannic Majesty. The plaintiff contended that a suit lay under ss. 9 and 86 of the Code of Civil Procedure.

Held: That there is no provision in the Code which permits institution of a suit against a foreign State. S. 86 provides that in certain circumstances and subject to the consent of the authorities concerned suits may be instituted against a Sovereign. As a rule foreign States cannot be sued here unless they voluntarily submit to the jurisdiction. This flows from the fact that all States are equal before International Law and no State can consequently claim jurisdiction over another. Such a State need not come forward and assert its right. The court itself should take notice of the fact that it has no jurisdiction.

Oppenheim's International Law, 6th Edn., Vol. I, p. 239, cited.

Mighell v. *Sultan of Johore*, L.R. (1894) 1 Q.B. 149 at p. 162, applied.

Case against the 1st defendant dismissed.

Tun Aung for the plaintiff.

Chan Htoon (Attorney-General of the Union of Burma) for defendant No. 2.

U BO GYI, J.—This action has been brought by U Kyaw Din, an advocate of this Court, against His Britannic Majesty's Government of the United Kingdom and the Union of Burma for recovery of Rs. 15,000 being the value of his goods said to have been

* Civil Regular No. 41 of 1948, High Court, Rangoon.

destroyed under the denial scheme on the eve of the evacuation of Rangoon in 1942. When the matter came up before me on the 10th May 1948, I accepted the plaint subject to objections, if any, by the defendants. Thereafter the Registrar (Original Side) sent in lieu of a summons a written intimation of the suit to His Britannic Majesty's Ambassador to the Union of Burma, and the Foreign Office has replied that His Excellency the Ambassador has declined to accept the letter substituted for a summons on the ground that no suit lies in the Burmese Courts against His Britannic Majesty's Government in the United Kingdom.

The case has therefore been placed before me again for argument as to whether this Court has jurisdiction to entertain the suit against the 1st defendant. U Tun Aung, learned advocate for the plaintiff, questions the right of the learned Attorney-General who appears for the Union of Burma to address the Court on behalf of the 1st defendant. But, since objection has been raised to the jurisdiction of the Court, the matter is now taken up by the Court on its own motion.

Plaintiff's learned advocate contends that in view of the provisions of sections 9 and 86 of the Civil Procedure Code the present suit lies against the 1st defendant. But section 9 of the Code merely mentions the nature of suits that may be instituted, and section 86 provides that in certain circumstances and subject to the consent of the authorities concerned suits may be instituted against a Sovereign Prince or Ruling Chief, or against an ambassador or envoy of a foreign State, but makes no mention of a foreign State as being amenable to the jurisdiction of the Burmese Courts. It is significant that while under section 84 of the Civil Procedure Code a foreign State may sue in any Court in the Union of Burma, there is no provision

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U KYAW DIN v. HIS BRITANNIC MAJESTY'S GOVERNMENT OF THE UNITED KINGDOM AND ANOTHER.

U BO GYI, J.

in the Code which permits the institution of a suit against a foreign State.

It would seem therefore that the authors of the Code of Civil Procedure followed the general law. There is a considerable body of weighty and unanimous authority for the view that "although States can sue in foreign courts, they cannot as a rule be sued there, unless they voluntarily submit to the jurisdiction of the court concerned" (1). This, as the learned author observes, flows from the fact that all member-States of the Family of Nations are equal before International Law and consequently no State can claim jurisdiction over another.

Since the 1st defendant has refused to submit to the jurisdiction of this Court, the question that now arises is as to the course to be adopted with regard to this defendant. In this connection, the observations of Kay L.J. in *Mighell* v. *Sultan of Johore* (2) are pertinent. There his Lordship observed :

"It is said that an independent sovereign may waive his right to immunity, and may treat himself as subject to the jurisdiction. I agree ; but how is that to be done ? This seems to me, in the first place, quite clear. Supposing, by way of illustration, that some well-known potentate, such as one of the great European emperors, were to be sued in a Court of this country, and took no kind of notice of the proceeding ; it would be the duty of the Court to recognize his position, and to say at once that the person cited was an independent foreign sovereign over whom it had no jurisdiction. Therefore it is not right to say that such a sovereign must come forward and assert his right. I do not think that he need. I think the Court itself would be bound to take notice of the fact that it had no jurisdiction."

I accordingly dismiss the suit as against the 1st defendant.

(1) International Law by L. Oppenheim, 6th Edn., Vol. I, p. 239.

(2) L.R. (1894) 1 Q.B. 149 at p. 162.

ORIGINAL CIVIL

Before U Bo Gyi, J.

H.C. 1948

June 4.

RANGOON TELEPHONE COMPANY, LIMITED (PLAINTIFF)

v.

THE UNION OF BURMA (DEFENDANT).*

Constitution Act, s. 225 (3)—Claim against Government for value of plaintiffs' properties—Licence gives the option to purchase by Government—Charge taken of properties since 1st January 1946—Frustration of contract by war—Contract Act, s. 56—Sale of Goods Act, ss. 7 and 8—Principles embodied in Contract Act, s. 70—Applicable—Analogy from conversion—Arbitration clause in contract, if applicable.

The Rangoon Telephone Company, Limited, was operating telephone and telegraph undertakings in Rangoon and Moulmein before war under a licence. Under clause 8 of the licence Government could buy the Company out, if the right was exercised at the end of 40th year, and by a letter dated 4th March 1940 Government exercised the option to purchase as on 31st March 1943. War broke out and part of the property was demolished under the denial scheme. The remaining properties were taken over on 1st January 1946. The Company claimed Rs. 24,93,490-2-6 as the value under the contract or as damages. Government contended that they were liable only for what was over.

Held: That frustration is the premature determination of an agreement lawfully entered into between parties owing to circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement and as entirely beyond what was contemplated by the parties when they entered into the agreement. This principle is embodied in s. 56 of Contract Act. The contract of purchase in this case was frustrated on account of the war.

Cricklewood Property and Investment Trust, Limited v. *Leighton's Investment Trust, Limited*, (1945) A.C. 221 at p. 228; *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Limited*, (1943) A.C. 32 at p. 40; *Hirji Mulji and others* v. *Cheong Yue Steamship Company, Limited*, (1926) A.C. 497; *Metropolitan Water Board* v. *Dick, Kerr & Co.*, (1918) A.C. 119; *The Pelepah* case, (1944) 170 L.T. 338; *Baily* v. *de Crespigny*, L.R. 4 Q.B. 180; *Mohamed Ismail and others* v. *The King*, (1946) R.L.R. 468, applied and followed.

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* Civil Regular Suit No. 73 of 1947 of the High Court, Rangoon; judgment dated the 4th June 1948.

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Held further : Under the Sale of Goods Act, ss. 7 and 8, if the goods after agreement become damaged, the agreement is avoided.

Barrow, Lane, and Ballard, Limited v. *Phillip Phillips & Co.*, L.R. (1929) 1 K.B. 574, applied.

The contract is indivisible and when the properties were damaged through the fault of neither party, the contract could not be enforced. There was no absolute implied promise to pay full value as on 31st March 1943.

Held further : The principles of *quantum meruit* embodied in s. 70 of the Contract Act come into play.

Secretary of State v. *G. T. Sarin & Co.*, 11 Lah. 375 ; *Zulaing* v. *Yamèthin District Council*, I.L.R. 10 Ran. 522.

If the suit were in tort the measure of damages would ordinarily be the value of the undertakings at the date of conversion. The Company is entitled to be paid the value of the assets in fact taken over on 1st January 1946. The principle of such valuation had been mentioned in the Third Schedule to the licence which was almost precisely the same as paragraph 1152 sub-paragraph 2, of Halsbury's Laws of England, 2nd Edn., Vol. XII.

Held further : As the contract was brought to an end by frustration, the clause relating to arbitration also came to an end.

Hirji Mulji's case, (1926) A.C. 497, referred to.

Horrocks for the plaintiff.

Chan Tun Aung for the defendant.

U BO GYI, J.—The Rangoon Telephone Company, Limited, which is the successor of the Oriental Telephone and Electric Company, Limited, and was operating telephone and telegraph undertakings in Rangoon and Moulmein prior to the 7th March, 1942, under licences granted by His Excellency the Governor of Burma, has sued the Government of Burma now replaced under sub-section (3) of section 225 of the Constitution by the Union Government, to recover Rs. 24,93,490-2-6 said to be the value of the plaintiff Company's undertakings agreed to be transferred to the Government of Burma, praying in the alternative that the sum may be awarded by way of damages. It is common ground that under clause 8 of the licences admittedly granted to the plaintiff for a term of 60 years, Government reserved the right to buy the

Company out at certain periodical intervals one of which fell on the 31st day of March, 1943, and under the terms of the licences if the right of purchase was exercised at the end of the fortieth year from the 1st day of April, 1903, the date of issue of the licences, the price to be paid would be the then value of the property as defined in the Third Schedule annexed to the licences, without any allowance for past or future profits, or goodwill. Now, Government by a letter dated the 4th day of March, 1940, communicated to the plaintiff its election to purchase the said undertakings on the 31st March, 1943. In pursuance of that election Mr. Daniel McGee, a director of the plaintiff Company, interviewed Mr. Nesbitt-Hawes, then Director-General, Posts and Telegraphs, Burma, who, it is said, agreed to take over the undertakings on the book value basis and without having any inventory made of the assets. Mr. McGee, however, to the question put by the Court frankly admits that he had no knowledge that Mr. Nesbitt-Hawes had been authorized by Government to make such an agreement; and during the argument the plaintiff's learned counsel states that the discussions at the interview took no definite shape. Thereafter, in February and March, 1942, when Burma was about to be invaded by the Japanese, Government, it is alleged, applied a scheme of denial to the enemy, pursuant to which Government caused to be demolished certain property and plant of the plaintiff Company being part of the said undertakings. The plaintiff Company and Government evacuated to India. There the Company demanded of Government payment of the money due under the contract and there was correspondence between the parties, the Company on the one hand demanding the price of the undertakings as they stood at 31st March, 1943, and Government on the other hand maintaining

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that it was entitled to take possession of whatever was found intact of the undertakings on its contemplated re-occupation of Burma and to pay for such remnants at the price ruling on the 31st March, 1943. Burma was re-occupied by the Allied forces in May, 1945, and the Company's undertakings were taken over by the British Military authorities who on or about the 1st January, 1946, made them over to Government. On the 21st September, 1946, Government wrote to the Company that pursuant to its electing to purchase the surviving assets of the Company it had taken over possession of them from the Military authorities on and from the 1st January, 1946. In the above circumstances the Company claims the sum of Rs. 24,93,490-2-6 on three grounds, first, under the terms of purchase contained in the said licences; secondly, by virtue of the contract to be implied by reason of its demand of the price of the undertakings on the basis of their value as at the 31st March, 1943, and Government's entering into occupation on or about 1st January, 1946; and, finally, by way of damages for breach of contract and/or as the current market value of the undertakings actually taken over by Government on the 1st January, 1946, together with the value at the time of demolition of the Company's property and plant which was demolished before evacuation. Government while admitting the licences and the contract has held its ground and maintains that it is only liable for whatever remnants of the plaintiff's undertakings were taken over on 1st January, 1946, at the fair market value which prevailed on 31st March, 1943. Government also denies the correctness of the value of the Company's undertakings as assessed. The question of notice under section 80 of the Civil Procedure Code has not been pressed to an issue and is considered as waived.

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On the pleadings, the following issues have been framed at the instance and by consent of the learned counsel for the parties :

1. Was the contract of purchase of plaintiff's assets frustrated by reason of the war ?

2. If it was frustrated, was there an implied contract to pay for the assets as they stood on the 31st March, 1943, and also for the assets denied on the basis of their value as on the 31st March, 1943

Or

Is plaintiff entitled to be paid the value of the assets in fact taken over on the 1st January, 1946, at their then value ?

3. Upon what basis should payment be made to the plaintiff ?

Under section 56 of the Contract Act a contract to do an act which becomes impossible after it is made becomes void. The doctrine of impossibility of performance which is enshrined in section 56 of the Contract Act is the basis of, or perhaps rather another name for, the doctrine of frustration which came into prominence about the middle of the First World War. The doctrine is not new to Burma and in *Mohamed Ismail and others* v. *The King* (1) where certain seamen who in times of peace had signed on for commercial voyages within a specified area and demanded new terms when war broke out over a portion of the area involving risk of life and liberty, it was held that the contract of service had been made under an implied promise that a state of peace would continue to exist along the routes which the ships would take in their commercial voyages and that when such state of things ceased to exist the contracts were deemed to be at an end. It was also held that the doctrine of frustration

(1) (1940) R.L.R. 468.

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as applied in England was applicable in Burma under the Contract Act. The best definition yet of the doctrine is by Viscount Simon, Lord Chancellor of England, who in *Cricklewood Property and Investment Trust, Limited* v. *Leighton's Investment Trust, Limited* (1) said,

". . . . . Frustration may be defined as the premature determination of an agreement between parties, lawfully entered into and in course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement."

The principle underlying the doctrine has been described by his Lordship in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Limited* (2) as "that where supervening events, not due to the default of either party, render the performance of a contract indefinitely impossible, and there is no undertaking to be bound in any event, frustration ensues, even though the parties may have expressly provided for the case of a limited interruption." The end of a war, as observed in that case, cannot reasonably be predicted. There shortly before war broke out between Germany and Poland an English Company agreed to sell machinery, delivery at Gdynia in Poland. Thereafter, on September 1, 1939, war broke out between Germany and Poland and on and after September 23, Gdynia was occupied by the Germans. Seven eminent Law Lords including the Lord Chancellor unanimously held that the contract was dissolved. As to the legal effect of the frustration of a contract, their Lordships of the

(1) (1945) A.C. 221 at p. 228. (2) (1943) A.C. 32 at p. 40.

Privy Council have held in *Hirji Mulji and others* v. *Cheong Yue Steamship Company, Limited* (1) that such effect does not depend upon the intention of the parties, or their opinions or even knowledge, as to the event which has brought about the frustration, but upon its occurrence in such circumstances as to show it to be inconsistent with the further prosecution of the adventure. To mention but one more out of the several authorities on the doctrine in support of the view that in circumstances such as those obtaining in the present case the contract is avoided, in *Metropolitan Water Board* v. *Dick, Kerr & Co.* (2), where the defendants had contracted to construct for the plaintiffs certain reservoirs within a specified time but after a substantial portion of the work had been done were ordered by the Minister of Munitions to cease work, it was held by the House of Lords that the contract was frustrated, the period of abeyance being so long and the changes in prices and conditions of labour so great that performance of the contract would be substantially different from what had been originally undertaken. On the other hand, the learned Assistant Attorney-General relies upon the *Cricklewood Property and Investment Trust, Limited* case (3), and *The Pilepah* case (4) in support of his contention that the contract in question has not been frustrated. But these cases relate to long leases and the abeyance period in each was but a small portion of the life of the lease. In the former case the House was divided on the question whether the doctrine of frustration could apply to a lease at all, and the decision in both the cases was that in the particular circumstances obtaining therein the leases had not been determined by the

(1) (1926) A.C. 497.
(2) (1918) A.C. 119.
(3) (1945) A.C. 221 at p. 228.
(4) (1944) 170 L.T. 338.

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doctrine of frustration. Furthermore, certain observations in the former case show that in any event covenants in a lease may become impossible of performance. Lord Russell of Killowen after observing that a lease is much more than a contract because it creates a vested interest in the land continues: "The contractual obligations thereunder of each party are merely obligations which are incidental to the relationship of landlord and tenant created by the demise, and which necessarily vary with the character and duration of the particular lease. It may well be that circumstances may arise during the currency of the terms which render it difficult, or even impossible, for one party or the other to carry out some of its obligations as landlord or tenant, circumstances which might afford a defence to a claim for damages for their breach, but the lease would remain. The estate in the land would still be vested in the tenant." Lord Wright observes that covenants in a lease may be suspended or terminated by operation of law and cites the case of *Baily v. de Crespigny* (1) where a lessor had entered into a covenant with his lessee not to permit building on a paddock facing the demised premises but was held discharged from the covenant when the paddock was compulsorily taken by a railway company, which erected buildings on it, including a urinal, thus impairing the amenities of the dwelling. Lord Porter says, "Some terms of the tenancy may be impossible of performance at least for the time being but the tenancy itself is not thereby necessarily determined." Lord Goddard makes similar observations. There is a considerable body of eminent judicial authority, therefore, that covenants in a lease may become impossible of performance whether or not the doctrine

(1) L.R. 4 Q.B. 180.

of frustration applies to leases ; and in answer to the first issue I hold that the contract of purchase of the Company's assets was frustrated by reason of the War.

In their report (1) made in 1918, relating to impossibility and frustration, Buckmaster Committee submitted a statement of the law which *inter alia* was as follows : "Finally, the court can only declare the contract dissolved or not dissolved. If it is not dissolved it remains effective according to all its term in their full force. The court cannot in any way alter its terms, or modify them, or in any way vary or adjust the rights and obligations of both parties. And if it is not dissolved, and there is a breach, the court cannot mitigate or lessen the full measure of damages to which the other party is legally entitled by such breach."

The question may also be viewed in another, though similar, aspect. The undertakings consist of both moveables and immovables. Under section 8 of the Sale of Goods Act, "where there is an agreement to sell specific goods, and subsequently the goods without any fault on the part of the seller or buyer perish or become so damaged as no longer to answer to their description in the agreement before the risk passes to the buyer, the agreement is thereby avoided." Section 7 of the Act relates to legal consequences arising from goods perishing or becoming damaged before making of contract and sections 7 and 8 of the Act are on much the same lines as sections 6 and 7 respectively of the Sale of Goods Act, 1893. In *Barrow, Lane, and Ballard, Limited* v. *Phillip Phillips & Co.* (2) where there was a contract for sale and delivery of 700 bags of groundnuts and unknown

(1) "The Effect of War on Contracts" by Webber, 2nd Edn., pp. 418 and 419

(2) L.R. (1929) 1 K.B. 574.

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to the parties 109 bags of groundnuts had been lost before the date of the contract so that when the time for delivery arrived there remained only 591 bags for delivery, it was observed, "a contract for a parcel of 700 bags is something different from a contract for 591 bags and the position appears to me to be in no way different from what it would have been if the whole 700 bags had ceased to exist. The result is that the parties were contracting about something which at the date of the contract without the knowledge or fault of either party, did not exist. To compel the buyer in those circumstances, to take 591 bags would be to compel him to take something which he had not contracted to take, and would in my judgment be unjust." Wright J., as he then was, held that the contract was indivisible and that section 6 of the Sale of Goods Act, 1893, applied where part only of the goods had perished at the time when the contract was made. In this case also the undertakings are indivisible and consequently the same principle applies to the facts of the present case also.

Now, the position taken up by Government seems untenable in law. No doubt under section 13 of the Specific Relief Act a contract is not wholly impossible of performance because of the subsequent destruction of a portion of its subject-matter. But Government, presumably under legal advice, has not thought fit to file a suit for specific performance of the contract. Even if it should do so, it would be bound by sections 14 and 15 of the Specific Relief Act, the former relating to specific performace of part of a contract where the part unperformed is small and the latter to cases where the part unperformed is proportionately large. In either case, however, the party insisting upon performance is bound to pay

the price originally agreed upon before he gets his relief, though in the former case he may claim compensation in respect of part of the contract which cannot be performed. Now the Specific Relief Act is founded on the highest principles of justice and equity and in taking the stand it does on the contract Government is trying to get the plaintiff to perform a substantially new contract by way of defence, while if it had taken the initiative it would, under the Specific Relief Act, have been called upon to pay the full stipulated price.

The second issue may be disposed of briefly. *The Carbolic Smoke Ball* case relied upon by the plaintiff does not help it because Government has at all material times maintained that it could and would enter into possession of whatever remained of the undertakings on payment therefor at the price ruling on the 31st March 1943. Under section 7 of the Contract Act acceptance must be absolute and unqualified. The first part of the second issue is accordingly answered in the negative.

I now come to the second part of the second issue, which is whether the Company is entitled to be paid the value of the assets in fact taken over on the 1st January, 1946, at their then value. The contract, as I have held, has been dissolved and no new contract has been formed, and at the same time Government appears willing to take over the undertakings. In these circumstances the principles of *quantum meruit* embodied in section 70 of the Contract Act come into play. In *Secretary of State* v. *G. T. Sarin & Co.* (1) which arose out of a contract for supply of fodder the learned Judges ruled "as to the amount of compensation, it is obvious that it must be assessed at the market rates prevailing on the dates on which

(1) 11 Lah. 375.

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these supplies were made." This case has been followed in *Zulaing* v. *Yamèthin District Council* (1). I am of opinion that the principle adopted in the Lahore case is correct inasmuch as ordinarily the cause of action would have arisen on the respective dates on which the supplies were made. Here in this case also the cause of action apparently arose against Government on the 1st January, 1946, when it took over the undertakings. If the suit were in tort the measure of damages would ordinarily be the value of the undertakings at the date of the conversion. In answer to the second part of this issue, therefore, I hold that the Company is entitled to be paid the value of the assets in fact taken over on the 1st January, 1946, at their then value.

Coming to the third issue, the principle of valuation agreed upon by the parties and set forth in the Third Schedule to the licences appears to have been looked upon by the contracting parties as being just and equitable. The terms are almost precisely the same as those in paragraph 1152, sub-paragraph 2, of Halsbury's Laws of England, 2nd Edition, Vol. XII, and appear to have been borrowed therefrom. This principle of valuation has been adopted in acquisitions of electric supply undertakings by local authorities. To quote from the Third Schedule to the licences, "the value of such lands, buildings, works, materials and plant shall be deemed to be their fair market value at the time of purchase, due regard being had to the nature and condition for the time being of such lands, buildings, works, materials and plant, and to the state of repair thereof, and to the circumstance that they are in such a position as to be ready for immediate working, and to the suitability of the same for the

(1) I.L.R. 10 Ran. 522.

purposes of the undertaking, and where a part only of the undertaking is purchased to any loss occasioned by severance, but without any addition in respect of compulsory purchase or of goodwill or of any profits which may be or might have been made from the undertaking, or of any similar considerations." In answer to the third issue I hold the above to be the basis upon which payment should be made to the plaintiff, *i.e.* that payment should be made for the assets actually taken over on the 1st January, 1946, at their then value on the lines indicated above.

The last question is whether the arbitration clause in the licence bars the suit. The terms of the licences as I understand them are that arbitrators should only be appointed when there is a valid contract and the parties do not agree upon the price to be paid in pursuance of the contract. In *Hirji Mulji*'s case (1), it was held that a frustration brought to an end the whole contract including the submission to arbitration.

Under the reference rules in Chapter 9 of the Rules and Orders of the High Court, I refer the following issues to the Official Referee who will transmit his report with his findings thereon and reasons therefor in due course :

(1) What were the assets of the Rangoon Telephone Company, Limited, taken over by the Government of Burma on or about the 1st January, 1946? The assets which may have been put in by the British Military Administration will be separately inventoried and valued.

(2) What was the value of the Company's assets so taken over on or about the 1st January 1946 ?

[*4th June 1948.* When the judgment is delivered, Mr. Horrocks for the plaintiff and the learned

(1) (1926) A.C. 497.

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Attorney-General for the defendant state that since the assets put in by the Military Administration will belong to the Government it will not be necessary to value such assets separately. This will be noted by the learned Official Referee.]

SUPREME COURT.

U HTWE (*alias*) A. E. MADARI (APPLICANT)

v.

U TUN OHN AND ONE (RESPONDENTS).*

†S.C. 1948 July 23.

[On appeal from the High Court.]

Constitution of Burma, ss. 25, 133, 150 and 222 (1)—Writs of certiorari and prohibition—Nature of such writs—Both deal with questions of jurisdiction—The principles on which and circumstances under which directions in the nature of these writs will be granted in Burma—City of Rangoon Municipal Act, ss. 25, 79 and 80—Municipal Corporation of the City of Rangoon (Suspension) Act, 1943, scope of—The principles on which the provisions of written constitution will be laid down.

Held : That the writ of prohibition is a judicial process issued out of a Court of superior jurisdiction and directed to an inferior Court from usurping a jurisdiction with which it is not legally invested or to compel Courts entrusted with judicial duties to keep within the limits of their jurisdiction.

The writ of *certiorari* is a writ issued by superior Court in the exercise of its superintending power over inferior jurisdiction and it requires judges or officers of such jurisdiction to certify or send proceedings before them to the superior Court for the purpose of examination as to their legality or giving more satisfactory effect to them.

[Short and Mellor's (2nd Edn.) "Order and Practice of the Crown Office", p. 252, followed.]

The word "Court" for the purpose of these writs will not only include civil and criminal Courts and ecclesiastical, maritime or military Courts but also includes persons or tribunals which are not Courts of Justice in the strict sense of the term, whenever such person or the tribunal has legal authority to determine questions affecting rights of the subjects and the duty to act judicially.

Rex v. *Electricity Commissioners*, L.R. (1924) 1 K.B. 171 at p. 205 ; *The King* v. *Legislative Committee of the Church Assembly*, (1927) 1 K.B. 411 at p. 415 ; *The King* v. *North Worcestershire Assessment Committee*, (1929) 2 K.B. 397 at p. 406 ; *Errington and others* v. *Minister of Health*, (1934) 1 K.B. 249 at p. 266 ; *Rex* v. *Boycott and others*, (1939) 2 K.B. 651 at p. 659, followed ;

The King v. *The London County Council*, (1931) 2 K.B. 215 at p. 243 the view of Lord Justice Scrutton, distinguished.

S. 150 of the Constitution should be read as a proviso to s. 133 and therefore in Burma a person or a body of persons may exercise limited powers of judicial nature even though such person or body of persons is not a judge or a

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* Civil Misc. Application No. 5 of 1948.

† *Present* : SIR BA U, Chief Justice, E MAUNG, J., and KYAW MYINT, J.

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court. When a person or a body of persons (first) having legal authority (secondly) to determine questions affecting the rights of subjects (thirdly) having the duty to act according to law and (fourthly) act in excess of his or their legal authority, those writs will be issued.

This is the principle on which Supreme Court will issue directions in the nature of writs of prohibition and *certiorari*.

Sections of the Constitution should not be interpreted in a narrow and technical manner but should on all occasions be interpreted in a large, liberal and comprehensive spirit. Constructions most beneficial to the widest possible amplitude of its powers should be adopted. The Constitution though written should be interpreted in such a way as will be subject to development through usage and convention.

Grey v. *Pearson*, (1857) 6 H.L.C. 106 ; *Henrietta Muir Edwards and others* v. *Attorney-General for Canada and others*, L.R. (1929) A.C. 124 at p. 136-137 ; *St. Catherine's Milling and Lumber Company* v. *The Queen*, L.R. (1888) 14 A.C. 46 at p. 50 ; *Brophy* v. *Attorney-General of Manitoba* L.R. (1895) A.C. 202 at p. 216 ; *British Coal Corporation* v. *The King*, L.R. (1935) A.C. 500 at p. 518 ; *James* v. *Commonwealth of Australia*, L.R. (1936) A.C. 578 at p. 614, followed.

The term "existing law" in s. 222 (*1*) of the Constitution, embraces any law, Ordinance, Order, bye-law, rule or regulation passed or made before the commencement of the Constitution by any Legislature, authority or person having power for what now forms the Union of Burma to make such law, Ordinance, Order, bye-law, rule or regulation and not inconsistent with the Constitution.

Preamble of Municipal Corporation of the City of Rangoon (Suspension) Act, 1943, cannot, according to well-settled rule of interpretation, restrict or extend the enacting part of the Act when the language and the object and scope of the Act are not open to doubt, and therefore the Act is still operative and the appointment of the 1st respondent according to the provisions of the Act continues.

When the Corporation produces a budget it will be presumed under s. 114 (*e*) of the Evidence Act that official acts have been property done and that copy of the budget has been submitted to the Government under s. 73 (*1*) (*3*).

Under ss. 79 and 83 of the City of Rangoon Municipal Act the Administrator who now represents the Corporation has legal authority to determine any question affecting the rights of the subjects and he has power to improse taxes on all the citizens of Rangoon. The Administrator has to act judicially, *i.e.*, according to law. According to s. 80 he can fix general, lighting and conservancy taxes at his own discretion and as regards water tax he can fix it at such reasonable rate as would cover the expenses incurred in connection with the supply of water to the City of Rangoon.

The exercise of power by the Administrator is not administrative or mechanical but of a judical nature. But if he exercises his discretion in a *bona fide* manner not influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally, the Supreme Court will not interfere.

As the Administrator in fixing these rates of taxation has not acted illegally or arbitrarily his decision cannot be questioned.

The King v. *Board of Education*. L.R. (1910) 2 K.B. 165 at p. 178, referred to.

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P. K. Basu (with *E. C. V. Foucar*) for the applicant.

Kyaw Din for the respondent.

The judgment of the Court was delivered by

BA U, C.J.—This case raises a very important issue, the decision of which affects not only the applicant in this case but also a large body of tax-payers of Rangoon. We have, therefore, taken time to consider our decision.

The applicant, U Htwe *alias* A. E. Madari, is the owner of a house in Rangoon. Municipal taxes on his house and on other houses and lands in Rangoon liable to taxation have recently been doubled under the orders of the 1st respondent, U Tun Ohn, who is the Administrator of the Municipal Corporation of Rangoon. The 2nd respondent, N. B. Sen Gupta, is working under the 1st respondent as the Assessor of the Municipal Corporation.

The submission made by the applicant is that the 1st respondent, U Tun Ohn, has never had any authority or power to raise Municipal taxes, far less to double them. He therefore prays that a writ of *certiorari* may be issued to the two respondents, directing them to submit the proceedings resulting in the order raising Municipal taxes, and that the proceedings may thereafter be quashed.

The applicant further prays that a writ of prohibition may be issued, prohibiting the two respondents from levying taxes at an enhanced rate.

The Municipal administration of the City of Rangoon was before the war carried on under the City of Rangoon Municipal Act (hereinafter called the

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Municipal Act) by a body of persons composed of a certain number of elected representatives of the citizens of Rangoon and a few nominated persons. The body was named the Corporation. A few months after the outbreak of the war, when Burma was about to be overrun by the Japanese, the Government evacuated to Simla in India, where the then Governor issued a proclamation, dated the 10th December 1942, under section 139 of the Government of Burma Act, 1935, and assumed to himself all the powers vested by or under the said Act in the Legislature. In exercise of such powers, the then Governor of Burma passed an Act known as the Municipal Corporation of the City of Rangoon (Suspension) Act, 1943 (hereinafter called the Suspension Act), suspending the operation of the Municipal Act.

On the cessation of hostilities in 1945, the Governor returned to Rangoon, and on the 14th of November of the same year, the Governor, acting under the provisions of the Suspension Act, appointed some persons as Chairman and Councillors of the Corporation of Rangoon. The appointment of these persons was subsequently cancelled by another Notification, being Notification No. 474, dated the 22nd September 1947—Local Government (Administrative Branch) Social Services Department.

By Notification No. 475 of the same date, the 1st respondent, U Tun Ohn was appointed as the Administrator of the City of Rangoon Municipal Coporation.

The Notification is in the following terms :

"Under sub-section (*1*) of section 2 of the Municipal Corporation of the City of Rangoon (Suspension) Act, 1943 (Act VIII of 1943), and in supersession of all previous appointments made under this section, the Governor appoints U Tun Ohn, who shall be designated as Administrator of the City of Rangoon Municipal Corporation, to exercise and discharge the rights

duties, powers and functions which, by the City of Rangoon Municipal Act (Burma Act VI of 1922), are vested in or imposed upon the Municipal Corporation of Rangoon."

The duties and powers of the Corporation vested in or imposed upon the Municipal Corporation of Rangoon are set out in section 25 of the Municipal Act, which, *inter alia*, runs as follows :

" The Corporation shall make adequate provision, by any means or measures which it is lawfully competent for it to use, for each of the following matters, namely :

(i) the construction or laying out of drains for effectually draining the City, and the maintenance, flushing and cleansing of all municipal drains ;

(ii) the erection in proper and convenient situations on municipal land of water-closets, closet accommodation, urinals and other conveniences for the public and the maintenance and cleansing of the same ;

(iii) the collection, removal, treatment and disposal of sewage, offensive matter and rubbish ;

(iv) the watering, scavenging and cleansing of all public streets in the City and the removal of all sweeping therefrom ;

(v) the management and the maintenance of all municipal water-works and the construction or acquisition of new works necessary for a sufficient supply of suitable water for public and private purposes ;

* * * *

(xx) the lighting of all public streets and municipal markets and of buildings vested in the Corporation ;

* * * * "

To enable the Municipal Corporation to carry out these duties it was empowered by sections 79 and 80 of the Municipal Act to levy taxes. Before taxes could be imposed, the annual value of lands and buildings liable to taxation must, under section 91 of the Municipal Act, be assessed by an officer of the Corporation called the Commissioner, and the Commissioner

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must be appointed by the Corporation under section 27 of the same Act.

The 1st respondent U Tun Ohn, though fully empowered to do so, has not up-to-date appointed a Commissioner for the purpose of assessing the annual value of buildings and lands liable to taxation, but in spite of that, he issued a notice on the 23rd January 1948 announcing to the citizens of Rangoon that he would raise the Municipal taxes with effect from the 1st April 1948. That notice is in the following terms :

"Notice is hereby given that with effect from the 1st April 1948, property taxes on all buildings and lands within the Municipal limits of the City of Rangoon shall be levied at the following rates :

(a) *General Tax.*—At 14 per cent per annum of the annual value. This includes a fire brigade tax at 2 per cent.

(b) *Lighting Tax.*—At 3 per cent per annum of the annual value.

(c) *Conservancy Tax.*—

(i) At 17 per cent per annum on the annual value where it is at present levied at 8½ per cent.

(ii) At 13 per cent per annum on the annual value where it is at present levied at 6½ per cent.

(c) *Water Tax.*—

(i) At 13 per cent per annum on the annual value where it is at present levied at 6½ per cent.

(ii) At 6½ per cent per annum on the annual value where it is at present levied at 3¼ per cent.

* * * * * ."

In accordance with the new rate of taxation, demand notices have now been issued, and the applicant U Htwe is one of the tax-payers who have been asked to pay Municipal taxes at the enhanced rate. He therefore asks for reliefs, as stated above.

The question is whether a writ of prohibition and/or a writ of *certiorari* lies. Now, what is meant by a

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writ of prohibition and what is meant by a writ of *certiorari*? These are two of the writs mentioned in section 25 (2) of the Constitution, by means of which this Court is empowered to protect and safeguard the person and property of the citizens of the Union. The Constitution does not, however, explain how and under what circumstances these writs are to be used. As these writs are borrowed from English law, the presumption is that, consistently with our Constitution, they must be used in the same way as they are used by English Courts of law. In English law, these two writs are two of the weapons which Courts of superior jurisdiction use for the purpose of keeping a check and control over inferior Courts. Both deal with questions of jurisdiction.

A writ of prohibition is explained in "Order and Practice of the Crown Office" by Short and Mellor (2nd edition), at page 252 as being a judicial writ or process issuing out of a Court of superior jurisdiction and directed to an inferior Court for the purpose of preventing the inferior Court from usurping a jurisdiction with which it is not legally invested, or to compel Courts entrusted with judicial duties to keep within the limits of their jurisdiction.

In the case of a writ of *certiorari*, it is explained as being the process by which the King's Bench Division, in the exercise of its superintending power over inferior jurisdiction, requires Judges or officers of such jurisdiction to certify or send proceedings before them to the King's Bench Division, whether for the purpose of examining as to the legality of such proceedings or for giving fuller or more satisfactory effect to them could be done by the Court below.

As these two writs deal with questions of jurisdiction, they are frequently sought after together. They sometimes overlap. Prohibition is used as a preventive,

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whereas *certiorari* is used as a cure. The former is asked for at an earlier stage of a proceeding so as to prevent an inferior Court from usurping a jurisdiction with which it is not entrusted, or to prevent it from acting in excess of the jurisdiction entrusted therewith. *Certiorari* is asked for when a proceeding is concluded, so that any mischief or injustice resulting therein may be redressed. As explained, these writs issue out of a Court of superior jurisdiction to inferior Courts.

Now, what is meant by a Court ? 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 causes 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 ; *see* Halsbury's Law of England (2nd edition), Volume IX, page 830, and the cases quoted therein. Since then, the term " Court " has again been expanded so as to include not only the above-mentioned tribunals, but also other public 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 clearly and succinctly explained by Atkin L.J. as he then was, in the case of *Rex* v. *Electricity Commissioners* (1) as follows :

" It is to be noted that both writs (writ of prohibition and writ of *certiorari*) deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as Courts of Justice. But the operation of writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognised as, Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting

(1) L.R. (1924) K.B. 171, 205.

the rights of subjects, and having the duty to act judicially, acts in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

This has been accepted as laying down the law correctly, and has been followed in the following cases :

(i) *The King* v. *Legislative Committee of the Church Assembly.* Ex-parte *Hayne-Smith* (1) ;

(ii) *The King* v. *North Worcestershire Assessment Committee.* Ex-parte *Hadley* (2) ;

(iii) *The King* v. *The London County Council* (3) ;

(iv) *Errington and others* v. *Minister of Health* (4) ; and

(v) *Rex* v. *Boycott and others* (5).

It will be noticed that the phrase " having the duty to act judicially " is not explained. But in the case of *The King* v. *The London County Council* (4), Scrutton L.J. endeavoured to explain it, while explaining the term " Court ", as follows :

"There has been a great deal of discussion and a large number of cases explaining the meaning of 'Court.' It is not necessary that it should be a Court in the sense in which this Court is a Court: it is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition ; and it is not necessary to be strictly a Court; if it is a tribunal which has to decide rights after hearing evidence of the proposal and the opposition, it is amenable to the writ of *certiorari*."

It would appear from this as if the learned Judge of the Court of appeal took the view that unless there was a *lis inter partes* and the said *lis* was decided on evidence

(1) L.R. (1927) 1 K.B. 411, 415.
(2) L.R. (1929) 2 K.B. 397, 406.
(3) L.R. (1931) 2 K.B. 215, 243.
(4) L.R. (1934) 1 K.B. 249, 266.
(5) L.R. (1939) 2 K.B. 651, 659.

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neither a writ of prohibition nor a writ of *certiorari* would lie.

This view of the learned Judge may be correct so far as English law is concerned but it may not be in consonance with the provisions of our Constitution. 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 section 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. Therefore, when Atkin L.J. used the phase "having the duty to act judicially" we must in relation to the Constitution construe it as "having the duty to act according to law." This is in consonance with what Lord Selborne said in *Mackonochie* v. *Lord Penzance* (1). The learned Lord Chancellor said :

"It was contended that the sentence of suspension of the 1st June 1878, was contrary to two statutes of the realm (3 & 4 Vic. C. 86, and 53 Geo. 3, C. 127); and if it could be made out, the prohibition was thus rightly granted."

The view of Lord Esher as expressed in *The King* v. *The Local Government Board* (2) is in a way to the same effect. In that case, learned Master of the Rolls said :

"My view of the power of prohibition at the present day is that the Court should not be chary of exercising it, and that

(1) L.R. (1881) 6 A.C. 424, 431. (2) 10 Q.B.D. 309, 321.

wherever the Legislature entrusts to any body of persons other than to the superior Court the power of imposing an obligation upon individuals, the Court ought to exercise as widely as they can power of controlling those bodies of persons if these persons admittedly attempt to exercise powers beyond the powers given to them by an Act of Parliament."

In the latest case on the subject, *Rex* v. *Archbishop of Canterbury* (1), the present Master of the Rolls Lord Greene, quoted, apparently with approval, the submission made by the Counsel for the applicant as follows :

"Here is a piece of legislation with statutory force which may deprive an owner of property, to wit, the Patron, of some of his rights in respect of that property, and wherever a person or a body of persons is given the power to deprive a person of, or to affect, his rights, there is a statutory obligation to act in a quasi-judicial manner, with all the consequences which that implies.'

Such being the state of the law, if we paraphrase the test as laid down by Atkin L.J. we get it as follows :

"There must be a person or a body of persons (first) 'having legal authority,' (secondly) 'to determine questions affecting the rights of subjects' and (thirdly) 'having the duty to act according to law' (fourthly) 'act in excess of his or their legal authority'."

Now, does this case fulfil these conditions ?

The learned counsel for the applicant presents his case in two aspects. The first is that, having regard to the definition of "existing law" as given in section 222 (*1*) of the Constitution, the Suspension Act ceased to be in force with effect from the 4th January 1948, when Burma became a sovereign independent Republic, and, consequently, U Tun Ohn also ceased to be an Administrator of the Municipal Corporation on and from that date. All acts and things done by him after that date are null and void.

(1) L.R. (1944) 1 K.B. 282, 291.

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"'existing law', as explained in section 222 (*1*) of the Constitution, means any law, Ordinance, Order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person in any territories included within the Union of Burma, being a Legislature, authority, or person having power to make such law, Ordinance, Order, bye-law, rule or regulation."

Stress is laid by the learned counsel for the applicant on the words "by any Legislature, authority or person in any territories included within the Union of Burma."

Therefore, according to the learned counsel for the applicant, any law, Ordinance, Order, bye-law, rule or regulation, even if made by a competent authority but if not made in any of the territories included within the Union of Burma, must be treated as being no longer in force. If this submission were to be followed to its logical conclusion, the result would be only startling and disastrous. All the Acts, to take only a few, such as the Penal Code, the Transfer of Property Act, the Contract Act, the Succession Act and the Age of Majority Act, passed by the Indian Legislature before the separation of Burma from India in 1937 must be treated as being no longer in force. The result would be chaos in the economic and social life of the country. When this was pointed out to him, the learned counsel for the applicant said with his usual adroitness that as Burma was part of India when those Acts were enacted, they must be deemed to have been enacted in a territory included within the Union of Burma. That is not what section 222 (*1*) of the Constitution, on the learned counsel's reading can be made to say. What it says, if he is right, is that no Act, etc., passed by any competent authority in any territories which do not now form part of the Union of Burma is of the body of "existing Law."

As long ago as 1857, Lord Wensleydale pointed out in the case of *Grey* v. *Pearson* (1) as follows:

"In construing wills and, indeed, statutes and all written instruments, the grammatical and ordinary sense of words has to be adhered to unless that would lead to some absurdity, or some repugnancy or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no farther."

This rule of interpretation has stood the test of time and still holds good. 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.

In *Henrietta Muir Edwards and others* v. *Attorney-General for Canada and other* (2), the Lord Chancellor, Lord Sankey, said:

"The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. 'Like all written constitutions it has been subject to development through usage and convention': Canadian Constitutional Studies, Sir Robert Borden (1922), p. 55.

Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs. The Privy Council, indeed, has laid down that Courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or

(1) (1857) 6 House of Lords Cases 106. (2) L.R. (1929) A.C. 124, 136-137.

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one passed to regulate the affairs of an English parish would be often subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good Government of a British Colony : *see* Clement's Canadian Constitution, 3rd edition, 347.

The learned author of that treatise quotes from the argument of Mr. Mowet and Mr. Edward Blake before the Privy Council in *St. Catherine's Milling and Lumber Company* v. *The Queen* (1) : 'That Act should be on all occasions interpreted in a large, liberal and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in very few words.' With that their Lordships agree, but as was said by the Lord Chancellor in *Brophy* v. *Attorney-General of Manitoba* (2), the question is not what may be supposed to have been intended, but what has been said."

The same Lord Chancellor quoted the above observations in *British Coal Corporation* v. *The King* (3) and added—

"Indeed, in interpreting a constituent or organic statute such as the Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted."

This principle of interpretation of a Constitution was followed by Lord Wright M.R. in *James* v. *Commonwealth of Australia* (4) where the learned Master of the Rolls said—

"It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning."

In the light of these observations and taking the provisions of the Constitution one with the other, we

(1) L.R. (1888) 14 A.C. 46, 50.
(2) L.R. (1895) A.C. 202, 216.
(3) L.R. (1935) A.C. 500, 518.
(4) L.R. (1936) A.C. 578, 614.

are of the opinion that the reasonable interpretation of the term "existing law" in section 222 (*1*) of the Constitution, embraces any law, Ordinance, Order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power for what now forms the Union of Burma to make such law, Ordinance, Order, bye-law, rule or regulation and not inconsistent with the Constitution. This interpretation will not only remove an absurdity but will produce a result most beneficial to the community as a whole.

Next, it is contended by the learned counsel for the applicant that even if his interpretation of the words "existing law" is incorrect, the Suspension Act is no longer in force, because the preamble of the Act says that the Act is to remain in force "during the present emergency." "The present emergency", according to the learned counsel, means the last World War. But what is meant by "present emergency" is not defined or explained anywhere in the Suspension Act. It is a well-settled rule of interpretation that the preamble cannot either restrict or extend the enacting part when the language and the object and scope of the Act is not open to doubt. The enacting part of the Suspension Act does not say how long the said Act is to remain in force. Having regard to the language of the preamble, there can hardly be any doubt that the Act was intended to be a temporary Act. But, though it might have been intended to be a temporary Act, it must be regarded to be still in force as its period of life is not fixed anywhere in the enacting part of the Act.

The second aspect of the case is presented as follows: "Here is a citizen of Rangoon who is to be deprived of a portion of his property, to wit, a certain

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sum of money to be paid as municipal-taxes. Before the Administrator can call upon the applicant to make payment of a certain sum of money by way of municipal-taxes, he must go through certain procedure as laid down in the Municipal Act. First of all, he must appoint a Commissioner to assess the annual value of lands and buildings liable to taxation. Next, he must prepare a Budget containing estimated income and estimated expenditure under various Heads, and the Budget must be prepared before the financial year to which it relates. If any budget grant is found insufficient in the course of the financial year to meet the expenditure under any given Head, appropriation can be made from other Heads, and if that is found insufficient again, then the Corporation (now the Administrator) can sanction forthwith any measure which may be necessary for adjusting the year's income to the expenditure. In the present case, the Administrator has not appointed a Commissioner, and he has not prepared a Budget for the financial year 1947-48. Therefore his act in raising municipal-taxes in the middle of the financial year is illegal and *ultra vires*."

If the facts, as stated by the learned counsel for the applicant, are correct, then the case as presented by him will require serious consideration. In submitting his case, the learned counsel for the applicant has entirely overlooked one important point, and the point is the date of the appointment of the 1st respondent, U Tun Ohn, as Administrator of the Municipal Corporation. U Tun Ohn was appointed as Administrator only on the 22nd September 1947. Before that, there was an interim Corporation appointed under the Suspension Act. U So Nyun was the Chairman of that interim Corporation. It is not in dispute that U So Nyun was the Commissioner of the Municipal Corporation long before the war, and that he was neither removed,

dismissed, nor suspended either before the war, or during the war, from his appointment. Therefore, U So Nyun remained as Commissioner when he was appointed as Chairman of the interim Corporation. For that reason, the then Governor, when appointing U So Nyun as Chairman of the Council of the interim Corporation, said that U So Nyun was to act as Chairman of the interim Corporation in addition to his duties as Municipal Commissioner, interim Corporation of Rangoon ; *see* Notification No. 30, dated the 14th November 1945, of the Social Services Department.

Therefore, if any assessment was to be made, and if any Budget was to be prepared, U So Nyun must have done all that. In fact, the learned counsel for the respondent submits that U So Nyun did prepare the Budget for the financial year 1947-48 and submitted copies of it, as required by section 73 (*1*) (iii) of the Municipal Act, to the Government. He has produced a copy of the Budget for our inspection. Having regard to section 114, illustration (*e*), of the Evidence Act, we have no doubt in our mind that the submission made by the learned counsel for the respondents is correct. In that case, the Administrator could increase Municipal taxes, as he had done, in the course of the financial year when he found that the income of the Corporation was not sufficient to cover its expenditure.

We feel that there has been a confusion of thoughts in this case over the question of assessment and taxation. Assessment and taxation are two different things, though they are linked together. Different considerations arise in dealing with these two matters. What applies to the questions of assessment does not necessarily apply to the questions of taxation. In dealing with the question of the power of taxation, we must refer

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to sections 79 and 80 of the Municipal Act. They are as follows :

"79. (*1*) For the purposes of this Act, taxation shall be imposed as follows, namely :

(*a*) property taxes, and

(*b*) a tax on vehicles.

(*2*) In addition to the taxes mentioned in sub-section (*1*), the Corporation may, with the previous sanction of the Governor (now the President), impose any other tax.

80. (*1*) The following taxes shall, subject to the limitation hereinafter provided, be levied on buildings and lands, and shall be called 'Property Taxes', namely:

(*a*) a general tax of not more than 12 per cent of their annual value, to which may be added a fire brigade tax at such percentage not exceeding two per cent of their annual value as will, in the opinion of the Corporation, suffice to provide for the expenses necessary for fulfilling the duties of the Corporation arising under clause XVI of section 25 ;

(*b*) a lighting-tax at such percentage of their annual value as will, in the opinion of the Corporation, suffice to provide for lighting the public streets, municipal markets and buildings vested in the Corporation ;

(*c*) a conservancy-tax at such percentage of their annual value as will, in the opinion of the Corporation, suffice to provide for the collection, removal and disposal, by Municipal agency, of all sewage, offensive matter and rubbish and for efficiently constructing, maintaining and repairing municipal drains for the reception and conveyance of such matter ; and

(*d*) a water-tax at such percentage of their value as the Corporation shall deem reasonable with reference to the expense of providing a water-supply for the City: provided that the Corporation may direct that the water supplied for any domestic or non-domestic purpose to any buildings or lands separately assessed to water-tax shall be paid for by measurement at such rates and on such terms and conditions as it may deem reasonable and no water-tax shall be levied on

any buildings or lands in respect of which such direction has been made.

* * * * "

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What is clear from these two sections is that the Administrator has legal authority to determine any question affecting the rights of subjects, in that he has power to impose taxes on all the citizens of Rangoon and make them pay these taxes. Therefore, in so far as the first two conditions of the test as laid down by Atkin L.J. are concerned, they are fulfilled. Then the question is—In determining these questions, has the Administrator got to do it judicially, *i.e.* according to law? What is clear from section 80 of the Municipal Act is that it is entirely left to the Administrator, so far as General, Lighting and Conservancy Taxes are concerned, to fix them at his own discretion.

Even in the case of the imposition of the Water Tax, the Legislature has in its wisdom thought it fit to leave it to the Administrator to fix it at such a reasonable rate as would cover the expenses incurred in connection with the supply of water to the City of Rangoon.

It may, therefore, be fairly argued that, since the Administrator has to fix these rates of taxation in his discretion, he should be treated as an administrative officer, performing an administrative duty imposed on him by statute for the benefit of the community. His act is, therefore, more of a mechanical rather than of a judicial nature and is, therefore, not open to scrutiny or examination by this Court. The answer is that, a discretion which is demonstrably groundless or exercised in ignorance or at random, is not, in the eyes of the law, a discretion at all, but mere caprice. It must be the exercise of his faculties by a reasonable man, resulting in such action as a reasonable man might

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have adopted, though not necessarily that which another impartial critic would have adopted. Or, to use the language of Farwell L.J. as used in *The King v. Board of Education* (1), "If the Tribunal has exercised a discretion entrusted to it *bona fide*, not influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally, the Courts cannot interfere." In other words, a Tribunal entrusted with the exercise of quasi-judicial functions, would not be acting according to law, if it acted arbitrarily or illegally or was influenced by extraneous or irrelevant considerations.

We must, therefore, see whether the Administrator in fixing these rates of taxation acted illegally or arbitrarily or was in any way influenced by irrelevant or extraneous considerations.

What is clear from the papers placed before us is that the Administrator, before he fixed the present rates of taxation, consulted all the Heads of the Departments under his control and called for their reports, and only after having considered them, he fixed the present rates of taxation. It cannot therefore be said that the Administrator took extraneous or irrelevant matters into account. Even though we might not agree with him as to how these rates of taxation should be fixed, since he has come to an honest decision after considering all the matters relevant to the purpose in hand, we cannot substitute our discretion for his.

For all these reasons we discharge the rule *nisi* and dismiss the application with costs: ten gold mohurs.

In conclusion, we may point out that this Court, having been constituted by the Constitution as a protector and guardian of the rights of the subjects, will

(1) L.R. (1910) 2 K.B. 165, 178.

not hesitate to step in and afford appropriate relief whenever there is an illegal invasion of these rights. Whether this Court will do so or not in cases where there is a right of appeal, or where there is an equally beneficial, convenient and effectual mode of relief available to an aggrieved party, is a matter which we do not propose to discuss in this case.

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SUPREME COURT.

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Aug. 11.

DAW KHIN TEE (APPLICANT)

v.

U CHAN THA AND ONE (RESPONDENTS).*

[On appeal from the High Court.]

Public Property Protection Act, ss. 2 (*ii*) (b) *and* 7—*Prejudicial Act—When complete—Whether issue or procuring the issue of import licence by illegal means whether is—Suspicion—Nature of.*

Held: That the words "prejudicial act" in s. 2 (ii) (*b*) of the Act inclu issue and procuring of licence by illegal means because it would be clearly an act directly or indirectly connected with or relating to, any unlawful activity having for its object the smuggling of any property in Burma in contravention of import or export orders and rules duly made under the Imports and Exports (Temporary) Act, 1947.

Under s. 7 (*3*) it is not necessary that the order of commitment should set out the nature of suspicion entertained by the officer making the arrest and therefore redundant reference to the nature of the suspicion in the order of commitment, cannot be fatal to its validity.

The dividing line between a completed prejudicial act and a prejudicial act in the course of commission is thin, and in some cases it is difficult to dissociate them. Even though the officer making the arrest has not been able to make up his mind as to whether the person to be arrested has actually committed a prejudicial act or still in the course of committing that act, he would still have the right to make the arrest.

The right of appeal is not inherent in the nature of things, it is a right which has to be given by express enactment. The Supreme Court in issuing directions in the nature of *habeas corpus* does not exercise an appellate jurisdiction. If in arresting or directing the detention of a citizen the authority concerned was acting within its lawful powers, the Supreme Court cannot interfere and the Supreme Court cannot go into the question of fact when the Legislature has made that authority the judge of facts. The Supreme Court in proceedings for directions in the nature of *habeas corpus* will accept its findings of facts unless they are vitiated in law.

Suspicion is something much weaker than proof and all that is required of the officer in entertaining a suspicion is that it must be in good faith and a thing shall be deemed to have been done in good faith where it is in fact done honestly, whether it is done negligently or not. If he has acted honestly then the Court will not interfere unless the suspicion was entertained irrationally which would in itself not be conclusive of absence of honesty of motive.

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* Criminal Misc. Application No. 14 of 1948.

† *Present:* SIR BA U, Chief Justice, E MAUNG, J., and KYAW MYINT, J.

King Emperor v. *Deshpande and one*, (1946) 73 I.A. 144 ; *King* v. *Bethel*, 84 E.R. 494 at p. 495, referred to.

E. C. V. Foucar for the applicant.

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

The judgment of the Court was delivered by

E MAUNG, J.—The applicant prays for directions in the nature of ***habeas corpus*** on behalf of her husband U Aye Kyi who is now being detained in the Insein Jail under the orders of the President, dated the 13th July 1948, exercising the powers under section 7 (*3*) and (*5*) of the Public Property Protection Act, 1947.

U Aye Kyi, who carries on business as a merchant dealing in textiles and general goods, was arrested by U Ba Chit, Inspector of Police, Public Property Police Bureau of Investigation on the 3rd July 1948. The arrest was purported to have been made under section 7 (*2*) of the Act. Having made the arrest the Inspector of Police reported the fact of such arrest to the President and pending receipt of the orders of the President, he passed an order in writing committing U Aye Kyi to custody in Insein Jail for a period of 15 days. It is on this report that the order of detention by the President was made.

Before us it is claimed on behalf of the applicant that the arrest by U Ba Chit was illegal and the consequential order of detention made by the President on the Inspector's report was void. That the consequential order of detention by the President would be vitiated by an initial illegal arrest is beyond dispute. See *King Emperor* v. *Deshpande and one* (1). The original arrest and the commitment to jail of U Aye Kyi by U Ba Chit have been challenged in two ways.

(1) (1946) 73 I.A. 144.

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First of all it is said on behalf of the applicant that the Inspector of Police before effecting an arrest had to make up his mind that there were grounds for suspecting that the person to be arrested either had committed a prejudicial act or was committing such an act or had committed one such act and was further in the course of committing another such act. The learned counsel for the applicant relies strongly on the wording of the order of commitment of the 3rd July 1948 where the Inspector of Police said, *inter alia*:— "I . . . . have reason to suspect and do in fact suspect that U Aye Kyi . . . . has committed/or was committing a prejudicial act . . . ." On the wording of this order it was urged that the Inspector of Police clearly had not been able to make up his mind what it was he suspected U Aye Kyi of—whether it was of a completed prejudicial act or a prejudicial act in the course of commission.

We agree that this criticism is a substantial one but section 7 (3) of the Act does not require that the order of commitment should set out the nature of the suspicion entertained by the officer concerned. The relevant portion of that sub-section reads: "He may, by an order in writing, commit any person so arrested to such custody as the President may, by general or special order, specify." Accordingly, the redundant reference to the nature of the suspicion in the order of commitment, cannot be fatal to its validity; neither can it be conclusive evidence of the nature of the suspicion which led to the arrest. It is obvious that the order of commitment followed a form prescribed for such cases. The stroke between the words "has committed" and "or is committing" makes it clear that the officer filling up the form of commitment was expected to strike off either of the alternatives not relevant to the case in hand. Can it be said that the

omission to strike off one of the alternatives not applicable is conclusive evidence that the police officer had not formed a definite suspicion on cogent grounds before he effected the arrest? We think not.

Moreover, the dividing line between a completed prejudicial act and a prejudicial act in the course of commission is a thin one. In many circumstances it would be a matter open to serious controversy where to draw the line; from one point of view the prejudicial act may have been completed and from another point of view it may still be in the course of commission. The act and the consequences flowing therefrom are sometimes so entangled that it would be well nigh impossible to dissociate one from the other. In such a case it may well be that in spite of the officer not being able to make up his mind whether the person to be arrested had completed a prejudicial act or was still in the course of committing that act, he would, in our opinion, have the right to act under section 7 (2) of the Act.

Secondly, it was said on behalf of the applicant that the affidavit of U Ba Chit justifying the arrest and detention of U Aye Kyi is not a sufficient return for the detention of U Aye Kyi and that accepting the allegations in the affidavit at their face value they do not constitute in law a "prejudicial act" within the meaning of section 2 (ii) of the Public Property Protection Act.

We have discussed at some length the nature of and the practice for the issue of a writ of *habeas corpus* in *Banerjee*'s case (Criminal Miscellaneous Application No. 5 of 1948) and it is not necessary to go into the matter here again. But it may be recalled that Holt C.J. in *King* v. *Bethel* (1) said:

"There ought not only a good cause to appear but also commitment, both as to the manner and substance of it; for

(1) 87 E.R. 494 at p. 495.

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writ requires *causam captionisel detentionis*, and here is only the cause of the detention and not of the caption; and where the liberty of the subject is concerned we must be certified of the causes."

For the reasons which have already been stated, no exception can successfully be taken to the manner of the arrest and detention. The order of commitment may not have been very happily worded but that is all that can be said against the manner of the arrest or detention. The order of detention made in the name of the President is as regards form perfectly regular.

Coming to the substance we agree with the learned counsel for the applicant that the return could have been in more unambiguous and precise language. There are precedents, where the return not completely regular but disclosing sufficiently to make the Court consider that the return, if amplified, may be a return on which a complete argument could be had, of the Courts granting leave to amplify, and it was suggested to the counsel if by consent they would let further arguments stand over for the return to be amplified. But it was contended on the one hand by the learned counsel for the applicant that such course would prejudice his client and on the other hand by the learned Attorney-General that on the return already made he could support the arrest and the detention of U Aye Kyi. Accordingly, on the materials before us we proceed to decide the matter of the sufficiency or otherwise of the substance of the arrest and detention.

It would be well at this stage of the judgment to clarify the position of this Court in issuing directions in the nature of *habeas corpus*. The right of appeal is not inherent in the nature of things; it is a right which has to be given by express enactment, and in these proceedings this Court is not exercising an appellate jurisdiction. What we have to see is that in arresting

or directing the detention of a citizen the authority concerned was acting within its lawful powers. Where the Legislature made that authority the judge of facts, this Court in proceedings for directions in the nature of *habeas corpus* will accept its findings of facts unless they are vitiated in law.

We do not intend, as it is unnecessary for us, to make here an exhaustive survey of the circumstances in which the findings of facts would not be binding on us. But it is clear that such findings may be vitiated either because the authority concerned did not act in good faith in coming to the finding or if relevant materials were not before it and it allowed itself to form its opinion on extraneous and irrelevant matters; and where the enactment investing the authority with the power requires him to act reasonably, an irrational finding would vitiate itself.

Section 7 (2) of the Public Property Protection Act, 1947, empowers the officer authorized under the Act to arrest "without warrant any person whom he suspects of having committed . . . . or of committing any prejudicial act." Suspicion, it must be remembered, is something much weaker than proof and all that is required of the officer in entertaining a suspicion is that it must be in good faith. [*See* section 10 (*1*) of the Act.] Now, what is good faith? Section 2 (*25*) of the General Clauses Act states that "a thing shall be deemed to be done in 'good faith' where it is in fact done honestly, whether it is done negligently or not." Accordingly, as far as the state of the mind of the officer effecting the arrest is concerned the only justicable issue is whether he acted honestly or not, irrespective of whether it was done with due care or not. It may be that if the suspicion was entertained irrationally that in itself would be evidence of absence of honesty; but it would be only one item in the bundle

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of evidence on which the Court would have to decide whether the suspicion entertained was entertained honestly or not. Irrationality in itself would not be conclusive of absence of honesty of motive.

Now in this case honesty in the sense contemplated by section 2 (25) of the General Clauses Act in relation to U Ba Chit has not been directly questioned. What was said was that on the materials before him he, as a reasonable and prudent person, should not have entertained the suspicion of the nature contemplated by the Public Property Protection Act. That leads us to the question whether the entertainment of the suspicion was so irrational on the facts available to the police officer that it would be indicative of want of good faith. In considering this question it must be remembered that the learned counsel for the applicant himself stated that it was a common practice in importing circles for goods, required to be covered by import licences, to be first shipped to Burma and the necessary licences obtained subsequently. He said the issue of importing licences was so often delayed that many importers in anticipation—it is suggested in all good faith—of the grant of licences brought the goods into the ports of the Union of Burma. That practice is clearly an illegal practice in view of section 3 (2) of the Control of Imports and Exports (Temporary) Act, 1947. Section 18 of the Sea Customs Act, with which must be read section 19 of the same Act, prohibits goods falling with the classes covered by an Order under the Control of Imports and Exports (Temporary) Act, 1947, being brought into the Union, whether by land or sea.

We are prepared to agree with the learned counsel for the applicant that the affidavit of U Ba Chit, the Inspector of Police who arrested U Aye Kyi, is not as specific as could be desired. But when in paragraph 2 of his affidavit U Ba Chit stated that he suspected

U Aye Kyi of being concerned in the receiving of licences to import and export goods by illegal means contrary to the rules made by the Government in that behalf and also that U Aye Kyi was concerned in the matter of the loss of nearly Rs. 18 lakhs revenue payable by importers as duty under the Sea Customs Act, we are of the opinion that the only reasonable interpretation that can be put on these statements is that sought to be put on them by the learned Attorney-General. The learned Attorney-General says that the obvious reference in these statements is to the practice admitted by the learned counsel for the applicant of importers, before obtaining importing licences, to ship goods into the ports in the Union and obtaining licences only after the goods had arrived at the ports.

Under the Control of Imports and Exports (Temporary) Act, 1947, and an Order made thereunder, read together with the Sea Customs Act the provisions of which have been made applicable, the importers who import without the necessary licences are liable to confiscation of the goods, in lieu thereof to a fine ranging up to 300 per cent of the value of the goods and a penalty amounting to another 300 per cent of the value of the goods. (*See* section 167, item 8 of the Sea Customs Act.)

The issue then of licences *ex-post facto* and procuring the issue of such licences by illegal means would clearly be an act which directly or indirectly abets or incites or facilitates the contravention of any rule and order made under the Control of Imports and Exports (Temporary) Act, 1947. That act clearly would be a "prejudicial act" within the meaning of section 2 (ii) (*b*) of the Public Property Protection Act. Moreover, it appears also that such an act would fall within the definition of the term "prejudicial act" in sub-clause (*a*) of the same section, namely, an act

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directly or indirectly connected with, or relating to, any unlawful activity having for its object the smuggling of any property in Burma in contravention of import or export orders and rules duly made by the Government under the Control of Imports and Exports (Temporary) Act, 1947. Wharton's Lexicon defines "smuggling" as the offence of importing prohibited articles, or of defrauding the revenue by the introduction of articles into consumption without paying the duty chargeable on them. The allegations above set out would clearly fall within the first arm of this definition.

In these circumstances the application fails and stands dismissed.

SUPREME COURT.

TINSA MAW NAING (APPLICANT)

v.

COMMISSIONER OF POLICE, RANGOON, AND ANOTHER (RESPONDENTS).*

1948

Aug. 11.

[On appeal from the High Court.]

Public Order (Preservation) Act, 1947 (Act XVI of 1947), as amended by Act XXVIII of 1947—S. 5A (1) (b)—Power of Court to examine the return.

Held: The Court has power to examine the truth of the facts set forth in a return for *habeas corpus* but such an examination shall be done in a summary way by affidavit or affirmation.

Kin Ma Ma v. *The Chairman, Public Property Protection Board and one* (Criminal Misc. Application No. 12 of 1948), followed.

Where the activities of the person detained as set forth in the writ amounts to offences under the Penal law, the Supreme Court has no power to order the officer to prosecute him under the Penal law and not to detain him under the Public Order (Preservation) Act. Bare assertion by applicant suggesting that the Commissioner of Police is not acting in good faith is insufficient to prove that fact especially when he has arrived at a certain finding of fact on the materials before him.

Choung Po for the applicant.

Chan Htoon (Attorney-General of the Union of Burma) for the respondents.

The judgment of the Court was delivered by

KYAW MYINT, J.—The applicant in this case prays for directions in the nature of *habeas corpus* relating to her husband Bo Yan Naing who is under detention under section 5A (*1*) (*b*) of the Public Order (Preservation) Act, 1947 (Act XVI of 1947), as amended by Act XXVIII of 1947.

The 1st respondent, the Commissioner of Police, Rangoon, who passed the order of detention on the

* Criminal Misc. Application No. 15 of 1948.

† *Present:* SIR BA U, Chief Justice, E MAUNG, J., and KYAW MYINT, J.

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14th July 1948, has set out in his affidavit the particulars of the information he received regarding the activities of Bo Yan Naing, upon which he was satisfied that Bo Yan Naing was acting in a manner prejudicial to the public safety and the maintenance of public order.

The applicant in her affidavit in reply denies the truth of the allegations against Bo Yan Naing and it has been strenuously contended on her behalf that upon such denial the Court is bound to hold an enquiry by taking evidence.

A similar situation arose in this Court in the case of *Kin Ma Ma* v. *The Chairman, Public Property Protection Board and one* (Criminal Miscellaneous Application No. 12 of 1948). After an examination of the relevant English authorities and of section 3 of the *Habeas Corpus* Act of 1816, this Court came to the conclusion that, while the Court has power to examine the truth of the facts set forth in a return to a writ of *habeas corpus*, such an examination shall be done in a summary way by affidavit or affirmation.

It has also been contended that the alleged activities of Bo Yan Naing amount to offences under the penal law and that the 1st respondent, instead of ordering his detention, should have instituted criminal proceedings in the Courts. This Court however has no power to order the 1st respondent to follow any particular course.

The nature and scope of directions in the nature of *habeas corpus* has been explained by this Court in the case of *G. N. Banerji* v. *The Superintendent of the Jail at Insein* (Criminal Miscellaneous Application No. 5 of 1948) and it is unnecessary to repeat what was stated therein.

The 1st respondent has placed before the Court the materials upon which he came to the conclusion that Bo Yan Naing was acting in a manner prejudicial

to the public safety and the maintenance of public order. It is not contended that the 1st respondent did not in fact receive the information which he states that he received. There is nothing except the bare assertion of the applicant to suggest that the 1st respondent was not acting *bona fide* in passing the order of detention. He arrived in good faith at a certain finding of fact, and it is not for this Court to say that he should not have arrived at such a finding.

The application is dismissed.

SUPREME COURT.

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Aug. 11.

KIN MA MA (APPLICANT)

v.

THE CHAIRMAN, PUBLIC PROPERTY PROTECTION BOARD, AND ANOTHER (RESPONDENTS).*

Direction in the nature of habeas corpus—*Nature of return—Power of Court to examine its truth—Public Property Protection Act, ss. 2 (i), (ii), (b).*

Held : Under the English common law the return in a writ of *habeas corpus* could not originally be questioned but later by *Habeas Corpus* Act of 1816 (56 Geo. 3, C. 100) the rigour was mitigated. It gave power to the Judges to examine the truth of the facts set forth in such return by affidavit or affirmation.

The same principle should be applied in Burma. But the Supreme Court in issuing direction in the nature of *habeas corpus* does not sit as a Court of Appeal against the order of detention. In order to enable the Court to see whether the officer concerned had sufficient grounds of suspicion, *i.e.* whether he acted honestly, he must place all the facts and materials on which he acted before the Court. This must be done by an affidavit as provided by the rules of Supreme Court.

Definition of Public Property in s. 2 (i) of the Act is very wide. It does not however include all private properties. It means and includes one's own private property if it is intended, either under contract or any law for the time being in force, for use by the army, navy and air force in Burma and property purchased under such a contract from NAAFI is public property.

Rex v. *Secretary of State for Home Affairs*, (1942) 2 K.B. 14, followed.

Thein Moung for the applicant.

Chan Htoon (Attorney-General of the Union of Burma) for the respondents.

The judgment of the Court was delivered by

BA U, C.J.—This is an application for issue directions in the nature of a writ of *habeas corpus*. The applicant, Kin Ma Ma, is the senior partner of the firm of Messrs. Kin Ma Ma and Sons, Nos. 181, 189, Sule Pagoda Road, Rangoon. Her husband, U Tha Win, is the Managing Director of the said firm. The

* Criminal Misc. Application No. 12 of 1948.

† *Present :* SIR BA U, Chief Justice, E MAUNG, J., and KYAW MYINT, J.

firm was appointed as the Canteen Contractor to the Fighting Forces in Burma under a written contract dated the 13th January 1948.

The contract (Exhibit A) provides, *inter alia*—

"1. The contractor shall obey all official orders and regulations for the time being in force, including any orders which may be issued from time to time.

2. The area in which the contractor shall carry out his trade shall be that under the direct administrative control of O.C. the unit.

3. The contractor shall provide a shop and a restaurant and, in addition, other shops, dhobies, tailors, shoemakers as required.

4. The contractor shall not charge prices in excess of those notified in the official price list a copy of which it shall be his responsibility to put in all shops and restaurants and which will be signed by the O.C. unit or his representative.

* * * *

9. The contractor shall have the sole right of supply of all goods required for officers, non-commissioned officers and men within the unit lines except such goods as may be purchased under the orders of the Government by the officer commanding the unit or other persons on payment indent in accordance with the Regulations for the Army in Burma, from the BASC and rations provided in kind by the Government.

No outside hawkers or tradesmen will be allowed in the unit area.

* * * * "

In order to enable the contractor to supply the goods required by the Fighting Forces, the contractor was granted permits from time to time to purchase goods from the *NAAFI* (Navy, Army and Air Force Institute) stores taken over by Government. The goods so purchased by the contractor were to be sold only to the personnel of the Fighting Forces and to no others. This went on, apparently amicably, from the date, of the contract up till the 3rd July 1948. On that date U Tha Win was arrested by U Ba Tha, Inspector of Police of the Public Property Protection Police

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Bureau of Investigation, under section 7 (2) of the Public Property Protection Act, 1947, and since then U Tha Win has been in custody, first in the Barr Street Town Lock-up, and now in Insein Jail.

Two substantial points are submitted in support of the application, namely :

(1) that as the goods purchased by the contractor were purchased with his own money, even though from the *NAAFI* Stores, they were and are not public property within the meaning of section 2 (i) of the Public Property Protection Act, 1947, and that, therefore, the contractor could do whatever he liked with his own property ; and

(2) that, even assuming that the goods so purchased by the contractor with his own money were and are to be treated as public property, the arresting officer, U Ba Tha, has not shown any instance where the contractor has charged for his goods more than the prices fixed by the Army authorities, or sold them in the black market.

"Public Property" as defined in section 2 (i), Public Property Protection Act, means any store or equipment or any other property whatsoever belonging to, or consigned to, or intended for the use of the army, naval or air forces serving in Burma or belonging to, or consigned to, or intended for the use of, the Government of Burma or any local authority, or any Board or Body constituted under any law. The definition thus given is so wide that it even includes one's own property if it is intended or ear-marked for the use of the army, navy and air forces of the Union of Burma. This, if accepted as correct, is likely to lead to absurd results in some cases. Take, for instance, the case of a man having several bundles of piece-goods in his own possession as his own property, and an army officer coming round and telling him that

these bundles of goods are required for use by the army and that they must not be sold to others. These bundles of piece-goods would, according to the definition given above, become public property. Nobody in that case would have any sense of security with his own property. That would even in a way be in conflict with article 23 of the Constitution. As pointed out in our judgment passed in *U Htwe* v. *U Tun Ohn and one* (Civil Miscellaneous Application No. 5 of 1948), the grammatical and ordinary sense of the words has to be adhered to unless that would lead to some absurdity, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity.

Therefore, having regard to the whole context of section 2 (i), what public property means is and includes one's own property if it is intended, either under contract or any law for the time being in force, for use by the army, navy and air force in Burma, etc.

Now, what is not in dispute in this case is that the contractor was the only person given the right to purchase goods from the *NAAFI* Stores, and he was given that right as he was under orders to supply these goods to the army, navy and air forces of the Union of Burma and to no others. Therefore, though the goods purchased from the *NAAFI* Stores were goods purchased with his own money, they were public property within the meaning of section 2 (i) of the Public Property Protection Act. Therefore, if he dealt with these goods in any way contrary to the instructions given to him by officers of the armed forces, he would be committing a prejudicial act within the meaning of section 2 (ii) (*b*) of the Public Property Protection Act.

That brings us to the second point raised by the learned counsel for the applicant.

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In connection therewith, U Ba Tha in paragraph 4 of his affidavit states, amongst others—

"I say that in pursuance of these specific terms of contract, the military authorities have issued orders to U Tha Win that he shall sell the goods consigned to him exclusively to the members of the Burma Army, Navy and Air Forces. Contrary to the said order, lawfully issued by the military authorities attaching the discharge of the trust imposed upon U Tha Win under the said contract, many instances have been discovered in which U Tha Win has sold the goods received from the Civil Supplies and the NAAFI Stores at higher prices both to the members of the forces referred to above, and to the black-marketeers outside . . . ."

This allegation is traversed by both the applicant and her assistant, U Sein Maung. In paragraph 10 of her affidavit the applicant states :

"10. I say that no public property has ever been consigned to or received by my husband and I say that all along he has been dealing with his personal private property under the contract and no stores for the canteen have ever been sold with profit in black market nor have ever been sold at higher prices in the canteen."

In the case of U Sein Maung, he states in paragraph 6 of his affidavit as follows :

"6. I say that if there really were orders issued by the Military Authorities to the contractors or to the Managing Director, U Tha Win, in respect of the goods purchased by the contractors, as alleged by the Inspector of Police, U Ba Tha, in paragraph 4 of his affidavit, which affidavit, I have already read, U Ba Tha would certainly have produced such orders or a true copy thereof but he has refrained from doing so."

The question is whether this Court can and, if so, whether and how it should examine these disputed facts.

As pointed out in our judgment passed in *U Htwe*'s case (Civil Miscellaneous Application No. 5 of 1948), the writs as set out in article 25 of 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.

The writ of *habeas corpus* in English law is of two-fold origin, namely, common law and statute law. The latest statute on the subject is the *Habeas Corpus* Act, 1816 (56 Geo. 3, C. 100). At common law, the return could not be disputed. Sir William Holdsworth in his History of English Law, Volume IX at 119, said—

"But, in the course of the 18th century, two defects were disclosed in the existing law. Firstly, the Court had no power to examine the truth of any return made by a gaoler. Secondly, the Act of 1679 did not apply to a detention which was not a detention on a criminal charge . . . . . Attention was called to these defects, chiefly by the Acts which had allowed impressment for military service. To some extent also they were illustrated by the existing bankruptcy law and practice ; for we have seen that that law, by giving incompetent commissioners large powers to commit bankrupts, provided occasions for issue writs of *habeas corpus* for their release. It seems to have been the first of these causes which gave rise to a Bill which was considered by the House of Lords in 1758. The object of the Bill was to extend the Act of 1679 so as to give the benefit of the writ of *habeas corpus ad subjiciendum* as improved by that Act to persons who were imprisoned otherwise than on a criminal charge. But the Lords took the opportunity to give the opinion of the Judges, not only on the questions of law as to the issue of writs of *habeas corpus ad subjiciendum* not falling within the Act of 1679, but also upon the question whether a Judge, before whom such a writ was returned, had power to examine the truth of the facts stated in the return.

To some extent, the views of the Judges were in conflict ; but there was a very substantial measure of agreement. It was agreed by all that the truth of the return was not examinable by the Court, because it was a question of fact for a jury to be ascertained in other proceedings. The Courts, it was said, were concerned, not with the truth of the return, but with its sufficiency in point of law to justify a detention . . . . . To some extent, however, the Judges had mitigated its harshness by adopting the practice of making a rule that a person holding another in his custody should show cause for his detention, and of discharging

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such person if no cause were shown. In that way, the merits of the case could be gone into."

The Legislature stepped in and helped the Judges to mitigate the rigour of the common law practice by enacting section 3 of the *Habeas Corpus* Act of 1816, which is, *inter alia*, as follows :

"In all cases provided for by this Act, although the return to any writ of *habeas corpus* shall be good and sufficient in law, it shall be lawful for the Justice or Baron before whom such writ may be returnable to proceed to examine the truth of the facts set forth in such return by affidavit or by affirmation (in cases where affirmation is allowed by law) and to determine therein as to justice shall appertain."

At the end of the section it provides that such an examination shall be done in a summary way by affidavit or affirmation.

As our writ, as pointed out above, is derived from English law, it contains the characteristics of both the common law writ and the statute law writ.

As in English law, where in an application for a writ of *habeas corpus* for a man who has been imprisoned under sentence of a criminal Court of competent jurisdiction the return cannot be impugned, so in our law also we must hold that the return in such a case cannot be impugned. It is, however, otherwise in other cases. The question then arises as to what matters the examination should be directed to. To answer this question we cannot do better than quote the observation of Lord Green M.R. in the case of *Rex* v. *Secretary of State for Home Affairs* (1) this Court does not sit as a Court of appeal. To enable this Court to see whether the officer concerned had sufficient grounds for suspicion, or, in other words, whether he acted honestly, he must place all the facts

(1) (1942) 2 K.B. 14.

and materials on which he acted before this Court. This must be done by means of affidavit as provided by the rules of our Court. This is the same as in English law. In the present case, as pointed out above, the attitude taken up by the applicant is, as the goods were purchased from *NAAFI* Stores with their own money, they could do what they liked with those goods. That supports the case of the other side.

In these circumstances, we see no ground to interfere. The application is dismissed.

လွှတ်တော်တရားဝန်ကြီးချုပ် ဦးသိန်းမောင်နှင့် တရားဝန်ကြီးဦးစံမောင် ရှေ့၌။

၁၉၄၈
ဇွန်လ ၁၇

မတင်တင နှင့် ဒေါ်ကံရှိ။*

သက်သေများအပြိုင်အဆိုင်ဖြစ်နေခြင်း——အမှုကိုမှန်ရာရောက်အောင်ဆုံးဖြတ်နည်း——စာချုပ်ချုပ်ဆိုရန်အတွက် ဂတိနှင့်ညီညွတ်ချက် ရှိမရှိ။

နှစ်ဦးနှစ်ဘက်မှပြသော သက်သေများသည် အပြိုင်အဆိုင် ဖြစ်နေကြရာ၊ အမှုကိုမှန်ရာရောက်အောင်မည်သည့်နည်းနှင့်ဆုံးဖြတ်ရမည်နည်း။ ဤအချက်နှင့်စပ်လျဉ်း၍ပရီဗီကောင်စီ၏ လွှတ်တော်က ကို၊ ဒဗလျူ၊ ဒေဝိစ် နှင့် မောင်ရွှေကိုတို့အမှု (အတွဲနံပါတ် ၃၈၊ အိုင်၊အေ စာမျက်နှာ ၁၅၅)တွင် ဆုံးဖြတ်ထားသောအချက်မှာ များစွာဆီလျော်ပေသည်။ ယင်းသို့အမှုများတွင်ဝန်ခံထားသောအချက်များနှင့် ဖြစ်ဟန်လက္ခဏာရှိသောအချက်များကိုကိုထောက်ရှုပြီးမည်သည့်ဘက်ကမှန်လိမ့်မည်ဟုဆုံးဖြတ်သင့်ကြောင်း။

အတွဲနံပါတ် ၈၊ ရန်ကုန်၊ စာမျက်နှာ ၄၂၅။

တရားဝန်ကြီးဦးစံမောင်။ ။မိုရွာမြို့လက်ထောက် တရားမ တရားသူကြီးရုံး၊ တော် ၁၉၄၇ ခုနှစ်၊ တရားမကြီးမှုအမှတ် ၂၆ တွင် အယူခံတရားလိုမတင်တင်က ၎င်း၏ယောကျ်မဖြစ်သူ အယူခံတရားခံ ဒေါ်ကံရှိအပေါ်၌ သက်သေခံတင်ပြထားသော ဂတိပဋိညာဉ်စာချုပ်အရ၊ ငင်းစာချုပ်တွင်ဖေါ်ပြထားသောမြေများကို မိဓိအားရေစစ်ခွဲရှိစာချုပ်ပြုလုပ်ကာ အပြီးအပိုင်လွှဲပြောင်းပေးရန် တရားစွဲဆိုခဲ့၏။ ယင်းသို့တရားစွဲဆိုသောအခါ အယူခံတရားခံက ထုချေသော အဓိကအချက်မှာ အယူခံတရားလိုနှင့်အဆိုတွင် အခြေခံပြုထားသော ဂတိပဋိညာဉ်စာချုပ်မှာ မိမိချုပ်ဆိုသောပဋိညာဉ်စာချုပ်မဟုတ်သဖြင့်၊ တရားလို၏အဆိုကိုစဉ်းစားနှင့်တကွ ပလပ်ရန်ပင်ဖြစ်ပေသည်။ ဤအချက်နှင့်စပ်လျဉ်း၍ အောက်ရုံးတရားသူကြီးက ကောက်ချက်တရပ် ထုတ်ပေးပြီး နှစ်ဦးနှစ်ဘက်ပြသောသက်သေများကိုစစ်ဆေး၍ ထိုကောက်ချက်ကို အယူခံ တရားခံဘက်သို့ အနိုင်ပေးပြီးဖြေဆိုလျက်၊ အယူခံတရားလို၏ အမှုကိုစဉ်းစားနှင့်တကွ ပလပ်လိုက်၏။ ယင်းသို့ပလပ်ခြင်းကို မကျေနပ်သဖြင့်ဤရုံးတော်၌အယူခံသောအမှုဖြစ်လေသည်။

သက်သေခံတင်ပြထားသော ဂတိပဋိညာဉ်စာချုပ်မှာ အောက်ပါအတိုင်းဖြစ်၏။

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* ၁၉၄၈ ခုနှစ်၊ ပဋမတရားမအယူခံမှုအမှတ် ၁၀။

၁၉၄၈

မတင်တင်
နှင့်
ဒေါ်ကံရှိ။

တရားဝန်ကြီး
ဦးစံမောင်။

ဂတိပင်ရိုးညာခံစာချုပ်။

ဒေါ်ကံရှိ၊ အဘ ဦးရိုင်း။ မြေပိုင်ရှင်၊ အမြင့်၊ ကျောက်စာရပ်၊ ချောင်းဦးမြို့နယ်။
မတင်တင်၊ အဘ ဦးပေါ်ညွန်း၊ ဘုန်းမနိုးအနောက်ရွာ၊ မုံရွာမြို့နယ်။

၁၃၀၆ ခုနှစ်၊ တန်ဆောင်မုန်းလဆန်း ၇ ရက်နေ့ (၁၉၄၄ ခု၊ နောက်တိုဘာလ ၂၂ ရက်)၊ ဘုန်းမနိုးအနောက်ရွာအရပ်တွင် ဒေါ်ကံရှိ-မတင်တင်တို့ နှစ်ဦးသဘောတူ ဂတိစာချုပ်ပြုလုပ်ကြသည်မှာ၊ ဒေါ်ကံရှိက ယနေ့ကျွန်ုပ်၏သားမောင်ချစ်မောင်နှင့် မတင်တင်တို့ ထိန်းမြားမင်္ဂလာပွဲတွင် ကျွန်ုပ်၏ပိုင်ဆိုင်သောပစ္စည်းများနှင့် မြေယာစသော ရှိပစ္စည်းတို့ကို ထက်ဝက်ဟု ပရိက်သတ်၏ရှေ့တွင် မတင်တင်သို့လက်ဖွဲ့သောမြေယာများကိုဘရားဥပဒေအရ ရေစစ်ရိစာချုပ်ပြုလုပ်ပေးရန်၊ စစ်ဘေးအန္တရာယ်အမျိုးမျိုး တွေ့ကြုံနေရသဖြင့်ယခုမပြုလုပ်နိုင်သော်လည်းအခွင့်သင့်သည့်အခါမတင်တင်၏သဘောအတိုင်းပိုင်ဆိုင်လုံးစွဲနိုင်ရန်မတင်တင်၏ အစ်မ မခင်အုံးကပရိသတ်ထဲမှာ ပစ္စည်းအရပ်ရပ်ကိုလုံးချေပြောသော်ရှိ ပစ္စည်းထက်ဝက်လက်ဖွဲ့ခြင်းထက် မတင်တင်အားသီးသန့်၌အမှန်ပေးနိုင်သည့်မြေကိုသာ တရားနှင့်အညီစာချုပ်ပြုလုပ်ပေးရန်ပြောသည့်စကားကဲ့သို့ ကွယ်လွန်သွားသူဘုရားတကာဦးခဲ့ကြီးက မတင်တင်သို့ပေးရန် ကျွန်ုပ်နှင့်အတူရည်မှန်းပြီးဖြစ်သောမြေများအတိုင်း၊ ကျွန်ုပ်ဒေါ်ကံရှိကလည်း ၎င်းဘုရားတကာကြီးနှင့်မူလရည်မှန်းချက်အတိုင်း မတင်တင်သို့ပေးရန်အောက်ဖော်ပြရာပါ မြေများမှာ—

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၁၉၄၃-၄၄ ခုနှစ်၊ စာရင်းမြေပုံအရ အထက် ဖော်ပြပါ အရပ်ရပ်မြေအရိယာ (ဧကေ၄၉၊၀၃၀မ ၉၇) ကိုသမီးမတင်တင် သီးသန့်ပိုင်ဆိုင်ရန်စစ်ဘေးအန္တရာယ်များအေးချမ်းသောအခါရေစစ်ရိမှတ်ပုံတင်ရုံးသို့တရားနှင့်အညီစာချုပ်ပြုလုပ်၍မတင်ငင်ကိုပေးအပ်ပါမည်။ ရေစစ်ရိစာချုပ်ပြုလုပ်မပြီးမီလည်း၊ ယနေ့ကစ၍ အဆိုပါမြေများမှ ရရှိဖြစ်ထွန်းသည့်အကျိုးခံစားခွင့်များကို မတင်တင်အကျိုးခံစားပါဟု ဒေါ်ကံရှိကပြောဆိုသောစကားအတိုင်း၊ သမီးမတင်တင်က သဘောတူသဖြင့် ဒေါ်ကံရှိ-မတင်တင်တို့ နှစ်ဦးသဘောတူဒေါ်ကံရှိ၏အထက်အဆိုပါစကားများကို အောက်အမည်ပါ လူကြီးတို့အား အသိအမှတ်ထား၍၊ ဤစာချုပ်ကို ပြုလုပ်ကြပြီးလျှင် အောက်တွင်ပေးသူ ယူသူနှစ်ဦးက်လက်မှတ်ရေးထိုးကြသည်။

ပေးသူ။ **ဒေါ်ကံရှိကိုယ်တိုင်ကျက်ရေး** (+)
ဒေါ်ကံရှိလက်မ နှိပ်ပုံ။
လက်ခံသူ။ ။**မတင်တင်**။

ဤစာချုပ်ကို ချုပ်ဆိုသောအကြောင်းနှင့်စပ်လျဉ်း၍ မတင်တင်ကထွက်ဆိုသည်မှာ၊ မိမိနှင့်ဒေါ်ကံရှိ၏သားမောင်ချစ်မောင်တို့မင်္ဂလာဆောင်ကြသောနေ့မှာ ၁၃၀၆ ခုနှစ်၊ တန်ဆောင်မုန်းလဆန်း ၇ ရက်နေ့ဖြစ်ကြောင်း။ ၎င်းနေ့မတိုင်မီ တရက်က နေဝင်ချိန်တွင် ဒေါ်ကံရှိနှင့်မည်သူ့တို့သည် အခြားသူများနှင့်အတူတကွ ဘုန်းမနိုးရွာရှိ မိမိအိမ်သို့ရောက်လာကြကြောင်း။ ထိုသို့ရောက်လာသောအခါ

၁၉၄၈

မတင်တင်
နှင့်
ဒေါ်ကံမြို့

တရားဝန်ကြီး
ဦးစံမောင်။

မိမိ၏အစ်မဖြစ်သူ မခင်အုံးက ဒေါ်ကံရှိအား မင်္ဂလာဆောင်တွင် လက်ဖွဲ့ချည့် ပစ္စည်းစာရင်းများနှင့်စာချုပ်ချုပ်ဆိုရန် တံဆိပ်တော်ခေါင်းပါရှိသည့် စာရွက်များ ပါသလောဟုမေးရာ၊ ဒေါ်ကံရှိကမင်္ဂလာဆောင်သည့်နေ့တွင် အမြင့်ရှာမှလာမည် ဖြစ်သောကျောင်းဆရာများ၏ လက်တွင်ပါလာလိမ့်မည်ဟုပြောကြောင်း။ မင်္ဂလာ ဆောင်နေ့ကျွေးရာက်သောအခါ၊မင်္ဂလာဆောင်အခမ်းအနားမှာ နံနက် ၁၀ နာရီမှ အစပြု၍ နံနက် ၁၁ နာရီခွဲအချိန်တွင်ပြီးစီးကြောင်း။ မင်္ဂလာဆောင်ဩဘာစာကို ဆရာသန်းဆိုသူက မဘတ်ကြားမှီ၊ ဆရာသူက ကြွရောက်လာသောည့်ပရိသတ် ရှေ့၌ဒေါ်ကံရှိကသတို့သမီးမတင်တင်အား မိမိပိုင်ပစ္စည်းများ ထက်ဝက်ပေးသည် ဟုကျေညာကြောင်း။ ထိုနောက် နေ့တနာအချိန်တွင်မင်္ဂလာသက်နှံးကိုမိမိနှင့်သတို့ သားမောင်ချစ်မောင်တို့က ဘုန်းကြီးတပါးကိုဆက်ကပ်ကြကြောင်း။ ညနေသုံးနာ ရီခွဲအချိန်တွင် သက်ဝေခံတင်ပြထားသော ဂတိစာချုပ်ကို ဒေါ်ကံရှိနှင့်မိမိတို့က ချုပ်ဆိုသောအခါ ဦးဘိုးမှီ၊ ဦးအောင်ခင်၊ ဦးထွန်းခင်၊ ဦးဘအုန်း၊ ဦးလူခင်နှင့် မခင်အုံးတို့က အသိသက်သေအဖြစ်ဖြင့် လက်မှတ်ထိုးကြကြောင်း။ စာချုပ်ကို အကြမ်းရေးသူမှာ မိမိ၏အစ်မ မခင်အုံးဖြစ်၍တံဆိပ်တော်ခေါင်းစာရွက်ပေါ်တွင် အဆောက်သူမှာမိမိ၏ခဲအိဖြစ်သူ ကိုသန်းတင်ဖြစ်ကြောင်း။ စာချုပ်ချုပ်ပြီးသော အခါ ဒေါ်ကံရှိနှင့် မည္ဆန္ဒတို့သည် မိမိတို့နေထိုင်သော အမြင့်ရှာသို့ ပြန်သွားကြ ကြောင်း။ ထိုနောက်မောင်ချစ်မောင်နှင့် မိမိသည်အမြင့်ရှာ၌ လင်မယားအဖြစ်ဖြင့် ဆယ့်တလ ပေါင်းသင်းပြီးနောက်၊ မိမိသည်မောင်ချစ်မောင်နှင့် ခွဲခွါပြီးမိမိ၏မိဘ အိမ်သို့ပြန်လာကြောင်းပင်ဖြစ်လေသည်။

မတင်ကင်၏ ဆွက်ချက်ကို ထောက်ခံသူ သက်သေများမှာ ဌင်း၏ခဲအို မောင်သန်းတင် (တရားလိုသက်သေနံပါတ် ၁) နှင့် ပဋိညာဉ်စာချုပ်တွင် အသိ သက်သေအဖြစ်ဖြင့် လက်မှတ်ထိုးသည်ဟုဆိုကြသောဦးဘိုးမှီ၊ မောင်အောင်ခင်၊ မောင်ထွန်းခင်၊ မောင်ဘအုန်းနှင့်ဦးလူခင် (တရားလိုသက်သေနံပါတ် ၂၊ ၃၊ ၄၊ ၅၊ ၆) တို့ဖြစ်ကြ၏။ ဆင်ခြင်မြော်အသိသက်သေဖြစ်သော မခင်အုံးမှာ ၁၃၀၇ ခုနှစ်၊ သီတင်းကျွတ်လထဲတွင်သေဆုံးသွားပြီဖြစ်၍ သက်သေအဖြစ်ဖြင့် မစစ်ဆေး နိုင်ခဲ့ချေ။

သက်သေမောင်သန်းတင်ထွက်ချက်နှင့် စာချုပ်တွင်အသိသက်သေအဖြစ်ဖြင့် လက်မှတ်ထိုးသည်ဆိုသောသူတို့၏ထွက်ချက်မှာ အချို့အချို့သောနေရာ၌ကွဲလွဲ၏။ ဥပမာဆိုလျှင် မောင်သန်းတင်ကမိမိသည်စာချုပ်ကိုရေးပြီးသည့်နောက် မည္ဆန္ဒသူမှ လက်မှတ်မထိုးမှီ လက်မှတ်ထိုးသူများရှေ့တွင် စာချုပ်ကိုမိမိကဘတ်ပြကြောင်း ထွက်ဆိုရာ၊ ဦးလူခင် (တရားလို သက်သေနံပါတ် ၆) က မူကား၊ စာချုပ်

၁၉၄၈
မတင်ဘင်
နှင့်
မေ၊ကံရှိ။
တရားဝန်ကြီး
ဦးစံမောင်။

အပေါ်တွင် သက်သေများအားလုံးက သက်မှတ်ထိုးပြီးမှသာလျှင်မောင်သန်းတင်ကစာချုပ်ကိုဘတ်ပြီးကြောင်းထွက်ဆိုခဲ့၏။ ဦးဘိုးမို (တရားလိုသက်သေနံပါတ် ၂) က မောင်သန်းတင်ထွက်ဆိုသည့်အတိုင်းထွက်ဆိုရာ၊ မောင်အောင်ခင် (တရားလိုသက်သေနံပါတ် ၃) က မောင်လူခင်ကဲ့သို့ထွက်ဆိုခဲ့၏။ ထိုပြင် သက်သေခံစာချုပ်အပေါ်၌ ဒေါ်ကံရှိက မည်သည့်အခါတွင်လက်ပုံနှိပ်ထားသည်ဟူသောအချက်နှင့် စပ်လျဉ်း၍လည်းသက်သေတယောက်နှင့်ဘယောက် ကွဲလွဲကြသေးသည်။ သို့သော် ထိုကွဲလွဲချက်များမှာ အရေးတကြီးကွဲလွဲချက်ဟူ၍ ကျွန်ုပ်တို့မယူဆနိုင်။ စာချုပ်ချုပ်ဆိုပြီး နောက်သုံးနှစ်ခန့်ကြာအချိန်တွင် စစ်ဆေးသော သက်သေများ၏ ထွက်ချက်များမှာ ဤကဲ့သို့သော ကွဲလွဲချက်များရှိခြင်းသည် အံ့သြတွယ်ရာမဟုတ်။ ၎င်းသက်သေများသည် ရုံးတော်၌သက်သေခံမှီ တယောက်နှင့်ကယောက်ညှိနှိုင်းတိုင်ပင်ထားမှသာလျှင် ဤအချက်များ၌တဦးနှင့်တဦးကိုက်ညီပေလိမ့်မည်။

အောက်ရုံးတရားသူကြီးက ဤသက်သေများ၏ထွက်ချက်ကို ပယ်သော အကြောင်းရင်းမှာ၌သက်သေများသည် အယူခံတရားလိုမတင်တင်၏ဘခင်ဖြစ်သူ သူကြီးဦးပေါ်ညွန့် ပိုင်သောနယ်အတွင်း နေသောသူများဖြစ်ခြင်းကြောင့်ပင်ဖြစ်သည်။ ထိုပြင်တဝ အောက်ရုံးတရားသူကြီးက ဝေဖန်သည်မှာ၊ အကယ်၍သာအယူခံဘရားခံ မကံရှိက သက်သေခံတင်ပြထားသော ပဋိညာဉ်ခံစာချုပ်မျိုးကို ချုပ်ဆိုခြင်းမှန်ခဲ့ပါမူ၊ အမြင့်ရှာမှမင်္ဂလာအောင်အခမ်းအနားသို့ လာရောက်သော ဧည့်သည်အချို့သည် အသိသက်သေအဖြစ်ဖြင့် မှုချပါဝင်လိမ့်မည်။ ၎င်းသက်သေများမပါဝင်ခြင်းကြောင့် စာချုပ်ကိုဒေါ်ကံရှိက ချုပ်သည်ဆိုသောအချက်မှာ ယုတ္တိမရှိဟူ၍ပင်ဖြစ်သည်။

ပဌမအချက်နှင့်စပ်လျဉ်း၍ ကျွန်ုပ်တို့ဖေါ်ပြလိုသည်မှာ တရားလိုသက်သေဦးဆိုမို့သည်ဦးပေါ်ညွန့်၏ နယ်အတွင်းတွင် နေသောသူဖြစ်ကြောင်းသော်လည်း မဲလောဆောင်အခမ်းအနားသို့ သတို့သားဘက်ကဘိတ်ခေါ်၍ လာရောက်သော သူဖြစ်၏။ ထို့အပြင် မကံရှိနှင့် အဘူလာ အတူပြန်သော မည်သူ့၏ဆွေမျိုးရင်းချာတယောက်ဖြစ်ပေသည်။ ထိုကြောင့်၎င်းအမှုတွင်သက်သက်မဟုတ်မမှန်ဘဲ လိုဆယ်ပြီးထွက်ဆိုရန်အကြောင်းမရှိ။ မဆွကဖြာ်ပြခဲ့သောမြေမှုတမှုတွင် သူကြီးဦးပေါ်ညွန့်အား ၎င်းက သက်သေအဖြစ်ဖြင့် စစ်ဆေးခဲ့သော အကြောင်းကြောင့် ဦးပေါ်ညွန့်၏သမီးဘက်မှလိုက်ပြီး မတရားထွက်ဆိုသည်ဟုယူဆစရာအကြောင်းမလုံလောက်။ ထိုအမှုတွင် သူကြီးကမိမိ၏ဝတ္တရားအတိုင်း မလွဲမကင်းသာ၍ ဦးဘိုးမိုဘက်မှနေပြီးသက်သေလိုက်ရခြင်းဖြစ်မည်ဆိုကဖြစ်နိုင်၏။ မောင်အောင်ခင် (တရားလိုသက်သေနံပါတ် ၃) သည် ကျေးရွာကော်မိတီ လူကြီးတယောက်

၁၉၄၈
မတင်တင်
နှင့်
ဒေါ်ကံမို့
ကရားဝန်ကြီး
ဦးစံမောင်။

ဖြစ်ခြင်းမှန်၏။ သို့သော်ယင်းသို့ ကျေးရွာကော်မီတီလူကြီး တယောက်ဖြစ်တိုင်း မကောင်တင်ဘက်မှ လိုက်၍မတရားထွက်ဆိုရန် အကြောင်းမရှိ။ မော်င်ထွန်းခင် (တရားလိုသက်သေနံပါတ် ၄) အတိုင်းမှာဆိုလျှင် ဇင်းသည်ဦးပေါ်ညွှန်းပိုင်နယ်အတွင်း နေထိုင်သူတယောက်သာဖြစ်သည်။ ဤအချက်တချက်တည်းကြောင့် ဇင်းကိုမယုံကြည်ဟုဆိုရန်ခဲယဉ်း၏။ မောင်ဘအုန်း (တရားလိုသက်သေနံပါတ် ၅) သည် မင်္ဂလာဆောင်သောအခါ၌ ချက်ပြုတ်မှုတွင် ဝင်ရောက်ကူညီသူဖြစ်သည့်အတွက် သူကြီးဦးပေါ်ညွှန်းနှင့်ရင်းနှီးသူတယောက်ဖြစ်သည်ဟု ဆိုလျှင်ဆိုနိုင်၏။ ဦးလူခင် (တရားလိုသက်သေနံပါတ် ၆) သည် သူကြီးဦးပေါ်ညွှန်း၏ လယ်ငှါးလုပ်သူဖြစ်၍ ဦးပေါ်ညွှန်း၏သမီးဘက်ကနေပြီး ထွက်ဆိုရန်အကြောင်းရှိသည်ဟု ဆိုလိုကဆိုနိုင်၏။ သို့သော်အခြားသက်သေများထွက်ချက်နှင့်ပေါင်းစပ်၍ဆင်ခြင်ပါမူ၊ ဇင်းသက်သေများလည်း ထိုအချိန်ထိုအခါက မင်္ဂလာဆောင်သောအိမ်တွင် ရှိနေသေး၍သာ အသိသက်သေအဖြစ်ဖြင့် ပါဝင်ကြသည်ဟူ၍ တရားလိုဘက်က ဆိုလျှင်လည်း ယုတ္တိမရှိဟူ၍မယူဆနိုင်ချေ။

စာချုပ်ချုပ်ဆိုသောကိစ္စနှင့်စပ်လျဉ်း၍ အယူခံတရားခံ မကံရှိက လုံးဝငြင်းဆိုသည်သာမက၊ မိမိသားနှင့်မတင်တင်တို့ မင်္ဂလာဆောင်သောအခါဝယ် လက်ဖွဲပစ္စည်းများအကြောင်း လုံးဝမပြောဆိုကြဟူ၍ငြင်းဆိုပြန်သည်။ ဒုတိယငြင်းဆိုချက်မှာ ယုတ္တိမရှိလှသောအချက်ဖြစ်သည်ဟု ယူဆစရာပင်။ သမ္ဘီသားမောင်ချစ်မောင် (တရားခံသက်သေနံပါတ် ၂) ကလည်း မိမိ၏မိခင် ထွက်ဆိုသည့်အတိုင်း ထွက်ဆို၏။ ဇင်းအပြင် မိမိနှင့်မကံရှိတို့သည် မင်္ဂလာဆောင်သက်နှံးကပ်ပြီးနောက် အမြင့်ရွာမှလာသော ဆရာများနှင့်အတူ အမြင့်သို့ပြန်ကြကြောင်း ထွက်ဆိုသည်။ ဆရာဦးဘသူ (တရားခံသက်သေနံပါတ် ၃) ကလည်း မင်္ဂလာအခမ်းအနားတွင် ပစ္စည်းအကြောင်း ဘာမျှမပြောကြကြောင်း။ မင်္ဂလာဆောင်ပြီးနောက် ညနေ ၃ နာရီအချိန်ခန့်တွင် မကံရှိနှင့်မောင်ချစ်မောင်တို့သည် မိမိတို့နှင့်အတူအမြင့်သို့ပြန်ကြကြောင်းထွက်ဆိုပြန်၏။ သို့သော်တရားလို၏လွှတ်တော်ရှေ့နေကအပြန်အလှန်မေးခွန်းမေးသောအခါ၌ ဖြေကြားရာဝယ်မင်္ဂလာဆောင်ရာတွင်ဆရာသုံးကဲသာစာသာတ်ကြောင်း။ မိမိနှင့်ဆရာသောင်းတို့က မင်္ဂလာသြဘာစကား မြွက်ဆိုကြကြောင်း—မိမိ၏မြွက်ဆိုချက်တွင် သတို့သားသည်တဦးတည်းသောသားဖြစ်၍ ပစ္စည်းအတွက်နှင့်စပ်လျဉ်း၍ ဘာမျှပူပင်ရန်မရှိကြောင်း ဖေါ်ပြသည်ဟုဝန်ခံရ၏။ ဤသက်သေခံချက်ကိုထောက်ရှုလျှင် အယူခံတရားလိုမတင်တင်၏ထွက်ဆိုချက်မှာ များစွာယုတ္တိရှိလှသည်။ မတင်တင်ထွက်ဆိုခဲ့သောအချက်မှာ မင်္ဂလာဆောင်အခမ်းအနားတွင် ဆရာသုံးက ကြွရောက်လာသော ပရိသတ်ရှေ့၌ ဒေါ်ကံရှိသည်

မိမိပိုင်ပစ္စည်းလက်ဝက်ကို လက်ဖွဲ့ကြောင်း ကျေညာသည်ဟူသော အချက်ပင် ဖြစ်ပေသည်။

၁၉၄၈
မတင်တင်
နှင့်
ဒေါ်ကံရှိ။
တရားဝန်ကြီး
ဦးစံမောင်။

ဆရာသောင်း (တရားခံသက်သေနံပါတ် ၄) ကလည်း အယူခံတရားခံ၏ ထွက်ဆိုချက်ကို ပေးခံခဲ့ကာ အယူခံတရားခံသည် မိမိတို့နှင့်အတူ အမြင့်သို့ ပြန်ကြောင်း။ မင်္ဂလာဆောင်အခမ်းအနား၌ လက်ဖွဲ့ခြင်းအကြောင်းနှင့်ပတ်သက်၍ မည်သူတဦးတယောက်မျှမပြောဆိုကြောင်းထွက်ဆို၏။ ဆရာဦးငွေသန်း (တရားခံသက်သေနံပါတ် ၅) ကလည်း ဆရာသောင်းကဲ့သို့ပင်ပစ္စည်းအကြောင်းနှင့်ပတ်သက်၍ ဘာမျှမပြောမဆိုကြကြောင်းထောက်ခံသော်လည်း၊ အယူခံတရားခံသည် မိမိတို့နှင့်အတူအမြင့်သို့ပြန်သည်ဟူသော အချက်ကိုမူကားမထောက်ခံချေ။ ၎င်း၏ ထွက်ချက်အရဆိုလျှင် ဒေါ်ကံရှိနှင့် မောင်ချစ်မောင်တို့သည် အဘယ်အခါတွင် မတင်တင်၏အိမ်မှပြန်ကြသည်ဆိုသောအချက်ကိုမိမိတို့မသိ။ ယင်းသို့မသိဟူသော ထောက်ရှုလျှင်၊ မကံရှိနှင့်မောင်ချစ်မောင်တို့သည် ဆရာစု၊ ဆရာသောင်း၊ ဆရာငွေသန်းတို့နှင့်အတူ ဘလေဘည်းပြန်သည်ဆိုသောအချက်မှာ ယုတ္တိမရှိလှချေ။ ဦးဘဖေ (တရားခံသက်သေနံပါတ် ၆) နှင့် ကိုကင်ဦးနှင့် မအိုးယု (တရားခံသက်သေနံပါတ် ၇၊ ၈) တို့ကလည်း မင်္ဂလာဆောင်အခမ်းအနားတွင် ပစ္စည်းအကြောင်းနှင့်ပတ်သက်၍ဘာမျှမပြောဆိုကြဟုလွှက်ဆိုကြသည်။

တရားခံသက်သေများနှင့်စပ်လျဉ်း၍ စဉ်းစားဝေဖန်မည်ဆိုလျှင်၊ ၎င်းသက်သေများသည် မကံရှိ၏ဆရာအရင်းဖြစ်သောဘုန်းကြီးဦးနန္ဒာသီရိ၏ ဩဇာမကင်းသူများဖြစ်ကြောင်းထင်ရှားသည်။ ဆရာဦးဘသူ၊ ဆရာသောင်းတို့သည်ဦးနန္ဒာသီရိဘုန်းကြီးကျောင်းတွင် တည်းထောင်ထားသော ကျောင်းတွင် ဆရာများဖြစ်ကြ၏။ ဆရာဦးငွေသန်းသည် ၎င်းကျောင်းတွင်ဆရာသူနှင့်ဆရာသောင်းတို့နှင့် အတူလုပ်ဘူးသူတယောက်ဖြစ်၏။ ကိုတင်ဦးသည်ဦးနန္ဒာသီရိအား ရဟန်းတက်ပေးသော တကာဖြစ်၍မအုန်းယုသည် ဦးနန္ဒာသီရိအဒေါ်ဖြစ်သည်။ ထိုကြောင့် တရားခံသက်သေတို့မှာ ဦးနန္ဒာသီရိနှင့်ဆက်သွယ်ကာ ဒေါ်ကံရှိနှင့်မုန်းကြသော သူများဖြစ်ကြမကြောင်းထင်ရှားသည်။

ဤအမှုတွင်နှစ်ဦးနှစ်ဘက်မှပြောသောသက်သေများသည် အပြိုင်အဆိုင်ဖြစ်နေကြ၍အမှုကို မှန်ရာရောက်အောင်မည်သည့်နည်းနှင့်ဆုံးဖြတ်ရမည်နည်း။ ဤအချက်နှင့်စပ်လျဉ်း၍ပရီဗီကောင်စီ၏ လွှတ်တော်က ဂျီ၊ ဒေဝိစ်နှင့် မောင်ရွှေကိုတို့အမှု (၁) တွင် ဆုံးဖြတ်သားသောအချက်မှာ များစွာဆီလျော်ပေသည်။ ပရီဗီကောင်စီက ယင်းသို့အမှုများတွင် ဝန်ခံသားသောအချက်များနှင့် ဖြစ်ပာန်လက္ခဏာရှိသောအချက်များ (Admitted circumstances and resulting

(၁) [၌ အတွဲနံပါတ် ၃၈ အိုင်၊အေ၊ စာမျက်နှာ ၁၅၅။]

၁၉၄၈

မတင်တင်
နှင့်
ဒေါ်ကံရှိ။

ဟရားဝန်ကြီး
ဦးစံမောင်။

probabilities) တို့ကိုထောက်ရှုပြီး၊ မည်သည့်တက်ကမှန်လိမ့်မည်ဟု ဆုံးဖြတ်သင့်ကြောင်းမြွက်ဆိုထားလေသည်။

ဤအမှုတွင် ဝန်ခံထားသောအချက်များနှင့် မငြင်းဆိုနိုင်သောအချက်များမှာ အောက်ပါအတိုင်းဖြစ်၏။

(၁) ဆဋ္ဌမမြောက် အသိသက်သေအဖြစ်ဖြင့်စာချုပ်တွင် လက်မှတ်ထိုးထားသောမင်အုံးမှာ ၁၃၀၇ ခုနှစ်၊ သီတင်းကျွတ်လတွင်သေဆုံးသည်။

(၂) အယူခံတရားလို မတင်တင်နှင့် ၎င်း၏ယောကျ်ားမောင်ချစ်မောင်တို့ကွဲကြပြီးနောက်၊ ၁၉၄၆ ခုနှစ်၊ မေလ ၁၈ ရက်နေ့၌အယူခံတရားလိုက ဒေါ်ကံရှိထံသို့နိုတစ်စာပေးပို့လိုက်သည်မှာ "သင်၏သားနှင့်ကျွန်ုပ်၏အမှုသယ်မတင်တင်ထိမ်းမြားလက်ထပ်ရာ၌ သင်၏ရှိပစ္စည်းထက်ဝက်ကို လက်ဖွဲ့ပြီးသော်ဂဟိအတိုင်း ဆောင်ရွက်စေလိုကြောင်းဖြစ်၏။" ဟူ၍ ဒေါ်ကံရှိ ရသော်လည်း အကြောင်းမပြန်ခဲ့။

(၃) ပဋိညာဉ်စာချုပ်တွင် ဖော်ပြထားသောပစ္စည်းများမှာ ဒေါ်ကံရှိပိုင်သောပစ္စည်းများဖြစ်၏။ ထိုအချက်များကိုထောက်ခံလျှင်၊ သက်သေခံတုင်ပြထားသော ပဋိညာဉ်စာချုပ်သည် မခင်အုံးမသေဆုံးမီက ချုပ်ထားသော စာချုပ်ဖြစ်ကြောင်းတင်ရှားသည်။ ဆက်လက်၍ မခင်အုံးသေဆုံးပြီးမှ ချုပ်ဆိုသောစာချုပ်ဖြစ်လျှင် မခင်အုံး၏ လက်မှတ် မပါနိုင်။ ထိုလက်မှတ်မှာ မခင်အုံလက်မှတ်ဖြစ်ကြောင်း တရားလိုသက်သေများကထွက်ဆိုခဲ့၏။ ဤထွက်ဆိုချက်မမှန်ပါလျှင် တရားခံက ထိုလက်မှတ်သည်မခင်အုံး၏လက်မှတ်မဟုတ်ကြောင်း သက်သေပြရန် ခဲယဉ်းလိမ့်မည်မဟုတ်။ အဘယ်ကြောင့် ဆိုသော် မခင်အုံသည် ဘုန်းမနိုးရွာတွင် ကျောင်းဆရာမပယောက်ဖြစ်၍ ၎င်း၏လက်ရေးကိုလိုသူများစွာပင်ရှိပေလိမ့်မည်။

မတင်တင်နှင့်မောင်ချစ်မောင်တို့သည် ၁၁ လကြာမျှပေါင်းသင်းပြီးမှကဲခြင်းကြောင့် ဤပဋိညာဉ်စာချုပ်ကို ၎င်းတို့ကွဲပြီးမှသာလျှင် လိဆယ်ပြီး ချုပ်ဆိုသော စာချုပ်ဖြစ်သည်ဟု ဆိုရန်အလွန် ခဲယဉ်းပေလိမ့်မည်။ အယူခံတရားလို မတင်တင်ကပေးသော နိုတစ်စာထဲတွင် စာချုပ်အကြောင်းကိုဖော်ပြထားသောအချက်မပါခြင်းမှန်၏။ သို့သော်၎င်းနှင့်၎င်း၏သက်သေမောင်သန်းတင်တို့ထွက်ဆိုချက်အတိုင်း နိုတစ်စာပေးအခါက စာချုပ်ကိုရှာ၍မတွေ့ခြင်းကြောင့် ဖြစ်ပေလိမ့်မည်။ အကယ်၍သာစာချုပ်ကိုမတရားချုပ်ဆို၍ရွဲစွဲဆိုသောအမှုဖြစ်လျှင်၊ ၎င်းနိုတစ်စာမပေးမီကပင်ချုပ်ဆို၍ နိုတစ်စာပေးအခါ၌ ၎င်းစာချုပ်ကိုပါ ဖော်ပြရန် အကြောင်းရှိပေသည်။ ယခုမှာမူကား စာချုပ်ပျောက်ဆုံးနေသေး၍သာ ပစ္စည်းထက်ဝက်ဟူသော စကားကိုထည့်၍ ပြောရခြင်းပင် ဖြစ်ပေလိမ့်မည်။ နို့တစ်စာ

ရသော်လည်း အယူခံတရားလိုက ဘာမျှအကြောင်းမပြန်ခြင်းကို ထောက်ရှုလျှင် ၁၉၄၀ မတင်တင် နှင့် ဒေါ်ကံရှိ။ တရားဝန်ကြီး ဦးစံမောင်။

ဖြင့်သာ၌သာအကြောင်းမပြန်သည်ဟုယူဆရပေမည်။ နို့တစ်စာပေးပြီးနောက် တနှစ်ကျော်ကျော်ကြာမှသာလျှင်အယူခံတရားလိုကတရားစွဲဆိုခြင်းမှန်၏။ သို့သော် တဘက်ကပြန်စာမရသဖြင့် အချင်းချင်းစေ့စပ်၍ရနိုင်နိုးနိုးဖြင့် နေခြင်းပင်ဖြစ်ပေလိမ့်မည်။နောက်အုံး ဤစာချုပ်ချုပ်ဆိုသောရက်မှ သုံးနှစ်မတိုင်မီ ကာလေးတွင်ပင် မလွဲသာ၌သာ တရားစွဲဆိုရခြင်းဖြစ်ပေလိမ့်မည်။

အထက်ကပြောဆိုခဲ့သောအကြောင်းများကို ထောက်ရှု၍ တရားလိုဘက်က စွဲဆိုသောအချက်များမှာ မှန်ကန်ကြောင်းသက်သေခံတင်ပြထားသော ပဋိညာဉ်စာချုပ်မှာအယူခံတရားခံကချုပ်ဆိုသောစာချုပ်ဖြစ်ကြောင်းကျွန်ုပ်တို့ယူဆသည်။

အောက်ရုံးတရားသူကြီးက အကယ်၍သာ အယူခံတရေးခံ မကံရှိသည် သက်သေခံတင်ပြထားသောပဋိညာဉ်စာချုပ်မျိုးကို ချုပ်ဆိုခြင်းမှန်ခဲ့ပါမူ၊ အမြင့် ရွာမှမင်္ဂလာဆောင်အခမ်းအနားသို့ လာရောက်သော ဧည့်သည်များအဆို့လည်း အသိသက်သေအဖြစ်ဖြင့်မချပါဝင်လိမ့်မည်ဟုယူဆချက်ကို ကျွန်ုပ်တို့လက်မခံနိုင်။ မင်္ဂလာဆောင်အခမ်းအနားတွင် သတို့သားဘက်ကနေ၍ ဆရာသူက အယူခံတရားခံ၏ပစ္စည်းထက်ဝက်ကို လက်ဖွဲ့ပါမည်ဟု ကျေညာပြီးဖြစ်၏။ ထိုကြောင့် စာချုပ်ချုပ်ဆိုသောကိစ္စမှာ မင်္ဂလာဆောင်အခမ်းအနားမပြီးမီပင် ပြီးစီးအောင် လုပ်ရန်အရေးကြီးလှသော ကိစ္စမဟုတ်ချေ။ မင်္ဂလာဆောင် အခမ်းအနားပြီးမှ သာလျှင်အေးအေးဆေးဆေးလုပ်နိုင်သောကိစ္စဖြစ်၏။ ယင်းသို့ပြုလုပ်သောအခါ၌ ရင်းနှီးသောသူများသာ၌ပေလိမ့်မည်၊ မင်္ဂလာဆောင်အခမ်းအနားသို့ ကြွရောက်သော ဧည့်သည်များသည် ထိုအချိန်အခါအထိ ဆိုင်းငံ့၍ နေကြမည်မဟုတ်၊ အသီးသီးမိမိသို့သွားလိုသော နေရာသို့သွားကြပေလိမ့်မည်။ ကိုကြောင့်အမြင့်ရွာမှ လာရောက်သောဧည့်သည်များပါ ပဋိညာဉ်စာချုပ်တွင် အသိသက်သေအဖြစ်ဖြင့် သက်မှတ်မထိုးခြင်းကြောင့် ထိုစာချုပ်မှာ လိမ်ဆယ်၍ချေပထားသော စာချုပ်ဖြစ်သည်ဟုကျွန်ုပ်တို့မယူဆနိုင်။

ဥပဒေနှင့်စပ်လျဉ်း၍ စဉ်းစားရန်အချက်တရပ်မှာ ဤစာချုပ်ချုပ်ဆိုရန် အတွက် ဂဘီနှင့်ညီညွတ်ချက် (consideration) ရှိမရှိ ဟူသောအချက်ပင်ဖြစ်သည်။ စာချုပ်ချုပ်ဆိုချိန်မှာ မင်္ဂလာဆောင်အခမ်းအနားပြီးစီးသောအခါဖြစ်ခြင်း၊ သော်လည်း သတို့သားနှင့်သတို့သမီးတို့မှာ တဦးနှင့်တဦးလင်မယားအဖြစ်ပေါင်းသင်းဆက်ဆံ ကြသော အချိန်သို့ မဆိုက်ရောက်သေး။ ထိုကြောင့် မလှမယ်နှင့် မောင်လှကျော်တို့အမှုတွင် (၁) ဆုံးဖြတ်ထားသည့်အတိုင်း လင်မယားအရာသို့

(၁) အတွဲနံပါတ် ၈၊ ရန်ကုန်၊ စာမျက်နှာ ၄၂၅။

၁၉၄၈

မတင်တင်
နှင့်
ဒေါ်ကံရှိ။

တရားဝန်ကြီး
ဦးစံမောင်။

မရောက်သေးသော အချိန်ဖြစ်သည်။ ထိုကြောင့်အယူခံတရားလို မတင်တင် က ထိုအချိန်တွင် အယူခံတရားခံမကံရှိ၏သား မောင်ချစ်မောင်နှင့် မယားအဖြစ်ဖြင့် ပေါင်းသင်းပါမည်ဟု ဂတိပေးနိုင်သေးသောအချိန်ပင်ဖြစ်၍ သက်သေခံပဋိညာဉ် စာချုပ်သည် ဂတိနှင့်ညီညွတ်ချက်ဖြစ်သောစာချုပ်ဟုကောက်ယူရပေလိမ့်မည်။

အမှုကိုမုံရွာမြို့ လက်ထောက်တရားမ တရားသူကြီးရုံး၌ စစ်ဆေးပိုင်ခွင့်မရှိ ဟူသောအချက်နှင့်စပ်လျဉ်း၍ ဤရုံးတော်သို့အယူခံတရားခံ၏ လွှတ်တော်ရှေ့နေက ဘာမျှလျောက်ထားခြင်းမပြုတော့ချေ။ ဤအမှုကိုမုံရွာမြို့ လက်ထောက်တရားမ တရားသူကြီးက စစ်ဆေးပိုင်ခွင့်ရှိကြောင်းထင်ရှား၏။ အထက်ကပြောဆိုခဲ့သော အချက်များကို ထောက်ရှုကာ အောက်ရုံး တရားသူကြီးက အယူခံတရားလို၏ အမှုကိုစရိတ်နှင့်တကွပလပ်စေရန်ချမှတ်ထားသောအမိန့်ကိုကျွန်ုပ်တို့ကပယ်ဖျက်၍ အယူခံတရားလိုက စွဲဆိုထားသည့်အတိုင်း ပဋိညာဉ်စာချုပ်တွင် ဖေါ်ပြထားသော ပစ္စည်းများကိုအယူခံတရားခံက အယူခံတရားလိုအား ရေစစ်ရိစာချုပ်ပြုပုံကာလွှဲပြောင်းပေးရန် ကျွန်ုပ်တို့က အမိန့်ချမှတ်လိုက်၏။ အယူခံတရားခံသည် အယူခံတရားလိုက ကုန်ကျသောစရိတ်များကိုပေးစေ။ ဤရုံးတွင်လိုက်သောလွှတ်တော်ရှေ့နေကြီးတို့၏အခကို ရွှေဒင်္ဂါး ၁၂ ပြားဖြစ်သည်ဟုကျွန်ုပ်တို့သတ်မှတ်လိုက်၏။

လွှတ်တော်တရားဝန်ကြီးချုပ်။ ။ဦးသိန်းမောင် ကျွန်ုပ်သဘောတူသည်။

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

MA MYA SEIN (APPELLANT)

v.

MAUNG SO MYINT (TAN) AND TWO OTHERS (RESPONDENTS).*

H.C. 1948

June 21.

Application for letters—S. 23, Probate and Administration Act—S. 218, Succession Act—Findings in Administration suit—Binding nature.

Held : Where as between rival claimants for letters of administration, title of none of the applicants is admitted, the court must determine the status of the Applicant before Letters are granted.

Maung Ba Han and one v. *Maung Tun Yin*, (1934) 12 Ran. 629, referred to.

Where a widow of a Burman Buddhist made an announcement in a newspaper concerning divorce, it will be for her to prove that there is no divorce and her son will have to prove that he has maintained filial relations with his father till his death and therefore entitled to inherit.

The findings of fact in an application for letters of administration will constitute a bar to subsequent declaratory suit.

Maung Hmat v. *Ma Htay*, (1923) I.L.R. 1 Ran. 258, referred to.

Ma Tok v. *Ma Thi*, 5 L.B.R. 78, distinguished.

Hla Gyaw for the appellant.

H. Subramanyam for respondents 1 and 2.

P. K. Rasu for respondent No. 3.

U THEIN MAUNG, C.J.—We shall in this order deal with Civil First Appeals Nos. 61, 62 and 63 of 1947 as they are connected with one another.

All these appeals have arisen out of applications by Ma Mya Sein, Ma Chan Mya and Maung So Myint for letters of administration in respect of the estate of the

* Civil First Appeals Nos. 61, 62 and 63 of 1947 against the decree of the District Court of Insein in Civil Suits Nos. 6, 7 and 8 of 1947, dated the 8th September 1947.

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U THEIN MAUNG, C.J.

late Tan Site Wan who died intestate at Taikkyi on or about the 9th January 1947.

Ma Mya Sein claims that she is the sole widow of Tan Site Wan as Ma Chan Mya divorced him by mutual consent on the 1st June, 1946. She admits that Maung So Myint and Maung E Cho are the sons of Tan Site Wan by Ma Chan Mya but she does not admit that Maung So Myint is the *orasa* son nor does she admit that Maung So Myint and Maung E Cho are entitled to inherit the estate of Tan Site Wan. Her application is opposed by Ma Chan Mya, Maung So Myint and Maung E Cho on the ground that she was only a mistress or concubine.

Ma Chan Mya has also applied for letters of administration claiming to be the sole widow of Tan Site Wan and alleging that the advertisement of divorce which she herself had made in the "Sun" was made "through caprice or anger and that it does not in law effect any divorce." Her application is contested by Ma Mya Sein and it is supported by Maung So Myint and Maung E Cho.

Maung So Myint has also applied for letters of administration on the ground that he is the *orasa* son of the deceased. He has done so although he has no objection to the letters of administration being granted to his mother, Ma Chan Mya, with the obvious object of preventing letters of administration being granted to Ma Mya Sein.

The learned District Judge heard all the three applications, which have been turned into regular suits, together, with the consent of all the parties and he has come to the decision on a preliminary issue that it is not necessary to deal with the issues relating to the respective status of Ma Mya Sein and Ma Chan Mya inasmuch as Maung So Myint has been admitted by both of them to be a son of Tan Site Wan. Having

come to that finding he has granted letters of administration to Maung So Myint and dismissed the applications of Ma Mya Sein and Ma Chan Mya. So Ma Mya Sein who is a party to all the applications has filed these appeals making Ma Chan Mya, Maung So Myint and Maung E Cho parties-respondents thereto.

The sole question for consideration in these appeals is whether the learned District Judge was right in disposing of the applications on the preliminary issue as he has done. In *Maung Ba Han and another* v. *Maung Tun Yin* (1) to which the learned District Judge himself has referred in the course of his judgment, it has been held that "where as between the rival claimants *inter se* the claim of none of the claimants is admitted by the other claimants, the Court must determine the status of the applicant before letters of administration are issued to him." Now, the learned District Judge himself has observed in the course of his judgment that there is no admission by Ma Mya Sein that Maung So Myint is an heir to the estate and that she has has merely conceded that he is a son of Tan Site Wan by his divorced wife, Ma Chan Mya. That being so, this is not a case in which the claim of Maung So Myint to be an heir is admitted and the learned District Judge should have proceeded to determine the respective status of the rival claimants in accordance with the said ruling. We cannot agree with him that "Ma Chan Mya must be deemed to be a widow of the deceased unless and until the contrary is proved" She has admittedly made an announcement in a vernacular newspaper and it will be for her to prove that there was no divorce as a matter of fact or as a matter of law in spite of her own announcement. Nor can we agree with him that "she (Ma Mya Sein)

(1) 1934) 12 Ran. 629.

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will further have to establish that Tan So Myint who she has admitted is a son, is not an heir." If there has been a divorce between Ma Chan Mya and Tan Site Wan, Maung So Myint will have to prove that in spite of the divorce between his parents he has maintained filial relations with his father till his death and that he is accordingly entitled to inherit his estate.

The learned Advocate for Maung So Myint has invited our attention to *Ma Tok* v. *Ma Thi* (1). The headnote thereof reads:

> "When an application for letters of administration is made by a person who is by admitted natural relationship entitled under section 23 of the Probate and Administration Act to make it, and whom the Court considers to be otherwise a proper person to administer the estate, the Court ought not to allow the proceedings to become protracted and costly by entering into disputed points such as questions of adoption of other persons by the deceased, which questions could be fought over again in suits for administration or for possession of the estate."

However, the ruling relates to the case of an application by a person who is by admitted natural relationship entitled under section 23 of the Probate and Administration Act (now section 218 of the Succession Act) to make it; and a person who is entitled to make it under the said section is a person who according to the rules for the distribution of the estate, applicable in the case of the deceased, would be entitled to the whole or part of the estate. In the present case, Maung So Myint cannot yet be regarded as such a person for the reasons which we have already stated. Besides, that case was decided at a time when, as the authorities stood then, the findings of fact arrived at on an application for letters of administration would not operate as *res judicata* in a subsequent suit for

(1) 5 L.B.R. 78.

possession of the property or a share of the property comprised in the estate concerned; and it has been held since then in *Maung Hmat* v. *Ma Htay* (1) that such findings will constitute a bar to a subsequent declaratory suit.

We accordingly set aside the judgments and decrees on all the three applications, which have been converted into suits as required by law and allow the appeals of Ma Mya Sein with costs. Advocate's fee for each appeal five gold mohurs. Costs in the District Court shall abide by the final result of the applications therein. The proceedings will be returned to the District Court, Insein, to be determined according to law in the light of the above observations.

U SAN MAUNG, J.—I agree.

(1) (1923) I.L.R. 1 Ran. 258.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

H.C. 1948

June 24.

L. SHIN YU (APPELLANT)

v.

J. K. BEHARA (RESPONDENT).*

Japanese Currency (Evaluation) Act, s. 3, sub-s. 2—Applicability of—Execution of decree—Right of executing.

The decree-holder had obtained a decree for work done by him payable in Indian rupees and the decree provided that it must be satisfied by payment "in whatever may be legal tender in Burma when the payment is made"; upon a contention that the decree was in respect of money due under a contractual obligation of the description in s. 3 (*1*) of the Japanese Currency (Evaluation) Act.

Held: That for the purpose of execution and appeal arising out of such execution, the court was bound by the previous judgment of the High Court and cannot go beyond the same or reasons therefor.

The Full Bench decision of *Ko Maung Tin* v. *U Gon Man* (R.L.R. 1947, 149 at p. 152) cannot affect actual decree passed in another case prior to the decision of the Full Bench. Such decree will remain binding between parties to such suit. Consequently s. 3 of the Japanese Currency (Evaluation) Act, 1947, had no application to the case.

Kyaw Htoon for the appellant.

Maung Maung Latt 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 in which he held that sub-section (2) of section 3 of the Japanese Currency (Evaluation) Act, 1947, does not apply to the decree which was being executed in his Court. The said decree was passed by a Bench of the late High Court of Judicature at Rangoon in Special Civil First Appeal No. 18 of 1946. The decree was in respect of J. K. Behara's claim for payment of the

* Civil First Appeal No. 17 of 1948 against the order of the Second Judge of the City Civil Court, Rangoon, in Civil Execution No. 798 of 1947, dated the 18th February 1948.

balance that was due to him from L. Shin Yu on account of the work that he had done during the period of the Japanese occupation in accordance with a contract which had been entered into during the same period. In the said appeal Sharpe J. observed in the course of his judgment that the parties must be taken to have intended that payments required to be made under the contract should be made in the legal currency of Burma although at the time of the agreement nothing whatever had been said by either party as to the nature of the currency in which payment was to be made. Sir Ba U J., who was the other member of the Bench, however, stated in the course of his judgment,

". . . we must accept the case as presented by the plaintiff-appellant and the case presented by him is that the work done by him must be paid for in rupees and the rupees according to him was the Indian rupee."

Besides, Sharpe J. himself ordered that the decree must be satisfied by payment of the decretal amount "in whatever may be legal tender in Burma when the payment is made." And this order is in consonance with Sir Ba U's view that *J. K. Behara*'s case must be accepted.

Sub-section (*2*) of section 3 of the Japanese Currency (Evaluation) Act, 1947, will apply only if the decree was in respect of money due under a contractual obligation of the description referred to in sub-section (*1*), *i.e.* only if the contractual obligation could have been discharged by payment in Japanese currency notes. The contractual obligation in respect of which the decree was passed in the said appeal was not an obligation which could have been discharged by payment in Japanese currency notes. Sir Ba U expressly accepted *J. K. Behara*'s case that the obligation

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was to be discharged by payment in Indian rupees, and Sharpe J., who held that the so-called Japanese currency was never legal currency in Burma, also presumed that the obligation was to be discharged by payment in legal currency.

The learned Advocate for L. Shin Yu has contended before us that the obligation was one which could have been discharged by payment in Japanese currency; but we are bound for the purposes of this appeal by the judgments of Sir Ba U and Sharpe JJ., in the said appeal. We cannot go behind the judgment of Sir Ba U to see whether *J. K. Behara*'s case was as stated by him and whether he was right in accepting that case. Nor can we go behind Sharpe J.'s judgment to see whether he was justified in presuming that the parties contemplated payment in legal currency.

The learned Advocate for L. Shin Yu has invited our attention to the following observation which Roberts C.J. made in *Ko Maung Tin* v. *U Gon Man* (1):

> "But, with respect, I cannot follow Sharpe J. in what appear to me to be *obiter dicta* to the effect that where nothing is said as to the nature of the currency in what I may term an occupation-period contract here, payment must now be required to be made in British Burma rupees."

However, we find that Roberts C.J. also observed therein,

> ". . . unless there is express evidence to the contrary in a particular case, when persons in Burma during the Japanese occupation referred to sums of money they meant pieces of paper issued by the Japanese and expressed to be of the value of those sums of money. Now, express evidence to the contrary was to be found in *Behara*'s case, in which as it appears from the judgment of Ba U J., the defendant did not even give evidence

(1) (1947) Ran. 149 at p. 152.

on any of the points raised in his written statement, and wherein, therefore, the Court could properly accept the plaintiff's version that payment was to be made in Indian rupees . . . ."

The learned Advocate for L. Shin Yu has also contended that the decision of the Bench has been overruled by the ruling in *Ko Maung Tin* v. *U Gon Man* (1). However, he appears to have inferred that the decision has been overruled from the observations of Roberts C.J. on Sharpe J.'s presumption only ; and we find after a careful examination of the ruling that it does not overrule the actual decision of Sir Ba U and Sharpe JJ. Besides, as a matter of law, it will not make any difference for the purposes of this appeal, even if the Full Bench purported to overrule the decision of the Bench. The decision of the Bench and the decree granted by it will remain binding on the parties all the same.

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

U SAN MAUNG, J.—I agree.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

H.C. 1948

June 30.

SEI SHENG (APPLICANT)

v.

U THEIN (RESPONDENT).*

Union Judiciary Act, 1948, s. 5—Conditions.

When the judgment of the Trial Judge is confirmed by the High Court, in order that an appeal may lie to the Supreme Court there must be two certificates granted—one to the effect that the amount or the value of the subject-matter in dispute in the Court of first instance and still in dispute on appeal was and is not less than Rs. 10,000 and the other, that the appeal involves some substantial question of law. As the value was admittedly less than Rs. 10,000 an appeal does not lie to the Supreme Court.

Leong for the applicant.

Dr. Ba Han for the respondent.

U THEIN MAUNG, C.J.—This is an application for a certificate under section 5 of the Union Judiciary Act, 1948. The application is made on the ground that the proposed appeal to the Supreme Court involves a very substantial question of law. However, in order that an appeal may lie to the Supreme Court, there must be two certificates granted by this Court, as the judgment and decree to be appealed from affirm the decision of the Court immediately below and it has been admitted that the case does not involve any question as to the validity of any law having regard to the provisions of the Constitution. Of the two certificates which are necessary for the purpose, one must be to the effect that the amount or value of the

* Civil Misc. Application No. 25 of 1948 arising out of Civil First Appeal No. 49 of 1947 and Civil Regular Suit No. 14 of 1947 of the High Court, Rangoon.

subject-matter of the dispute in the Court of first instance and still in dispute on appeal, was, and is, not less than Rs. 10,000, or that the judgment, decree or final order involves, directly or indirectly, some claim or question respecting property of the like amount or value; and the other certificate must be to the effect that the appeal involves some substantial question of law. Now, even though the appeal may involve some substantial question of law as alleged by the petitioner, his learned advocate has to admit that the amount or value of the subject-matter of the dispute in the Court of first instance, and still in dispute on appeal, is less than Rs. 10,000, and that the judgment and decree do not, directly or indirectly, involve any claim or question respecting property of the like amount or value.

Under these circumstances, an appeal does not lie to the Supreme Court. So the application is dismissed with costs. Advocate's fee two gold mohurs.

U SAN MAUNG, J.—I agree.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

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July 16.

MA THAN (APPLICANT)

v.

U TUN YIN AND ONE (RESPONDENTS).*

Code of Civil Procedure, Order 44, Order 33, Rule (2)—Conditions for entertaining pauper appeal.

Held : That there is a difference between an application for leave to sue as a pauper and an application for leave to appeal as a pauper. When the appellate stage is reached a more severe test has to be applied and it is incumbent on the appellant to satisfy the court that the judgment is erroneous and this after a perusal of the judgment and decree. This is a necessary safeguard introduced by the Legislature for the benefit of the litigants.

Ma Tha Din v. *Daw Paw*, 4 B.L.J. 55-A.I.R., (1925) Ran. 249; *Thirupuraneni Narayana Rao* v. *Soorapaneni Veerayya and three others*, (1933) I.L.R. 56 Mad. 323 at pp. 326-327; *Chennamma, In re* (1929) I.L.R. 53 Mad. 245; *Sakubai, widow of Vinayak Ramkrishna* v. *Ganpat Ramkrishna*, (1904) I.L.R. 28 Bom. 451 at p. 452, followed and applied.

Tun Sein for the applicant.

The judgment of the Bench was delivered by

U THEIN MAUNG, C.J.—This is an application under Order 44, Rule 1, of the Code of Civil Procedure for permission to appeal as a pauper from the judgment and decree of the 2nd Assistant Judge, Maubin, in Civil Regular Suit No. 12 of 1947. The plantiff-petitioner claimed in that case that she is entitled to a half share of the properties which were possessed by her father, the 1st defendant-respondent U Tun Yin, at the time of his marriage with the 2nd defendant-respondent, Ma Thein Yin, as she is a daughter of U Tun Yin by his first wife Ma Mai Khin, who died many years before his remarriage. Her case was that

* Civil Misc. Application No. 39 of 1948—Application for leave to appeal as a pauper under Order 44, read with Order 33, Rule 2, of the Code of Civil Procedure.

the said remarriage took place in October 1930 (*i.e. Thadingyut* of that year) and that her suit was not time-barred as she is entiled to the benefit of section 7 of the Courts (Emergency Provisions) Act, 1943, as regards the period beginning with the 8th December 1941 and ending with the 31st March 1947.

The defendants-respondents pleaded *inter alia* that her suit was time-barred inasmuch as the remarriage took place on the 11th *lazan* of *Kason*, 1291 B.E. (the 18th April 1929) and the period of 12 years expired on the 18th April 1941, *i.e.* about 8 months before the said Act came into force.

The learned Assistant Judge has found that the remarriage did take place on the 18th April 1929 as alleged by the defendants-respondents and that the suit is time-barred. He has come to the said conclusion after a careful consideration of the evidence in the case. He has given reasons for rejecting the evidence of witnesses who gave evidence as to the date of the remarriage from memory. He has also given reasons for preferring the documentary evidence in the form of an inscription on a "Kyizi", which shows that the "Kyizi" was donated by the two defendants-respondents on the Full Moon of *Kason*, 1291 B.E. (the 22nd April 1929), *i.e.* four days after their marriage.

Now, the proviso to Order 44, Rule 1, reads :

"Provided that the Court shall reject the application unless, upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unju t"

With reference to this proviso, Brown J. has observed in *Ma Tha Din* v. *Daw Paw* (1) :

"If the judgment and the decree are on the face of them unexceptionable, the application cannot be entertained and it is

(1) 4 B.L.J. 55-A.I.R. (1925) Ran. 249.

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not open to the appellate Court to consider whether the judgment is justified by the record. It is only on the payment of Court-fees that an appellant can claim the full rights of appeal. He cannot claim the special privileges of Order 44 unless the conditions of the proviso to Rule 1 are satisfied.".

The ruling in *Ma Tha Din* v. *Daw Paw* (1) has been cited with approval in *Thirupuraneni Narayana Rao* v. *Soorapaneni Veerayya and three others* (2), where Beasley C.J. has observed :

"What appears to me to have been overlooked in *Chennamma, In re* (3) is the difference between an application for leave to sue as a pauper and an application for leave to appeal as a pauper. In the former case, apart from the question of pauperism, the only test applied is whether there is a cause of action shown ; but when the appellate stage is reached, a more severe test has to be applied. The defendant has been successful in the lower Court and he has been put to great cost in successfully defending the suit and in most cases he has not been able to recover one anna from the plaintiff towards his costs. Therefore it is that when the pauper litigant comes to the appellate Court for leave to continue the litigation as a pauper, it is incumbent upon him to satisfy the Court that the judgment is erroneous This does not mean a final decision by the Court, but such a decision as can be given after a perusal of the judgment and the decree."

Jenkins C.J. has also observed in *Sakubai, widow of Vinayak Ramkrishna* v. *Ganpat Ramkrishna* (4) :

"That proviso is a very necessary safeguard introduced by the Legislature for the benefit of litigants who found themselves opposed by paupers, and in our opinion the Court should be careful to see that the proviso is satisfied."

So, all that we are concerned with at the present moment is whether, on the face of them, the judgment and decree are contrary to law or to some usage having

(1) 4 B.L.J. 55-A.I.R. (1925) Ran. 249.
(2) (1933) I.L.R. 56 Mad. 323 at pp. 326-327.
(3) (1929) I.L.R. 53 Mad. 245.
(4) (1904) I.L.R. 28 Bom. 451 at p. 452.

the force of law, or are otherwise erroneous or unjust, and although we have heard the arguments of the learned advocate for the plaintiff-petitioner at considerable length, we must say that we are not in a position to say that they are. [Compare *Rajendra Prasad Bose* v. *Gopal Prasad Bose* (1).]

The application is dismissed accordingly.

(1) (1925) I.L.R. 4 Pat. 67.

APPELLATE CIVIL.

Before U Tun Byu and U Aung Tha Gyaw, JJ.

H.C. 1948

June 7.

U SHWE KYU AND FOUR OTHERS (APPELLANTS)

v.

MA TIN U (RESPONDENT).*

Limitation Act, s. 5—Sufficient cause—Ignorance of law—Money lenders' Act, s. 12—Retrospective effect—Mortgage suit—Parties claiming adverse title—Attestation.

In a suit on a mortgage bond for a claim of Rs. 7,000 the Trial Court granted a decree. An appeal filed in the District Court of Myingyan was successful, but on second appeal the High Court reversed the decision of the District Court on the ground that the District Court had no jurisdiction to entertain the appeal of the value of over Rs. 5,000. The present appeal was then filed in the High Court, and even though allowance was made for the time spent in the District Court the appellants were still out of time by about ten days due to inability to raise necessary funds.

Held: That the mistake of the appellants' Pleader amounted to sufficient cause within the meaning of s. 5, Limitation Act.

Held further: That though ignorance of law is no excuse the degree of skill and efficiency displayed by the moffusil bar is a special circumstance for adoption of a liberal construction when copies of legal Acts and enactments were not readily available for easy reference.

The District Court and the Officers of the Court shared the same notion as to forum of appeal and the pleader had honestly given the advice under which the appellants acted.

Case law on the point referred to and discussed.

Ma Hmon and others v. *Ma Shwe Me*, (1892—96) Civil, Vol. 2, U.B.R. 452; *Gopal Chandra Lahiri* v. *Solomon*, 13 Cal. 62; *Krishna* v. *Chathappan*, 13 Mad. 269; *Nga Po An* v *Nga Nyun Bu and two others*, (1907—09) Civil Vol. 2, U.B.R., Limitation 2; *Ma Mai Gale* v. *Tun Win*, (1913-16), Vol. 8, L.B.R. 566; *Tin Tin Nyo and others* v. *M. Aung Ba Saing and one*, 1 Ran. 584; *J. N. Surty* v. *T. S. Chettyar Firm*, 4 Ran. 265; *Rakhal Chandra Ghosh and others* v. *Ashutosh Gosh and others*, 17 C.W.N. 807; *Kura Mal* v. *Ram Nath and another*, 28 All. 414; *Nagindas Motilal and others* v. *Nilaji Moroba Naik and others*, 48 Bom. 442; *Ambika Ranjan Majumdar* v. *Manikgunge Loan Office, Limited* 55 Cal. 798; *Ghulam Mohammad* v. *Usman and others* 14 Lah. 206; *Mithoo Lal* v. *Jamna Prasad and another*, A.I.R. (1933) Oudh 523; *Kishan Chand* v. *Mohammad Husain*, A.I.R. (1942) Lah. 94; *Kayambu Pillai and another* v. *Court of Wards by Collector, Trichinopoly District and others*, A.I.R. (1942) Mad. 170, referred to.

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* Civil First Appeal No. 5 of 1948 against the decree of the Assistant Judge's Court of Myingyan in Civil Suit No. 16 of 1946, dated 9th November 1946.

Held : Where the execution of a mortgage bond is admitted it is not necessary to produce the specific proof of attestation and this fact could be proved by the other evidence.

M.F.A.K. Firm v. *Ma Mya Thein and others*, A.I.R. (1940) Ran. 184, referred to.

Held also. That the Money-lenders' Act came into force on 1st January 1947 and it has retrospective effect. No decree can be passed for an amount, which, together with interest paid is more than double the original sum borrowed.

Parties who claim under a title adversely to both mortgagor and mortgagee are not proper parties to the mortgage suit.

M.V.A.L. Viswanathan Chettyar v. *Ma Aye and three others*, 4 Ran. 214, followed.

A. N. Basu for the appellants.

Leong for the respondent.

U AUNG THA GYAW, J.—The appellants in this case were sued in the Court of the Assistant Judge, Myingyan, on a registered mortgage bond alleged to have been executed by the 1st appellent U Shwe Kyu and his deceased wife Daw Gyan Byu on the 23rd November, 1931. The sum borrowed was said to be Rs. 1,700 bearing interest at the rate of Rs. 2 per cent per mensem. The total debt now due after deducting the sum of Rs. 500 received towards the interest paid on three occasions was said to amount to Rs. 7,000. Daw Gyan Byu has been dead these ten years. The 2nd to 5th appellants who are said to be the children of the mortgagors have been impleaded as party defendants on the score that they are now in possession of the mortgaged lands.

The 1st defendant-appellant contended that the mortage deed in suit was not executed in accordance with law, that it was not properly attested, that two of the latter payments of interest were not in fact made, that the suit was barred by limitation in consequence, that no consideration was received under the mortgage and that the debt had otherwise been settled by

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arrangement made by the plaintiff-respondent's mother Daw Nge.

The trial Court found that the suit mortgage bond was duly executed and registered, that consideration passed under the same, that by reason of the terms of section 7 of the Courts (Emergency Provisions) Act, 1943 (Burma Act No. XI of 1943), the suit was not barred by the Law of Limitation, that the debt had not been liquidated or satisfied, and, holding further that the Money-lenders' Act was not then in force, no relief under the same was granted to the defendant-appellants and a preliminary mortgage decree for the amount claimed was thus passed in the suit on the 9th November, 1946.

On the 8th January, 1947, the appellants, contrary to the provisions of section 13 (*1*) (*a*) of the Courts Act, 1945 (Burma Act No. XIV of 1945), published in the Government of Burma, Home Department Notification No. 136, dated the 5th October, 1945, preferred an appeal in the District Court of Myingyan in Civil Appeal No. 1 of 1947, instead of in the High Court, to which the appeal properly lay. The District Court, apparently unaware of its want of jurisdiction in the matter, heard and decided the appeal, setting aside the judgment and decree of the Court of the Assistant Judge, on the 24th March 1947.

The plaintiff-respondent thereupon preferred in the High Court on the 30th May, 1947, Civil Second Appeal No. 65 of 1947, and on the 14th November, 1947, succeeded in getting the decision of the District Court reversed on the sole ground of its lack of jurisdiction to entertain the appeal from the judgment and decree of the Court of the Assistant Judge.

The defendant-appellants then brought the present appeal on the 16th January, 1948, and by then the appeal was found to be barred by time to the extent of

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320 days. The defendant-appellants have now asked that this inordinate delay in filing their present appeal be excused under sections 5 and 14 of the Limitation Act on the ground that they were wrongly advised by their lawyer to file their first appeal in the District Court and that they had by taking the said advice committed a *bona fide* mistake. Even if due allowance be given to the period of time spent in pursuing the remedy in the wrong Court, the appellants are still out of time by about 8 or 10 days, and in regard to this matter they offered a further excuse that additional delay was due to their inability to raise the necessary funds in time to pay for the costs of their present appeal.

Section 5 of the Limitation Act provides that any appeal or application for a review of judgment or for leave to appeal, or any other application, etc., 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. Section 14 of the Act provides that in computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

The point raised on the appellants' behalf has been dealt with in a number of decisions of this and other Courts in Burma. In *Ma Hmon and others* v. *Ma Shwe Me* (1), the Court of the Judicial

(1) (1892—96) Civil, Vol. 2, U.B.R. 452.

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Commissioner, Upper Burma, following the Indian cases of *Gopal Chandra Lahiri* v. *Solomon* (1) and *Krishna* v. *Chathappan* (2) held the view that a judicial discretion must be exercised in the construction of the words "sufficient cause" in section 5 of the Limitation Act with reference to the special circumstances of a particular case and that though the provisions of this section must be applied with much circumspection and caution, they should be applied without hesitation where it was shown that delay was due to no fault of the appellant's own but to special causes beyond his control. In *Nga Po An* v. *Nga Nyun Bu and two others* (3) the decision in *Krishna* v. *Chathappan* (2) was again quoted with approval to support the *dictum* that in the exercise of discretion under section 5 of the Limitation Act the words "sufficient cause" should receive a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of *bona fides* is imputable to the appellant. In *Ma Mai Gale* v. *Tun Win* (4) it was held that a *bona fide* mistake on the part of a pleader might be a sufficient cause for admitting an appeal after time, but no mistake was *bona fide* unless made in spite of due care and attention. It was found in this case that the pleader who mis-calculated the value of the suit for purposes of appeal was wanting in the exercise of due care and attention and that the mistake he committed was not due to inadvertance as pleaded by him. In the case of *Tin Tin Nyo and others* v. *M. Aung Ba Saing and one* (5) a Bench of this Court, dealing with the facts similar to those now dealt with, held that in order that the provisions of section 5 of the Limitation Act might

(1) 13 Cal. 62.

(2) 13 Mad. 269.

(3) (1907—09) Civil, Vol. 2, U.B.R., Limitation 2.

(4) (1915-16) Vol. 8, L.B.R. 566.

(5) 1 Ran. 584.

be invoked in favour of an appellant, it must be found that the error was one that might easily have occurred even if reasonably due care and attention had been exercised by his Advocate. It was found that the mistake pleaded by the appellant in that case could only be accounted for by the fact that no care at all was taken, that no consideration was given to the question as to the forum in which the appeal lay and that the very obvious necessity for considering the value of the lands, the subject-matter of the appeal, for purposes of jurisdiction was entirely neglected. The same view was adopted by a Full Bench of this Court in *J. N. Surty* v. *T. S. Chettyar Firm* (1) where it was held that though a *bona fide* mistake on the part of a pleader was sufficient cause for admitting an appeal after time, no mistake was *bona fide* unless made in spite of due care and attention.

A number of Indian decisions have been placed before us in support of the appellants' claim that the mistake on the part of the appellants' pleader in regard to the forum in which the appeal lay should constitute a sufficient cause within the terms of section 5 of the Limitation Act. In *Rakhal Chandra Ghosh and others* v. *Ashutosh Gosh and others* (2) it was pointed out that it was neither necessary nor desirable that any attempt should be made to find precisely and exhaustively the meaning of the expression "sufficient cause" but that these words should receive a liberal construction so as to advance substantial justice when no negligence, nor inaction, nor want of *bona fides* was imputable to the appellant. In this case the particular matter before the Court was the miscalculation of the period of limitation made by a pleader and it was observed that the question whether the miscalculation in question did constitute a sufficient cause in any particular case must be decided

(1) 4 Ran. 265. (2) 17. C.W.N., 807.

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by the Court having regard to all the facts and circumstances of that case. When a client *bona fide* accepts the advice of counsel as to the proper procedure to adopt in the course of litigation and misled by that advice fails to file an appeal within time, he is entitled to the benefit of section 5 of the Limitation Act and should not be visited with the serious penalty which is involved in the rejection of this appeal : see *Kura Mal* v. *Ram Nath and another* (1). See also *Nagindas Motilal and others* v. *Nilaji Moroba Naik and others* (2), *Ambika Ranjan Majumdar* v. *Manikgunge Loan Office, Limited* (3) and *Ghulam Mohammad* v. *Usman and others* (4). The law was again reviewed in the Full Bench case of *Mithoo Lal* v. *Jamna Prasad and another* (5) where again it was stressed that what constituted "sufficient cause" could not be laid down by hard and fast rules but that it must be determined by a reference to all the circumstances of each particular case with a view to securing the furtherance of justice. In order that mistaken advice given by counsel may be sufficient cause within the meaning of section 5, such advice must be given with due care and attention and not through gross negligence. Filing of an appeal in a wrong Court through gross carelessness of the counsel is not a "sufficient cause" for presenting the appeal to the proper Court after the expiry of the period of limitation. This *dictum* is however subject to the qualification contained in the observation made by Srivastava J., one of the Judges of the Bench, to the following effect :

"While on the one hand I am not prepared to lay down that erroneous advice of a pleader howsoever gross or negligent it may

(1) 28 All. 414.
(2) 48 Bom. 442.
(3) 55 Cal. 798.
(4) 14 Lah. 206.
(5) A.I.R. (1933) Oudh 523.

be, must always and under all circumstances be regarded as a sufficient cause for extension of time ; I am equally not prepared to hold that a litigant acting *bona fide* upon the advice of his counsel should in no circumstances be entitled to the protection of section 5 if the counsel has in the opinion of the Court acted negligently even though honestly in giving the advice."

In *Kishan Chand* v. *Mohammad Husain* (1) the appellant on the mistaken advice given by his pleader who was not conversant with a recent notification filed an appeal in the wrong Court in good faith. It was held that there was sufficient cause within the meaning of section 5 for excluding the time taken in transmitting the appeal from the wrong Court to the proper Court. In *Kayambu Pillai and another* v. *Court of Wards by Collector, Trichinopoly District and others* (2) the *dictum* given in *Krishna* v. *Chathappan* (3) was quoted with approval to the effect that the words " sufficient cause " in section 5 must be liberally construed so as to advance substantial justice particularly when no negligence, nor inaction, nor want of *bona fides* was imputable to the applicant, and it was further observed that the question of excusing the delay had to be approached from the point of view of the petitioner's conduct rather than of the advantage gained by the other side.

Much of the observations made in these decisions obviously run counter to the maxim that ignorance of law is no excuse : *ignorantia legis non excusat*, but the degree of skill and efficiency displayed by the mofussil Bar is deemed to be a special circumstance justifying the adoption of a liberal construction of the words of the statute. In this particular case the pleaders in the out-stations in Burma resumed their practice after the upheaval caused by the invading armies which twice

(1) A.I.R. (1942) Lah. 94. (2) A.I.R. (1942) Mad. 170.
(3) 13 Mad. 269.

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overran the country and from the affidavits filed in support of the appellants' application there is good reason to believe that copies of local Acts and enactments were not readily available to the members of the Bar for easy reference. The Courts Act, 1945, introduced substantial changes in the constitution and jurisdiction of subordinate Courts and the wording of the relevant section relating to the jurisdiction of appellate Courts was also materially changed though the matter of the appellate jurisdiction of the District Court relating to decrees of the value exceeding Rs. 5,000 has remained unchanged. However, in the circumstances in which the parties were placed at the time, the question relating to the proper forum to which the present appeal lay could well have been a matter of justifiable doubt and it cannot therefore be said that the appellants' pleader was guilty of gross negligence when the advice offered by him to the appellants was that their appeal lay to the District Court and not to this Court. The mistaken notion under which the appellants' pleader acted at the time was shared by the learned District Judge and the ministerial officers of this Court. There is thus good reason to think that the pleader concerned had honestly given the wrong advice under which the appellants acted and consequently we are of the view that the delay in bringing the present appeal was due to sufficient cause within the meaning of section 5 of the Limitation Act. We feel further disposed to condone the further delay of 8 or 10 days which had resulted from the penury to which the appellants were reduced by having to have recourse to the wrong Court for the furtherance of their claim.

As to the merits of this appeal, only two material points have been urged before this Court, namely, that the mortgage bond in suit was not executed in

accordance with law and that under section 12 of the Money-lenders' Act, 1945 (Burma Act No. XXVII of 1945), no decree could be passed 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.

On the question of due execution and proper attestation there is sufficient evidence on the record to establish the fact that both U Shwe Kyu and his wife Daw Gyan Byu had taken part in the execution of the bond and its subsequent registration in the Registration Office. U Shwe Kyu himself has admitted the execution of the suit mortgage bond and the circumstances in which the transaction took place. U Shwe Kyu had a son whose name was U Teik-kheindria. According to the defendant Ohn Mya, a son of the first defendant U Shwe Kyu, this *phongyi* wanted to go to India and prevailed upon the first defendant to raise the necessary expenses for his Indian trip. The document in suit was written by him and besides U Shwe Kyu's signature a cross-mark purporting to be that of Ma Gyan Byu appears under the same. On its side margin the two attesting witnesses were mentioned as Maung Sein and Chit Po, both sons of the first defendant-appellant. The parties were apparently on friendly and intimate terms with Daw Nge, the mother of the respondent from whom the loan was taken. U Shwe Kyu admits in his evidence that Ma Gyan Byu and Maung Sein came along with him to the Registration Office to get the mortgage bond registered. Endorsements relating to this registration bear the signatures and cross-marks purporting to be those of the executants and read with the evidence of Maung Ba Kaw (P.W. 2) who then worked as a clerk in the Registration Office, there can be no question that U Shwe Kyu and Ma Gyan Byu did execute the suit mortgage bond and

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that Maung Sein, their son, was one of the attesting witnesses for it was Maung Sein who appeared before the witness and identified his parents.

Objection has been taken on the appellants' behalf that no proof of proper attestation has been furnished by the plaintiff-respondent in regard to the suit mortgage bond. On this point the case of *M.P.A.K. Firm* v. *Ma Mya Thein and others* (1) is brought to our attention. It is there held that where the execution of the mortgage bond is admitted it is not necessary to produce specific proof of the attestation of the document and that this fact can be proved by other evidence in the case. In this case in view of the admissions made by U Shwe Kyu and of the evidence given by other witnesses relating to the transaction it was unnecessary for the plaintiff-respondent to call any attesting witness to prove the due execution of the document. The effect of the evidence adduced in favour of the plaintiff-respondent and the admissions made by the 1st appellant himself clearly establish the fact that the mortgage bond in suit was properly executed and attested, and there is no substance in the objection raised on the appellants' behalf in this appeal.

The next objection raised in this appeal relating to the amount of the mortgage debt to which the plaintiff-respondent is justly entitled under the provisions of section 12 of the Money-lenders' Act does not appear to admit of any adequate reply. The Money-lenders' Act came into force on the 1st January, 1947, and, from the wording of the section itself, it has retrospective effect and this Court cannot in the circumstances pass a decree in the respondent's favour for more than the sum which, together with the amount of interest

(1) A.I.R. (1940) Ran. 184.

admittedly received by her, totals twice the original sum borrowed by the 1st appellant. Consequently, the 1st appellant is liable to repay the sum of Rs. 2,900 only to the plaintiff-respondent under the mortgage bond in suit.

It is noticed that the decree in this case has also been passed against the 2nd to 5th appellants, who, from the statements made in their written statement, claimed the mortgaged property as heirs to their grand-mother Ma Thaw, the mother of their deceased mother Daw Gyan Byu, one of the executants of the mortgage bond. The plaintiff-respondent from the statement made in paragraph 10 of her plaint appears to have impleaded these defendants as parties to the suit merely for the reason that as children of the 1st defendant-appellant U Shwe Kyu they have been in actual possession of the mortgaged lands. Under Order 34, Rule 1 of the Code of Civil Procedure all persons having an interest either in the mortgage-security or in the right of redemption are liable to be joined as parties to the mortgage suit. It is clear from this that parties who are claiming under a title adversely to that of both the mortgagor and the mortgagee are not proper parties to the mortgage suit and the claims made by them cannot be adjudicated in the same. This is made clear in the decision in *M.V.A.L. Viswanathan Chettyar* v. *Ma Aye and three others* (1). The 2nd to 5th appellants are not therefore proper parties to the present mortgage suit and no mortgage decree can therefore be passed against them.

Accordingly this appeal will be accepted in part and a preliminary mortgage decree will be passed against the 1st defendant-appellant in respect of a sum of Rs. 2,900 only with proportionate costs. The suit

(1) 4 Ran. 214

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against the remaining defendant-appellants will be dismissed. There will be no order for separate costs in their favour.

U TUN BYU, J.—I agree.

APPELLATE CIVIL.

Before U Tun Byu and U Aung Tha Gyaw, JJ.

MAUNG BA KYAW AND FIVE OTHERS (APPELLANTS)

v.

MAUNG BA SHEIN (RESPONDENT).*

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June 8.

"Parabaik" Upper Burma Registration Regulation, 1897, s. 4—Mortgage for Rs. 200 and Rs. 500 recorded in "Parabaik" admissibility.

The concensus of judicial opinion has been to treat mortgage transactions recorded in "Parabaiks" as completed mortgage instruments and where the validity of such transactions depended upon registration the unregistered instrument has been held to be inadmissible in evidence to prove its terms. The case law on the point discussed.

Queen-Empress v. *Mi Nan Tha*, 1. U.B.R. (1892—96) 303 ; *Mi Ta* v. *Nga Scin*, 2 U.B.R. (Civil) (1907—09) Execution-Signing 5 ; *In re Chet Po*, 7 L.B.R. 77 ; *Ma Sat Pu* v. *Ma Sin*, 3 U.B.R. (1917—20) 258 ; *Maung Po Din* v. *Maung Po Nyein*, 4 U.B R. 80 ; *Ma Saw* v. *Maung Ba*, 5 Ran. 650 ; *Maung Ba* v. *Maung Tha Kyu*, (1939) Ran. 39, referred to and discussed.

Sein Bwa (for *T. K. Boon*) for the appellants.

Dr. Ba Han for the respondent.

U AUNG THA GYAW, J.—In Civil Suit No. 50 of 1946 of the Court of the Assistant Judge, Sagaing, the appellants sued the respondent for redemption of a piece of land alleged to have been mortgaged with possession to the respondent U Po Lone and his wife (deceased), for two separate debts of Rs. 200 and Rs. 50 taken in the years 1908 and 1913. The mortgages alleged were recorded in the "Parabaik", Exhibits A and A1 and on the strength of this documentary evidence and the oral evidence offered by way of corroboration to the entries found therein, the usual mortgage decree was granted in favour of the

* Civil Appeal No. 3 of 1948 against the decree of the Appellate Side of High Court, Rangoon, in Civil Second Appeal No. 76 of 1947, dated the 20th November 1947

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appellants. This decree was confirmed, on appeal, by the District Court of Sagaing. The respondent preferred his appeal to this Court in Civil Appeal No. 76 of 1947 and obtained a reversal of these decisions. The learned Judge who dealt with this appeal held the view that the "Parabaik" being the repository of all the terms of the mortgage transactions, was the only evidence that was admissible under section 91 of the Evidence Act and not being registered under section 4 of the Upper Burma Registration Regulation, 1897, the said document could not be legally admitted in evidence and in consequence, the mortgage in suit was not proved to entitle the appellants to the decree.

It is now contended in the present appeal that the "Parabaik" in question is not an executed document and is not in consequence, subject to the requirements of section 4 of the Upper Burma Registration Regulation, 1897.

The "Parabaik" in suit purports to record the mortgage transaction in the following terms :

"On the 7th Waning of *Kason*, 1270 B.E., Ko Thaung Paw and Ko Lu Hla, residents of Sat-pan-gon Village, say to Ko Po Lone and wife Ma Saw, residents of Tha-ya-baung Village (thus), '(We) are in need of money to spend. (We) want to mortgage one set of big and small paddy lands, known as Ta-bet-pyit-chaung paddy land(s), situate in Thi-la-pon *Kwin*, bounded on the east by *chaung* (creek) and on the west by U Lu Gale, to which we have title, for Rs. 200 (Rupees two hundred). Please accept mortgage.' According to the proposal of the said Ko Thaung Paw and Ko Lu Hla, Ko Po Lone and wife Ma Saw count out and give Rs. 200 (two hundred) into the hands of Ko Thaung Paw and Ko Lu Hla. By mutual consent 'ngwe-pay-mye-ya' (usufructuary) mortgage is made of the paddy land without limiting the period. The witnesses are U Po Oh and Maung Po Hmi and the writer Maung Tun Za.

On the 10th Waxing of *Nayon*, 1275 B.E., Ko Thaung Paw, owner of the land, says, 'Please give an additional loan of

Rs. 50 on the previous original mortgage of the paddy land(s), known as Ta-bet-pyit-chaung paddy land(s).' According to the said request U Po Lone and wife Ma Saw given an additional loan of Rs. 50 (fifty) in to the hand of U Thaung Paw. The witness is U Po Hmi and the writer U Chit Su."

It is apparent that the transaction was executed in a manner which was judicially noticed in the case of *Queen-Empress* v. ***Mi Nan Tha*** (1) where the following observations occur :

" Under Burmese law and practice signatures were absolutely unknown, and it was the fashion to draw up documents (after the manner noticed in this case). Everyday the Courts admit in evidence documents in the same form as duly executed instruments, and rightly so."

Transactions similar to the one now under notice had often in the past come before the Courts but mostly on the question of their liability to stamp duty by reason of the fact that they were not signed by the executants. [See *Mi Ta* v. *Nga Sein* (2), *In re Chet Po* (3), *Ma Sat Pu* v. *Ma Sin* (4) ; *Maung Po Din* v. *Maung Po Nyein* (5) ; *Ma Saw* v. *Maung Ba* (6).

In *Chet Po*'s case (3) a Bench of the late Chief Court of Lower Burma held that an instrument written on a " Parabaik " but not signed by the parties was not " executed " within the meaning of the Indian Stamp Act, 1899, and need not be stamped ; but " that the mere fact that such an instrument was not ' executed ' within the meaning of the Indian Stamp Act did not necessarily imply that the instrument is incomplete for the purposes for which it was drawn up." In *Maung Po Din*'s (5) case a similar view was adopted and it was further held that " where a mortgage for less than

(1) 1. U.B.R. (1892—96) 303.
(2) U.B.R. 2 (Civil) (1907—09) Execution-Signing 5.
(3) 7 L.B.R. 77.
(4) 3 U.B.R. (1917—20) 258.
(5) 4 U.B.R. 80.
(6) 5 Ran. 650.

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Rs. 100 is effected by delivery of possession an unregistered document recording the terms of the mortgage executed after the Registration Act came into force in Upper Burma is admissible in evidence to prove the terms of the mortgage and may be the only admissible evidence of such terms" On this latter point, the learned Judge observed,

"The unregistered document having been drawn up after the introduction of the Registration Act did not require registration to be admissible in evidence, as it would have required it if it had been drawn up while the Registration Regulation contained the law applicable in the matter in Upper Burma."

This latter dictum is pertinent in the consideration of the matter now in dispute in view of what follows in *Ma Sat Pu*'s case (1) where the learned Judge held that documents completed in the Burmese fashion without being signed were "executed" within the meaning of section 4 of the Upper Burma Registration Regulation. The practice of documents being executed on "parabaiks" or palm leaves is here noticed as follows :

"It is true that "parabaiks" or palm-leaf documents were not usually signed but this Court continually accepts and has always accepted such documents as complete records of the transactions embodied in them and as excluding oral evidence of those transactions."

It appears that the same contentions as now set up on behalf of the appellants were raised in this reported case for the judgment continues,

"The Registration Regulation, which came into force at the end of 1897, expressly stated that a document which was required to be registered should not affect any immoveable property comprised in it or be received as evidence of any transaction

(1) 3 U.B.R. (1917—20) 258.

affecting that property unless it had been registered. Under the Local Government's General Department Notification No. 25, dated the 17th February 1898, which was issued in exercise of the power conferred by section 4 of the Regulation, all non-testamentary instruments executed on or after the 1st of July 1898, and purporting or operating to create, declare, assign, limit or extinguish any right, title, or interest in immoveable property were required to be registered. . . . The question whether documents which according to Burmese custom were complete without signature could be said to be 'executed' was considered by this Court in *Queen-Empress* v. *Mi Nan Tha* (1) and *Mi Ta* v. *Nga Sein* (2), and it was decided that such documents were executed at any rate within the meaning of the Stamp Act of 1879. I have not been able to trace any published ruling in which the meaning of the word 'executed' in section 4 of the Regulation or in Notifications under that section has been considered, but this Court has always held that such unsigned documents were compulsorily registrable and were inadmissible in evidence if unregistered and I see no reason to believe that that view is incorrect."

In *Ma Saw* v. *Maung Ba* (1) the contrary view was found expressed relating to the admissibility of secondary evidence in respect of the contents of a formal deed of mortgage, drawn up on an unstamped palm-leaf not signed by the mortgagor but it appears from the body of the ruling in question that the writing on the palm-leaf was not an instrument of mortgage but was merely a note that a mortgage had taken place; and it was there further remarked that the mortgage transaction had not been reduced to the form of a document within the meaning of section 91 of the Evidence Act.

In *Maung Ba* v. *Maung Tha Kyu* (2) it was held that a mortgagor who sought to redeem an usufructuary mortgage for loan of less than one hundred rupees must prove the terms of the contract, and that in view of section 91 of the Evidence Act, it could

(1) 5 Ran. 650. (2) (1939) Ran. 39.

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only be proved by the document itself, though there was delivery of possession of the property. If such a document had not been registered it was inadmissible in evidence under section 49 of the Registration Act to prove the transaction. The mortgage sought to be redeemed in this case was made in 1900 for a sum of Rs. 95 and it was pointed out that section 59 of the Transfer of Property Act which was assumed to apply to the case was to be read as supplemental to the Registration Act, and that owing to the amendment of the Registration Act in 1929 an unregistered document was not admissible in evidence to prove the terms of the mortgage.

Thus, the consensus of judicial opinion in the past has been to treat mortgage transactions recorded in "parabaiks" as completed mortgage instruments and where the validity of such transactions depended upon their compliance with the requirements of the law of registration, the unregistered instrument or "parabaik" had been held to be inadmissible in evidence in order to prove its terms. In the present case the document in question fails to comply with the requirements of Notification No. 5, dated the 17th February 1898, issued by the Local Government under section 4 of the Upper Burma Registration Regulation No. 2 of 1897 and under section 6 of the said Regulation, the document cannot be received in evidence of the mortgage it purported to create. Accordingly, this appeal fails and will be dismissed with costs.

U TUN BYU, J.—I agree.

APPELLATE CIVIL.

Before U Tun Byu and U Aung Tha Gyaw, JJ.

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July 5.

MA E MAI AND ONE (APPELLANTS)

v.

MA KYI KYI AND ONE (RESPONDENTS).*

Buddhist Law—Marriage—Essentials of marriage—Essentials of keittima *adoption.*

Held : That under Burmese Buddhist Law no ceremony is required in order to constitute a valid marriage. All that is necessary is the consent of both parties. In the case of persons who have been previously married it is not however usual to have any entertainment ; but in the case of a Burmese Buddhist couple neither of whom has been previously married, marriage is ordinarily accompanied by ceremony attended by neighbours of the couple. There is, however, no recognized ceremony.

Ma E v. *Maung San Da*, 3 B.L.R. 8 ; *Mi Me* v. *Mi Shwe Ma*, (1910—13) 1 U.B.R. 111 (P.C.) ; *Ma Hla Me* v. *Maung Hla Baw*, I.L.R. 8 Ran. 425.

Held : That courts are bound to insist upon strict proof of adoption. The intention to adopt as an heir is the essential criterion of *keittima* adoption. While no special formalities are required, there must be proof of intention to adopt an heir by making such intention public.

The fact that an orphan niece lived with his childless uncle and for 7 or 8 years uncle and aunt treated her with affection and that in an inscription on a " kyi-si " donated by the uncle she was described as the daughter and on the death of the aunt in the obituary notice her name appeared as daughter are not sufficient to prove *keittima* adoption.

It is common knowledge that the words " father " and " mother ", " son " and " daughter ", are loosely used by the Burmese.

Ma Pwa v. *Ma The The and seven others*, 1 L.B.R. 273 ; *Maung Po Kan* v. *Daw Ai, and others*, 1 Ran. 102 ; *Ma Than Nyun* v. *Daw Shwe Thit*, 14 Ran. 557 *Maung Sin* v *Po Ko*, 12 B.L.T. 236 ; *Ma Nyun Yin* v. *Ma Kyin and others*, (1941) Ran. 445 ; *Ma Ywet's case*, 5 L.B.R. 118 ; *Ma Gun's case* (1897—1901) 2 U.B.R. Civil 66 at p. 68 ; *Maung Seik* v. *Ma Thet Pu*, 9 B.L.T. 154 ; *Tet Tun* v. *Ma Chein*, 5 L.B.R. 216 at p. 218 ; *Maung Ba Thein* v. *Ma Than Myint and others*, I.L.R. 3 Ran. 483 referred to and followed.

P. N. Ghosh for the appellants.

P. K. Basu for the respondents.

* Civil First Appeal No. 66 of 1947 arising out of Civil Suit No 241 of 1940 of the High Court, Rangoon.

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MA E MAI AND ONE v. MA KYI KYI AND ONE.

U AUNG THA GYAW, J.—This is an appeal brought against the judgment and decree passed on the Original Side of this Court in Civil Regular Suit No. 241 of 1940, in favour of the 1st respondent Ma Kyi Kyi (*a*) Ma Thein Kyi declaring that she is the surviving widow of one U Ba Lat, deceased, and is entitled to the possession of the properties both moveable and immoveable comprised in his estate. The plaintiff-respondent's claim was opposed by the present appellants Ma E Mai (*a*) Ma E Kyi and Maung Tun E, who are husband and wife and in possession of the house property left behind by the deceased with the contention that the plaintiff was a mere maid-servant of the deceased and that the 1st appellant being a *keittima* adopted daughter of the deceased, was entitled to the entire estate. Daw Thein, the 3rd defendant in the suit, was said to have in her possession the jewellery belonging to the deceased's estate and she entered her contest in the suit claiming the entire estate as the surviving sister of the deceased U Ba Lat and denying the respective status set up by the plaintiff-respondent and the 1st appellant. On the evidence adduced by the parties to the suit, the learned Judge sitting on the Original Side arrived at the findings that the plaintiff-respondent Ma Kyi Kyi (*a*) Ma Thein Kyi was the surviving widow of the deceased U Ba Lat and that the 1st appellant Ma E Mai (*a*) Ma E Kyi was not a *keittima* adopted daughter of the deceased, and accordingly granted a decree in the plaintiff-respondent's favour, from which the present appellants have now appealed. Daw Thein not having preferred her appeal, appears in these proceedings as a *pro-forma* respondent.

It has been put forward in this Court that the claim made by the plaintiff-respondent that she was the legally married wife of the deceased has not been

sufficiently proved, and that the learned trial Judge has failed to consider fully the effect of both oral and documentary evidence produced in support of the appellant's claim of *keittima* adoption.

The family history of the deceased U Ba Lat and the facts antecedant to this litigation are set out hereunder. His parents U Min Han and Daw Shwe Lon had three children, namely, Daw Thein, the eldest, U Ba Lat and his brother, U Hla Maung (deceased), the natural father of the 1st appellant, Ma E Mai. After Daw Shwe Lon's death, U Min Han remarried Daw Dwe Hla with whom he had six children who are, however, not interested in the present dispute, their claims to inheritance having been settled after the death of their father. U Ba Lat was married to Daw Shin but the union was not blessed by any issue. His younger brother U Hla Maung married Daw Saw Shin by whom he had two children, Ma E Mai, the 1st appellant and her brother, Maung Tha Noe, since deceased. Their mother, Daw Saw Shin, died when Ma E Mai was about three or four years of age, and U Hla Maung subsequently contracted his second marriage with Daw Thaung Shwe, witness No. 5 for the appellants (defendant). In the life time of U Hla Maung, who died in or about 1925, there had been litigation between the two brothers and their sister Daw Thein in respect of certain properties left behind by their parents. The claims were eventually compromised but not before a considerable degree of ill-feeling had been engendered between the parties concerned in the litigation, and right up to the time of his death, U Hla Maung was not on speaking terms with the deceased U Ba Lat. Before his death U Hla Maung had also brought a suit against his own children to set aside a deed of sale executed by him in their favour in respect of some of the properties. In this

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litigation Daw Thein, his elder sister, acted as the *guardian-ad-litem* of the minor defendants. When U Hla Maung died during his coverture with Daw Thaung Shwe, the 1st appellant Ma E Mai was 13 or 14 years of age and her brother, Maung Tha Noe, a couple of years older. A few months after U Hla Maung's death, Daw Thein, the 2nd respondent in this appeal, Daw Shin, wife of U Ba Lat and one Daw E Kywe, a cousin of Daw Thein, went and brought away the 1st appellant Ma E Mai from her step-mother's place in Macgregor Street to be brought up in U Ba Lat's household. In May 1933, Daw Shin died and within a year of her death, the 1st appellant Ma E Mai eloped with the 2nd appellant Maung Tun E and went and lived in the latter's place at Gyobingauk. In about February 1934, U Ba Lat is alleged to have married the plaintiff-respondent Ma Kyi Kyi (*a*) Ma Thein Kyi. Some five years later, in September 1939, U Ba Lat died at his residence at No. 1, Insein Road, Kamayut. During his last illness, his elder sister Daw Thein, first came to his house to look after him, and she was later joined by Ma E Mai who was sent for from Gyobingauk. After the funeral and the *thabeikthoot* ceremony which followed, the plaintiff-respondent vainly appealed to the police authorities for protection against the hostile and inimical conduct of the defendants, which in the end compelled her to leave her husband's place and initiate judicial proceedings culminating in her present suit.

It has been contended on behalf of the appellants that the plaintiff-respondent Ma Kyi Kyi never attained the status of a legally married wife in U Ba Lat's household. It is pointed out that no wedding ceremony worth the name was publicly held and that the so-called proceedings which was said to have taken place in the plaintiff-respondent's parents' house by

way of a formal ceremony was not attended by any of the close relatives of U Ba Lat and that none of them has been called to support the claim made by the plaintiff-respondent. These objections are found answered in the plaintiff's evidence, but before dealing with them the law relating to the manner in which a Burmese Buddhist marriage may be effected might be briefly referred to,

"According to Burmese customary law, no ceremony is requisite in order to constitute a valid marriage. All that is necessary is consent on both sides to live together as husband and wife. If the bride's parents are alive, it is usual for them to give their consent to the marriage and it is also usual to inform relatives and friends and to have some sort of entertainment, but this is not necessary in order to make the marriage binding . . . " [*See Ma E* v. *Maung San Da* (1).]

"In the case of persons who have been married before, it is not, however, usual to have any entertainment." [*Mi Me* v. *Mi Shwe Ma* (2).]

The need and significance of having a wedding ceremony to bring about the marriage tie between the contracting parties, was commented upon in the case of *Ma Hla Me* v. *Maung Hla Baw* (3) in these words :

"A marriage between Burmese Buddhists, neither of whom has been previously married, is ordinarily accompanied by a ceremony attended by the neighbours of the couple. There is however no recognized ceremony, as this is regulated almost entirely by the finances and wishes of the parties."

At the time of the alleged marriage U Ba Lat's mother-in-law Daw Daung, since deceased, was still living with him in his house. He was also helped in the house by Mi Mi, a step-daughter of Daw Thein and Mi Mi's husband, Lun Maung. Living inside his

(1) 3 B.L.R. 8. (2) (1910—13) 1 U.B.R. 111 (P.C.).
(3) 8 Ran. 425.

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garden at the time was one, Maung Sein, a motor-driver, a brother of U Myint (P.W. 16). Maung Sein was evidently on friendly and confidential terms with U Ba Lat and through him U Ba Lat proposed his marriage with the plaintiff to her adoptive parents U Thein Lwin (P.W. 2) and Ma Thon (P.W. 3) then living in U Ohn Ghine Road. This was a proceeding well in accord with the prevailing custom of the people, for the plaintiff-respondent was then under 20 years of age. U Ba Lat was past 50 years of age and as a widower marrying a young girl perhaps beneath his station in life, it was not surprising that he did not throw himself headlong into the commitments, both social and financial, of a public wedding ceremony. When he went to demand the hand of the plaintiff, he was accompanied by Daw Thein's step-daughter Mi Mi, her husband Lun Maung and his deceased wife Daw Shin's step-mother Daw Daung besides a few intimate friends from his locality in Kamayut. The plaintiff's parents had with them at the time several of their relatives and intimate friends, of whom two, U Ba Thet (P.W. 5) and Daw Swin (P.W. 13) have given their evidence in Court. After the guests were entertained, the purpose of U Ba Lat's presence in the house was explained to those present, the plaintiff was presented with a set of jewellery to wear and was formally handed over to U Ba Lat with the usual accompaniment of advice and blessings uttered by one U Tha Zan, deceased, and the wedding party returned to Kamayut in two motor-cars. On arrival at U Ba Lat's house, the guests present at the time were served with their morning meal.

This formal demand for the plaintiff's hand and the brief informal marriage ceremony that took place in the plaintiff's parents' house was next followed by the offer of *Mingala Sun* in the bridegroom's house a few

days later, and this fact has been deposed to by the plaintiff and her witness U Ba (P.W. 11). Thus all the witnesses who were present on these occasions and are still alive have given their support to the plaintiff's claim that she was the lawfully wedded wife of the deceased U Ba Lat.

It has, however, been objected on the appellant's behalf that the so-called wedding was a hole and corner affair and that the incident described in the evidence of the witnesses is more consistent with the taking over of the plaintiff as a mistress than as a wife. The admitted presence of his quondam mother-in-law Daw Daung, his sister's step-daughter Mi Mi and the latter's husband Lun Maung in U Ba Lat's house at the time of this marriage would render it highly improbable that U Ba Lat could have been guilty of such a serious deviation of his social conduct as taking a young girl into the household as a mere mistress. It was also very unlikely for a couple of independent, though comparatively poor, means like U Thein Lwin and Daw Thon to have agreed to give away their daughter to U Ba Lat if the prospect offered was short of lawful wedlock. Nor could it be easily imagined that a witness like U Ba Thet would have been invited to be present when this incident took place at No. 150, U Ohn Ghine Street. The absence of U Ba Lat's near relations at his wedding could more appropriately be explained by other circumstances than his desire to conceal his guilty and improper conduct from their knowledge. He was at that time living aloof from them, and disputes over his inheritance had estranged him from his elder sister Daw Thein, the 2nd respondent, his only surviving close relation. His younger brother Hla Maung had long been dead. With his step-mother Daw Dwe Hla, he was not on speaking or visiting terms. Contracting a marriage with a young

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girl of seventeen at his advanced age was a matter about which he could hardly be expected to take his distant relations into his confidence. His wife had been dead for a year, and the niece he had brought up in the house had left his protection; and besides he had no children of his living with him whose interest he should protect by entering into illicit relationship with the object of his passion, a subterfuge sometimes adopted by rich widowers with large family commitments.

For five-and-half years the plaintiff-respondent lived with U Ba Lat in the same house at No. 1, Insein Road, Kamayut. Social life was evidently circumscribed by the natural reluctance of the elderly spouse to parade about publicly in the company of his very young wife, and thus the only places they occasionally visited together were the Pagoda and the places of amusement like cinemas; but in their own house they openly lived as husband and wife and of this fact, witnesses like Po Thein (P.W. 9) and his father U Myint (P.W. 16) who were living in the same compound with U Ba Lat have given their evidence. They have been supported by the evidence of Ko Sai, the headman of the locality who had frequent occasions to go and collect land revenue from U Ba Lat. That the couple received and entertained guests in their house is deposed to by U Po Chit (P.W. 6), Headmater of Post-Primary School, Kyaukmyaung, a friend of the plaintiff whom he knew when she was a young girl in Moulmein and also an acquaintance of U Ba Lat of fairly long standing. The impartiality of this witness cannot be seriously questioned. The last witness who personally knew the plaintiff as U Ba Lat's wife is U Tin Maung (P.W. 21), now Assistant Registrar of this Court. This witness is a son-in-law of Daw Dwe Hla, step-mother of U Ba Lat and during the latter's last illness U Ba Lat gave him

a number of cheques to cash and at U Ba Lat's request, he handed over the money to the plaintiff whom U Ba Lat referred to as his wife.

The evidence of Ma Saw Shin (P.W. 10) deserves further consideration as she and her deceased husband Mr. Joseph had occasion to buy a piece of land from U Ba Lat and had visited him in his house where they were introduced to the plaintiff as U Ba Lat's wife. Thereafter they paid frequent visits to U Ba Lat's house and met the plaintiff there.

Daw Thein, the 2nd respondent, admits that after her reconciliation with her brother U Ba Lat, she became on terms of affectionate familiarity with the plaintiff who in view of her age, insisted on addressing her as "Amay Thein" instead of "Ma Ma Thein". Her professed ignorance of the exact relationship between U Ba Lat and the plaintiff is evidently explained by her present opposition to the latter's claim to U Ba Lat's property Daw Dwe Hla, giving evidence for Daw Thein, admits that when she had occasion to visit U Ba Lat's house during his last illness, she saw the plaintiff and thought that she was his wife. The exchange of conversation she heard between the two over the proposed pledge of some pieces of jewellery to pay the medical expenses incurred during the husband's illness must have given her substantial grounds for her correct conjecture regarding the plaintiff's status in the household.

The evidence regarding the performance of the quiet and informal wedding ceremony in the plaintiff's parents' house in the presence of neighbours and relations and the subsequent cohabitation of the parties in U Ba Lat's house openly as husband and wife has further been corroborated by the entries found in the Registers of Electors, Exhibits F and G, about which U Po Han (P.W. 7), Assessment Inspector of

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the Rangoon Corporation, has given his testimony. U Po Han speaks of the manner in which the plaintiff's name came first to be substituted in the Register in place of U Ba Lat's first wife Daw Shin. In both the Registers for 1934 and 1937, the plaintiff's name appeared along with the name of U Ba Lat.

There is next the evidence of U Tun Maung, an Advocate of this Court, now married to the plaintiff, who speaks of the land acquisition proceedings in the office of the Collector of Rangoon in which U Ba Lat was a party. During U Ba Lat's illness, the plaintiff was sent by him as his wife to be examined by the Collector in the matter. A copy of the notice (Exhibit V) issued by the Collector's office confirms this part of the witness's story, as also, the letter, Exhibit R, sent by the Collector to the Assistant Registrar of this Court in that same connection. U Tun Maung next speaks of a notice sought to be served upon U Ba Lat in July 1935 by the appellant Ma E Mai in connection with her application for payment of some money lying in U Ba Lat's hands as Receiver of her father's estate. This notice was in fact served upon the plaintiff in U Ba Lat's absence from the house and the fact of this service was said to have been sworn to by the process-server as well as by the 2nd appellant Maung Tun E who witnessed the service. In the affidavits filed by them in Court, the plaintiff was described by them as the wife of U Ba Lat. This evidence has been accepted by the learned trial Judge and no cogent reasons have been advanced in this Court for its rejection. Thus, there is in this case evidence of the formal demand of the plaintiff's hand from her parents, of the brief and informal ceremony which accompained the taking of the plaintiff from her parents' house to that of U Ba Lat, of openly living together in his place as husband and wife and of the

conduct of the parties to each other and to strangers which was consistent only with the fact that they were husband and wife, and the final effect of all this evidence in the case leaves no room for doubt that the plaintiff was the lawfully wedded wife of the deceased U Ba Lat.

The finding of the trial Court on this issue must accordingly be upheld.

The next question canvassed in this appeal relates to the alleged *keittima* adoption of the 1st appellant Ma E Mai by U Ba Lat and his first wife, Daw Shin. Adoption among Burman Buddhists is a mixed question of fact and law and Courts are bound to insist upon strict proof thereof. [See *Ma Pwa* v. *Ma The The and seven others* (1).] Accordingly, the trial Court has made an exhaustive study of the facts appearing on the record and with the law applicable thereto and arrived at the finding to which exception has now been taken. In a matter like the present the function of this Bench, as pointed out in the case of *Ma Than Yin* v. *Ma Than May* (2) would appear to fall within certain prescribed limits,

". . . What the appellate Court has to do is to see (1) whether the principles of law applicable to the case were appreciated and correctly applied, (2) whether there was evidence upon which the Court of first instance could find the facts as it did, (3) whether any mistake of fact or of inference or any material oversight has occurred any one of which might reasonably affect the result, (4) whether the weight of the evidence shows that the trial Court came to a right conclusion, bearing in mind that the Judge who saw and heard the witnesses is in a much better position to form an estimate of the worth of the testimony than the appellate Court which has not that advantage."

The appellants in this case have sought to show that the learned trial Judge had overlooked certain

(1) 1 L.B.R. 273. (2) (1940) Ran. 168.

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material facts bearing on the question in issue and that in dealing with those other material facts presented in the case on which its finding is based, it had done so in a manner, which in the result, prejudiced the appellant's claim. It has been pointed out that each salient fact has been picked out and considered disjunctively and isolated from the others with the unfortunate result that the complete picture, namely that the degree of proof required in the case, could not be obtained. It is urged that if all these facts proved in the appellant's favour were cumulatively considered and placed against the psychological background furnished in the previous domestic life of U Ba Lat and his wife Daw Shin, a finding in the appellant's favour could well have been passed on the same.

It is an admitted fact that U Ba Lat and Daw Shin had no children of their own. It is not clear whether any was born to them and had failed to survive. Daw Thein, the 2nd respondent, has stated that the childless couple had at one time adopted a son of the name of Aung Khin and that this boy died some years before Daw Shin's death, and before the 1st appellant was taken to their house. This death of the adopted son, according to the appellants, had created a void in the hearts of the elderly couple and a desire to adopt another child in his place and that as soon as Hla Maung's death removed the obstacle in their way, they took the first appellant in adoption as their child and heir. It is said that U Ba Lat and Daw Shin were well-to-do people and kept servants in the house and were not in need of any extra hand to help them. Hla Maung had been on bad terms with U Ba Lat before his death and some sentiment stronger than mere family affection, it is urged, had moved U Ba Lat to act in the way he did. The death of the adopted child and their subsequent longing to bring up another

in his place is said to constitute the psychological background which the trial Court is alleged to have overlooked in appraising the evidence laid before it.

It is not shown in Daw Thein's evidence as to the particular form in which Aung Khin was adopted by U Ba Lat and Daw Shin. Several years intervened between Aung Khin's death and the taking of the 1st appellant into U Ba Lat's family. According to Daw Thein, U Ba Lat had shown no enthusiasm or even inclination to accept the 1st appellant in his home when the subject was first broached to him after his brother Hla Maung's death. Besides, the 1st appellant was already 13 or 14 years of age and sufficiently mature in understanding to make her own choice in the matter of her residence in preference to the protection of her step-mother's home. She refused to go and stay with Daw Thein with whom she had stayed for a year or two previously, and Daw Thein had complained to her rich cousin Daw Kyi Kyi about this. Thus, the background, if any existed at the time when the 1st appellant was taken into U Ba Lat's home, would hardly be of any consequence to affect the issue of *keittima* adoption.

The 1st appellant has given her own account of the manner in which she was brought away from the house of her step-mother Daw Thaung Shwe to live in U Ba Lat's place. Her allegation that Daw Thein told her and Daw Thaung Shwe that she was going to be adopted by U Ba Lat as his child has not received any support from either of them. Daw Thein, conscious of her own interest in the litigation, has chosen to give her testimony in a cautious and guarded manner. She did not like the idea of the 1st appellant being brought up by her step-mother Daw Thaung Shwe, and as the girl refused to come to her, she proposed to Daw Kyi Kyi, her rich cousin, that U Ba Lat, being childless, should bring her up. The matter was put to U Ba Lat

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who first demurred but eventually allowed Daw Thein to do as she pleased. Having obtained his consent, Daw Thein, Daw Shin and Daw Thein Kywe, went and fetched the girl to U Ba Lat's house, then in Lanmadaw quarter in Rangoon. Apart from informing Daw Thaung Shwe that the girl was being given an alternative home, nothing regarding the form of her adoption was disclosed to her. Daw Thaung Shwe similarly had no knowledge of this fact either. When brought before U Ba Lat the latter reminded the 1st appellant that she was an orphan and should live in the house like a good girl. Daw Thein thereupon pressed upon her brother Ba Lat to take the girl in adoption as his heir and each time, he countered with the remark that if she was a good girl she would get (inheritance). It is admitted that when Daw Thein went to fetch the 1st appellant, she had U Ba Lat's wife Daw Shin in her company and this fact is significant in showing that U Ba Lat and his wife were both interested in the offer of her new home to the 1st appellant. There is, however, no evidence either direct or presumptive to support the appellant's contention that either U Ba Lat or Daw Shin had expressed any intention at the time that she was to be their daughter and heir.

But as was pointed out in the case of *Maung Po Kan* v. *Daw At and others* (1) this intention to adopt the appellant as their heir could be expressed by the adoptive parents at the later period or may be inferred from a long course of conduct making such intention public. It is in respect of this aspect of her case that the 1st appellant has put forward a number of facts which are more or less admitted on the record.

It appears in the evidence of Daw Thaung Shwe (D.W. 5) that after the appellant was taken to U Ba Lat's

(1) 1 Ran. 102.

house her name was changed from Ma E Kyi to Ma E Mai. Burmese parents do sometimes change their children's names after consulting their astrologers but in regard to this change of her name, the 1st appellant has not on her part given any explanation, and it is difficult to draw the inference that this change of name was done from the parental concern of the alleged adoptive parents for the welfare of their adopted child. It may, however, be pointed out here that in the sale deed (Exhibit T) in the execution of which the first appellant took part in 1931, her name was still mentioned as Ma E Kyi (*a*) Ma Kyi Kyi.

While living with her alleged adoptive parents, the 1st appellant was invited to the *Shinpyu* ceremony performed in Daw Kyi Kyi's house in Rangoon. She attended this function as one of the *Nayans* (companions or maids of honour required to sit by the side of the daughters of the house whose ear-boring ceremony was being performed). She had to wear the appropriate ceremonial dress as noticed in the photograph (Exhibit 15). Her attendance at this function as a *Nayan* was of no possible significance considering that she was the daughter of a first cousin of Daw Kyi Kyi, the donor of the *Ahlu*. But stress is however laid on the further fact that after attending the *Shinpyu* ceremony, U Ba Lat and Daw Shin took the 1st appellant to the photographer's studio and had their family group photograph taken as shown in Exhibit 15. This took place on the 22nd February 1927 about two years after the 1st appellant came to live with the old couple. Taking a group photograph with the 1st appellant in the centre can hardly be described as conduct expressing the intention to treat her as their heir. The invitation card (Exhibit 12) shows an impressive list of charities donated by Daw Kyi Kyi on the occasion and the incident was worthy of remembrance.

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A photograph was the usual medium by which such notable social events are recorded. The inclusion of the 1st appellant in the family photograph is not inconsistent with the fact that she was an orphan niece who was being kindly brought up by the old couple.

The next fact which is said to have given rise to the presumption of adoption in the 1st appellant's favour is found in the inscription on a *Kyisi* which U Ba Lat and Daw Shin were said to have donated to the local charitable society at Kamayut in about the year 1929 or 1930. The donors' names are found inscribed there as U Ba Lat, Daw Shin and their daughter Ma E Mai, the 1st appellant. The *Kyisi* was worth Rs. 20 and the inclusion of the 1st appellant's name as one of the donors shows that, if the money was contributed by U Ba Lat alone, he obviously wanted the 1st appellant to share the merit along with him and his wife. This again is a piece of conduct not inconsistent with the fact that the 1st appellant was regarded as an orphan niece rather than an adopted daughter. Such an inscription unsupported by other evidence of a corroborative nature cannot give rise to an inference of *keittima* adoption. [See *Ma Than Nyun* v. *Daw Shwe Thit* (1).]

Maung Po Thein (D.W. 7) has given evidence relating to the circumstances in which this inscription was made and how the *Kyisi* passed into the hands of the 2nd appellant. In view of the unsatisfactory nature of Po Thein's evidence on another point, *i.e.* the length of time which the witness saw the 1st appellant in U Ba Lat's house, the production of the evidence of the goldsmith U Po Saing, who made the inscription would have given re-assurance to the story that the latter portion of the writing was there on the *Kyisi* from the very beginning and genuinely represented an admission

(1) 14 Ran. 557.

made by U Ba Lat. Even if U Ba Lat had made this admission, it did not amount to an admission that the 1st appellant was to inherit from him as his *keittima* child, for an orphan niece living in the house may often be addressed or referred to as a daughter, a term rather of affection than an admission or indicia of heirship. [See *Shwe Khin* v. *Maung Sin* (1).]

The next important admission of the 1st appellant's status is said to be contained in the obituary notices published in the Burmese newspapers on the death of the alleged adoptive mother Daw Shin (Exhibits 8, 9, 10 and 11). In these notices or invitations to the funeral, Daw Shin was described as the motner of the 1st appellant, Ma E Mai. These notices were said to have been drafted by the deceased U Ba Lat himself and were sent to the press through U Shwe Tun U (D.W. 9) retired Head Judicial Clerk living in the locality. These obituary notices also refer to one U Kundinnya, an *upazin*, as the son of Daw Shin. This latter statement about the relationship of U Kundinnya to the deceased had no basis in fact and was made merely by way of courtesy as she had borne the expenses of his ordination. When Daw Shin died, the 1st appellant had lived with the old couple for nearly eight years and had perhaps been treated by them like a daughter and the reference made to her in the notices as such could have only meant that she was a member of Daw Shin's household. A similar inclusion of a claimant's name in the funeral card was held in the case of *Maung Sin* v. *Po Ko* (2) as not a reliable proof of *keittima* status.

The death of Daw Shin was next followed after a few months by the 1st appellant's elopement with the 2nd appellant, Maung Tun E. After their elopement the couple went and lived in Gyobingauk, and it

(1) 10 L.B.R. 376 at p. 385. (2) 12 B.L.T. 236.

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is alleged that after an interval of seven or eight months, the 1st appellant alone returned to U Ba Lat and effected a reconciliation with the happy result that she was presented by him with a purse of Rs. 3,000 to enable her to return to her husband and invest the money in trade. There is no corroboration to her story of this visit and of the gift of the money. What had really happened, as has been proved in the evidence, is that, after her 1st child was born, she with her baby in her arms, approached U Ba Lat for assistance and meeting with a rebuff, she filed an application in Court against U Ba Lat who then was the receiver of the estate of his brother, U Hla Maung, for payment of her share in the sum of money lying in his hands. As a result of this application U Ba Lat paid her a sum of Rs. 2,500.

The last in the array of facts relied on by the appellants as proving their claim is the obituary notice published after U Ba Lat's death wherein the 1st appellant was again described as a daughter of U Ba Lat and Maung Tun E as his son (Exhibits A and 16). This obituary notice was said to have been inserted in the papers by U Tha Tun, a cousin of U Ba Lat, since deceased, a fact which has not been satisfactorily proved, and considering that the parties had by then entered into active contest for succession to U Ba Lat's estate, it is hardly possible to attach any weight to the admission contained in these publications.

Thus, all the facts urged in the appellants' behalf as evidence of U Ba Lat's conduct amounting to his admission of her superior status, when considered either singly or cumulatively, do not appear to constitute that degree of proof of her claim, so strictly necessary in this case. Of these facts only two, namely, the inscription on the *Kyisi* and the funeral notice published after Daw Shin's death can be said to have any weight, if the appellant's evidence is implicitly believed; but the

Kyisi was produced from the possession of the 2nd appellant. There is no reliable proof of the fact that the latter portion of the inscription containing the 1st appellant's name was present on the *Kyisi* during U Ba Lat's life time and that it was inscribed at his request. Reasons for not attaching undue weight to the contents of the funeral notice have been mentioned. In such publications made under stress of family bereavement, names and relationships are freely stated with little regard to actual blood connection and from reasons of common courtesy.

With these several facts displaced from the body of proof presented in the case on the appellants' behalf, there is left a considerable amount of oral testimony adduced with a view to show that there was sufficient publicity and notoriety of the appellant's status amongst the friends and relations of the deceased and in the locality where she spent her adoptive life in the deceased's household in Kamayut.

The first of these witnesses who deposed to this part of the appellant's case is U Ba U (D.W. 2), according to whom U Ba Lat proposed to adopt both the 1st appellant Ma E Mai and her brother Maung Tha Noe after their father, U Hla Maung's death. The offer made could well have been a new home for the orphan children not necessarily involving their adoption as his own. The witness has stated that both the children were taken into U Ba Lat's home which however was not a fact.

U Pan Cha (D.W. 3) for the appellants had been to U Ba Lat's house on a few occasions and had not only heard the 1st appellant addressed by the old couple as "daughter" but was told by U Ba Lat that she was his daughter. The witness is one of the hut dwellers of the neighbourhood and from his own admission he was not on too intimate terms with U Ba Lat and his wife Daw Shin, having been to their house only on a few occasions

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in all the twenty years of their acquaintanceship. If evidence of this nature is adduced in proof of the publicity of the relationship, it must, as was pointed out in the case of *Ma Nyun Yin* v. *Ma Kyin and others* (1), be evidence of persons who had special means of knowledge of this relevant fact.

Ma Ma Gyi (D.W. 4) was married to a cousin of U Ba Lat. She had been to see him twice only within a space of six years before the latter's death and can thus hardly be described as a person who could have known about the real relationship between the deceased and the 1st appellant, nor had she by her own conduct expressed such knowledge to anybody at any time.

Po Chet (D.W. 6) is but another man of straw whose evidence was clearly open to a charge of exaggeration for according to him, he had seen Ma E Mai, the 1st appellant with U Ba Lat for twenty years. Maung Po Thein (D.W. 7) who gives evidence of the *Kyisi* and the inscription seen on it, is a friend of the 2nd appellant and like Po Chet, makes some exaggerated estimate of the duration of Ma E Mai's stay with U Ba Lat, with whom he struck an acquaintanceship over religious matters of common concern in the locality.

Shwe Tun U (D.W. 9) describes himself as a friend of the police officer Htaik Tin who is the brother-in-law of the 2nd appellant Maung Tun E. He speaks of an admission made by U Ba Lat to the effect that the 1st appellant was his adopted heir. Witness also went and inserted the obituary notices in the newspapers when Daw Shin died under instructions from U Ba Lat. The veracity of this witness is open to doubt for the reason that he is hazy about the date of the conversation on which U Ba Lat is alleged to have made the admission about the 1st appellant's status. He came

(1) (1941) Ran. 445

to know U Ba Lat only after the latter had come to stay in Kamayut which event must have taken place sometime in 1927 or thereabouts since Ma E Mai was taken to his house while he was still living in a rented flat in Lanmadaw in 1925. The casual conversation with U Ba Lat could not have taken place twenty years ago as alleged by the witness for by then U Ba Lat was still in his Lanmadaw residence. Witness's further statement that he knew U Ba Lat, 4, 5, 6 years before this casual talk would obviously be grossly inaccurate. Witness also states that some six or seven months after her elopement Ma E Mai came back to her adoptive father and witness further saw the 2nd appellant Maung Tun E there some three or four months after he saw Ma E Mai. It is somewhat strange that this witness should have paid his casual visits to U Ba Lat on both these occasions so as to be able to corroborate the appellants on the point.

Apart from Ma Ma Gyi who had been away with her husband in the district in the seven or eight years during which Ma E Mai had lived with U Ba Lat and Daw Shin, none of the other close relations of U Ba Lat had been called in support of her claim. Lady Maung Gyee (D.W. 1) for the 2nd respondent Daw Thein, is a cousin of the appellant and she, according to her statement, was never aware of the 1st appellant's adoption by U Ba Lat as an heir. The indifference to her cause shown by her other near relations is a matter of some significance. Daw Thein and Daw Dwe Hla on their own showing were rival claimants to the deceased's estate, and they have denied the first appellant's claim. They have, however, explained in what circumstances the plaintiff-respondent had to leave her husband's house after his funeral.

Daw Thein has, however, admitted that anxious for the 1st appellant's welfare, she had often proposed to

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her brother U Ba Lat that he should adopt Ma E Mai as his daughter so that she could inherit from him. U Ba Lat was always hesitant and contented himself with the remark that if she was a good girl she would get (inheritance) from him. This attitude of his was understandable, for the girl was already 13 or 14 years of age and previous relationship between the families had not been too friendly. Doubts could very well exist in his mind as to whether with her character already formed and her family prejudices developed, she could ever prove to be dutiful and obedient to her adoptive parents. In the circumstances, a period of probation seemed necessary and that was what U Ba Lat probably intended to convey to his sister by his ambiguous remarks. If U Ba Lat's words amounted to a promise of adoption, it must be shown by reliable evidence that this promise was duly carried into effect.

Did U Ba Lat then at any subsequent time make up his mind in the matter? To this question, the two facts put forward for the appellants, namely, the inscription on the *Kyisi* and the admission made in the funeral notices do not afford a reliable and sufficient answer.

As to the degree of weight that can be attached to the evidence relating to the publicity of relationship claimed in the case, we can do no better than repeat the observations made by a Bench of this Court in the case of *Ma Nyun Yin* v. *Ma Kyin and others* (1) (*supra*) for much of the evidence given for the appellants do not conform to the rule either of relevancy or of admissibility.

" Evidence of mere rumour or gossip to the effect that an adoption has taken place or that such and such a person has no adopted child is not admissible. The opinion of any one who has special means of knowledge as to the existence of the relationship

(1) 1941 Rang. 445.

of one person to another is a relevant fact only when that opinion is expressed by conduct. (Head Note.)

Section 32, clause 5, admits oral evidence of statements by deceased persons as to relationship by blood, marriage or adoption, provided they had special means of knowledge, and provided the statement was made before the question in dispute was raised. But no section of the Evidence Act admits evidence of the current talk of a neighbourhood, for the very good reason that a man's neighbours may be and often are quite misinformed as to his private affairs, and that their opinions are purely conjectural, unless they are derived from some one who has special knowledge of the question at issue." (P. 463.)

Regarding the alleged references made by the deceased to the 1st appellant as a daughter in the hearing of the witnesses, it is hardly necessary to repeat what has been said of this practice among the Burmese in *Ma Ywet*'s case (1),

"The words 'father' 'mother' 'son' and 'daughter' are very loosely used by the Burmese. It would be quite natural for an old man to refer to a niece who had lived with him for a long time as his daughter."

As to the evidence of publicity of the relationship emanating from neighbours, relations and friends the decision in *Ma Gun*'s case (2) laid down the settled principle in these words,

"This Court has always proceeded, in cases of adoption, upon the clear principle that, while no special formalities are required, there must be distinct proof of the intention to adopt as heir by conduct making such intention public, or at least plain to the family generally and to friends and neighbours on such a footing of intimacy as to render it likely that they should be acquainted with the truth of the matter."

None of the witnesses who have come forward to support the appellant would appear to be friends and

(1) 5 L.B.R. 118. (2) (1897—1901) 2 U.B.R. Civil 166 at p. 68.

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neighbours of the deceased on such terms of intimacy as to be in a position to know the truth of her claim.

There are certain matters brought out in the evidence of the near relations like Daw Thein and Daw Thaung Shwe which would appear to explain the conduct of the parties both before and after the alleged adoption took place. These have already been referred to in their place but they deserve to be mentioned again for further elucidation of the facts tending to conflict with the allegations made by the appellant. U Hla Maung's suit brought against his children for setting aside the deed of gift was continued after his death by his widow Daw Thaung Shwe, and in this suit Daw Thein represented the minor defendants as their *guardian-ad-litem* and U Ba Lat was appointed receiver of the estate in dispute. Besides this litigation, Daw Thein herself on her own account sued her two brothers for her share of inheritance in the properties left by her parents, and this suit was later compromised but not before a good deal of mutual bad feeling among them had been created. During the pendency of U Hla Maung's suit the 1st appellant had gone and lived with her guardian Daw Thein for sometime but after her father's death, she had declined to go back to her aunt. Above all things, these litigations would show that the 1st appellant, on the death of her father U Hla Maung, was not left in a state of such destitution as to justify the presumption that when she was taken to U Ba Lat's house any form of adoption could have been contemplated. Her change of residence would rather appear to be a matter of family arrangement brought about to satisfy the wishes and sentiments of her near relations. Kind and considerate treatment which she later received at the hands of her uncle and aunt can hardly raise the presumption of

adoption in any form. [See *Shwe Kin and three others* v. *Maung Sin* (1) *supra.*] Her independent social status would also appear to have been admitted and recognized in the fact that when her aunt Daw Kyi Kyi gave a big *Ahlu*, a separate invitation card was sent to her while she was still living under U Ba Lat's roof.

Other facts which negative both the proof and presumption of adoption have also been brought out in the evidence of the witnesses. One of these was a sale transaction in which the 1st appellant Ma E Mai took part as a joint vendor of a piece of land forming part of her natural father U Hla Maung's estate. In this document of sale executed in December 1931 (Exhibit T) the 1st appellant is described as the daughter of U Hla Maung in the body of the deed, and the same description appears in the endorsement of the Registrar before whom she admitted execution of the document. She has not been able to give any reasonable explanation of these damaging facts brought out against her. U Ba Lat was an elderly person and must have read the contents of the deed of sale and the registration endorsement, and if he had regarded the 1st appellant as his daughter and heir it was unlikely that he should have overlooked the misdescription of her parentage.

The 1st appellant admittedly married a man of her choice with complete indifference to the feelings and sentiments of her alleged adoptive parent who then was passing through the first difficult year of his widowed existence. After her elopement she stayed away with her husband in Gyobingauk and no attempt was made by anybody to restore her to her alleged adoptive father so that the latter could arrange a regular wedding ceremony befitting her social status. Nor was any anxiety shown by U Ba Lat for her return to her adoptive home.

(1) 10 L.B.R. 376 at p. 385.

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If any jewellery was given to the 1st appellant to wear during her stay with him, no part of it is alleged to have been taken away by her at the time of her elopement. The conduct of both parties in the matter renders the existence of a relationship of father and daughter extremely improbable.

The 1st appellant's allegation that she effected a reconciliation with her adoptive father some seven months after her elopement and that she was presented on the occasion with a purse of Rs. 3,000 has remained unsupported by any reliable evidence. Considering that she had to make an application in Court with the help of a pleader to obtain the sum of Rs 2,500 from U Ba Lat out of the funds held by him as receiver of her natural father's estate, the story told by her is clearly unacceptable. In the absence of positive evidence of adoption the significance of this latter fact is clear. [See *Maung Seik* v. *Ma Thet Pu* (1)]. Besides, there is no proof whatever that the father and daughter had exchanged letters or presents at any time before the former's death. Above all the 1st appellant herself has admitted that she had no occasion to go and stop with her adoptive father at any time after her marriage. Complete estrangement between the 1st appellant and her alleged adoptive father following her elopement with the 2nd appellant is clearly proved in the evidence despite her protestations to the contrary and her further allegation that during his last illness U Ba Lat sent for her both by telegram and by messenger would somewhat strain belief and can hardly be accepted as having any basis of truth.

On the appellant's behalf a belated claim has been made that if she be not allowed to succeed in her suit on the basis of her *keittima* adoption she might be held

(1) 9 B.L.T. 154

to have proved her *appatittha* status. In regard to this alternative claim the principle of law bearing on the matter may be briefly stated, " The principle underlying the definition of the terms seems to be that an *appatittha* adoption is a compassionate one which takes place in consequence of the child being destitute with no one to maintain it, through abandonment by, or the decease of, its natural parents or some such similar cause." [*Tet Tun* v. *Ma Chein* (1).] In any case such an alternative claim does not appear to be permissible in view of the decision in *Maung Ba Thein* v. *Ma Than Myint and others* (2) where it was held, " causes of action on which the claims to be a *keittima* son and an *appatittha* son are based being widely different, the Court of appeal by allowing the amendment would be practically ordering a new suit to be commenced afresh and that should not be permitted."

Thus when all the facts and circumstances brought out in the evidence on the record are pieced together and considered in the light of the principles of law applicable to the same, the effect obtained falls far short of a proof of claim of *keittima* adoption set up by the appellants, and accordingly this appeal fails and will be dismissed with costs.

U TUN BYU, J.—I agree.

(1) 5 L.B.R. 216 at p. 218 (2) 3 Ran. 483.

APPELLATE CRIMINAL.

Before U Thein Maung, Chief Justice.

H.C. 1948 — *Aug. 13.*

U WA GYI (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Criminal Procedure Code, ss. 197 and 439—Prosecution under s. 409, Penal Code—Power of revision of the High Court.

Held : It is undesirable and impossible to lay down a rigid rule as to when the High Court in its Revisional Jurisdiction will interfere with a pending case ; but the High Court will do so only in exceptional cases where there is no legal evidence to establish a *prima facie* case against the accused.

Where the Superintendent of Government Printing Works sold condemned machinery at a price mentioned in the Dead Stock Ledger and the value of the machinery were credited to the Government, and it was not suggested that the sale was made dishonestly the mere fact that the sale was at an under-value does not make the Superintendent of the Printing Works liable for criminal breach of trust.

When the Court finds that there is no legal evidence of criminal breach of trust against the accused a *de novo* trial of the accused owing to the transfer of the Magistrate should not be allowed, and under these circumstances, the Court would quash the proceedings.

Khan Bahadur *Hajee Gulam Sherazee* v. *The King*, (1941) R.L.R. 599 at p. 601.

Maung Ba Yon v. *Ma Hla Kin*, A.I.R. (1933) Ran. 297 at p. 298 ; *Hari Charan* v. *Girish Chandra Sadhukan*, (1911) I.L.R. 38 Cal. 68 ; *Abdul Wali* v. *Emperor*, A.I.R. (1933) Oudh 387 at p. 391, referred and followed.

Dr. Ba Han for the appellant.

L. Choon Foung (Government Advocate) for the respondent.

U THEIN MAUNG, C.J.—This is an application to quash the proceedings against the applicant in Criminal Regular Trial No. 9 of 1948 in the Court of the District Magistrate, Rangoon. The applicant, who is Superintendent, Government Printing Press under suspension, is

*Criminal Appeal No. 80B of 1948 being $\frac{\text{appeal}}{\text{revision}}$ from the order dated the 24th June 1948 passed in Criminal Regular Trial No. 9 of 1948.

prosecuted in that case with sanction under section 2 of the Sanction for Prosecution (War-Time Offences) Act, 1946, and section 197 of the Code of Criminal Procedure for an offence under section 409 of the Penal Code in respect of two printing machines, namely, printing machines Nos. 8065 and 7492. The case for the prosecution has been closed and a date has actually been fixed for hearing as to whether a charge should be framed or not. However, the learned District Magistrate who tried the appellant has gone on leave and his successor in office has decided *suo motu* to try the case *de novo*.

With reference to a similar application Mosely J. observed in Khan Bahadur *Hajee Gulam Sherazee* v. *The King* (1),—

"It is undesirable and impossible, of course, to lay down any rigid rules as to when interference can or should be made, but the guiding principles are quite clear. The High Court will only interfere in exceptional cases such as where a person is being harrassed by an illegal prosecution; where there is some manifest and patent injustice apparent on the face of the proceedings and calling for prompt redress; where the evidence on record for the prosecution clearly does not justify a charge of any offence (*Ba Yon* v. *Ma Hla Kin*, Criminal Revision 171B of 1933 of this Court), or where the trial is on the face of it an abuse of the process of the Court. It has well been said that one test of the exceptional nature of the application is that a bare statement of the facts without any elaborate argument should be sufficient to convince the High Court that the case is a fit one for its interference at an intermediate stage. There are numerous rulings to this effect by other High Courts."

Dunkley J. also observed in *Maung Ba Yon* v. *Ma Hla Kin* (2),

"It has been repeatedly laid down that a Court of revision should be most reluctant to interfere in a pending case but where upon the alleged facts, there is no justification for the charge

(1) (1941) R.L.R. 599 at p. 601. (2) A.I.R. (1933) Rang. 297 at p. 298.

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against the accused, he should not for a moment longer than is necessary be allowed to remain in the position of a person accused of an offence and forced to defend himself against a charge which there is no legal evidence to establish. Consequently if there are any allegations of fact to support the charge which has been brought by the respondent against the applicant, then I shall not be justified in interfering ; but it is my duty to interfere and to quash the proceedings of the Magistrate if, even were all the allegation set out in the complaint and in the examination of respondent upon her complaint to be proved, they would not substantiate the charge which she has made against the applicant."

In the present case the complainant U Oung Khine (*a*) U Bon Khain has merely stated in his First Information Report (Exhibit A), dated the 2nd October 1947, "There are no records that U Wa Gyi, the Superintendent of Government Printing and Stationery Department, has the power to dispose of or sell the Government property." He has not stated therein that U Wa Gyi did not, as a matter of fact, have power to sell the Government property or that U Wa Gyi disposed of the Government property dishonestly. It was only in his examination-in-chief on the 24th May 1948, *i.e.* over seven months after the First Information Report that he stated : "I seized them because they were sold at an under-value and contrary to Government instructions, that is, they should be sold by a public auction after due advertisement." He has practically admitted that U Wa Gyi had authority to sell the machines. His complaint at the hearing is that U Wa Gyi sold them at an under-value and contrary to Government instructions ; but he has not alleged even at the hearing that U Wa Gyi did so dishonestly. The alleged Government instructions are contained in Exhibit B which is a copy of Department of Commerce and Industry letter dated the 12th October 1939, the original of which cannot be found by the complainant

although he has made a search for it. He seized Exhibit B on the 21st October 1947, from Maung San Shein, Stationery Clerk ir Insein Jail (P.W. 9) who had received the file containing it from his predecessor-in-office U Hla Baw Zan (P.W. 8); and according to U Hla Baw Zan "Exhibit B was found in a file in a rubbish heap." It is admitted that U Wa Gyi was not the Superintendent, Government Printing and Stationery, Burma, in 1939 when instructions as per Exhibit B were alleged to have been issued and there is no express allegation of U Wa Gyi having been aware of them. The allegation is implied in the complainant's statement; "It may be that U Wa Gyi himself did not remember Exhibit B;" but this statement must be read with the statement immediately preceding it which is "None of them [referring to U Hla who is acting in U Wa Gyi's place and U Khin Maung, Assistant Superintendent, Government Press (P.W. 10)], remembered an order like Exhibit B." Besides, apart from the concession that U Wa Gyi might not have remembered the instructions (even if they were issued) there is no allegation of U Wa Gyi having been aware of them before the sale or of any circumstance to show that he must have been aware of them or of his having sold the machines dishonestly.

The case for the prosecution as stated by the learned Government Advocate is that by virtue of the instructions as per Exhibit B, an implied legal contract has been made by U Wa Gyi touching the discharge of the trust and that U Wa Gyi has dishonestly disposed of the machines in violation of the implied legal contract. However, the allegations made by the complainant and the evidence led by him are not to that effect. Even if all the allegations set out in the First Information Report and the evidence of U Oung Khine were proved, they would not substantiate the charge of an

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offence under section 409 of the Penal Code. Besides, the allegation that the machines were sold at an under-value has not been proved at all. U Oung Khine has stated in his examination-in-chief, "I cannot say the original value of the machines. I cannot also say their values at the time of the sale." It is true that he has added "I know that they are worth more than the price at which the accused has sold them ;" but he has to admit under cross-examination, "I have never effected sale of printing machines. By looking at the size of the exhibit machines and its (*sic* ? their) usefulness, I formed my estimate of them." On the other hand U On Kin (P.W. 2), who bought them from U Wa Gyi, found them in very bad condition and "did not think the price to be a bargain." U Ba Ohn Overseer, Government Press (P.W. 7) has stated, "Those machines that could not be used were classed as unserviceable machines. The exhibit machines were of the class. They were very old. When machines were unserviceable, I had to send a report to U Wa Gyi through the Overseer and Deputy Superintendent. On receipt of the report, U Wa Gyi, who was Superintendent ordered the Engineer U Shwe Gaung to inspect and examine the machines. The same procedure was followed in connection with the exhibit machines." Moreover U Oung Khine has admitted that the machines were sold at the prices mentioned in the Dead Stock Ledger (Exhibit D, page 173) at their book value and that "the value of the machines were all credited to Government."

Under the circumstances further trial of the applicant on the complaint will not serve any useful purpose. [Cf. *Hari Cheran* v. *Girish Chandra Sadhukan* (1).] Nay, it will certainly be unjust to compel him to

(1) (1911) I.L.R. 38 Cal. 68.

stand further trial thereon. [Cf. *Maung Ba Yon* v. *Ma Hla Kin* (1)]. In the words of Wazir Hasan, C.J., in *Abdul Wali* v. *Emperor* (2) "If I were to allow these proceedings to continue, I would be allowing a farce to be enacted to the great harassment of the applicant."

This is enough to dispose of the application and it is not necessary for me to go into the question as to the legal effect of the sanction under section 197 of the Criminal Procedure Code having been obtained—unlike the sanction under the Sanction for Prosecution (War-Time Offences) Act, 1946, only after the learned District Magistrate had taken cognizance of the case, granted bail to the accused and fixed a date for hearing.

I accordingly direct that the prosecution be quashed.

(1) A.I.R. (1933) Ran. 297 at p. 298. (2) A.I.R. (1933) Oudh 387 at p. 391.

APPELLATE CRIMINAL.

Before U San Maung, J.

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June 30.

NGA SAW SHWE (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Arms Act s. 19 (f) as amended by Act LXIV of 1947—Anomaly—Hiding of rifle by burying it—Presumption.

Under s. 19 (*f*) of the Arms Act an offence is punishable with imprisonment for three years only while an offence under s. 20 is punishable with rigorous imprisonment up to seven years. After the amendment by Burma Act LXIV of 1947 when a person is in possession of a rifle in contravention of s. 14 or s. 15, he is punishable under s. 19 (*f*) with transportation for life or with death. If he is in possession of the same rifle in such manner that his possession may not be known to any public servant he is only punishable with rigorous imprisonment up to seven years under s. 20. This anomaly has been overlooked by the Legislature.

The accused had hidden a rifle by burying it under the earth. He must be presumed to have intended to keep his possession hidden from the knowledge of a public servant. This case is distinguishable from where the concealment was under the floor-board of the cattle shed which adjoined the house.

***Maung Hla Sein* v. *The King*, (1947) R.L.R. 53, distinguished.**

U SAN MAUNG, J.—In Special Judge's Trial No. 6 of 1948 of the Additional Special Judge (U Hnit) of Henzada the appellant Saw Shwe was sent up for trial by the police for an offence punishable under section 19 (*f*) of the Arms Act as amended by the Arms (Temporary Amendment) Act, 1947, Burma Act No. LXIV of 1947. On the facts the learned trial Judge came to the conclusion that the offence committed by the appellant was one punishable under section 20 of the Arms Act, and accordingly convicted him under that section and sentenced him to rigorous imprisonment for five years.

I have admitted this appeal only for the purpose of considering whether, when an accused person is sent

* Criminal Appeal No. 403 of 1948 being appeal from the Order of Additional Special Judge of Henzada, dated 16th March 1948, in Special Judge's Trial No. 6 of 1948.

up for trial under section 19 (*f*) of the Arms Act, as amended by Burma Act No. LXIV of 1947, it is competent for a magistrate to convict him under section 20 of the Act when the facts appearing in evidence justifies a conviction under the latter section. Curiously enough, before section 19 (*f*) of the Arms Act was amended by Burma Act No. LXIV of 1947, an offence under that section was punishable with imprisonment for three years only, whereas an offence under section 20 of the Act was and still is punishable with rigorous imprisonment which may extend to seven years. After the amendment offences under section 19 (*f*) become punishable with death or transportation for life, if the arm, ammunition or military store found in the possession of the accused person is a machine-gun, bren-gun, tommy-gun, sten-gun or rifle, etc. Now, the relevant portions of section 19 (*f*) of the Arms Act, as amended, will read as follows :

"19. Whoever commits any of the following offences (namely) :

* * * *

(*f*) has in his possession or under his control any arms, ammunition or military stores in contravention of the provisions of section 14 or section 15 ;

* * * *

shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both :

Provided that where any person commits an offence falling within 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, etc."

The relevant portion of section 20 reads :

"20. Whoever does any act mentioned in clause (*a*), (*c*), (*d*) or (*f*) of section 19, in such manner as to indicate an intention that such act may not be known to any public servant as defined in the Penal Code,

* * * *

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shall be punished with imprisonment for a term which may extend to seven years, etc."

Therefore, an anomalous situation arises, namely, that, when a person is in possession of a rifle in contravention of the provisions of section 14 or section 15 of the Arms Act, he is punishable under section 19 (*f*) with transportation for life or with death, whereas if a person is in possession of the same rifle in such manner as to indicate an intention that his possession may not be known to any public servant as defined in the Penal Code, he is only punishable with rigorous imprisonment extending to seven years under section 20 of the Act. This anomaly must have been overlooked by the Legislature in enacting the Arms (Temporary Amendment) Act, 1947.

On the facts it is clear that the appellant in this case had hidden a rifle by burying it under the earth. He must, therefore, be presumed to have intended to keep his possession hidden from the knowledge of a public servant as defined in the Penal Code. His case is distinguishable from that of *Maung Hla Sein* v. *The King* (1), where the concealment of a rifle under the floor-board of the cattle shed which adjoined the house was held to be not possession with an intention that such possession might not be known to any public servant.

The conviction of the appellant under section 20 of the Arms Act is correct and the sentence of five years rigorous imprisonment calls for no interference. The appeal is dismissed.

(1) (1947) R.L.R. 53.

တရားဝန်ကြီးဦးစံမောင် ရှေ့၌

မောင်ကတိုး (ဂဒုံး) နှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်။*

၁၉၄၈ ဇူလိုင်လ ၁။

ရာဇသတ်ပုဒ်မ ၃၀၄—ခုခံကာကွယ်ပိုင်ခွင့်၊—ငင်းအခွင့်ကိုပိုချဲ့ပြုလုပ်ခြင်း။

လူတဦးတယောက်က မိမိအား ရန်မူရန် လာလျှင် ရန်မူခြင်း ခံရသူသည် ထွက်ပြေးရန် မလို၊ ရပ်တန့်၍ ခုခံနိုင်သည်။ မိမိကိုရန်မူသူသည် ထပ်မံ၍ ရန်မမူနိုင်သည့်တိုင်အောင် ခုခံနိုင်သည်။

ဘုရင်ကေရာဇ်မင်းမြတ်နှင့် မောင်လှမောင် တို့၏အမှု၊ ၁၉၄၆ ခုနှစ်၊ ရန်ကုန်၊ စာမျက်နှာ ၅၀၊ လိုက်နာသည်။

မောင်အောင်ဘွင့်နှင့် ဘုရင်ကေရာဇ်မင်းမြတ်တို့၏အမှု၊ ၁၉၄၇ ခုနှစ်၊ ရန်ကုန်၊ စာမျက်နှာ ၅၀၊ ညွှန်ပြသည်။

တရားဝန်ကြီး ဦးစံမောင်။ဟသံဘာမြို့၊ အထူးတရားသူကြီး (ဦးဘဆွေရုံး၏) ၁၉၄၇ ခု၊ ရာဇဝတ်ကြီးမှုအမှတ် ၅၆ တွင်၊ အယူခံတရားလို မောင်ကတိုးအား ရာဇသတ်ပုဒ်မ ၃၀၄ အရ အပစ်ပေးလိုက်သော ပစ်မှုကျူးလွန်သည်ဟု ထောခဏ ဒဏ် ၇ နှစ် ကျခံစေရန် အမိန့်ပေးလိုက်ခြင်းကို မကြေနပ်၍ အယူခံသော အမှုဖြစ်သည်။

အမှုအဖြစ်အပျက်မှာ အတိုချုပ်အားဖြင့် အောက်ပါအတိုင်းဖြစ်သည်။

၁၉၀၃ ခုနှစ်၊ နတော်လပြည့်နေ့ (၁၉၄၇ ခုနှစ်၊ နိုဝင်ဘာလ ၂၇ ရက်) ညနေ ၇ နာရီအချိန် ခန့်တွင် သေသူ မောင်သန်းသည်၊ မောင်တင်ကြည်၊ မောင်တင်၊ မောင်မြမောင် (တရားလိုပြ သက်သေ အမှတ် ၁-၂-၇) တို့သည်၊ နှောကုန်းရွာ မောင်တင်၏ အိမ်၌ စကား ပြောနေကြစဉ် အယူခံ တရားလို မောင်ကတိုးသည်၊ မောင်တင်၏ အိမ်ရှေ့ လမ်းမှာ၊ ဒါးတလက်ကို ထမ်းပြီး တောင်မှ မြောက်သို့သွား၏။ ထိုအခါ သေသူမောင်သန်းက ဘယ်သူလဲဟုမေးပြီး ရုံးရှေ့တွင် သက်သေတင်ပြထားသော မိုန်းကိုကိုင်လျက် မောင်ကတိုး နောက်သို့

* ၁၉၄၈ ခု၊ ရာဇဝတ်အယူခံအမှတ် ၄၃၃။ ဟသံဘာမြို့ အထူး (စက်ရှင်) တရားသူကြီး ဦးဘဆွေ၏ရုံး။ ၁၉၄၇ ခု၊ အထူးရာဇဝတ်ကြီးမှုအမှတ် ၅၆ တွင်၊ ၁၉၄၈ ခုနှစ်၊ မတ်လ ၂၀ ရက်နေ့ကချမှတ်သောအမိန့်ကိုအယူခံသောအမှု။

၁၉၄၈

မောင်ကတုံး (ဂဒုံး) နှင့် မြည်ထောင်စု မြန်မာနိုင်ငံတော်

တရား ဝန်ကြီး ဦးစံမောင်။

လိုက်ရာ၊မောင်မြမောင် (တရားလိုပြသက်သေအမှတ် ၇) ကလည်း ဒုတိယတချောင်းကိုကိုင်လျက်လိုက်သွား၏။ မောင်တင့်၏အိမ်မှ တအိမ်ကျော်သို့ရောက်သောအခါ သေသူ မောင်သန်းသည် အယူခံတရားလို မောင်ကတုံးကိုမြို၍ မောင်ကတုံးက သေသူနှင့်မျက်နှာခြင်းဆိုင်လျက်ရှိနေ၏။ ထိုနောက် သေသူနှင့်အယူခံတရားလို တို့သည် တယောက်ကို တယောက် ထိုးဝှန်းလျှင်ထိုး ခုတ်ဝှန်းလျှင်ခုတ် စသဖြင့် အသီးသီးပြောပြီးနောက်၊သေသူက မောင်ကတုံးအား စတင်၍ မိုန်းနှင့်ထိုးလိုက်ရာ မောင်ကတုံးကိုမထိဘဲ မိုန်းသည် မြေသို့စိုက်သွားလေသည်။ ဤသို့ထိုးလိုက်သည်နှင့်ကပြိုင်နက်၊အယူခံတရားလိုသည်၊မောင်ကတုံးက မိမိတွင်ပါလာသောဒါးမဖြင့် သေသူကိုခုတ်လိုက်ရာ၊သေသူ၏လက်ဝဲဘက်ပါးကိုခုတ်မိပြီး၊ သေသူသည် ထိုနေရာ၌ပင်လဲသွား၏။ ထိုနောက် မောင်တင်ကြည်နှင့် မောင်မြမောင် ရောက်လာကြ၍ မောင်တင်ကြည်က မောင်ကတုံး ဘက်ဆီသို့ မိုန်းနှင့် ပစ်ထိုး လိုက်ပြီးလျှင် မောင်မြမောင်နှင့်အတူတောင်ဘက်သို့ပြေးကြ၏။ အယူခံတရားလိုလည်း မြောက်ဘက်သို့ ထွက်ပြေးလေသည်။ ထိုနောက် အတော်အတန် ကြာသောအခါ၊ မောင်သန်း လဲသောနေရာသို့ သွားကြည့်သောအခါ၊ မောင်သန်း သေနေသည်ဖြစ်ကြောင်းတွေ့ရှိရ၏။ အလောင်းကို နောက်တနေ့ နံနက်တွင် အင်ပူဆေးရုံသို့ ယူဆောင်လာကြ၍၊ အင်ပူဌာနာတွင် ကိုတိုးဆင့် (တရားလိုပြ သက်သေအမှတ် ၃) သည် (က) အမှတ်ဖြင့် သက်သေခံ တင်ပြထားသော ပဌမတိုင်ချက်ကို ရေးခဲ့၏၊ အမှုကို ရာဇဝတ်အုပ် ဦးထွန်းမြင့် (တရားလိုပြသက်သေအမှတ် ၆) က လိုက်ခံစစ်ဆေးလေသည်။ အယူခံတဂ္ဂးလိုလည်း (၁၉၄၇ ခုနှစ်၊ ဒီဇင်ဘာလ ၂ ရက်) နေ့တွင် အင်ပူဌာနာသို့ လာရောက်အဘင်းခံ၍၊ ၎င်း၏ ဦးခေါင်းတွင် ရှိသောဒဏ်ရာကို စစ်ဆေးရန် ဆရာဝန်ထံသို့ပို့လိုက်ရ၏၊

ထိုနောက် (၁၉၄၈ ခုနှစ်၊ဖေဖော်ဝါရီလ ၇ ရက်) နေ့တွင် အယူခံ တရားလိုအား၊ရာဇသတ်ပုဒ်မ ၃၀၂ အရ စွဲချက်တင်ကာ ရုံးတော်သို့ စစ်ဆေးစီရင်ရန် တင်ပို့လိုက်ခြင်းဖြစ်လေသည်။

အယူခံတရားလိုက သေသူအား ကိုင်းခုတ်ဒါးဖြင့်မိမိခုတ်ကြောင်းမငြင်းချေ။ သို့သော်မိမိကိုယ်ကိုကာကွယ်ရှင်းခုတ်လိုက်သဖြင့် အပြစ်မရှိပါဟုထုချေလေသည်။ ယင်းသို့ထုချေချက်ကို အောက်ရုံးတရားသူကြီးက အယူခံတရားလိုသည် ရုပ်တန့်၍ ရန်ကိုမခုခံဘဲထွက်ပြေးသွားက လွတ်မြောက်နိုင်သည်။ ရုပ်တန့်၍ ခုခံသည့်အပြင်၊ ခုတ်ရန်လည်း ကြိုးစားနေသည်ဖြစ်သောကြောင့်၊ မိမိကိုယ်ကို ကာကွယ်ခုခံပိုင်ခွင့် လက်လွတ်ဆုံးရှုံးခြင်းခံရမည်ဟုဆုံးဖြတ်ထား၏။ သို့သော်ရုတ်တရက်ရောင်တခင် တဦးနှင့်တဦး ခိုက်ရန်ဒေါသဖြစ်ပြီး ဒါးဖြင့်ခုတ်ခြင်းကြောင့်၊ အယူခံတရားလိုအား

ရေဇသတ်ပုဒ်မ ခုဝဂ အရ၎ာ အပစ်ပေးထိုက်သည်ဟုယူဆကာ၊ အထဲက်ဖေါ်ပြ ထားသည့်အတိုင်း အပစ်ပေးလိုက်ခြင်းဖြစ်သည်။

၁၉၄၈

မောင်ကတိုး (ကဒုံး) နှင့် ပြည်ထောင်စု မြန်မာ နိုင်ငံတော်

တရားဝန်ကြီး ဦးစံမောင်။

ကျွန်ုပ်သဘောအရဆိုလျှင် အယူခံတရားလိုသည် အောက်ရုံး တရားသူကြီး ယူဆသည်အတိုင်း မိမိကိုယ်ကို ကာကွယ်ခုခံပိုင်ခွင့်ဆုံးရှုံးသောအခြေသို့မရောက် သေး၊ အမှုတွင် ပေါ်လွင်လျက်ရှိသော သက်သေ ခံချက်များကို ထောက်ရှုလျှင်၊ အယူခံတရားလိုသည်၊ မိမိအလိုအလျောက် ကောင်းမွန်စွာ ရွာလမ်းပေါ်တွင် လျောက်သွားနေခိုက် မိမိအနောက်က မှိန်းစွဲကိုင်ကာ လိုက်လာသော သေသူ မောင်သန်းနှင့်ဒုတ်စွဲကိုင်လျက် လာသော တရားလိုပြု သက်သေ မောင်မြမောင် တို့ကိုမြင်လျှင် မိမိအား မုချရန်မူရန် လာကြသည်ဟု ထင်မည်ဟိုက ထင်နိုင်စရာ အကြောင်းရှိ၏။ သူတပါးက မိမိကိုရန်မူရန်လာသောအခါ၊ မိမိကိုယ်ကို မခုခံဘဲ ထွက်ပြေးရမည်ဟူ၍ဥပဒေမရှိ။ အကယ်၍ အယူခံတရားလိုသည် ထွက်ပြေးလျှင် လည်း၊ သေသူ မောင်သန်းက နောက်ကလိုက်၍ ရန်မူလိမ့်မည်မဟုတ်ဟု မည်သူ မျှမပြောနိုင်ချေ။ အယူခံ တရားလို ကြောဘက်မှနေပြီး မှိန်းဖြင့် ပစ်ထိုးလိုက်လျှင် အယူခံ တရားလိုတွင် ဆေးလောက်သော ဒဏ်ရာ ရနိုင်စရာ အကြောင်းရှိ၏။ ထိုကြောင့် ထွက်မပြေးဘဲ လှည့်၍ခုခံခြင်းသာလျှင် အယူခံတရားလိုအတွက် သာ၍ အကျိုးရှိသော အချက်ဖြစ်ပေသည်။ ထိုပြင်တဝ သေသူ မောင်သန်းက စတင်၍ မှိန်းဖြင့်ထိုးရာဝယ်၊ အယူခံတရားလိုက မိမိတွင်ပါသော ကိုင်းခုက်ဒါးဖြင့် တချက် သာလျှင် ပြန်ခုတ်လိုက်ခြင်းကို ထောက်ရှုကာ၊ အယူခံတရားလိုသည်၊ မိမိခုခံ ကာကွယ်ပိုင်ခွင့်အတွက် ပို၍ပြုလုပ်သည်ဟုမဆိုနိုင်ခဲ့ချေ။ ဘုရင်ကောင်စီမင်းမြတ်နှင့် မောင်လှမောင် တို့၏အမှု (၁) ၌ ဃခင်လွှတ်တော် တရားဝန်ကြီး ဆာဘဉီးနှင့် မစ္စတာရိုက်တို့က၊ တဦးသော သူတယောက်သည် မိမိ၏ ခုခံကာကွယ်ပိုင်ခွင့်အရ ခုခံသောအခါ ထွက်ပြေးရန်မလို။ မိမိကို ရန်မူသောသူသည် ထပ်မံ၍ ရန်မမူနိုင် သည်တိုင်အောင် ခုခံနိုင်သည်ဟု ဆုံးဖြတ်ထား၏။ ဤဆုံးဖြတ်ချက်သည် ယခု အမှုနှင့် သက်ဆိုင်သည်မှာ လူတဦးတယော်က်က မိမိအား ရန်မူရန် လာလျှင် ရန်မူခြင်းခံရသူသည် ထွက်ပြေးရန်မလို ရပ်တန့်၍ ခုခံနိုင်ခြင်းပင်ဖြစ်သည်။ မည်သို့ ဆိုစေကာမူ ဤအမှု၌ အကယ်၍ အယူခံတရားလိုသည် သေသူ မောင်သန်းအား ဒါးဖြင့် ခုတ်ရာဝယ် ခုခံပိုင်ခွင့်အရ ခုတ်သည် မခုတ်သည်ဟူသော အချက်နှင့်စပ် လျဉ်း၍ ဒွိဟသံသယ ဖြစ်စရာအကြောင်းမှာ ပေါ်လွင်လျက်ရှိ၏။ ယင်းသို့ဒွိဟသံသယ ရှိလျှင် အယူခံ တရားလိုကိုသာ ဒွိဟသံသယ ဖြစ်ခြင်းအကျိုးကို ခံယူစေရမည်။

(၁) ၁၉၄၆ ခုနှစ်၊ ရန်ကုန် စာမျက်နှာ ၅၀။

၁၉၄၀

မောင်ကုတ်း (ကဒုံး) နှင့် ပြည်ထောင်စု မြန်မာနိုင်ငံတော်

တရားဝန်ကြီးဦးစံမောင်။

မောင်အောင်ဘွင့်နှင့် ဘုရင်ကောရှဗ်မင်းမြတ်တို့အမှု (၂) တွင် ဆုံးဖြတ်ထားသည်ကိုကြည့်ပါလေ။

အထက်တွင်ဖေါ်ဆိုခဲ့သောအကြောင်းများ၊ ခုကြောင့် အယူခံတရားလို၏အပေါ်တွင် ပေးထားသောအပစ်ဒဏ်ကိုပယ်ဖြက်၍ ၎င်းအား တရားသွေလွှတ်ရန် ကျွန်ုပ် အမိန့်ချမှတ်လိုက်သည်။

(၂) ၁၉၄၇ ခုနှစ်၊ ရန်ကုန်၊ စာမျက်နှာ ၅၀။

APPELLATE CRIMINAL.

Before U San Maung, J.

H.C.
1948

July 15.

THA GYAW AUNG (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Arms Act, s. 19 (f)—Possession of Arms—Meaning of—Evidence Act s. 27—Admissibility.

Held: From mere fact that a person is able to point out the place where a fire-arm is hidden there is no presumption that he himself hid it there in the absence of other evidence of possession.

Khuda Bakhsh v. *The Crown*, A.I.R. (1923) Lah. 283; *Gian Chand* v. *Emperor*, A.I.R. (1933) Lah. 314, referred to.

If a person is able to point out where a fire-arm is hidden it only means that he knows the hiding place, not that the fire-arm is in his possession or under his control.

Under s. 27 of the Evidence Act the portion of the information given by the accused which was the immediate or approximate cause of the fact is provable.

Nauranga Singh v. *Emperor*, 28 Cr.L.J. 250; *Emperor* v. *Chokhey*, A.I.R. (1937 All. 497; *Sukhan* v. *The Crown*, 10 Lah. 283; *Pulukuri Kotayya and others* v. *King-Emperor*, (1947) 74 I.A. 65, referred to and followed.

The statement to the Police by the accused to the effect that the revolver was hidden by him was made either at the time when the revolver was actually pointed out or after the revolver was pointed out. Such a statement is inadmissible in evidence under s. 162, Cr.P.C.

Tha Nge Gyi and one v. *The King*, (1946) Ran. L.R. 229.

In a Criminal Case onus is upon the prosecution to prove its case beyond reasonable doubt and not for the accused to prove his innocence.

U Dhamapala v. *King-Emperor*, 14 Ran. 666.

Ba Shun (Government Advocate) for the respondent.

U SAN MAUNG, J.—The appellant Tha Gyaw Aung has been convicted under section 19 (*f*) of the Arms Act by the Special Judge (U Pha Tha Htaw) of Akyab for the possession of a revolver and six rounds of sten-gun cartridges and sentenced to transportation for life as the offence took place after the Arms (Temporary

* Criminal Appeal No. 509 of 1948 from the Order of Special Judge of Akyab, dated the 7th April 1948 in Special Trial No. 16 of 1948.

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U SAN MAUNG, J.

Amendment) Act, 1947 (Burma Act No. LXIV of 1947) had come into force in Arakan Division.

The prosecution case in brief is as follows :

On the 8th of February 1948, the appellant Tha Gyaw Aung and five others were arrested by the Special Police Reserves of Agridawma outpost under the command of Tun Aung Gyaw (P.W. 4), who had the rank of a Sub-Inspector of Police. When examined by Tun Aung Gyaw, the appellant revealed the existence of a hidden revolver, which he apparently undertook to produce. When the police party from Myohaung arrived some members of that party and members of Special Police Reserves proceeded to Pyade which was reached at about 3 p.m. Then, while the regular police remained outside the village the Special Police Reserves led by the appellant Tha Gyaw Aung went through the village to the north where the village cemetery was situated.

On arrival at the village cemetery, Tha Gyaw Aung pointed out a bush and with his own hands uncovered the portion where a revolver lay hidden. Then, as Tha Gyaw Aung was about to pick it up, he was told not to do so and the revolver was actually picked up by Kyaw Aung (P.W. 2), Head Constable of the Special Police Reserves. The revolver was found to be loaded with six sten-gun cartridges which had been adapted for use in it by the simple process of covering the grooves thereon with threads. The revolver and cartridges were later handed over to the Head Constable Sein Kyaw Aung (P.W. 1) of Myohaung Police and the appellant was sent up for trial under section 19 (*f*) of the Arms Act as amended after the requisite sanction for his prosecution had been obtained from the District Magistrate.

Kyaw Aung (P.W. 2) tried to exaggerate the prosecution case by saying that when Tha Gyaw Aung

pointed out the bush in the cemetery all the members of the search party made a search inside the bush in vain and that the actual spot where the revolver lay hidden was found only when Tha Gyaw Aung was made to point it out. He is not supported on this point by other searchers including Maung Saw (P.W. 3). However, the discrepancy is immaterial as it must be held as established that the actual spot where the revolver lay hidden in the bush was in fact pointed out by the appellant.

The appellant's defence was that the revolver belonged to one Kyaw U (a lieutenant of U Pyinnyathiha) who was then absconding and that he knew the exact spot where it was hidden because he happened to see Kyaw U hiding it there. He gave evidence on behalf of his own defence and also cited one witness Hla Tha Tun, who was also supposed to be present at the time the revolver was hidden by Kyaw U. According to the appellant, the revolver was hidden inside the bush of a ***thinbaw*** tree near a ***dani*** garden and the particular bush where it was actually found was connected with other bushes whereas according to Hla Tha Tun, it was hidden under a heap of rubbish consisting of old ***dani*** leaves. The defence story was, however, rejected by the learned trial Judge on the ground that the appellant and his witness contradicted each other on many points especially as regards the spot where the revolver was hidden.

The learned trial Judge then held that on the evidence on record the appellant must be deemed to be in possession of the exhibit revolver and cartridges and that he should, therefore, be convicted of the offence under section 19 (*f*) of the Arms Act, with which he had been charged.

From the mere fact that a person is able to point out the place where fire-arm is concealed, it cannot be

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presumed that he himself must have hidden it there. See *Khuda Bakhsh* v. *The Crown* (1) where it was held that in the absence of any other evidence of possession by the petitioner it cannot be presumed that because he knew where the rifle was, he had concealed it himself. *See also* the case of *Gian Chand* v. *Emperor* (2) where the accused led the police to a cattle shed near the house in which he was living with his father and brother and pointed out the place where a revolver was lying, it was held that the mere knowledge of the fact that the revolver was lying there without proof that the place was in the exclusive possession of the accused was not sufficient to hold the accused guilty under section 19 (*f*) of the Arms Act.

If a person is able to point out the spot where fire-arm is hidden, it only means that he knows its hiding place. Something more is necessary to enable the Court to presume that the fire-arm is in his possession or under his control.

In the case of *Naurang Singh* v. *Emperor* (3) where a revolver was found in a well which the accused had pointed out to the police as being the place in which he had thrown the weapon, it was held that where an article, the possession of which is forbidden by the Arms Act, has been discovered by reason of information given by an accused person, the conviction based upon that evidence is legally sound. That decision was followed by a Bench of Allahabad High Court in *Emperor* v. *Chokhey* (4) where an accused while in police custody made a statement that he had himself buried a gun at a certain place, and a gun was subsequently found at that place, it was held that the statement of the accused was admissible in evidence

(1) A.I.R. (1923) Lah. 283.
(2) A.I.R. (1933) Lah. 314.
(3) 28 Cr.L.J. 250.
(4) A.I.R. (1937) All. 497.

under section 27 of the Evidence Act and that although the gun was found hidden in the railway premises within the railway fencing, which was accessible to the public, no member of the public could have ordinarily got at the gun inasmuch as it was concealed from view, whereas the accused could have access to it at opportune moments and hence in the eye of the law he must be deemed to be in possession and control of the gun.

However, in these cases, in addition to the fact that the fire-arm was found concealed at the spot pointed out by the accused, there is the fact that the accused before taking the police to the spot where it was hidden, had stated that he himself had concealed it there. Such a statement of course is admissible in evidence. *See* the case of *Sukhan* v. *The Crown* (1) where a Full Bench of seven Judges of the Lahore High Court held that under section 27 of the Evidence Act the portion of the information given by the accused which was the immediate or proximate cause of the fact is provable and that when the accused says that he had hidden a certain article at a certain spot and that article is subsequently discovered at that spot, the statement of the accused to the effect that he had hidden it there is admissible in evidence. This decision of the Lahore High Court is approved by the Privy Council in *Pulukuri Kotayya and others* v. *King-Emperor* (2) where information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" was held to be admissible in evidence if the information leads to the discovery of the fact that a knife was concealed in the house of the informant to his knowledge.

Unfortunately in the case now under consideration, there is no evidence on record to show that the

(1) 10 Lah. 283. (2) (1947) 74 I.A. 65.

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appellant had stated to the police that he himself had hidden the revolver and cartridges in a bush near the cemetery of Pyade and that it was in consequence of the information thus received from the appellant that the revolver and cartridges were subsequently found at the place indicated by him. According to the Sub-Inspector of Police Tun Aung Gyaw (P.W. 4) of the Special Police Reserves what the appellant merely stated to him was that there was a revolver in existence. No doubt, where Kyaw Aung (P.W. 2) was cross-examined by the pleader for the appellant he stated—

"The accused did not say that the revolver pointed out by him was the revolver hidden by Kyaw U and he saw him hiding it there. He however said that it was the revolver hidden by him."

As Kyaw Aung is prone to exaggerate the prosecution case, his statement on this point must be treated with great caution. Besides, the statement alleged to have been made by the appellant to the effect that the revolver was hidden by him is not such a statement as is admissible under section 27 of the Evidence Act as it is not one leading to the finding of the revolver and cartridges in the bush. From the context it is clear that it was a statement made by the appellant either at the time he actually pointed out the revolver or after the revolver had been pointed out by him. Such a statement is inadmissible in evidence *vide Tha Nge Gyi and one* v. *The King* (1) where it was held that where persons in police custody pointed out objects to a magistrate or searcher, the statements which accompanied the discovery of such objects are not admissible in evidence in view of section 162 of the Criminal Procedure Code.

(1) (1946) Ran. 229.

The appellant's defence that he was able to point out the place because he saw Kyaw U hiding the exhibit revolver and cartridges there may or may not be true. However in a criminal case the onus is upon the prosecution to prove its case beyond reasonable doubt and not for the accused to prove his innocence. See *U Dhamapala* v. *King-Emperor* (1). Therefore unless the prosecution has adduced sufficient evidence to justify a presumption that an accused person has in his possession or under his control arms and ammuntions in contravention of sections 14 and 15 of the Arms Act a conviction under section 19 (*f*) of the Arms Act cannot be allowed to stand.

In the result the appeal succeeds. The conviction of the appellant under section 19 (*f*) of the Arms Act and the sentence of transportation for life are set aside and the appellant is acquitted and released so far as this case is concerned.

(1) 14 Ran. 666.

CIVIL REVISION.

Before U Aung Tha Gyaw, J.

H.C. 1948

June 18.

A. S. A. MAJID (*alias*) KO LU (APPLICANT)

v.

P. A. L. ALAMELU ACHI (RESPONDENT).*

Code of Civil Procedure, s. 115—Revision of Interlocutory Orders—When lies—Order 18, Rule 17—Recalling of witnesses—Production of certified copy under s. 74, Evidence Act—If proof.

Held: The High Court has jurisdiction under s. 115 of Code of Civil Procedure to revise an Interlocutory Order passed by a Subordinate Court from which no appeal lies to the High Court, only when an irremediable injury will be done. Under Order 18, Rule 17, of the Code of Civil Procedure the Court may, at any stage of a suit, recall any witnesses who had been examined and may put such questions as the Court thinks fit.

This jurisdiction of the Trial Court is of a discretionary character and the High Court will not exercise its revisional powers unless the Order is not supported by considerations of justice or by any provision of law or unless there will be a failure of justice if the matter is not put right.

Mohamed Chootoo and others v. *Abdul Hamid Khan and others*, I.L.R. 11 Ran. 36; *Anindra* v. *Pramatha Nath*, 55 Cal. 748; *Syed Sadeq Reza* v. *Nawab Bahadur of Murshidbad*, 34 C.W.N 578; *Indubala Dassi* v. *Lakshmi Narayan Ganguly and others*, 38 C.W.N. 1146.

The deposition of a witness taken in court of law forms part of the record of "acts of an official tribunal" under s. 74 of the Evidence Act, and may be proved by production of certified copy. But mere production of a certified copy, without the proof of the identity of the person making the deposition, is not sufficient proof.

Chandreshwar Prasad Narain Singh v. *Bisheshwar Pratap Narain Singh*, I.L.R. 5 Pat. 777 at p. 793; *Brajaballay Ghose* v. *Akhoy Bagid and others*, 30 C.W.N. 254.

Kyaw Thoung for the applicant.

S. N. Sastry for the respondent.

U AUNG THA GYAW, J.—In this application in revision the applicant A. S. A. Majid (*a*) Ko Lu seeks interference with an interlocutory order passed by the

* Civil Revision No. 17 of 1948 against the order of the Assistant Judge's Court of Yamèthin in Civil Regular Suit No. 9 of 1947, dated the 10th February 1948.

Assistant Judge, Yamèthin, in his Civil Regular Suit No. 9 of 1947 rejecting the applicant's petition asking the Court to recall the agent of the plaintiff in the suit for the purpose of further cross-examination. It is contended in support of the present application that the learned Assistant Judge had failed to exercise jurisdiction vested in him by law; and that in consequence irreparable injury is likely to result to the applicant.

The suit before the Court of the Assistant Judge is for recovery of a substantial sum of Rs. 4,150 alleged to be due on two promissory notes executed by the applicant. To this claim the applicant set up a plea of full satisfaction producing in Court a document alleged to be a receipt granted by the respondent Chinnaya Chettiar, acting as the agent of the plaintiff money lending firm of P. A. L. Alamelu Achi. The applicant adduced his evidence in the first instance followed by the examination of Chinnaya Chettiar and his witnesses on the same date. After the conclusion of the hearing, a date was given for hearing of the arguments of the respective counsels. On the said date, *i.e.* 28th January 1948, the applicant applied for calling certain judicial records of the Court of the Subordinate Judge, Yamèthin, so that copies could be obtained therefrom and filed in the present suit. On the date next fixed, certified copies of depositions and pleadings made by the respondent in two previous suits, being Civil Regular Suit Nos. 31/47 and 79/47 of the Court of the Subordinate Judge, Yamèthin, were permitted to be filed. An application was then filed for recalling the respondent's agent Chinnaya Chettiar for further cross-examination respecting his previous depositions and pleadings. The learned Assistant Judge without assigning any reason whatsoever recorded an order disallowing the application.

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A. S. A. MAJID (*alias*) KO LU v. P. A. L. ALAMELU ACHI.

U AUNG THA GYAW, J.

This Court has jurisdiction under section 115 of the Code of Civil Procedure to revise an interlocutory order passed by a subordinate Court from which no appeal lies to the High Court [see *Mohamed Chootoo and others* v. *Abdul Hamid Khan and others* (1)]. But this Court will, however, interfere only when irremediable injury will be done, and miscarriage of justice will ensue if the Court held its hand. (*Supra.*)

Now under Order 18, Rule 17, of the Code of Civil Procedure the Court of the Assistant Judge, Yamèthin, may at any stage of the suit recall any witness who had been examined and may (subject to the Law of Evidence for the time being in force) put such questions to him as the Court thinks fit. The jurisdiction vested in the Court is clearly of a discretionary character, and ordinarily this Court could not exercise its revisional powers unless the order complained of is not supported by any consideration of justice, or by any provision of law, or unless irreparable injury will ensue to the applicant, or that there will be a failure of justice if the matter is not put right. [See *Anindra* v. *Framatha Nath* (2), *Syed Sadeq Reza* v. *Nawab Bahadur of Murshidabad* (3) and *Indubala Dassi* v. *Lakshmi Narayan Ganguly and others* (4).]

In the present case, the discretion of the Court was appealed to for the purpose of cross-examining the respondent's agent with a view to discredit him in the explanation he had made in Court regarding his absence from Burma on the date on which he was alleged to have granted the receipt upon which the whole defence to the suit rested. It is, however, difficult to see how the absence of the respondent's explanation relating to certain depositions and pleadings he had made in previous litigations could cause

(1) I.L.R. 11 Ran. 36.
(2) 55 Cal. 718.
(3) 34 C.W.N. 578.
(4) 38 C.W.N. 1146.

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irremediable injury to the applicant's defence especially when the Court's attention has already been invited to their existence in the form of certified copies. The Court is at liberty to draw from them its inferences either favourable or unfavourable to the respondent. As matters stand it cannot be said that the Court's exercise of discretionary jurisdiction vested in it would give rise to any of the mischiefs set out in the reported decisions to which reference has already been made. It would have been more proper however if in rejecting the applicant's petition, the Court below had given the reasons therefor.

It is further complained that the certified copies of the depositions and pleadings have not been properly admitted in evidence. This is a matter on which the trial Court will have to make up its mind, as from the Diary Order passed on the 10th February 1948 it does not appear that any attempt was made to get them so admitted. The deposition of a witness taken in a Court of law forms part of the record of "the acts of an official tribunal" within the meaning of section 74 of the Evidence Act and it may be proved by the production of a certified copy. [See *Chandreshwar Prasad Narain Singh* v. *Bisheshwar Pratap Narain Singh* (1).] Such production however does not amount to a sufficient proof, for evidence must be further adduced to prove the identity of the person making the deposition. [See *Brajaballay Ghose* v. *Akhoy Bagid and others* (2).]

However on the merits this application fails and will be dismissed. Advocate's fees five gold mohurs.

(1) I.L.R. 5 Pat. 777 at p. 793. (2) 30 C.W.N. 254.

APPELLATE CIVIL.

Before U Aung Tha Gyaw, J.

H.C. 1948

July 8.

P.R.V.S.P. CHETTYAR FIRM (APPELLANT)

v.

U KYI MIN AND FIVE OTHERS (RESPONDENTS).*

Evidence Act, s. 63 (5), s. 63 (c)—Lost document—Necessity for proof of execution and attestation.

Held: When execution was denied it is incumbent to have satisfactory proof of execution including attestation and registration of the document, even though the document was lost as a result of robbery at the time of evacuation. S. 68 of the Evidence Act is clear on the point and the loss or destruction of the document does not dispense with the mode of proof.

R.M.A.R.M. Chettyar Firm v. *U Htaw*, 11 Ran. 26; *Karimullah* v. *Gudar*, 82 I.C. 396; *Jadunath Mitra* v. *Isar Jha and others*, 178 I.C. 198, referred to.

A decree could not be passed on the basis of entries in the account books alone, and they do not establish that the transaction did take place as alleged. There must be evidence to corroborate the entries such as the evidence of the document or persons present at the transaction.

Ramgobind Prasad v. *Gulab Chand Sahu*, I.L.R. 20 Pat. 273, followed.

Even if the entries in the account books are relevant under s. 32 (2) of the Evidence Act the Court is not bound to believe the same without corroboration.

Rampyarabai v. *Balaji Shridhar*, I.L.R. 28 Bom. 294, referred to.

Bhattacharyya for the appellant.

Kyaw Zan U for the respondents.

U AUNG THA GYAW, J.—The appellant P.R.V.S.P. Chettyar Firm of Zigôn claimed a mortgage decree against the respondents in respect of a sum of Rs. 4,179-4 alleged to be due on a registered mortgage bond executed by the 1st respondent and his deceased wife, Daw Nyein on the 10th April 1941. The

* Civil Second Appeal No. 40 of 1948 against the decree of the District Court of Thayawadd, in Civil 1st Appea No. 16 of 1947, dated the 31st January 1948.

respondents denied the execution of the bond and the existence of the debt claimed by the appellant. The registered mortgage bond was said to have been lost in the possession of Chokaligam Chettyar, an agent of the appellant firm in 1942, when he lost his life somewhere in Arakan in about March 1942 while he was fleeing from the Japanese invaders. Secondary evidence of the contents of the said document was offered for the appellant in proof of its claim. On the evidence produced before him, the learned Assistant Judge came to the conclusion that the respondent U Kyi Min, and his deceased wife, Daw Nyein, did execute a registered mortgage bond in favour of the appellant firm and that this registered mortgage bond was lost from the possession of the firm's Agent, Chokalingam Chettyar, in about March 1942 and accordingly granted the appellant a preliminary mortgage decree for the amount claimed with the usual costs. The repondents' appealed to the District Court which set aside the judgment and decree of the lower Court and dismissed the appellant's suit with costs on the ground that although the appellant firm had succeeded in proving the loss of the original registered mortgage bond, to entitle the firm to use secondary evidence of its contents, they had failed to prove due execution and attestation of the document to be entitled to the decree asked for.

The appellant has now put forward the plea that in the circumstances arising out of the War in Burma, the claim in suit should be allowed on the strength of the entries found in the firm's books of accounts produced as evidence in the case. It is also contended that due execution and attestation of the registered mortgage bond in suit need not be proved in the case of lost documents and that if any such proof is required in this particular case, the evidence given by the appellant

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U AUNG THA GYAW, J.

in that regard should have been found sufficient to entitle him to the decree asked for.

Regarding the loss and destruction of the mortgage bond in suit both the lower Courts came to a concurrent finding in the appellant's favour. There is sufficient evidence on the record in proof of the fact that documents belonging to the appellant firm were lost in about March 1942 in the possession of Chokalingam Chettyar, its agent, when he was robbed and murdered on his way to India. Under section 63 (5) of the Evidence Act secondary evidence of a document in suit must mean and include oral accounts of the contents of the document given by some person who has himself seen it. The lower Appellate Court appears to have examined the appellant's evidence on this point with some care and it rightly came to the conclusion that the evidence so adduced in the appellant's behalf does not satisfy the requirements of law contained in section 63 (5) read with section 63 (c) of the Evidence Act. Arumu, the present agent of the plaintiff firm, was said to have been present at the time the said mortgage bond was executed by the respondents in the firm's office in Zigôn ; but it does not appear from his evidence that he had acquainted himself with the contents of the document in question. The extracts from the account books can hardly be regarded as any evidence of this fact when the witness did not say definitely in his evidence that these entries were made by him. The next witness relied upon by the appellant is U Kyaw Hoe (P.W. 1), the alleged writer of the mortgage bond. This witness, however, cannot possibly remember the fact that he had himself written the mortgage bond in suit for the appellant firm six years ago. In this state of the evidence it was hardly possible for the lower Appellate Court to arrive at any finding in the appellant's favour. The lower

Appellate Court next relies on the case of *R.M.A.R.M. Cheltyar Firm* v. *U Htaw* (1) in respect of its view that in the face of the respondents' denial of execution, it was incumbent upon the appellant to adduce satisfactory proof of the fact that the mortgage bond in suit was registered, signed by the mortgagors, and attested by at least two witnesses. Though the terms of section 68 of the Evidence Act is clear on the point, it is urged on the appellant's behalf that in the case of lost documents the Court need not insist upon this manner of proof. No authority has been cited for this proposition. On the other hand, the contrary view was taken in the cases of *Karimullah* v. *Gudar* (2) and *Jadunath Mitra* v. *Isar Jha and others* (3) where it was stated that the loss or destruction of the document may necessitate the giving of secondary evidence to prove its contents but that if it is a document required by the law to be registered, so long as an attesting witness is available, he must be called. The appellant in the present case did make an attempt to prove proper attestation by calling one, Lachamanam Chettyar in the latter stages of the hearing of the suit. The lower Appellate Court has given good and sound reasons for not believing him. This witness and the appellant's agent Arumu have given conflicting accounts of the circumstances in which Lachamanam came to offer his testimony in Court as an attesting witness of the mortgage bond in suit. Maung Tin said to be the second attesting witness has not been called and no explanation has been given as to whether he was available or not.

Regarding the entries said to have been found in two of the appellant's account books, the lower Appellate Court has drawn attention to the unsatisfactory

(1) 11 Ran. 26 (2) 82 I.C. 396.

(3) 178 I.C. 198.

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manner in which their production has been explained by the appellant's Agent, Arumu. Owing to conflict of evidence on the point the question whether Chokalingam Chettyar took the original account books with him in his flight to India remained a matter of doubt. However, the claim of the appellant either for a mortgage decree or for a money decree cannot be based on these entries alone. Even if they are accepted as having been made in the ordinary course of business it does not appear in the evidence of Arumu that these entries in the account books produced by him were in his handwriting. Mere proof of the correctness of the entries in the account books would not be sufficient to establish the fact that the transaction in suit did take place as alleged. There must be some evidence to corroborate these entries and such corroboration can best be afforded by the evidence of the person who wrote the account books and in whose presence the transaction took place. [See *Ramgobind Prasad* v. *Gulab Chand Sahu* (1).] The appellant has not also adduced any evidence to justify the acceptance of the entries in the account books under section 32, clause (2) of the Evidence Act; but even if such proof be given to render the accounts relevant under section 32 (2) of the Evidence Act, the Court is not bound to believe the same without corroboration—a matter on which it must exercise its own judicial discretion. [See *Rampyarabai* v. *Balaji Shridhar* (2).]

Although the Court may take notice of the abnormal circumstances arising out of the war in a particular case, in the absence of any special legislation, the ordinary provision of law laid down in the Evidence Act cannot be ignored or relaxed. The appellant's suit was rightly dismissed by the lower Appellate Court.

This appeal fails and will be dismissed with costs.

(1) I.L.R. 20 Pat. 273. (2) I.L.R. 28 Bom. 294.

APPELLATE CIVIL.

Before U Aung Tha Gyaw, J.

J. M. CHAPIA (APPELLANT)

v.

M. HASSAN SHIRAZEE (RESPONDENT).*

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July 14.

Japanese Currency (Evaluation) Act, 1947, s. 3—House-rent incurred during Japanese occupation—Pre-war contract to pay monthly rent—Whether s. 3 applicable.

An unregistered document was executed prior to the Japanese occupation providing for occupation for five years but on payment of monthly rent as it fell due. The document being unregistered could not affect the right of parties. The claim for rent due between July 1944 and February 1945 did not amount to a contractual obligation entered prior to Japanese occupation. The parties must be deemed to have agreed that each month's rent would become payable at the end of the month. It is a separate debt which for the period in suit, *viz.* July 1944 to February 1945 could have been satisfied by payment in Japanese Currency Notes. Accordingly the party is liable to pay only in terms of s. 3 of the Japanese Currency (Evaluation) Act, 1947.

R. K. Roy for the appellant.

N. R. Burjorjee for the respondent.

U AUNG THA GYAW, J.—The only question which arises for decision in this appeal is whether the debt sued for as being due for house-rent falls within the ambit of section 3 of the Japanese Currency (Evaluation) Act, 1947. Section 3 of this Act provides,

"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 re-occupation

* Civil Second Appeal No. 36 of 1948 against the decree of the Resident's Court of Southern Shan States in Civil Appeal No. 3 of 1947-48, dated the 10th February 1948.

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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, etc."

It is contended on the appellant's behalf that the debt sought to be recovered by the respondent as being due to him as house-rent had been incurred during the period of the Japanese occupation and that it was a debt which could have been discharged by payment in Japanese currency notes and that this debt had remained unsatisfied at the time of the British Military re-occupation of the area where it had been incurred. For the respondent, the plea is advanced that by reason of the existence of the document, Exhibit C, the payment of a monthly rent for the premises occupied by the appellant was in fact a contractual obligation entered into by him before the period of the Japanese occupation and that the provisions of section 3 of the Japanese Currency (Evaluation) Act, 1947, cannot be invoked in support of the appellant's contention. This unregistered agreement, Exhibit C, was entered into on the 28th of April 1940 between the respondent Shirazee and one Chunilal, described in the evidence as the father-in-law of the appellant. The agreement provides for the continuance of the occupation of the premises by the tenant Mr. Chunilal for a period of five years but the monthly rent was intended to be paid by the occupant every month as it fell due. Being unregistered, this agreement cannot affect the rights of the parties in this case in relation to the premises in question, and it cannot, therefore, be held that the debt now sued for, *viz.* arrears of house-rent due between July 1944 and February 1945, amounted to a contractual obligation incurred by the appellant previous to the Japanese occupation. In regard to the payment of

house-rent, the parties must be deemed to have agreed that the same would not accrue due until the expiry of each month's tenancy ; each month's house-rent would be in the nature of a separate debt incurred by the appellant during each month of his tenancy. And between July 1944 and February 1945 these separate debts could have been satisfied by the appellant by payment in Japanese currency notes. These debts remained unsatisfied and for the purposes of this case, it does not appear to be necessary to enquire into the circumstances arising out of the war which had led to the accumulation of these debts. Accordingly, the amount sued for would appear to be covered by the provision of law contained in section 3 of the Act abovenamed and the respondent cannot therefore receive a sum more than what has been deposited in Court by the appellant, *i.e.* Rs. 312-8-0.

Accordingly, this appeal is allowed and the judgment and decree of the lower Courts will be modified to the extent indicated above with proportionate costs throughout.

ORIGINAL CIVIL.

Before U Bo Gyi, J.

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July 16.

ESOOF ISMAIL ATTIA (PLAINTIFF)

v.

YACOOB AHMED MAMSA (DEFENDANT).*

Ratification—S. 198, Contract Act—Whether mere inaction amounts to ratification—S. 70, Contract Act—Whether compensation can be claimed for officious interference.

There could be no valid ratification when the knowledge of facts is defective. Acquiescence in an act while in progress may amount to consent but not mere inaction after the act has been completed. Ratification is an act more active than acquiescence. Mere inaction on the part of the defendant where he is under no duty to act cannot amount to ratification.

Shyamlal v. *Rameswari Basu*, 33 I.C. 273, followed.

Unauthorized assumption of powers of the true owner amounts to conversion.

Pollock on Tort, 14th Edn., p. 134 and p. 286, followed.

S. 70 ought not to be so read as to justify the officious interference of one man with the affairs or property of another or impose obligations in respect of services which the person sought to be charged did not wish to have rendered.

Nathu v. *Balwantrao*, (1903) 27 Bom. 390; *Suraj Bahu* v. *Hashmi Begam*, (1918) 40 All. 555, followed.

Chan Htoon (Attorney-General of the Union of Burma) (with *S. B. Chakravarti*) for the plaintiff.

Dr. Ba Han (with *Dawoodjee*) for the defendant.

U BO GYI, J.—This suit has been instituted *in forma pauperis* by Esoof Ismail Attia against Yacoob Ahmed Mamsa, the husband of his step-sister, for recovery of Rs. 25,000 for services rendered during the Japanese occupation, on the basis of the promise alleged to have been made by the latter to pay remuneration both before and after the occupation period, or, in the alternative, on the principles of

* Civil Regular No. 40 of 1947.

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quantum meruit. The facts of the case, so far as they are not seriously in dispute, are that when Rangoon was bombed for the first time in December 1942 the plaintiff, the defendant, the first defence witness Mohamed Hussein Baber Mamsa who is a cousin of the defendant, together with some of their relations and friends, went and lived in a school building at No. 161, Kyaikkasan Road. On the 18th February 1942, when the danger of Japanese occupation of Rangoon became imminent, the defendant blocked the entrances to his hardware shop at No. 73, 26th Street, Rangoon, with brick walling and on the 19th February left for his native place in India where he had sent his wife and family earlier. On the 23rd or 24th February when general evacuation of Rangoon was ordered, the plaintiff and Mohamed Hussein Baber Mamsa, who will hereinafter be called Baber Mamsa for short, went and stayed at Paungdè and about the end of April, after Rangoon had been occupied, they returned and put up at the old place. The defendant's shop was found intact but some shops in the same street had been looted. A permit to carry on business in the defendant's shop, Exhibit E, was obtained from the Hiraoka Commission on the 9th May 1942. Shortly afterwards, Baber Mamsa called in masons and a locksmith and had the brick walling pulled down and the locks broken. He and the plaintiff then did business together in the shop. The defendant's old durwan, Bakridi (D.W. 2), was taken on again. Apparently, Baber Mamsa managed the shop during this period and a few months later troubles arose. The defendant's step-nephews, I. M. Mamsa and Dawood Mamsa, it is said, tried to oust the plaintiff and Baber Mamsa from the shop, and therefore the help of E. I. G. Mohamed (he will hereinafter be called Gora for short) was sought. Gora and the defendant

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U BO GYI, J.

have married sisters, and Gora together with his father and his uncle has been one of the biggest dealers in hardware in Rangoon. Gora appointed Yacoob Usoof Aboo (D.W. 4) as accountant and salesman at the defendant's shop on or about the 2nd December 1942. Gora was a busy man and could not devote all his time to defendant's shop, but he checked the accounts of the shop and the salaries were paid out to the employees of the shop, if not by him, at any rate in consultation with him. In 1945 when Burma was re-occupied by the Allied Forces and communications were restored between Burma and India there was correspondence between the defendant in India on the one hand and the plaintiff, Gora and Baber Mamsa on the other, and rupees one lakh in British money was remitted to the defendant as representing the sale proceeds of his shop. The defendant on his part sent four powers-of-attorney, Exhibits A, B, C and D, granted to those three persons jointly at their request but, whether by accident or by design is not clear, the documents could not be used by the recipients because they had not been stamped. The defendant arrived back in Rangoon on the 9th January 1946 and having got back his shop and received the accounts of the business, had the powers-of-attorney stamped. The defendant then dispensed with the services of Baber Mamsa as no longer necessary but kept the plaintiff on till about May 1946 when the plaintiff left his service.

The plaintiff claims that but for his efforts all the goods in defendant's shop would have been looted either by the Japanese or hooligans and also that at grave risk of life he converted the sale proceeds which were in Japanese notes into British currency; and alleging that the defendant on the 18th February 1942 had entrusted the business of the shop to him with a

promise of remuneration and that thereafter in March 1946 defendant promised to pay 25 per cent of the realizations and, further, that in any event the defendant ratified his acts, plaintiff prays for a decree in the sum of Rs. 25,000.

The defendant denies all the material allegations of the plaintiff, and the following issues have been fixed :—

(1) Did the defendant ask the plaintiff to look after his properties and carry on his business during his absence promising to pay a fair and reasonable remuneration ?

(2) Did the plaintiff look after and carry on the defendant's properties and business as alleged in the plaint ?

(3) Did the defendant afterwards ratify what had been done by the plaintiff on his behalf ?

(4) Did the defendant promise to pay the plaintiff 25 per cent of the money realized as alleged in paragraph 7 of the plaint ?

(5) Under what circumstances did the plaintiff take charge of and carry on the defendant's business and properties ?

(6) To what remuneration, if any, is the plaintiff entitled for his services ?

[The learned Judge then discussed evidence and answered the 1st and 4th issues in the negative. On issues Nos. 2 and 5 the learned Judge held that the plaintiff acted as an employee but he found that the plaintiff sent to the defendant one lakh of rupees.]

I now come to the third issue whether the defendant ratified what the plaintiff purported to have done on his behalf. Naturally, the defendant while in India could not have known what was going on in his shop

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in Burma. Consequently, the facts that while in India he received rupees one lakh remitted to him from Burma and that in his letters to the plaintiff (Exhibits H, J, K and L) he asked the plaintiff to look after his business in Burma and even offered his services cannot be taken as a valid ratification by the defendant of what the plaintiff had done during the occupation. Section 198 of the Contract Act is clear on the point. It says :

"No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective."

It is contended that the defendant's sending four powers-of-attorney from India is an important factor to be taken into consideration in considering whether the defendant ratified the plaintiff's conduct of his business. It appears from the evidence, however, that Gora, Baber Mamsa and the plaintiff wrote to the defendant asking for power-of-attorney informing him that they could do nothing without such document with respect to the defendant's properties in Burma. The defendant appears to be a shrewd man. He sent four powers-of-attorney granted not to any single person, but to those three men jointly ; and none of the powers-of-attorney was stamped, with the result that although the documents were sent no use could be made of them in Burma. Furthermore, it is clear from the evidence of both the plaintiff and the defendant that the powers-of-attorney were granted for the primary purpose of collecting rents from tenants and, if necessary, suing them for recovery of rents. It is admitted that on the defendant's return although the plaintiff was kept on he was not allowed to manage the defendant's shop but had to look after the repairs of houses in which the defendant is interested and also attend to suits against the tenants in Courts. It is

impossible to hold in the circumstances that by granting the powers-of-attorney the defendant ratified the acts of the plaintiff during his absence in India.

One very important factor to be taken into consideration is the fact that for the period from May 1942 to December 1942 although there were sales in the defendant's shop no account of the sales was kept. The plaintiff admits this. In these circumstances it must be held that since the defendant's knowledge of the facts of the case is materially defective, under section 198 of the Contract Act, no valid ratification can be made by him.

It is argued on the plaintiff's behalf that although the plaintiff and Gora asked the defendant to check the accounts the defendant did not check them and that therefore the defendant must be deemed to have ratified the plaintiff's acts. The defendant denies that he was ever asked to check the accounts. He says that he noticed false entries in the accounts but that he took no action because the plaintiff is a pauper and he does not wish to create bad blood between two of them. Admittedly the plaintiff is a pauper, and it seems probable that the defendant does not wish to throw good money after bad in trying to recover damages from the plaintiff. The defendant has not taken any action either against the plaintiff or against any one who has bought his goods from the plaintiff. In these circumstances, I am of opinion that the defendant is entitled to remain quiet; and where there is no duty to speak, I do not think that mere silence is tantamount to ratification. In the case of *Shyamlal* v. *Rameswari Basu* (1) it has been held that acquiescence in an act while it is in progress may amount to consent but not mere inaction after the act has been completed.

(1) 23 C.L.J. 82.

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U BO GYI, J.

Ratification is an act more active than acquiescence and in the circumstance of the case I am unable to hold that mere inaction on the defendant's part, where he is under no duty to act, amounts to ratification. I accordingly answer the issue in the negative.

As regards the last and sixth issue as to the remuneration to which the plaintiff may be entitled, reliance is placed on section 70 of the Contract Act which is as follows :

> " Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

The first question that arises for consideration is therefore whether in running the defendant's shop during the occupation the plaintiff was doing a lawful act. Since I have held that the plaintiff had received no permission from the defendant to carry on the latter's business, his act in doing so amounted *prima facie* to conversion. The plaintiff evidently treated the defendant's goods as his own. In Pollock's Law of Torts, 14th Edition, it is observed at page 286 :

> " The grievance is the unauthorized assumption of the powers of the true owner. Actually dealing with another's goods as owner, for however short a time and however limited a purpose, is therefore conversion ; . . . . "

and the learned author goes on to say that it is immaterial whether such an act was done with the intention of benefiting the true owner. It is contended that this proposition is subject to certain general exceptions one of which is described in Pollock's Torts as " Works of Necessity " such as putting out a fire. But on page 134 of the treatise appears this passage,

" . . . . The test of justification seems to be the actual presence of imminent danger and a reasonably apparent necessity of taking such action as was taken.

It seems that on the same principle a stranger may justify interfering with the goods of a lately deceased person so far, but only so far, as required for the protection of the estate or for other purposes of immediate necessity."

In view of these propositions of law I am unable to hold that even if the plaintiff thought it necessary to protect the defendant's goods, I do not think that he was justified in selling them off. The plaintiff could have removed the goods to Madha's soap factory compound at Kamayut on the outskirts of the town or to No. 161, Kyaikkasan Road, but he did not do so. The goods were not subject to speedy and natural decay. I hold, for the above reasons, that in selling off the defendant's goods the plaintiff was not acting lawfully. Again, section 70 of the Contract Act seems to contemplate cases where a person does anything for another without receiving any present remuneration for his services. This seems clear from the words "not intending to do so gratuitously". Here, however, the plaintiff, as I have held, drew salaries every month from the shop. Yet again the defendant had blocked up the entrances to his shop and had not asked anyone to look after it. Rightly or wrongly, he had thought that by so doing his goods would be fully protected. In these circumstances the action of the plaintiff and Baber Mamsa in breaking open the shop and selling off the goods was mere officious interference. It has been held in *Nathu* v. *Balwantrao* (1) and *Suraj Bahu* v. *Hashmi Begam* (2) that :

" The section ought not to be so read as to justify the officious interference of one man with the affairs or property of

(1) (1903) 27 Bom. 390, 393. (2) (1918) 40 All. 555.

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another, or to impose obligations in respect of services which the person sought to be charged did not wish to have rendered."

For all these reasons I hold that the plaintiff is not entitled to remuneration under section 70 of the Contract Act.

The plaintiff's suit is accordingly dismissed with costs. Under Order XXXIII, Rule 7, of the Civil Procedure Code, the plaintiff is directed to pay the court-fees which would have been paid by him if he had not been permitted to sue as a pauper.

ORIGINAL SIDE.

Before U Bo Gyi, J.

H.C. 1948

July 21.

A. P. ALAGU PILLAY (PLAINTIFF)

v.

A. PARAMKUNDRAM PILLAY AND EIGHT OTHERS (DEFENDANTS).*

Hindu Law—Mitakshara School—Adoption—Proof of—Principles applicable—Self-acquired properties—Will—Validity of—Alienation—Legal necessity—Immorality—Burden of proof.

Evidence in support of adoption must be sufficient to satisfy the very grave and serious onus that rests upon any person who seeks to displace the natural succession by alleging adoption.

The physical act of giving and receiving is absolutely necessary to the validity of adoption. It is the essence of adoption under the Hindu Law, and the Law does not accept any substitute. Mere expression of consent or the execution of a deed of adoption, though registered but not accompanied by an actual delivery of the boy does not operate as a valid adoption.

When there is a lapse of period of years between the adoption and its being questioned an allowance must be made for absence of evidence.

The fact that the alleged adopted son's brother never heard of it during the adoptive father's lifetime, that the adoptive father treated both his brother's son and the alleged adopted son exactly alike as they helped him in the management of his business and that during the adoptive father's lifetime the son never claimed that right and the adopted son's name was not mentioned as such in the deceased's Will is consistent only with the view that there was no adoption.

Mulla's Hindu Law, ss. 512 and 489, followed.

Property inherited by a Hindu from other relatives is his separate property.

Mulla's Hindu Law, s. 223, referred to.

As against a son an alienation by a father can be sustained if it is for antecedent debt, that is, antecedent in fact as well as in time. But that debt must be truly independent and not part of the transaction.

A transfer outright in satisfaction of a mortgage debt is a transfer for antecedent debt.

The burden of proof is upon the sons to prove the immorality of the debt. It is not discharged by showing that the father lived an extravagant and immoral life. There must be a direct connection between the debt and the immorality set up by the sons.

Brij Narain v *Mangla Prasad*, L.R. 51 I.A. 129, applied and followed.

* Civil Regular No. 224 of 1938.

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Nature and character of father's debt should be examined with reference to the time when it originated.

Hemraj alias *Babu Lal and others* v. *Kham Chand and others*, I.L.R. (1943) All. 727, followed.

Subramanyam for the plaintiff.

K. R. Venkatram for defendants 4 (*a*) and 4 (*b*).

Jaffer for defendant No. 1.

U. Bo Gyi, J.—This suit was originally brought *in forma pauperis* by A. P. Alagu Pillay against his parents A. Paramkundram Pillay and Papathi Ammal who are the first and second defendants respectively, his sister Veeramma Kali (*a*) Papa who is the third defendant, and certain transferees of properties from the first defendant, for a declaration that the transfers to these transferees did not bind his interest in the said properties and *inter alia* for partition and separate possession of his share. The suit was originally instituted in 1938 and, I am told, was dismissed for default and then restored to file before the evacuation. The original record was lost during the war and the case has been reconstructed. A. P. Alagu Pillay died after the re-occupation, and his son Andiappan (*a*) Ponnusawmy, a child three years old, has been brought on the record as his legal representative. The child has been shown to be a pauper and since the learned advocate Mr. Venkataram for the fourth defendants, who are the only contesting defendants in the suit, has not objected to the child's continuing with the suit, I have allowed the child to continue the suit *in forma pauperis*.

The decision in this suit turns upon the life and activities of the first defendant, and, therefore, a brief biography of this defendant would not be out of place. It is common ground that this defendant and his wife

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and family as well as his alleged adoptive father A. Andiappa Pillay (*a*) Mudalia Pillay have at all material times been subject to the Mitakshara school of Hindu Law. A. Andiappa Pillay, it appears, came over to Burma over four decades ago and apparently from small beginnings rose to be maistry and labour contractor at the Arracan Rice Mill at Dawbong across the Pazundaung Creek and amassed a fortune. He had two wives, Ramayi and Ankalamma, and had by them Muthu-ammal and Muthu Irulayee respectively, both daughters. It is said that when the first defendant was three years old Andiappa Pillay adopted him as his son and brought him up in his home, and when he came of age married him to the second defendant. It is in evidence that Andiappa Pillay and the first defendant's father were cousins about twice removed. Andiappa Pillay brought over from India his brother's son Muthu Irulappa Pillay, and while the first defendant helped Andiappa Pillay in the labour contract business at the mill, Irulappa Pillay spent most of his time in the districts looking after Andiappa Pillay's paddy lands. In 1913 Andiappa Pillay died leaving a Will, *vide* Exhibit A, by which he bequeathed the bulk of his estate to the first defendant, Muthu Irulappa Pillay, Muthu-ammal, and Muthu Irulayee. The first defendant and Muthu Irulappa Pillay jointly applied for and received Letters of Administration to Andiappa Pillay's estate with the Will annexed, and while they were administering the estate, Muthu Irulappa Pillay died and his brother Mahalingam Pillay came over from India. Muthu Irulayee also was dead, and the estate was divided among the first defendant, Muthu Irulappa's widow, and Muthu-ammal by a partition deed, *vide* Exhibit J, on the 1st October 1916. Certain lands forming part of the estate were at that time under litigation and some outstandings remained to be collected, and these were

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divided under an award, *vide* Exhibit G, dated the 30th April 1918, of a *panchayat*. After the partition these three persons enjoyed their respective shares separately.

The first defendant was superseded in the contract business by another contractor and he lived on the rentals of the paddy lands that had fallen to his share. In 1918 he secured a contract for supply of labour to the Joseph Heap & Sons' Rice Mill at Dawbon and raised a loan of Rs. 20,000 on his properties, out of which he deposited Rs. 3,000 with the mill and advanced the balance Rs. 17,000 to coolies. Business was slack for some months and when the Chettyars from whom he had borrowed the money pressed for repayment he mortgaged the properties to S.K.R.S.L. Firm and paid off the first mortgage. That was in 1919. In the following year the mill was bought by the Japan Cotton Trading Company and the first defendant's business at the mill flourished so that he could clear the mortgage debt towards the end of 1920. The contract business continued to flourish and with the proceeds of the business and the proceeds of his rental paddy he made purchases of lands and buildings up to 1929. This year is important. About that time depression had set in as a result, it is said, of the first World War and many land owners, big and small, were ruined. In 1931 the first defendant started keeping a mistress, Papathi, whose husband had died, and he kept her in a room of his house at No. 21, G Street, Singapore Quarter, Pazundaung. He had in 1926 purchased a valuable house in 51st Street and was living there with his wife and family.

Previous to the year 1932, so far as the evidence shows, the first defendant was not in debt. Then on the 21st October 1932 he borrowed Rs. 3,000 on a pro-note and also Rs. 2,000 on another pro-note (Exhibits V

and W) from R.M.A.R.A.R.R.M. Chettyar Firm and the next day he borrowed Rs. 20,000 from the same firm mortgaging his house in 51st Street and paddy lands measuring 610 odd acres by a registered deed (Exhibit 1). The fourth defendants are the receivers of the estate of the proprietor of the said firm. The first defendant with the proceeds of the mortgage discharged the pro-note for Rs. 2,000. Thereafter he apparently took further loans from the same Chettyar firm and also from others On the 2nd July 1933 he borrowed Rs. 5,000 on a pro-note from the Chettyar firm. He was paying interest regularly on the mortgage as well as on the other loans till the year 1934. In that year the Japan Cotton Trading Company's mill closed down and there was no more business for the first defendant. It appears that he became unable to meet his debts as they fell due, and in 1936 the Chettyar firm filed a suit on the pro-note dated the 2nd July 1933 and besides having the first defendant's house in 51st Street attached in execution of the decree launched insolvency proceedings against him. A compromise was effected, as a result of which on the 12th February 1937 the first defendant made an outright transfer of the equity of redemption in the mortgaged properties to the Chettyar firm for Rs. 26,500 made up of Rs. 23,447 being principal and interest then due on the mortgage and a further sum of Rs. 3,053 in part satisfaction of the decretal debt aforesaid, undertaking to pay the balance sum of Rs. 2,807 under the decree. The first defendant had also transferred his other properties and these properties are now in the possession of the fifth to ninth defendants. The result was that of the properties received from Andiappa and further accretions the first defendant has with him now only some property in India.

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The plaintiff's case is that after Andiappa Pillay's death A. P. Alagu Pillay, his sister Veeramma Kali and their parents formed a coparcenary governed by the Mitakshara Law and that with the nucleus of the property inherited by the first defendant from his adoptive father Andiappa Pillay the first defendant as *karta* of the joint family acquired other properties. It is averred that the first defendant transferred the nucleus and accretions in the circumstances mentioned above in his individual capacity and not for legal necessity or the benefit of the family and that he utilized the money borrowed by him for illegal or immoral purposes.

The first defendant had not at the time made common cause with the plaintiff. He denied having been adopted by Andiappa Pillay according to Hindu Law and said that he and Muthu Irulappa Pillay were not adopted but merely brought up by Andiappa Pillay. He denied that he had inherited any of the properties mentioned in the plaint and also denied that there was any coparcenary property. He claimed to be the absolute owner of the said properties. He said that the mortgage in favour of the R.M.A.R.A.R.R.M. Firm was executed for securing a debt incurred in the course of his business as labour contractor and that he made the outright transfer to the firm in satisfaction of the money due on the mortgage and of his other debts. He averred that no part of the consideration for the transfers made by him was utilized for illegal or immoral purposes. The defence of the Chettyar firm was on much the same lines as that of the first defendant, and the firm raised an additional defence that if the plaintiff was entitled to any relief the properties in their possession should be allotted to the first defendant.

On the pleadings the following issues were framed :

(1) Is the first defendant an adopted son of A. Andiappa Pillay *alias* Mudalia Pillay ?

(2) Were the properties mentioned in paragraph 2 of the plaint inherited by the first defendant from A. Andiappa Pillay ?

(3) If so, are they the joint family properties of the plaintiff and the first defendant ?

(4) Whether the other properties mentioned in paragraph 4 of the plaint were acquired with the income of the joint family properties and added to the joint family properties ?

(5) Are the transfers mentioned in paragraphs 5 to 9 of the plaint not binding on the plaintiff on the ground that the transfers were not for legal necessity and for the benefit of the joint family or because the consideration for any of them was utilized for illegal or immoral purposes ?

(6) To what relief, if any, is the plaintiff entitled, and if so, subject to what equities ?

The first issue as to whether Andiappa Pillay adopted the first defendant is in my opinion one of the crucial issues in this suit ; for if the adoption is not proved, the bottom will be knocked out of the plaintiff's case. Mulla in section 512 of his Principles of Hindu Law says that the evidence in support of an adoption must be sufficient to satisfy the very grave and serious onus that rests upon any person who seeks to displace the natural succession by alleging an adoption, but that when there is a lapse of a period of years between the adoption and its being questioned, every allowance for the absence of evidence to prove such fact must be favourably entertained. In considering the evidence in this case, therefore, these principles will be borne in mind. Now, the first defendant gives

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his age as over fifty-nine and it is alleged that he was adopted when he was three years old. His uterine brother V. K. Subramanyam Thevar is fifty-three years of age and was born after the date of the alleged adoption. The only direct evidence on the issue is that of V. E. Muthu Swamy Thevar. He gives his age as eighty-five and his occupation as Fish Contractor. My impression of him might be wrong, but he has struck me as being rather too active for a man of eighty-five years. He speaks to having witnessed the ceremony of adoption at Andiappa Pillay's house in Singapore Quarter, Pazundaung, when the first defendant's father Arunarcham Pillay gave the boy in adoption by pouring turmeric water into Andiappa Pillay's hands. He says that he does not now see the priest who officiated at the ceremony and that all the elders who were present at the ceremony are dead. A very unsatisfactory feature regarding this witness is the mystery surrounding the circumstances in which he was discovered by the plaintiff. As mentioned before, he is the only person in the case who has given direct evidence regarding the adoption ; and he states that he has not told anyone—not even plaintiff Alagu Pillay or Alagu Pillay's agent V. K. Subramanyam Thevar—about the adoption. I gave him a chance to explain why he was cited as a witness and asked him whether anyone had approached him with a request to give evidence about the adoption. He replied that no one had done so. Finally, he said that it was only when he received the summons that he knew he would have to give evidence in the case. In these circumstances I am unable to accept this witness's evidence unless it is in consonance with probabilities. The circumstances of the case, however, militate against the probability of his story being true. In the first place, it is admitted both by the first defendant and his uterine brother

V. K. Subramanyam Thevar that there was no document executed before Andiappa Pillay's death in which the first defendant was mentioned as Andiappa Pillay's adopted son. On the contrary, in 1908 and again in 1910 before leaving for India on business, Andiappa Pillay granted a power-of-attorney to the first defendant and M. Thiroomalay Moothoo Pillay, *vide* Exhibits F and F-1, in which the names of their fathers were not mentioned. This circumstance by itself may not be conclusive. But then in the Will solemnly executed by Andiappa Pillay, *vide* Exhibit A, neither Muthu Irulappa Pillay nor the first defendant was acknowledged by Andiappa Pillay as his adopted son. It cannot be said that the testator had failed to mention this as the result of an oversight, because he mentioned the name of his own father in the Will. It is contended that the first defendant and Muthu Irulappa Pillay were described in the Will as Andiappa Pillay's male heirs. But in view of the circumstance that his two daughters also were described in the document as his heirs, the inference that reasonably flows from the contents of the Will is that the first defendant is not Andiappa Pillay's adopted son. In Hindu Law the son inherits his father's estate to the exclusion of every other member of the family, and I believe this legal position is well-known among Hindus. It follows therefore that since Andiappa Pillay mentioned as his heirs his daughters who would have had merely a right to maintenance and marriage expenses if he had a son, neither the first defendant nor Muthu Irulappa Pillay who were jointly mentioned with the daughters had been recognized by Andiappa Pillay as his adopted son. There is another circumstance that seems to go a long way to disprove the story of the adoption. V. K. Subramanyam Thevar is the first defendant's uterine brother and six years junior to him in age.

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He was managing the first defendant's business at the mill for some years and he was living in the same part of the city, Pazundaung, with Andiappa Pillay and the first defendant. He must therefore have known the first defendant more intimately than most other people; and if the first defendant had been adopted by Andiappa Pillay, this witness must have been one of the first persons to hear about the adoption. Yet, when he was questioned about his knowledge of the adoption, he made the following very damaging admission :

> *Q.* When did you come to know first of the adoption of 1st defendant by Andiappa Pillay ?
>
> *A.* Only when Andiappa Pillay died I came to know about this adoption.

It seems clear from the above that before Andiappa Pillay's death no one, not even the 1st defendant's own half-brother and manager of his business, had heard that the 1st defendant had been adopted by Andiappa Pillay. This in my view clinches the case against the story of the adoption and is an eye-opener to witness V. E. Muthu Swamy Thevar's inability to explain how he had been " discovered " and at the same time shows this witness's evidence to be unreliable. This witness had told no one about the adoption ; and no one had approached him to give testimony evidently because no one had heard about the adoption. Nevertheless, for reasons best known to those running the plaintiff's case, this person has figured as the most important witness in the suit.

Capital is sought to be made out of a statement said to have been made by Ramayi, Andiappa Pillay's widow, in her affidavit, *vide* Exhibit D-2, filed in the Letters of Administration proceedings, that the 1st defendant and Muthu Irulappa Pillay had been adopted

by her and Andiappa Pillay. In this connection, the 1st defendant's evidence is interesting. Both he and Muthu Irulappa Pillay described themselves in the application for Letters of Administration and their supporting affidavits (Exhibits B—D-1) as Andiappa Pillay's adopted sons. The 1st defendant does not know that Andiappa Pillay had adopted Muthu Irulappa Pillay. In point of fact, no one knows about it. When the 1st defendant was asked why in these circumstances he swore in his affidavit that he and Muthu Irulappa Pillay were Andiappa Pillay's adopted sons, he replied his lawyer drafted the affidavit and he did not know about this matter. If the 1st defendant did not known about the material contents of his affidavit, *a fortiori* Ramayi, apparently an ignorant woman, would not have known about the material contents of her affidavit.

The 1st defendant has made a noteworthy admission that Andiappa Pillay had treated him and Muthu Irulappa Pillay exactly alike and as members of his family. He was related to both of them, and they each in their respective spheres helped him in the management of his business and estate. Andiappa Pillay shortly before his death bequeathed the bulk of his estate to these two young men and his small daughters in equal shares. It is not shown that Irulappa Pillay had been adopted by Andiappa Pillay; and in all the above circumstances it is highly improbable that the 1st defendant was adopted by the gentleman.

There is also the 1st defendant's admission that it was only after Andiappa Pillay's death that he and Muthu Irulappa Pillay described themselves for the first time as Andiappa Pillay's adopted sons. In the last analysis, therefore, the 1st defendant never claimed before Andiappa Pillay's death to have been adopted by Andiappa Pillay; Andiappa Pillay on his part never

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acknowledged him as an adopted son ; and no one, not even his own half-brother, knew him to have been adopted by Andiappa Pillay. Now, it is well-known that in a Hindu family the son, whether natural or adopted, occupies a unique position. He is the heir-apparent of the family and after his father's death he has to perform ceremonies for the salvation of his father's soul. Yet, Andiappa Pillay in one of the most solemn moments of his life, *i.e.* at the time he was making his Will, and on the occasion when he would have acknowledged his relationship to the 1st defendant, did not acknowledge the 1st defendant as his adopted son. The Will, in my opinion, throws a revealing light on Andiappa Pillay's attitude towards the 1st defendant, who on his part when the document was read over to him by Andiappa Pillay raised no protest whatever. He did not even ask Andiappa Pillay why he had not been mentioned in the Will as an adopted son. He apparently accepted the position. Andiappa Pillay who was a self-made man had a mind of his own. He refused to be trammelled by conventions and leaving a pittance for his widow bequeathed the bulk of his estate to his two relatives who had rendered services to him and to his two daughters in equal shares. The evidence, read as a whole, is consistent with this view rather than with the view that the 1st defendant is the adopted son of Andiappa Pillay.

Now, Mulla in section 489 of his Principles of Hindu Law states : "*Giving and receiving.*—(1) The physical act of giving and receiving is absolutely necessary to the validity of an adoption. This is so not only in the case of the twice born classes, but also in the case of Sudras. It is of the essence of adoption, and the law does not accept any substitute for it. Mere expression of consent, or the execution of a deed

of adoption, though registered, but not accompained by an *actual delivery* of the boy, does not operative as a valid adoption. To constitute giving and taking in adoption all that is necessary is that there should be some overt act to signify the delivery of the boy from one family to another." Here, no doubt, the adoption is alleged to have taken place about half a century ago and consequently direct evidence as to the ceremony would be meagre. But at the same time it must be remembered that it is the plaintiff who has come forward with his story of adoption and this is not a case where his adoption is attacked by another claiming property in his hands.

For all the above reasons I find that the adoption has not been proved and answer the first issue accordingly. It follows from this that Andiappa Pillay's properties which were admittedly self-acquired properties were taken by the 1st defendant not as ancestral property but as his own separate property. Mulla in section 223 (3) of his treatise says :

"*Property inherited from collaterals—property inherited from females.*—Excluding the doubtful case of property inherited from a maternal grandfather, it may be said that the only property that can be called ancestral property is property inherited by a person from his father, father's father, or father's father's father. Property inherited by a person from any other relation is his separate property, and his male issue do not take any interest in it by birth. Thus property inherited by a person from collaterals, such as a brother, uncle, etc., or property inherited by him from a female, *e.g.* his mother, is his separate property."

It seems clear therefore that the plaintiff did not by birth acquire any interest in the property bequeathed by Andiappa Pillay to the 1st defendant. There is nothing to show that the plaintiff contributed anything towards the acquisition of property by the 1st defendant, who, moreover, in his written statement has claimed

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all the suit properties as his own absolute property. Furthermore, "A coparcenary is purely a creature of law; it cannot be created by act of parties, save in so far that by adoption a stranger may be introduced as a member thereof." [Mulla's treatise, section 214; *see* sections 222 and 223 (1) also.] I find that the plaintiff did not acquire any interest in the suit properties and that he and the 1st defendant had no coparcenary property, and I answer the second and third issues in this sense.

In view of the above findings, it is unnecessary to come to a decision on the remaining issues. Since, however, arguments have been addressed to me at great length on the legal issues, I shall proceed to discuss them.

Assuming that the suit properties were a coparcenary, the 1st defendant would be more than a mere manager of the coparcenary estate. It is not necessary therefore that when he borrowed money legal necessity must be proved in order that the interests of the other coparceners may be bound. It is common ground that the 1st defendant borrowed Rs. 20,000 on the mortage deed, Exhibit 1, and a further sum of Rs. 5,000 on a pro-note from R.M.A.R.A.R.R.M. Firm and that subsequently he transferred most of his properties to the firm in discharge of the mortgage debt and partial discharge of the decree obtained on the pro-note. It has been ruled by the Privy Council in *Brij Narain* v. *Mangla Prasad* (1) that "antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached". Here the debts due on the mortgage and the pro-note must be held to be antecedent to the outright transfer both in fact and in

(1) L.R. 51 I. A. 129.

time. It is contended that since the mortgage debt which was for a present consideration was not an antecedent debt and the mortgage was therefore void under the Hindu Law, it follows that the outright transfer made in consideration of the discharge of the mortgage is also void. I do not think that the ruling of the Privy Council should be interpreted in this way. Their Lordships have not mentioned "debts" or "transactions" and each transaction, the mortgage as well as the sale in this case, must be considered separately and it must be ascertained whether the debt was antecedent to the particular transaction at the moment under consideration. (*See* also Mulla's comments at page 373 of his treatise in section 295.) I hold therefore that the sale as per Exhibit 2 was for antecedent debts.

It is not contended that the debts were contracted for illegal purposes, and the next question that falls for determination therefore is whether they were contracted for immoral purposes. It is said that the 1st defendant was addicted to drink, that he used to frequent the races, and that he kept a mistress. There is no evidence to show that the 1st defendant used to drink intoxicating liquor. He admits that he used to go to the races. But on his own showing he first went to the races after he had executed the mortgage deed. He says that he used to spend about Rs. 500 a month on his mistress and her people. According to him he had a banking account and used to draw money from the bank and pay it to his mistress and his banking account-book would show how much he had spent on her. Summonses and notices issued to him by the Court in the cases above mentioned as well as the discharged pro-notes have been tendered in evidence at the hearing. The 1st defendant says that these documents as well as his other documents were left at

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his house in Singapore Quarter when he evacuated Rangoon and that on his return he found his house burnt down. V. K. Subramanyam Thevar professes to have obtained those notices and summonses and discharged pro-notes from the 1st defendant's house. It is significant that the other documents belonging to the 1st defendant, such as the banking account-book, have not been produced. It appears from the 1st defendant's evidence itself that at the time he took the loans on pro-notes and the loan on the mortgage on two successive days he was in need of money to pay advances to his tenants. He had no cash with him at the time, and he and his wife admit that advances were usually made to the tenants during the harvest. Although he has stated that he made no fresh advances to the coolies, he admits in the course of his evidence that he used to make advances to the coolies about the beginning of each working season. The fact that he borrowed Rs. 5,000 on the 21st October 1932 although it had been arranged that he should borrow Rs. 20,000 on the following day, is significant. He must have been in urgent need of money to pay out advances. He had not started going to the races then and it is extremely unlikely that he would have paid out big sums of money to his mistress, and in any case he has not suggested that he paid out big sums of money to her. In these circumstances, the evidence of the then agent of the firm, Arunachalam Chettyar, that he saw the 1st defendant actually paying out advances out of the loans to some of his coolies is credible. For all the above reasons, I am of opinion that the debts were contracted in the course of the 1st defendant's business. Furthermore, there is the evidence of V. K. Subramanyam Thevar that in 1932 the 1st defendant's income from the labour contract business was about Rs. 12,000 per annum. The 1st defendant

could very well have supported his mistress out of that income. Now, a mere general charge of immorality is not enough, and it must be shown that there is some connection between the debts and the immorality. In Mulla's treatise the following passage occurs at page 371 :

"The burden which lies upon the sons to prove the immorality of the debt is not discharged by showing that the father lived an extravagant or immoral life ; there must be a direct connection between the debt and the immorality set up by the sons."

It has also been held in *Hemraj* alias *Babu Lal and others* v. *Khem Chand and others* (1) that " Examination of the nature and character of the father's debt should be made with reference to the time when it originated and if it appears that at its inception the debt was not tainted with immorality of any kind then it must be held to be binding on the son." For all these reasons, I hold that, assuming that the properties transferred by Exhibit 1 belonged to the joint Hindu family of the plaintiff and the 1st defendant, the plaintiff's interest therein was bound by the sale and I answer the 5th issue accordingly.

No arguments have been addressed regarding the validity of the transfers made in favour of the 5th to 9th defendants and in view of my finding that the plaintiff was not a coparcener with the 1st defendant I shall not go into the validity of the transfers to these defendants.

In the result, the suit is dismissed with costs. The plaintiff by his legal representative will pay the court-fee on the plaint which he would have had to pay if he had not been allowed to sue as a pauper.

(1) I.L.R. (1943) All. 727.

APPELLATE CIVIL.

Before U Thaung Sein, J.

H.C. 1948

June 1.

MAUNG BA THI NYO AND OTHERS (APPELLANTS)

v.

MAUNG SAN NYUN AND OTHERS (RESPONDENTS).*

Buddhist Law—Keittima *adoption*—Apatitha—*Difference.*

Held : That distinction between *keittima* and *apatitha* adoption is a fine one and lies solely in the intention of the adoptive parent. If the child was taken with intent that it shall inherit from the adoptive parent then the adoption is *keittima* and it is this intention that must be given publicity. *Apatitha* child is one adopted casually without the intention expressed that the child shall inherit.

Ma Than Nyun v. *Daw Shwe Thit*, I.L.R. 14 Ran. 557, followed.

Maung Gyi and one v. *Maung Aung Pyu*, I.L.R. 2 Ran. 661, referred to.

Yan Aung for the appellants in 14/1948 and respondent in 166/1947.

Ba Nyunt for the respondents in 14/1948 and appellant in 166/1947.

U THAUNG SEIN, J.—Civil Second Appeals No. 166 of 1947 and No. 14 of 1948, which have arisen out of the same suit, namely, Civil Regular No. 32 of 1946 of the Subordinate Judge Tavoy, have been dealt with together, and the present judgment will cover both those cases

In the above suit the plaintiffs Maung San Nyun and Ma Thaung Sein, who are husband and wife, sued Maung Ba Thi Nyo and Ma Aye Kyi (husband and wife) for a declaration of their title to a certain piece of land in Tavoy town and for possession of the same. Their case was that they (the plaintiffs) had bought the suit land from six persons who were the legal representatives and heirs of one Daw Sein Nu, the

*Civil Second Appeal No. 166 of 1947
Civil Second Appeal No. 14 of 1948. Cross appeals against the decree of the District Court of Tavoy in Appeal No. 15 of 1947, dated the 6th November 1947.

original owner. The defendants had, however, built a house on the land and were in occupation and refused to quit in spite of notices served on them.

The suit was hotly contested by the defendants, who claimed that Ma Aye Kyi (2nd defendant) was a *keittima* daughter of Daw Sein Nu and hence sole heir to her estate to the exclusion of all other heirs.

The learned Subordinate Judge framed three issues which I do not propose to reiterate, and the suit went to trial. The most important issue in the case was whether the defendant Ma Aye Kyi was, in fact, the *keittima* daughter of Daw Sein Nu. Evidence was led by both sides, and when the hearing of the witnesses had been concluded, the defendants applied for permission to amend their written statement so as to put in an alternative claim as an *apatitha* child. The learned Subordinate Judge granted the necessary permission, and it is interesting to note that there was no objection to the proposed amendment by the plaintiffs. Finally, the learned Subordinate Judge found that the defendant Ma Aye Kyi was, in fact the *keittima* adopted daughter of Daw Sein Nu and, as such, her sole heir. The suit was then dismissed as the six persons who transferred the suit land had no right, title or interest in it.

An appeal was filed in the District Court of Tavoy against the decree of the learned Subordinate Judge, and the learned District Judge held that Ma Aye Kyi had failed to prove *keittima* adoption and that she was merely an *apatitha* child. It is settled law that an *apatitha* child is only entitled to a half share in the estate of her adopted parents and that the remaining half share must fall to the other heirs. The learned District Judge accordingly set aside the decree of the trial Court and granted a decree to the plaintiffs as prayed for in respect of a half share in the suit land

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and for possession of the same. Both the plaintiffs and defendants have now come up in second apeal—the plaintiffs asserting that the learned District Judge was wrong in holding that there was any adoption of Ma Aye Kyi by Daw Sein Nu and that Ma Aye Kyi is not an *apatitha* child. The defendant Ma Aye Kyi, on the other hand, claims that she is a *keittima* child and not an *apatitha* child as found by the learned District Judge.

The main grounds put forward by the learned counsel appearing for the original plaintiffs is that, on the evidence led at the trial, the lower Courts ought to have held that Ma Aye Kyi failed to prove any adoption of herself by Daw Sein Nu. The defendants, however, assert that there was clear evidence of *keittima* adoption. Both the lower Courts have held that there was at least an adoption of Ma Aye Kyi by Daw Sein Nu, though, of course, they do not agree on the exact nature of the adoption. This concurrent finding of fact, that is to say, of the adoption of Ma Aye Kyi, must be accepted. The only question that remains is whether Ma Aye Kyi was a *keittima* or an *apatitha* child.

Now, the distinction between a *keittima* and an *apatitha* child is a fine one and lies solely in the intention of the adoptive parents. In *Ma Than Nyun* v. *Daw Shwe Thit* (1) the distinction between a *keittima* and *apatitha* child has been explained as follows :

> "The intention of the person who takes the child of another in adoption that the child shall inherit from the adoptive parent is the principal requisite of *keittima* adoption, and it is this intention that must be given publicity.
>
> * * * *
>
> An *apatitha* child is one who has been adopted casually and without any intention expressed on the part of the adoptive

(1) I.L.R. 14 Ran. 557.

parent that the child shall inherit. The intention forms the dividing line between a *keittima* child and an *apatitha* child; in other respects their position is the same."

Applying these principles to the present case, the questions that arise are whether there was any intention on the part of Daw Sein Nu that Ma Aye Kyi should inherit her estate to the exclusion of other relatives, and whether there was public notoriety of this intention. The learned Subordinate Judge has discussed the evidence led in great detail and held that Daw Sein Nu had adopted Ma Aye Kyi with the consent of her parents and lived for 20 years with her as her adoptive mother. During that period Daw Sein Nu had usually addressed her as "thami" (daughter), allowed her to manage the house and sent her on a religious pilgrimage with other friends. The learned Subordinate Judge was impressed by the veracity of the witnesses cited by Ma Aye Kyi and remarked: "Theirs is a simple story to tell and they told it plainly." He went on to say "Studied as a whole the story has a ring of truth." Some of the witnesses cited by Ma Aye Kyi are admittedly her close relatives.

The learned District Judge, however, refused to accept the testimony of these witnesses on the ground that they "are either under obligations to or relations of Ma Aye Kyi". Perhaps, the learned District Judge has overlooked the fact that, in weighing the evidence of witnesses, the trial Court is always in a far better position than the appellate Court. The trial Court has the advantage of seeing and noting on the demeanour of the witnesses, whereas the appellate Court merely reads the evidence as recorded. As a general rule therefore, findings of fact by trial Courts dependent on the oral evidence of witnesses should normally be accepted. The learned Subordinate Judge, who saw and heard the witnesses in the present case,

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has given good reasons for believing them, and I see no reason why his findings should have been upset by the learned District Judge.

There are, however, two factors pointed by the learned District Judge which were not discussed in the judgment of the trial Court. In the first place, it appears that, at the time of Daw Sein Nu's death, she left a boat and this was sold by one Maung Kywe Phyu, her nephew. According to the learned District Judge, this would clearly go to show that Ma Aye Kyi was not the adopted daughter, as, if she were, no such sale could have taken place except by herself. The answer to this is that, as pointed out by the learned counsel for the defendants, the boat was apparently sold during an unsettled period and perhaps Ma Aye Kyi did not feel inclined to interfere with Maung Kywe Phyu.

Next, the learned District Judge has referred to an *ahlu* given by Daw Sein Nu to which hundred guests were invited. It appears that invitation cards were issued for the occasion, and Ma Aye Kyi has referred to that ***ahlu*** in the following words :

> " Daw Sein Nu personally performed the dedication ceremony. She did not declare then that I was her adopted daughter."

The ceremony in question was one relating to the offering of honey to some *pongyis*, and I am at a loss to know why it should have been necessary for Daw Sein Nu to have announced then that Ma Aye Kyi was her adopted child. As regards the invitation cards, the learned District Judge has held that they were not issued in the joint names of Daw Sein Nu and Ma Aye Kyi. No copies of the cards in question were filed as an Exhibit, and none of the witnesses were specifically questioned on this matter.

On the whole, I am of the opinion that the learned Subordinate Judge was correct in holding that Ma Aye Kyi was the *keittima* adopted daughter of Daw Sein Nu and, as such, her sole heir. The suit lands were the property of Daw Sein Nu, and Ma Aye Kyi alone was legally entitled to dispose of them. The six persons who transferred the suit lands to the plaintiffs were not legally entitled to do so, and, as such, could confer no title in the property. The learned District Judge therefore erred in holding that Ma Aye Kyi was only an *apatitha* child of Daw Sein Nu.

Before finally disposing of this appeal I should like to point out that the learned counsel for the plaintiffs has also argued that the trial Court should not have allowed an amendment of the written statement by the defendants by means of which they were able to put in an alternative claim as an *apatitha* child. According to the learned counsel, the plaintiffs were deprived of their right to meet the defendants' additional claim. As a matter of fact, no objections were raised by the plaintiffs at the time when the amendment was allowed by the trial Court. It has been laid down in *Maung Gyi and one* v. *Maung Aung Pyu* (1) that a Court may, under suitable circumstances, permit a written statement to be amended so as to make the defence also into an alternative one of *apatitha* adoption. There can be no doubt that the present suit was a fit case in which such an amendment should have been allowed and was, in fact, allowed by the learned Subordinate Judge, Tavoy.

Accordingly, Civil Second Appeal No. 166 of 1947 is allowed and the decree of the lower appellate Court is set aside and the plaintiffs' suit is dismissed with costs in all Courts.

(1) I.L.R. 2 Ran. 661.

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Civil Second Appeal No. 14 of 1948 is dismissed. There will be no costs in this case as I have already allowed costs in Civil Second Appeal No. 166 of 1947.

APPELLATE CIVIL.

Before U Thaung Sein, J.

MAUNG PU (APPELLANT)

v.

U THA HPYE AND FOUR OTHERS (RESPONDENTS).*

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June 2.

New question of law—When can be raised—Burmese Buddhist Law—Gift—Immoveable property.

Held : A Burman Buddhist cannot claim immoveable property by way of gift except by a registered instrument.

Lim Charlie and another v. *The Official Receiver*, I.L.R. 12 Ran. 238, referred to and followed.

In Second Appeal a new point of law which would affect the plaintiff's right to institute the suit can be raised for first time.

Maung San Ya and one v. *Maung San Pe*, I.L.R. 4. Ran. 500, followed.

B. W. Ba Tun for the appellant.

Win Maung for the respondent.

U THAUNG SEIN, J.—The 1st respondent-plaintiff U Tha Hpye sued the appellant Maung Pu and the remaining respondents in the Court of the Subordinate Judge, Myingyan, for possession of a certain piece of land.

In the plaint it was alleged that the suit lands were originally owned by Daw Kyoke, the mother of the plaintiff, who died about five years before the filing of the suit, and that the lands in question devolved on the plaintiff by way of inheritance. Some time before her death Daw Kyoke created a usufructuary mortgage in respect of the suit land with the respondent U Ya Gyaw who in turn sub-mortgaged it to the respondent Ma Pwa Nyun. The plaintiff went on to say that he redeemed the mortgage from U Ya Gyaw in or

* Civil Second Appeal No. 31 of 1948 against the decree of the District Court of Myingyan in Civil Appeal No. 24 of 1947, dated the 20th December 1947.

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MAUNG PU v. U THA HPYE AND FOUR OTHERS.

U THAUNG SEIN, J.

about November 1946 and the sub-mortgage was extinguished and he therefore claimed that he was entitled to possession of the land. Unfortunately for the plaintiff the suit land is in the exclusive possession of the appellant Maung Pu who asserts that he bought it during the Japanese occupation of Burma for the sum of Rs. 1,500 in Japanese currency from the respondents Ma Aye Shin and Ma Thein who are said to be the original owners of the land by means of an unregistered deed of sale.

The suit was contested by the appellant alone as the remaining respondent-defendants filed admissions supporting the plaintiff's claim.

The issues between the appellant and the plaintiff therefore were (1) whether the plaintiff is the owner of the suit land, and (2) if so, whether he is entitled to possession of it as against the appellant (defendant) Maung Pu.

The learned Subordinate Judge held that the plaintiff is not the owner of the land in question and that it belongs to the appellant who had bought it from the original owner, and the suit was accordingly dismissed. On appeal to the District Court of Myingyan, the learned District Judge disagreed with the finding of the lower trial Court and held that Daw Kyoke was the original owner of the lands and that the plaintiff had inherited them on her death. The decree of the trial Court was accordingly set aside and a decree for possession as prayed for by the plaintiff was passed. The defendant-appellant Maung Pu has now come up to the High Court on 2nd appeal to have the decree of the lower appellate Court set aside.

The main grounds urged by the learned counsel for the appellant are that the plaintiff failed to prove exclusive ownership of the land in question and that on his own showing he is at best a co-owner along with

two other brothers who were not made parties to the suit and hence the suit must be dismissed.

Now, the plaintiff in his plaint claimed that the suit land was inherited by him from his mother. However, in his evidence in the trial Court he stated, " Partition of my parents' estate had been made before the death of my mother. That is, about 4 years before her death. Partition was made orally." Apparently the plaintiff meant that he received the lands by way of gift when he refers to " Partition of the estate ". According to Burmese Buddhist Law partition of an estate between a parent and children can only take place under the following circumstances : (1) An *aurasa* child may claim partition of his or her quarter share, if a son on the death of his father, or if a daughter on the death of her mother ; (2) On the remarriage of the surviving parent the children of a former marriage are entitled to claim partition of the estate. In the case under consideration there is nothing on the record to suggest that the plaintiff was an *aurasa* child and in addition his mother Daw Kyoke does not appear to have contracted a second marriage. There was thus no occasion or reason for the so-called partition of Daw Kyoke's estate. In all probability the plaintiff meant to say that the lands were gifted to him orally by his mother. If this be so, that gift was clearly invalid ; vide *Lim Charlie and another* v. *The Official Receiver* (1), which lays down that " a Burman Buddhist cannot claim immoveable property by way of gift except by a registered instrument in accordance with the provisions of section 123 of the Transfer of Property Act."

The plaintiff cannot possibly rely on the so-called "partition of the estate" to prove his title to the lands. On the plaintiff's own showing it appears that besides

(1) I.L.R. 12 Ran. 238.

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himself two other brothers survived Daw Kyoke. If the suit lands were the property of his mother, then the plaintiff is only a co-owner with his brothers. That being so, the question that arises is whether the plaintiff could obtain possession of the lands without impleading his brothers as parties to the suit? In this connection I should like to mention that this point was not raised by the appellant either in the trial Court or in the lower appellate Court and it has been raised for the first time in second appeal. That such a plea may be raised in second appeal is laid down in *Maung San Ya and one* v. *Maung San Pe* (1) in the following terms :

"A question of law which would affect the plaintiff's right to institute the suit could be raised for the first time in second appeal."

If the brothers of the appellant are necessary and indispensable parties to the suit, then the plaintiff's suit must necessarily fail as he has not applied for amendment of the plaint so as to implead them. The question is whether the brothers of the appellant are persons who ought to have been joined as parties to the suit. If the plaintiff's suit could have been decreed without the brothers being on the record as parties, then under Order 1, Rule 9 of the Code of Civil Procedure, the suit should not be defeated by reason of non-joinder of parties. But in the present case the plaintiff is not the sole owner of the land and he is not entitled to exclusive possession as against his brothers and, hence, all the brothers are necessary parties to the suit. In this connection, I would refer to the following note at page 512 of Mulla's Civil Procedure Code, 11th edition, under Order 1, Rule 9 :

"Similarly, a suit by executors, trustees, co-owners of immoveable property or partners for the recovery of property in

(1) I.L.R. 4 Ran. 500.

which they are jointly interested will not lie unless all the parties interested are joined. If such a suit is filed by some only of the parties interested, the Court will allow an amendment and join the absent parties as co-plaintiffs. But, if the plaintiff in spite of objection raised persists in the suit without joining the absent parties, the suit will be dismissed."

In the present suit the plaintiff alone seeks to get possession of the lands and applying the above principles I would hold that in the absence of his brothers no decree could be passed in his favour for possession of the suit lands. The plaintiff's suit must therefore stand dismissed.

The appeal is accordingly allowed. The decree of the lower appellate Court is set aside and the plaintiff's suit will stand dismissed with costs in all Courts.

APPELLATE CIVIL.

Before U Thaung Sein, J.

H.C. 1948

June 24.

MAUNG THIT MAUNG (APPELLANT)

v.

MAUNG TIN AND THREE OTHERS (RESPONDENTS).*

Material alteration of receipt—Effect of—Test whether the document is the foundation of the claim or merely evidence.

Held: Where a document which is the foundation of the obligation of the defendant is materially altered by the plaintiff, his suit should be dismissed. But where the document materially altered is merely a piece of evidence and plaintiff can prove his claim without reference to the altered document, the claim may be decreed.

Nathu Lal and others v. *Mt. Gomti Kuar and others*, (1940) A.I.R. 160; *Gour Chandra Das* v. *Prasanna Kumar Chandra*, 33 Cal. 812; *Tapiram* v. *Jugalkishore and another*, (1926) A.I.R. Nag. 209, referred to and discussed.

The test is whether the original consideration has merged in the document.

M. Zakaria for the appellant.

S. Choung Po and *Thein Maung* for the respondents.

U THAUNG SEIN, J.—On the 27th October 1944, that is to say, during the period of the Japanese military occupation of Burma, the plaintiff-appellant Maung Thit Maung sued the respondents Maung Tin and Ko Po Hlaing [(deceased) and represented by his heirs and legal representatives—respondents Nos. 2, 3 and 4] in the then Subdivisional Court of Maubin for the recovery of 750 baskets of paddy or their value. According to the plaint the plaintiff-appellant had lent the respondents Maung Tin and Ko Po Hlaing a sum of Rs. 270 on the 9th of December 1941 on the express understanding that it would be repaid by means of 300 baskets of paddy. In addition, the plaintiff-appellant was alleged

* Civil Second Appeal No 2. of 1948 against the decree of the District Court of Maubin in Civil Appeal No. 4 of 1947, dated the 22nd September 1947.

to have rented out to the same individuals a house and 10 head of cattle on a fixed rental of 150 baskets of paddy a year. The respondent Maung Tin and Maung Po Hlaing failed to repay the original loan of Rs. 270 or the paddy or the rent agreed upon and retained possession of the house and cattle and were thus liable to pay the plaintiff-appellant 750 baskets of paddy or their value.

The suit was contested by the respondents who admitted the receipt of Rs. 70 only out of the alleged loan of Rs. 270 and pleaded, *inter alia*, that the receipt or acknowledgment signed for that loan had been materially altered by the addition of the figure " 2 " in front of " 70 " and was thus void and unenforcible. They also averred that the possession of the house in question was not on a rental basis but under an agreement to repurchase the same. As regards the cattle it was asserted that these had died a long while ago.

The suit in question was pending at the time of the Japanese retreat in 1945 and was continued and finally decided by the learned Assistant Judge of Maubin in February 1947 only. The learned Assistant Judge has found that there had been fraudulent and material alteration in the acknowledgment or receipt for the loan by the addition of the figure " 2 " in front of " 70 " and hence that receipt was void. As regards the house and cattle it has been held that the plaintiff appellant failed to prove that he had rented them out as alleged by him. In the result the plaintiff-appellant's suit was dismissed.

An appeal was filed before the District Court of Maubin and the learned District Judge agreed with all the findings of the trial Court and accordingly dismissed the appeal. So far as the findings of fact are concerned the plaintiff-appellant has made no attempt whatsoever to challenge them in second appeal. The present appeal turns mainly on a question of law, namely,

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whether the receipt or acknowledgment filed by the plaintiff-appellant was the basis of his claim or whether it was merely a piece of evidence and if it were merely an item of evidence whether the plaintiff-appellant should not be granted a decree for the sum of Rs. 70 which was admitted by the respondents. The learned District Judge relied on two rulings :—*Nathu Lal and others* v. *Mt. Gomti Kuar and others* (1) and *Gour Chandra Das* v. *Prasanna Kumar Chandra* (2) for the view that the material and fraudulent alteration in the receipt or acknowledgment dated the 9th December 1941 (filed as Exhibit A in the trial record) rendered it void and hence the plaintiff-appellant's claim was bound to fail. These rulings are no doubt good authority for the view that material alterations in a document without the consent of the party affected and so as to alter the character of the document render it void and that no suit can be brought on such a document. However, the learned District Judge overlooked the fact that the suit under consideration was not based solely on the receipt dated the 9th December 1941 (Exhibit A). It is clear from the pleadings and the evidence led at the trial that the suit was one on the original consideration and the receipt (Exhibit A) was only an item of evidence to prove the claim. It was open to the plaintiff-appellant to have proved his claim without referring to the receipt (Exhibit A) and hence it matters little whether that receipt was void or not. In this connection I would refer to the ruling in *Tapiram* v. *Jugalkishore and another* (3) the headnote of which reads as follows :

"The rule that there is no right of action on a document which has been materially altered after execution and without the privity of the party to be affected by it, and that no decree should

(1) (1940) A.I.R. 160. (2) 33 Cal. 812.
(3) (1926) A.I.R. Nag. 209.

be passed in a suit brought on such a document despite the fact that consideration for the document has been admitted by the defendant has no application where the obligation to be enforced does not arise under the altered instrument and the instrument is produced merely as a piece of evidence in proof of the obligation."

This ruling discusses in great detail the law on the subject of the effect of material alterations in documents and a large number of rulings were referred to therein. The crucial test in the case under consideration is whether the original consideration has merged in the receipt dated the 9th December 1941 (Exhibit A). If it has merged then, the suit must fail as the receipt in question is void and will have to be left out of all consideration. But I need hardly point out that there was no such merger in the present case and the receipt dated the 9th December 1941 (Exhibit A) was merely an acknowledgment of a certain sum of money. Under the circumstances, the plaintiff-appellant was at least entitled to a decree for the amount admitted by the respondents, namely, Rs. 70. This appeal is accordingly allowed. The judgments and decrees of both the lower Courts are set aside and instead there will be a decree for the plaintiff-appellant for the sum of Rs. 70 with proportionate costs in all Courts.

APPELLATE CIVIL.

Before U Thaung Sein, J.

H.C. 1948

July 15

MA CHO AND ONE (APPELLANTS)

v.

THAKIN ANT GYI (RESPONDENT).*

Suit for damages for wrongful use and occupation—S. 42, Specific Relief Act.

Held: There is no rule that as soon as plaintiff's title to property is challenged the plaintiff must also pray for declaration of title. It is sufficient that he proves that he is the owner of the property and entitled to possession.

M. P. Sayed Mohamed v. *K. S. Ebrahim Das and one*, (1947) R.L.R. 98, referred to.

Tun Sein for the appellants.

Yan Aung and *Win Maung* for the respondent.

U THAUNG SEIN, J.—The plaintiff-respondent Thakin Ant Gyi sued the appellant-defendants Ma Cho and Ma Mya in the Court of the 1st Subordinate Judge, Pakôkku, for recovery of Rs. 180, being damages and compensation for the wrongful use and occupation of a house belonging to the plantiff-respondent. The appellant-defendants contested the suit and pleaded that the house in question had been transferred to them by the plantiff-respondent in exchange for their own house and hence the question of payment of damages or compensation did not arise.

The learned Subordinate Judge held that there had been an exchange of houses as alleged by the appellant-defendants but that, as the transaction had not been registered, there was no valid transfer of title in the disputed house. However, the learned Subordinate Judge went on to say that the appellant-defendants were not trespassers on the property and

* Civil Second Appeal No. 41 of 1948 against the decree of the 1st Assistant Judge's Court of Pakôkku in Civil Appeal No 2 of 1948, dated the 19th January 1948.

that no notice to quit had been served on them and they were therefore not liable to pay any damage or compensation in respect of the house. The plaintiff-respondent's suit was accordingly dismissed.

An appeal was filed before the 1st Assistant Judge of Pakôkku (U Pu) who has been invested with appellate jurisdiction under section 13 (*1*) (*a*) of the Courts Act, 1945 (Burma Act No. XIV of 1945). The learned Assistant Judge allowed the appeal and decreed the plaintiff-respondent's suit on the following grounds. He has pointed out that the exchange of houses between the parties was invalid owing to lack of registration and as such the ownership in the house under consideration remained with the plaintiff-respondent. Then again, it was stressed that notice to quit was served on the defendant-appellants who admitted receipt of it and they had failed to comply with it and were thus bound to pay damages and compensation as claimed by the plaintiff-respondent.

The defendants have now come up on second appeal to the High Court against the decree of the 1st Assistant Judge, Pakôkku, and the main ground put forward by the learned counsel for the defendant-appellants is that on the pleadings the suit was in fact one for a declaration of the plaintiff-respondent's title to the house but has been purposely disguised as a suit for damages and compensation for wrongful use and occupation. The learned counsel has argued that the plaintiff-respondent cannot succeed in his suit without praying for a declaration of title. My attention was drawn to *M. P. Sayed Mohamed* v. *K. S. Ebrahim Das and one* (1) where it was held as follows :

"In deciding the court fees payable for a plaint the Court should look to the matter as a whole case and find out what in

(1) (1947) R.L.R. 98.

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U THAUNG SEIN, J.

substance the suit is for. It is the real nature of the relief that matters, whatever garb it is clothed in. Suit in substance for possession cannot be converted into a suit for declaration with consequential relief by adding a prayer for declaration."

The learned counsel has laid great emphasis on the portion which says that it is the real nature of the relief that matters, whatever garb it is clothed in, or in other words that the suit must be examined as a whole to discover its true nature. According to him, the suit under consideration was in fact one for declaration of the plaintiff-respondent's title with consequential relief—namely, recovery of damages and compensation for wrongful use and occupation of the house—and as the plaintiff-respondent failed to pray for a declaration the suit must be dismissed.

Now, in considering the claim for damages and compensation for wrongful use and occupation it was necessary to go into the question of the plaintiff-respondent's ownership in the property as the defendant-appellants had also set up their own title to it. But there is no enactment or ruling which lays down that as soon as the plaintiff's title in respect of a house or land is challenged in a suit for ejectment, compensation or mesne profits, the plaintiff must also pray for declaration of his title. On the other hand, it is open to a person whose title to an immoveable property has been challenged to file a suit for declaration of his title. But if he is able to seek further consequential relief and omits to do so his suit is bound to fail, *vide* section 42 of the Specific Relief Act. In other words, a suit for a bare declaration does not lie if the plaintiff is able to seek consequential relief also. The converse of this proposition does not, of course, hold, *viz.* that where the plaintiff sues for a certain relief based on his title to certain property and his title is disputed, then he shall not succeed unless he also prays for a

declaration of title. The learned counsel's arguments are based on this converse proposition and he is not able to cite any authority on the point. Section 42 of the Specific Relief Act does not make it imperative for a plaintiff to sue for a declaration whenever his title is challenged.

In the present case, in order that the plaintiff-respondent might succeed in the suit he must first prove that he is the owner of the property and entitled to possession of it. This does not mean that he must also pray for a declaration of his title to the property. The plaintiff-respondent was admittedly the original owner of the house in question and his title in the property has not passed to the defendant-appellants by the invalid exchange of houses. The defendant-appellants had no legal right to be in possession of the property as against the plaintiff-respondent and hence they are liable to pay damages for wrongful use and occupation of it.

This appeal fails and is accordingly dismissed with costs.

CIVIL REVISION.

Before U Thaung Sein, J.

H.C. 1948

Aug. 2.

ABDUL (APPLICANT)

v.

Q. H. AGNA (RESPONDENT).*

Burma Municipal Act, s. 141—Lairage fees—When can be collected—Taxing statute—Benefit of doubt.

Held: Under s. 141, Municipal Act, "Municipal Committee may charge fees for * * * * lairage" only where there is "use or occupation" of the lair. Where there was no use or occupation of the lair as in the present case no fees can be levied. S. 141 of the Municipal Act must be construed strictly and no taxes can be imposed except by words which are clear and the benefit of the doubt is the right of the subject.

The Executive Engineer, Mandalay v. *The Maymyo Municipality*, I.L.R. 13 Ran. 758, followed and applied.

The mere fact that the Municipal Committee had issued a licence to collect such fees cannot create any liability to pay the same.

K. R. Venkatram for the appellant.

U THAUNG SEIN, J.—The respondent Q. H. Agna is a Cattle Slaughter-house licensee of the Moulmein Municipality for the period 1st October 1947 to 30th September 1948 and according to the licence issued to him he is entitled to collect slaughtering fees and lairage fees in respect of cattle slaughtered at the Municipal Slaughter-house. The present applicant Abdul is a butcher who slaughtered a number of animals at the slaughter-house in question and he has paid to the respondent slaughter fees in respect of those animals. But he refused to pay the lairage fees on the ground that no lair had in fact been provided and the animals slaughtered by him had not been kept in the lair for observation prior to the slaughter. It appears

* Civil Revision No. 40 of 1948 against the decree of the Small Causes Court of Moulmein in Civil Suit No. 8 of 1948, dated the 26th March 1948.

that under the bye-laws of the Moulmein Municipality no animal should be slaughtered unless it has been kept under observation in the lair for at least four days. While in the lair the animals were to be fed and tended by the Municipal Committee or with the permission of the Committee, by the owner of the animals. The feeding charge for each animal while in the lair was fixed at eight annas per day. It is this lairage fee which the respondent as a licensee of the Moulmein Municipal Committee was empowered to collect from those who brought animals for slaughter.

It appears that the bye-law in question has been a "dead letter" for some time past and that animals had been slaughtered without any observation in the lair. The respondent claimed that he was entitled to lairage fees as laid down in his licence whether the animals were kept in the lair or not and accordingly sued the applicant in the Small Cause Court of Moulmein for the recovery of Rs. 126 for lairage fees in respect of the animals slaughtered by the latter. The learned Judge of the Small Cause Court has held that though the animals had not, in fact, been kept in the lair, yet the respondent's licence clearly mentioned that he was entitled to collect such fees and decreed the suit.

Now, lairage fees are charged for expenses incurred in feeding or tending animals while they are in the lair. The Municipal Committee are no doubt entitled to levy such fees under section 141 of the Municipal Act which runs as follows :

"141. The committee may charge rents or fees for the use or occupation of any municipal slaughter-house or any shed, standing, pen, lairage or other building or space therein."

But, I would stress that the Municipal Act permits the levy of such fees only where there is "use or occupation" of the lair. Where there has been no use

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U THAUNG SEIN, J.

or occupation of the lair as in the present case, I fail to see how they could levy such fees. It is clearly laid down in *the Executive Engineer, Mandalay* v. *The Maymyo Municipality* (1) that:

"No tax can be imposed except by words which are clear and the benefit of the doubt is the right of the subject."

In my opinion section 141 of the Municipal Act must be construed strictly and it is clear that where there has been no use or occupation of a lair then, no fees could be leviable. The learned trial Judge was apparently under the impression that the licence issued by a Municipal Committee cannot be questioned by any other person. If that be so then Municipal Committees could issue licences for the collection of any fees or taxes which they deem fit. I feel certain that no one would assert that Municipal Committees possess such wide and unlimited powers of taxation. In issuing the licence to collect certain fees, the Municipal Committee does not guarantee its validity and the applicant was thus entitled to question it.

In the present case there was no use or occupation of the lair by the animals slaughtered by the applicant and no expenses were incurred by the respondent in respect of them. The applicant cannot be compelled to pay such charges merely because the Municipal Committee had issued a licence to collect it. On the whole the learned trial Judge erred in decreeing the respondent's suit and the application for revision is accordingly allowed.

The judgment and decree of the Small Cause Court of Moulmein is hereby set aside and the respondent's suit shall stand dismissed with costs in all Courts.

(1) I.L.R. 13 Ran. 758.

SUPREME COURT.

U MYA (APPLICANT)

v.

U TUN OHN AND ONE (RESPONDENTS).*

† S.C. 1948

July 23.

Writ of certiorari—*Dismissal of an Engineer by the Corporation of Rangoon under s. 34 of the City of Rangoon Municipal Act whether judicial or quasi-judicial—Whether writ of* certiorari *the proper remedy.*

Held: That the dismissal of an Engineer by the Administrator of the Corporation was not a judicial act for which the writ of *certiorari* could be issued. If the dismissal be wrongful the remedy of the party is by a suit for damages.

A. E. Madari v. *U Tun Ohn and one*, (1948) Bur. L.R. 541, followed.

Dr. Thein for the applicant.

Kyaw Din for the respondents.

The judgment of the Court was delivered by

E MAUNG, J.—The remedies originally sought on behalf of the applicant in these proceedings were for directions in the nature of *certiorari* and *mandamus*. The applicant's case shortly is that the 1st respondent U Tun Ohn's action in dispensing with his services as an Assistant Engineer (Buildings) in the City of Rangoon Municipal Corporation was one not made in due course of law and further that U Tun Ohn had no authority to act as the Administrator and on behalf of the City of Rangoon Municipal Corporation. He prayed therefore, in the first instance, that the proceedings ending with his services being dispensed with be quashed in exercise of the powers of *certiorari* and also for the issue of directions in the nature of *mandamus* requiring the 1st respondent to

* Civil Misc. Application No. 7 of 1948.

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

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E MAUNG, J.

permit him to return to duty as an Assistant Engineer in the City of Rangoon Municipal Corporation.

The application also mentions casually relief by way of prohibition, but that was obviously the result of a misappreciation of what directions in the nature of prohibition mean. This branch of the application was, however, never pressed either at the hearing in chambers or before the Court.

The application in respect of directions in the nature of *mandamus* was refused by the Judge in Chambers under Order XXI, Rule 2 of the Rules of this Court. Section 45 of the Specific Relief Act provides a sufficient remedy which the applicant could have sought instead of applying to this Court for directions in the nature of *mandamus*. Accordingly, at the hearing before the Court the only relief sought was for directions in the nature of *certiorari*.

The facts necessary for the determination of this application are not in dispute. The applicant was a permanent servant of the City of Rangoon Municipal Corporation, being an Assistant Engineer at the time his services were dispensed with by the 1st respondent. It is also not in dispute that prior to dispensing with the services of the applicant no departmental enquiry had been held into the charges of carelessness and negligence in the discharge of his duties by the applicant. It is on these facts that the applicant claims that he is entitled to relief by way of directions in the nature of *certiorari*.

The case put before the Court on behalf of the applicant by his learned counsel is, firstly, that U Tun Ohn is not in law the Administrator of the City of Rangoon Municipal Corporation and that therefore he cannot act on behalf of the said Corporation in determining the services of the applicant. Secondly, it was said on his behalf that, if U Tun Ohn was

lawfully appointed an Administrator and therefore capable of acting on behalf of the City of Rangoon Municipal Corporation he was bound in law to hold a departmental enquiry before finding the applicant guilty of carelessness or negligence in the discharge of his duties. Under the second branch of his case, U Thein for the applicant claims that U Tun Ohn must be deemed to be acting in a quasi-judicial capacity and that therefore he would be amenable to the jurisdiction of this Court exercising its powers of *certiorari*.

In claiming that U Tun Ohn was not at the relevant date the lawful Administrator of the City of Rangoon Municipal Corporation the learned counsel for the applicant relies on section 222 (1) of the Constitution. It was contended by him that the Municipal Corporation of the City of Rangoon (Suspension) Act, 1943, ceased to be an "existing law" within the meaning of the Constitution, and that therefore U Tun Ohn, since the 4th January 1948 at any rate, could not continue to act as Administrator and on behalf of the City of Rangoon Municipal Corporation. A similar contention was raised in Civil Miscellaneous Application No. 5 of 1948 *U Htwe* (a) *A. E. Madari* v. *U Tun Ohn and one* (1) but was rejected by this Court. For reasons given in that case it must be held that U Tun Ohn, who was prior to the 4th January 1948, duly appointed the Administrator of the City of Rangoon Municipal Corporation, remains to this date the lawful holder of that office.

The next point that arises for consideration is whether U Tun Ohn, in dispensing with the services of the applicant, can be said to be acting in a quasi-judicial capacity so as to attract the exercise of *certiorari* by this Court. In Civil Miscellaneous Application No. 5 of 1948, referred to above, the question when a person or a body of persons can be said to act in a judicial or

(1) (1948) Bur. L.R. 541.

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quasi-judicial capacity has been considered at length and it is not necessary here to go into the matter again. It would, for the purposes of the present case, be sufficient to say that the applicant was a municipal officer who under section 34 of the City of Rangoon Municipal Act could be " suspended or dismissed . . . . . for any breach of departmental rules or discipline or for carelessness, incompetence, neglect of duty or whether misconduct, by the authority by whom such officer or servant is appointed." The power of dismissal under section 34 appears to be absolute though it is true certain rules have been made by the Government under the provisions of section 235 (vi) (*c*) of the Act. It is very difficult to see how U Tun Ohn as Administrator of the City of Rangoon Municipal Corporation dismissing a municipal servant for what he considers to be the latter's carelessness or negligence differs in any way from the same U Tun Ohn in his personal capacity dismissing a private servant for a similar ground. In either case it is true that if he was not justified in summarily dismissing the servant, he would lay himself open to a suit for damages. To that extent no doubt the employer, whether he be a public servant or a private citizen, is bound to act according to the law ; but we fail to see that the duty of the employer to act according to the law extends further than this.

In any case, if the applicant's claim on the merits are substantiated he has a complete remedy for wrongful dismissal against either the 1st respondent or the 2nd respondent or possibly against both. That remedy would be more substantial than any remedy by way of *certiorari*.

The application stands dismissed and the rule *nisi* will stand discharged. The applicant will pay the costs of this application. Advocate's fee five gold mohurs.

SUPREME COURT.

AH NYWE (APPLICANT)

v.

COMMISSIONER OF POLICE, RANGOON AND ANOTHER (RESPONDENTS).*

† S.C. 1948

July 27.

Writ of certiorari—Detention under s. 5A (1) (b) of the Public Order Preservation Act—Order of detention should be in writing—Confirmation of a verbal order if sufficient—Return of Respondent.

Held: The order of detention under the Public Order Preservation Act should be in writing. Detention in pursuance of a verbal order is invalid. The mere passing of an order in writing confirming the verbal order as to detention is in effective.

Bo San Lin v. *Commissioner of Police and one*, (1948) Bur. L.R. 372, followed.

The return of the officer in support of detention should state the nature of the unlawful activities or the nature of acts prejudicial to public safety and maintenance of public order, on which the officer had reason to believe that the applicant was guilty.

The Supreme Court will not substitute its own discretion for the discretion invested on an officer under the Statute.

Applicant in person.

Chan Tun Aung (Assistant Attorney-General) for the respondent.

The judgment of the Court was delivered by

E MAUNG, J.—At the hearing of the application made before us by one Ah Nywe on the 26th July 1948 we directed the release of her husband Kan Nyunt who had been detained first in the Tharrawaddy Jail, later in the Insein Central Jail and finally in Rangoon Central Jail, since the 12th December 1947 under the orders of the Commissioner of Police, Rangoon, purporting to have acted in

* Criminal Misc. Application No. 13 of 1948.

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

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E MAUNG, J.

exercise of his powers under section 5A (*1*) (*b*) of the Public Order (Preservation) Act, 1947. We now proceed to give our reasons for the order we then made.

Kan Nyunt, with three other persons, was sent up for trial before the Eastern Subdivisional Magistrate, Rangoon, in Criminal Regular Trial No. 324 of 1947 on the 31st October 1947. On 13th November 1947 the learned Magistrate directed Kan Nyunt to be released on bail in the sum of Rs. 1,000 with two sureties each on an application being made. Thereafter Kan Nyunt appeared before the learned Magistrate on three occasions on bail. The last time he appeared on bail was on the 10th December 1947. Of these three appearances only one was partly effective as far as the proceeding of the trial was concerned. When the case was called again on the 22nd December 1947 Kan Nyunt was absent and the diary entry states: "He is supposed to be detained under section 5, P.O.P.A. by Obo P.S. . . . Issue production for 3rd January 1948." On the date fixed for production Kan Nyunt was again absent and the diary entry states: "I.O. says that he is detained under section 5, P.O.P. Act. Issue production warrant through D.C.P." It is also to be noticed that on that date none of the prosecution witnesses appeared before the Court. On 14th January 1948 the production order appears to have been ignored for the diary entry for that date states that Kan Nyunt was absent and further production warrant was directed to be issued.

This last production order appears to have proved effective for on the 20th January 1948 Kan Nyunt was present in custody before the Court. The witnesses however were absent and the case had to be posted for hearing to the 28th January 1948. On this date two prosecution witnesses presented themselves and were

examined. At the next hearing four more prosecution witnesses appeared and were examined. On three further adjournments three more prosecution witnesses were examined, with the result that by the 18th March 1948 ten prosecution witnesses out of sixteen had been examined. The attendance of the remaining prosecution witnesses has proved difficult to obtain and four adjournments for this purpose proved abortive. Then on the 29th April 1948 the investigating police officer was examined and as a result the Court directed the issue of summons to Station Writer Maung Par of Obo Police Station to be examined as a witness. On the date fixed for Maung Par's examination, Maung Par did not attend; neither was Kan Nyunt produced before the Court. Kan Nyunt was also not produced before the Court on two further adjournments. Maung Par ultimately appeared before the Court on the 15th June 1948 when he requested leave to refer to the General Diary and the police registers before giving evidence. The diary entry of that date specifically mentions: "He is warned to appear on 23rd June 1948." On the latter date Maung Par failed to appear and, as far as the records show, he has failed to appear up to the 9th July 1948 in spite of two subsequent issues of summonses to him.

It is in this state of affairs that Kan Nyunt's wife Ah Nywe filed the application to this Court for directions in the nature of *habeas corpus*. In reply to her application the Commissioner of Police, Rangoon, and the Superintendent of Rangoon Central Jail have filed their affidavits justifying the detention of Kan Nyunt.

In paragraph 3 of the affidavit of the Commissioner of Police he states:

"I say that I received credible information that Kan Nyunt has been acting in a manner prejudicial to the public safety and maintenance of public order, and that it was necessary that he

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should be detained under the provision of the Public Order (Preservation) Act, 1947."

He amplifies this statement in paragraph 4 of the affidavit and states :

"I say that I received several reports concerning Kan Nyunt's unlawful activities from the Police Station Officer, Obo, and having reasonable grounds that his detention is absolutely necessary, I directed Kan Nyunt's detention by a verbal order on the 12th December, 1947."

We do not desire to make the path of officers entrusted with the preservation of public order and ranquillity difficult but the liberty of the citizen and his fundamental right not to be deprived of his personal liberty save in accordance with law are matters of great import. Whilst we do not wish to fetter the lawful exercise of discretion by such officers of powers invested in them by an act of the Legislature, it is, on the other hand, the duty of this Court to see that the infringement of a fundamental right of the citizen by them is in due process of law.

This case can be disposed of shortly on the decision given by us in *Bo Sen Lin* v. *Commissioner of Police and one* (1) and we do not wish therefore to go further into the other aspects of it than to say that we do not consider a vague return as in paragraphs 3 and 4 of the affidavit of the Commissioner of Police, above reproduced, a sufficient return to justify the detention. It appears to us that whilst it would not be right for us to substitute our discretion for the discretion invested in the Commissioner of Police under the Public Order (Preservation) Act, 1947, we are entitled to be informed of the nature of the "unlawful activities" of which the

(1) (1948) Bur. L.R. 372.

Commissioner of Police considered that he had reasonable grounds to believe Kan Nyunt guilty of. We also feel that we are entitled to be told what Kan Nyunt had been doing when he was said to have "been acting in a manner prejudicial to the public safety and maintenance of public order."

As we have already said, this case is concluded by our decision in *Bo San Lin* v. *Commissioner of Police and one* (1). The affidavit of the Commissioner of Police discloses the following facts: Kan Nyunt was taken into custody by the Police Station Officer, Obo Police Station, on the 12th December 1947 under the verbal orders of the Commissioner of Police and was sent to the Tharrawaddy Jail for detention; on the 29th December 1947 the Commissioner of Police for the first time issued an order in writing directing the detention of Kan Nyunt and the order of detention directed that "Kan Nyunt, son of U Myint, No. 40, Hteedan, Obo Police Station, be detained in Tharrawaddy Jail until further orders with effect from the 12th December 1947." On the 9th July 1948, apparently in view of our decision in Bo San Lin's case, the Commissioner of Police purported to issue a further order in writing, the operative part of which reads: "Now, therefore, I hereby confirm the said verbal order of detention", referring to the verbal order made by him on the 12th December 1947. It is to be noticed that in this order Kan Nyunt was directed to be detained in Insein Jail though it appears from the affidavit of the Superintendent of the Rangoon Jail that since 4th June 1948 Kan Nyunt had been in Rangoon Central Jail.

Following our decision in *Bo San Lin's* case we hold that the original arrest of Kan Nyunt on the

(1) (1948) Bur. L.R. 372.

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12th December 1947 was illegal, that the subsequent order of detention of the 29th December 1947 would not legalise the detention of Kan Nyunt ; and that what purported to be a confirmation of the original illegal order by an order in writing on the 9th July 1948 is inoperative.

SUPREME COURT.

MAUNG OHN KYAING (APPELLANT)

v.

THE UNION OF THE GOVERNMENT OF BURMA (RESPONDENT).*

† S.C. 1948

Aug. 1.

[On appeal from the High Court by Special Leave.]

Union Judiciary Act, s. 22—S. 434, Code of Criminal Procedure—Reservation of point of law—Whether can be made after conviction and sentence.

Held: That under s. 434, Code of Criminal Procedure, read with s. 22, Union Judiciary Act, the point or points arising in the course of trial may be noticed in course of trial or almost immediately after the trial is over or even sometimes after the trial is over. The Presiding Judge, either of his own motion or at the instance of a party after the trial is over, may make a reference under s. 434 of the Code of Criminal Procedure, even though he did not reserve any point or points of law for reference at the time of passing the sentence.

Rex v. *Brown*, L.R. (1890) 24 Q.B.D. 357, followed.

Queen Empress v. *Durga Charan*, I.L.R. 7 All. 672; *Queen-Empress* v. *C. P. Fox*, I.L.R. 10 Bom. 176; *In re Kunhammad Haji*, I.L.R. 46 Mad. 382; *King-Emperor* v. *Nga Tin Gyi*, I.L.R. 4 Ran. 488, referred to.

B. W. Ba Tun for the appellant.

San Sein (Covernment Advocate) for the respondent.

The judgment of the Court was delivered by

BA U, C.J.—The point that arises in this appeal for decision is—

> "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 is over if the Judge did not reserve for reference any point or points of law at the time he passed the sentence."

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* Criminal Appeal No. 1 of 1948.

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

S.C. 1948

MAUNG OHN KYAING v. THE UNION OF THE GOVERNMENT OF BURMA.

BA U, C.J.

The appeal is by special leave filed against an order passed by Mr. Justice Aung Tha Gyaw in Criminal Miscellaneous Application No. 9 of 1948 of the High Court.

The appellant was tried by Mr. Justice Aung Tha Gyaw, with Jury, at the Third Criminal Session Trial, under section 302 of the Penal Code. He was, however, found guilty under section 304 of the Penal Code and sentenced to suffer seven year's rigorous imprisonment. He filed an appeal against the conviction and sentence on the Appellate Side of the High Court, but his appeal was rejected on the ground that there was no right of appeal in cases tried by a Judge of the High Court in exercise of criminal original jurisdiction ; whereupon he filed an application under section 22 of the Union Judiciary Act read with section 434 of the Code of Criminal Procedure. The application was rejected by Mr. Justice Aung Tha Gyaw on the ground that, since he had not reserved any point or points of law arising in the course of the trial, section 22 of the Union Judiciary Act did not apply.

The learned Judge did not, however, deal with the question of the applicability or otherwise of section 434 of the Code of Criminal Procedure. Section 22 of the Union Judiciary Act is only an enabling section. It says :

"Subject to the provisions contained in the Code of Criminal Procedure, there shall be no appeal to the High Court from any sentence or order passed or made in any criminal trial before the Court of original criminal jurisdiction, which may be constituted by one or more Judges of the High Court :

Provided that any such Court may reserve any point or points of law for the opinion of the High Court."

It does not provide what is to happen after a reference has been made. It must therefore be read with section 434, Criminal Procedure Code.

Section 434 is in the following terms :

"434. (1) When any person has, in a trial before a Judge of the High Court acting in the exercise of its original criminal jurisdiction, been convicted of an offence, the Judge, if he thinks fit, may reserve and refer for the decision of a Court consisting of two or more Judges of such Court any question of law which has arisen in the course of the trial of such person, and the determination of which would affect the event of the trial.

(2) If the Judge reserves any such question, the person convicted shall, pending the decision thereon, be remanded to jail, or, if the Judge thinks fit, be admitted to bail, and 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."

Now, what is to be observed in sub-section (1) is the use of the language "When any person has * * * been convicted of an offence, the Judge, if he thinks fit, may reserve and refer * * * any question of law * * *."

What is meant by the word "convicted" is not defined in the Code. But the meaning is clear ; it denotes the finding of guilty as distinct from acquittal or discharge on a finding of not guilty. But this word "convicted" is not used in section 305 of the Code. What is used there is the word "judgment." Under the said section, if the Jury are unanimous in their opinion, or when as many as six are of one opinion, and the Judge agrees with them, the Judge shall give judgment in accordance with such opinion. The word "judgment" as used therein, like the word "convicted" is not defined. But having regard to the provisions of sections 366 and 367 of the Code, the word "judgment" means a decision in a trial which decides a case finally, so far as the Court trying the case is concerned, and

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terminating in either a conviction or acquittal of the accused.

Bearing in mind the meaning of these two terms "convicted" and "judgment" as explained above, if we refer to section 434 (1), we shall find what it really means. It means that, if the Jury are unanimous in their opinion, or as many as six are of one opinion, and if the Judge agrees with them, the Judge must convict the accused and sentence him according to law, and thereafter he can reserve a question or questions of law which have arisen in the course of the trial and refer such question or questions for the decision of a Court consisting of two or more Judges.

Now, what is to be noticed is that reference can be made only after the trial is over and that no time is fixed within which such a reference is to be made. Sub-section (2), however, contemplates a reservation and a reference being made almost immediately after the conclusion of the trial, because thereunder the Judge can postpone the passing of sentence on the accused and he can even release him on bail during the pendency of the reference.

Section 434, therefore, deals with two classes of cases :

(1) where a point or points arising in the course of the trial is noticed some time after the trial is over, and

(2) where such a point or points is noticed either in the course of the trial or almost immediately after the trial is over.

This is as it should be ; otherwise no innocent man will have any kind of redress since he has no right of appeal and the trial Court has no right to review its own judgment.

Several High Courts in India in dealing with section 369, Criminal Procedure Code, before its

amendment in 1923 pointed out that the exclusion of the judgment of the High Court from the purview of section 369 could not be read as conferring upon the High Court any such power, and that the Legislature in thus excluding High Court from the purview of the said section had in mind section 434, Criminal Procedure Code, see *Queen-Empress* v. *Durga Charan* (1), *Queen-Empress* v. *C. P. Fox* (2), *In re Kunhammad Haji* (3).

There is no case either in Burma or India where the point now under discussion has been directly dealt with ; but one case in Burma, *King-Emperor* v. *Nga Tin Gyi* (4), which has been brought to our notice by the learned Advocate for the appellant in a way supports our view.

There is also one English case where the same view as ours was held, and the case is the case of *Rex* v. *Brown* (5). The case was dealt with under 11 and 12 Vict. c. 78 (Crown cases Act, 1848), section 1 of which is in material particulars the same as section 434 of the Code of Criminal Procedure. It states, *inter alia*, as follows :

"When any person shall have been convicted of any treason, felony, or misdemeanor, before any court of oyer and terminer or gaol delivery, * * * the judge or commissioner * * * before whom the case shall have been tried, may, in his * * * discretion, reserve any question of law which shall have arisen on the trial for the consideration of the justices of either bench and barons of the exchequer ; and thereupon shall have authority to respite execution of the judgment on such conviction, or postpone the judgment, until such question shall have been considered and decided * * *"

Relying on this section, Lord Coleridge C.J. referred the above case for decision by a Bench of the

(1) I.L.R. 7 All. 672 at p. 674.
(2) I.L.R. 10 Bom. 176 at p. 180.
(3) I.L.R. 46 Mad. 382.
(4) I.L.R. 4 Ran. 488.
(5) L.R. (1890) 24 Q.B.D. 357.

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BA U, C.J.

High Court. In stating his case, the learned Chief Justice said :

"The prisoner was convicted before me upon his own confession at the last assizes for the county of Essex, on an indictment charging him with an attempt to commit unnatural offences with domestic fowls. * * *

On his confession I sentenced him to twelve months' imprisonment with hard labour. Afterwards I was informed that the Court of Criminal Appeal in an unreported case had unanimously held that a duck was not an animal within 24 and 25 Vict. c. 100, s. 61.

If I had been aware of that decision it would have been my duty to defer to it, whatever my own opinion on the matter might be. In the present case, however, there exists a conviction which, if the case of *Reg* v. *Dodd* (unreported) is to be followed, must be quashed. I request "the opinion of the Court of Criminal Appeal whether it should be affirmed or quashed * *."

In delivering the judgment of the Court, the learned Chief Justice, who himself presided over the Court, said:

"In *Reg* v. *Clark* (1) the prisoner pleaded guilty, but the evidence on the depositions did not make out any offence. The decision was that of a strong Court, which seems to have held that because he pleaded guilty, and pleaded guilty to that which, if he had known it, was not an offence, and not supported by any evidence of an offence, nevertheless he must be taken to have known the law, and his plea of guilty estopped him from afterwards disputing the conviction. Cockburn C.J., delivered a very short judgment, saying : 'In this case we have no jurisdiction. It was not a question arising on the trial, for the man pleaded guilty, and he must be taken to know the law. The power to state a case for the consideration of this Court only applies to questions of law which arise at the trial.'

If it is intended by that judgment that because a man pleads guilty, * * * that he is absolutely concluded for ever after from taking any point upon it, and that the judge who tries him cannot state a case for the opinion of this Court, we respectfully differ from that view, * * *

(1) L.R. 1 C.C.R. 54.

We are of opinion, first, that we have jurisdiction to entertain this case, and, secondly, that upon the facts, and clearly upon the general law, the boy was properly convicted upon his own confession of an attempt to commit an unnatural offence. * * * "

For all these reasons, we answer the question propounded in the affirmative, and we set aside the order passed by Mr. Justice Aung Tha Gyaw in Criminal Miscellaneous Application No. 9 of 1948 of the High Court. We remit the case to the learned Judge for disposal of the application filed by the appellant in the light of the above observations.

SUPREME COURT.

† S.C. 1948

Aug. 27.

CHAS. R. COWIE & CO. (APPLICANTS)

v.

THE GOVERNMENT OF THE UNION OF BURMA (RESPONDENTS).*

Direction in the nature of Mandamus—*When granted—Another effective remedy available—Right of a party to War Risk Insurance under the War Risk Insurance Rules made under Defence of Burma Act—Whether right under contract or statutory right—Effective remedy of the applicant by suit.*

Held: It is settled law that if a specific remedy exists at law and remedy is not less convenient, beneficial or effective, the writ of *mandamus* or direction in the nature of the writ of *mandamus*, which cannot be claimed by applicants *ex debito* justice, will not be granted.

The Queen v. *Commissioner of Inland Revenue*, L.R. (1884) 12 Q.B.D. 461; *The Queen* v. *Charity Commissioners of England & Wales*, L.R. (1897) 1 Q.B.D. 407; *Rex* v. *Dymock*, L.R. (1915) 1 K.B. 147, followed.

Manik Chand Mahata v. *The Corporation of Calcutta*, I.L.R. 48 Cal. 916 at p. 924, dissented from.

The nature of the writ of *mandamus* is explained in *Murray* v. *Wellington*. (1938) Ran. L.R. 83.

Whether the right of the applicant for compensation under War Risk Insurance Rules made under the Defence of Burma Act, arises *ex contractu* or by operation of the Statutory Rules, the principle to be applied is the same that a person shall not take advantage of his own failure or own wrong.

Rainey v. *The Burma Fire & Marine Insurance Co., Ltd.*, I.L.R. 3 Ran. 383, referred to.

Raymond v. *Minton*, L.R. (1866) 1 Exch. 244, followed.

As the applicant claims that the Board of War Risk Insurance is still in existence he has an effective remedy by way of a suit for compensation and therefore issue of direction in the nature of *mandamus* cannot be ordered.

Kyaw Din for the applicants.

Chan Htoon (Attorney-General) for the respondents.

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* Civil Misc. Application No. 37 of 1948.

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

S.C. 1948

CHAS. R. COWIE & CO v. THE GOVERNMENT OF THE UNION OF BURMA.

The judgment of the Court was delivered by

E MAUNG, J.—The applicants seek to have directions in the nature of *mandamus* issued to the respondents "to carry out the provisions of the law as contained in Rule 24 of the War Risks (Goods) Insurance Rules, 1941, by constituting a Board of Management of the War Risks (Goods) Insurance Scheme.

The War Risks (Goods) Insurance Rules, 1941, were promulgated on the 20th December 1941, by the Governor of Burma exercising powers vested in him by section 2 of the Defence of Burma Act, 1940. Under these Rules it was made compulsory for certain persons to insure their goods with the Board of Management of the War Risks (Goods) Insurance Scheme, and by Rule 24 (1) was constituted the Board of Management "which shall under that name be a corporation sole with perpetual succession and a common seal and which may sue and be sued under that name."

Under Rule 24 (2) the Governor was empowered to appoint from time to time a Chairman and such number of other members not exceeding seven in the exercise of his individual judgment, and in exercise of that power and by Notification No. 306 of the 20th December 1941 the Governor appointed the first Chairman and six other members to the Board.

For the purposes of this application it may be assumed that the applicants, who had been carrying on business at Rangoon, in pursuance of the Rules became participants in the Insurance Scheme and paid all the premiums due under the said Scheme up to the end of March 1942.

On the 20th February 1942, when Rangoon was threatened with enemy occupation, the applicants evacuated from Rangoon and later, on the re-occupation

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of Burma by the lawful Government, they gave notice in writing to the Board of loss of or damage to goods insured by them under the Scheme and made a claim for payment of compensation. It is averred on behalf of the applicants—and for the purposes of this application, may be assumed—that the claim in writing was made on the 27th May 1947. It may also be assumed that the claim was duly registered by the Board which afterwards examined on the 5th July 1947 a witness called by the applicants in support of their claim. The enquiry was then adjourned, and it may again be assumed for the purposes of the present application that on the 24th September 1947 the applicants were told on behalf of the Board that under orders from the Government the meetings of the Board had been temporarily suspended and that the hearing of the claims for which notice had already been issued would not therefore take place on the dates intimated but that revised dates of hearing would be communicated to the applicants by the Board on receipt of further orders from the Government.

On the 5th May 1948 a notice was issued under the authority of the Ministry of Finance and Revenue in the following terms:

> "The public is hereby informed that with the expiry of the Defence of Burma Act, 1940, the Board of Management of the War Risks (Goods) Insurance Scheme, constituted under Rule 24 of the War Risks (Goods) Insurance Rules, 1941, has ceased to exist with effect from the 31st July 1947, the date on which the said Act expired."

It is in these circumstances that the applicants sought the assistance of this Court by way of directions in the nature of *mandamus* to be issued to the respondents.

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The nature of the prerogative writ of *mandamus* has been considered in some detail in *Murray* v. *Wellington* (1). Accordingly all that need be said here is that it is a writ whereby the Court empowered to issue it, directs the person to whom it is addressed to perform some public or quasi-public legal duty which he has refused to perform and the performance of which cannot be enforced by any other adequate legal remedy. It is settled and not open to dispute that if specific remedy exists at law and that remedy is not less convenient, beneficial or effective the writ of *mandamus* or directions in the nature of *mandamus*, which cannot be claimed by the applicants *ex debito justice*, will not be granted.

In *Manick Chand Mahata* v. *The Corporation of Calcutta and one* (2) a single Judge of the Calcutta High Court, it is true, said that " specific and adequate remedy " refers not to a general right of suit which must, unless expressly barred, always exist, but to some specific remedy expressly given by a particular Act. For this proposition the learned Judge gives no authority whatsoever, and so far as the learned Judge may be taken to have said that the existence of the right of suit would not bar the remedy by way of *mandamus* there is a long line of authorities consistently against him.

In *Queen* v. *The Commissioners of Inland Revenue* (3), Brett M.R. said : " " Where there is no specific remedy by which justice can be done, the Court will grant a *mandamus*, but where there is a specific remedy by which the subject will get justice by a judicial decision of the Courts, then it is within the reason of the rule that if there is such a remedy a *mandamus* ought not to issue." The learned Master of the Rolls made it clear

(1) (1938) Ran. 83. (2) I.L.R. 48 Cal. 916 at p. 924.
(3) L.R. (1884) 12 Q.B.D. 614.

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that for a remedy to be specific within the meaning of that rule it would be enough if the remedy was a remedy in law which the petitioner is entitled to claim as of right. Bowen L.J. agreed with Brett M.R. that a petition of right is such a remedy that the possibility of it would exclude *mandamus*.

In *Queen* v. *Charity Commissioners for England & Wales* (1) Wright and Bruce J.J. taking the view that the applicant could have sought his remedy within the ordinary jurisdiction of the Courts, either by way of an action for an injunction or by way of an application for a declaration of a right which could be claimed, refused to grant the writ of *mandamus*.

In *Rex* v. *Dymook* (2) Darling J. said: "There is another ground on which the application fails, namely that *mandamus* is not the only remedy open to the applicant. If he is entitled to the office of sexton as a freehold for life he can bring an action to recover the fees."

It has been strenuously claimed on behalf of the applicants that section 4 of the Defence of Burma (Repealing) Act, 1947, operates to keep alive, in spite of the expiry of the Defence of Burma Act, 1940, the Rules relating to the War Risks (Goods) Insurance Scheme and that consequently the claim made by the Ministry of Finance and Revenue that the Board has ceased to exist with effect from the 31st July 1947 is in law incorrect. It has also been claimed on behalf of the applicants that the power under Rule 24 (2) to appoint a Chairman and members to the Board from time to time imposes a duty and that this duty can and should be enforced by directions in the nature of *mandamus*.

It must then be first considered in this case whether there is available to the applicants an alternative specific remedy such as would exclude the issue of directions in

(1) L.R. (1897) 1 Q.B. 407. (2) (1915) 1 K.B. 147.

the nature of *mandamus*. In considering this point it must be borne in mind that at the root of the applicants' case lies the claim that the Board of Management of the War Risks (Goods) Insurance Scheme has not, as claimed on behalf of the Government of the Union of Burma, ceased to exist with effect from the 31st July 1947 and that the body corporate under that name and title continues its existence to this day.

It is clear therefore that, assuming the applicants' contention that the Rules persist and the Board remains in existence to this day to be correct in law, the discretionary remedy by way of directions in the nature of *mandamus* will have to be withheld if the applicants can have an effective alternative remedy at law.

On behalf of the applicants it is then said that the right to compensation for loss or damage to goods insured under the Scheme cannot arise out of contractual relations between the Board and the applicants but that the right accrued under and was treaceable exclusively to the statutory Rules made under section 2 of the Defence of Burma Act, 1940. It may be so, but the truth of the status theory of the origin of the right of compensation of the insurer under the Scheme is not so obvious. A contract has been defined in section 2, clause (*h*) of the Contract Act as an agreement enforceable by law, and in clauses (*a*), (*b*) and (*g*) of the same section are defined "proposal", "promise" and "agreement". Is it possible to say that the relationship, arising out of the acceptance of the obligation for insurance under Rule 17 (1) of the War Risks (Goods) Insurance Rules, 1941, is not a contract? Moreover the operation of sections 14 and 25 (*2*) of the Contract Act cannot be ignored in this connection. However, for reasons which will become apparent later, this point does not need to be further considered.

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The right to compensation whether *ex contractu* or as the creation of the Rules is admittedly dependent on the conditions precedent specified in Rule 19 (1) being complied with. It is said on behalf of the applicants, and may be assumed for the purposes of this application, that these conditions precedent have all been complied with.

It is next said on behalf of the applicants that there is another condition precedent in Rule 19 (2) (*d*) on the fulfilment of which their right of suit to enforce their claim to compensation is dependant. It was said that this condition precedent requires for its fulfilment an Act on the part of the Board and that the act was one which the Board was under a duty to perform and that the Board could not perform that act except through the human agencies of a Chairman and such number of members as the President of the Union is empowered and under a duty to appoint.

It would appear as if this part of the case would make it necessary for the Court to adjudicate on the question whether the Rules persist and the Board remains in existence, as claimed by the applicants, or not. A little reflection, however, would show that this necessity does not arise. It is not clear that Rule 19 (2) (*d*) enunciates a condition precedent to the accrual of a right of suit. A similar provision appearing in policies of insurance had formed the subject of consideration in *Rainey* v. *The Burma Fire and Marine Insurance Co., Ltd.* (1) where it has been said that the provision merely provides for the barring of a right which has already accrued. However, it is not necessary to pursue this matter further.

It is immaterial whether Rule 19 (2) (*d*) enunciates a condition precedent or not; neither is it material whether the condition precedent, if it is one, arises

(1) 3 Ran. 383.

ex contractu or by the operation of the statutory Rules. Assuming everything in favour of the applicants, it must be remembered that the principle which finds form in sections 53 and 67 of the Contract Act is one of universal application and is in substance true not only of the Common law but of natural justice and therefore of all civilized law.

As applied to contractual relations, the promisee who neglects or refuses to afford the promisor reasonable facilities for the performance of his promise thereby excuses the non-performance by the promisor, and the promisor who is prevented from performing his promise is, in spite of his non-performance, entitled to compensation from the promisee for the loss sustained in consequence of the non-performance of the contract.

In relations other than *ex contractu* the principle is clear that a man shall not take advantage of his own wrong. No man can complain of an impossibility for which he and he alone has been responsible ; *Nullus commodum capere potest de injuria sua propria*. As Pollock C.B. with robust commonsense said in *Raymond* v. *Minton* (1), " It is evident that the master cannot be liable for not teaching the apprentice if the apprentice will not be taught." No man can be called upon to perform an impossibility and if the impossibility arises out of the defendant's own act the non-performance of the conditions thus brought about clearly cannot be taken advantage of by the defendant.

It follows therefore that if, as claimed on behalf of the applicants, the Rules persist and the Board remains in existence, they would have a complete and effectual remedy at law by way of a suit for compensation in the appropriate Court. On the other hand if, as claimed on behalf of the respondents, the Rules are no longer in

(1) (1866) L.R. 1 Exch. 244.

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force and the Board has ceased to exist, the applicants clearly cannot seek to have the Chairman and other members appointed to a defunct Board. In either contingency the applicants have not established a case for the issue by this Court of directions in the nature of *mandamus*.

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

SUPREME COURT.

U PIT (APPLICANT)

v.

THEGON VILLAGE AGRICULTURAL COMMITTEE AND TWO OTHERS (RESPONDENTS).*

† S.C. 1948

Sept. 1.

Direction in the nature of writ of certiorari—*Disposal of Tenancy Act, 1948 as amended by Act XII of 1948—Village Agricultural Committee constituted under the Act—Quasi-judicial body—Amenable to the jurisdiction of the Supreme Court if the acts of the Committee are in excess of its jurisdiction or against natural justice.*

Held: Village Agricultural Committees constituted under the Tenancy Disposal Act, 1948 as amended by Act XII of 1948 are quasi-judicial bodies amenable to the jurisdiction of the Supreme Court in the exercise of its powers to issue directions in the nature of *certiorari*.

U Htwe v. *U Tun Ohn and one*, (1948) Bur. L.R., 541, followed.

As statutory bodies exercising quasi-judicial functions, the Village Agricultural Committees cannot act in excess of their powers or contrary to the provisions of the Act and rules. These Committees must also act according to rules of natural justice which require *inter alia* that:

(1) a person cannot be judge of his own acts and can not judge a matter in which he is interested,

(2) the judges must act in good faith and give an opportunity to parties of being heard and stating their own case and view point.

If any of these rules and principles are violated by the Committees the Supreme Court will quash the proceedings by issue of directions in the nature of *certiorari*.

Dr. U Thein for the appellant.

Chan Htoon (Attorney-General) for the respondents.

The judgment of the Court was delivered by

KYAW MYINT, J.—In this application the proceedings of the 1st respondent Committee are sought to be quashed in exercise by this Court of its powers to issue directions in the nature of *certiorari*.

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* Civil Misc. Application No. 18 of 1948.

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

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The Disposal of Tenancies Act, 1948, as amended by Amending Act No. XII of 1948, empowers the President to provide for regulating or controlling the lease of any agricultural land by any person or class of persons holding such land to any tenants or class of tenants. The Act, however, was made expressly not applicable to any agricultural land or lands not exceeding 50 acres in area and "in the possession of a person who is engaged in the cultivation of the same land with his own hands as his principal means of subsistence". In exercise of the powers vested in the President by section 5 of the Act, the Disposal of Tenancies Rules, 1948, were made and under Rule 2 thereof it was prescribed that a Village Agricultural Committee shall be constituted in each village tract in such manner as the Government may direct. To such committees were entrusted the functions of regulating or controlling the leases of agricultural lands falling within their respective areas.

These committees are therefore statutory bodies invested with the power to determine the rights of claimants to leases of agricultural land within their areas and are under a duty in exercising that power to act in accordance with the terms of the Act and the Rules made thereunder. Accordingly, they come within the reason of the rule enunciated by this Court in *U Htwe* v. *U Tun Ohn* (1) and would be quasi-judicial bodies amenable to the jurisdiction of this Court in exercise of its powers to issue directions in the nature of *certiorari*.

It is clear that as statutory bodies exercising quasi-judicial functions these committees cannot act in excess of the powers which are vested in them by the statutory authority under which they are created. Nor can they act contrary to the provisions of the statute or rules.

(1) (1948) Bur. L.R. 541.

In addition to this limitation on their powers there is also another limitation within which these committees as quasi-judicial bodies must act. In all their proceedings they must comply with the requirements of rules of " natural justice ". What, then, are rules of " natural justice "?

It is a rule of universal application and therefore of natural justice that no man can be a judge in his own cause. A person who has an interest in the matter arising for decision cannot constitute himself a judge at the hearing. Natural justice also requires that those entrusted with the power of adjudicating upon any dispute must act in good faith and give the parties an opportunity of being heard and stating their case and their view-point.

In the absence of any specific statutory provision to the contrary applicable to the proceedings of a quasi-judicial body, it is entitled to obtain information in any way it considers suitable, provided that those who are parties to the controversy before it are given a fair opportunity to correct or contradict any relevant statement or view to their prejudice.

In the case now before us the applicant had admittedly been a tenant of the land described in paragraph 2 of his application for some years. The 1st respondent Committee has withdrawn this land from the applicant and leased it to the 2nd and 3rd respondents.

Under Rule 7 of the Disposal of Tenancies Rules, 1948, a tenant who is in occupation of agricultural land which he cultivated in the agricultural season, 1947-48 shall be permitted to continue to cultivate such agricultural land for the agricultural season, 1948-49. The only restriction on the rights thus given to such a tenant is imposed by Rule 10 (2) which empowers the Village Agricultural Committee to withdraw such land

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or any portion thereof from the occupation of such tenant where there is sufficient ground to believe that he would be unable to cultivate it.

In their order the 1st respondent Committee state somewhat vaguely that the applicant has only two men for the purpose of cultivating the land. The applicant in his affidavit states that the 1st respondent Committee made no enquiry and gave him no opportunity of representing his case. This allegation is not denied by the 1st respondent Committee.

The applicant also states that the 2nd respondent Maung Tun Lwin is a son of U E Maung, who appears to be the Secretary of the Committee. This allegation is not denied and in fact U Toe Lone, the Vice-President of the Committee, merely states that the instructions issued by the Government do not prohibit the allotment of land to any relatives of the members of the Committee.

The fact that the 1st respondent Committee failed to hold an enquiry as to whether the applicant would be able to cultivate the land and the fact that one of the members of the Committee was at least indirectly interested in obtaining the lease for his son are, in our opinion, sufficient grounds for holding that the order complained of is contrary to law.

We order that the rule *nisi* in this case be made absolute and that the order of the 1st respondent Committee be quashed. The respondents will pay the costs of the application to the applicant. Advocate's fee five gold mohurs.

We should add that we have also heard the learned advocates representing the various parties in the series of cases relating to Village Agricultural Committees on the following question :

"Whether, having regard to the provisions of the Constitution, the Tenancy Standard Rent Act, 1947, as

amended by Act No. XIII of 1948, and the Disposal of Tenancy Act and Rules made thereunder, are valid?" We have not however found it necessary in this case to decide the question.

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Sept. 22.

MAUNG HLA GYAW (APPLICANT)

v.

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

Public Order (Preservation) Act, 1947, s. 5A—Preventive Justice—Nature of—Rights and duties of the courts and extent of enquiry they would hold in an application for direction in the nature of habeas corpus.

Held: Preventive justice which consists in restraining a man from committing a crime which he may commit but has not yet committed or from doing some act injurious to the members of the community which he may do but has not yet done, is common to all systems of jurisprudence; and as preventive justice proceeds upon the principle that a person should be restrained from doing something which, if free and unfettered, it is reasonably probable that he would do, it must in all cases necessarily proceed to some extent on anticipation as distinct from proof.

Commissioner of Police acting under s. 5A of the Public Order (Preservation) Act, 1947, cannot be required to act on such materials only as *would be sufficient for conviction at a criminal* trial but his power to detain under the Act is not absolute. Supreme Court can enquire into the legality or sufficiency of any decision of a judicial or quasi-judicial body dealing with the liberty of subjects.

In proceedings in the nature of *habeas corpus* the Supreme Court does not exercise appellate jurisdiction. Its function is simply to see whether the authority detaining a person has or has not acted within the limits of its power. For this purpose it must examine the competency of the authority and also consider whether it had before it such materials as would justify in law to arrive at the conclusion it did, and court may for the purpose of satisfying itself require to be informed of the nature of the materials on which the authority purported to act. The Court can enquire even into the *bona fides* of the authority and genuineness of the order itself.

Rex v. *Secretary of State for Home Affairs*, (1942) 2 K.B. 14 at p. 22, followed.

Though the original order of detention is legal in its inception the court can consider whether because of events subsequently supervening the continuance of the detention is legal or justifiable.

Where the authorities are entrusted with the power to direct detention under the Act for an indefinite—it may be for a prolonged—period, of a citizen, the duty of the authorities is to sift such materials as are before them with care and to form a definite opinion before they take action.

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* Criminal Misc. Application No. 19 of 1948.

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

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Aung Min for the applicant.

Chan Htoon (Attorney-General) for the respondents.

The judgment of the Court was delivered by

E MAUNG, J.—This application for directions in the nature of *habeas corpus* raises directly some points not covered by previous decisions of this Court.

The prisoner whose release is sought in these proceedings was taken into custody on the 20th July 1947 and has since been detained at the Jail Annex, Insein. This detention is sought to be justified on behalf of the respondents as having been made under section 5A of the Public Order (Preservation) Act, 1947. In the return made to the summons to show cause on behalf of the Commissioner of Police, it is said that the Commissioner of Police, who had been authorized under section 7 of the Public Order (Preservation) Act to exercise powers under section 5A of the Act, had received credible information that the prisoner had been acting in a manner prejudicial to public safety and the maintenance of public order and that the Commissioner of Police was satisfied that it was necessary that the prisoner should be detained under the provisions of section 5A of the Act. The return proceeds to recite four of the unlawful activities which the prisoner was alleged to have been engaged in.

The return was traversed on behalf of the prisoner in several respects. The order of detention in writing, a copy of which was filed with the return made by the respondents, has been challenged as not being in existence on the 20th July 1947 and it was claimed that the warrant of detention purporting to bear that date is a recent fabrication coming into existence only in July 1948. This is a very grave allegation ; if true, it

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would justify the immediate release of the prisoner. But we are satisfied that there is no substance in this allegation. Apart from the inherent improvability of senior and responsible officers like the Commissioner of Police and the Superintendent of Jail being parties to such fabrication, the learned Assistant Attorney-General who appears for the respondent has on definite instructions repudiated the correctness of the allegation made on behalf of the prisoner in this respect.

The detention of the prisoner in this case is under the Public Order (Preservation) Act, 1947. Section 5A, which is the relevant provision of the Act, *inter alia* enables the President of the Union and other officers empowered by him to direct the detention of any particular person if the President or such officer is satisfied that "with a view to preventing him from acting in a manner prejudicial to the public safety and the maintenance of public order it is necessary so to do." The detention is not for any specified period and it may be indefinite and prolonged in duration.

Preventive justice which consists in restraining a man from committing a crime which he may commit but has not yet committed or from doing some act injurious to the members of the community which he may do but has not yet done, is common to all systems of jurisprudence; and as preventive justice proceeds upon the principle that a person should be restrained from doing something which, if free and unfettered, it is reasonably probable that he would do, it must in all cases necessarily proceed to some extent on anticipation as distinct from proof. It follows, therefore, that it cannot be required of the Commissioner of Police when acting under section 5A of the Public Order (Preservation) Act that he must act on such materials only as would be sufficient for conviction at a

criminal trial. On the other hand, his power to detain a person under the Act is not absolute. Whatever the legal position under a similar enactment may be elsewhere, it cannot within the Union be said that administrative plenary discretion is vested in the officer empowered under the Act and that it is for him without question to decide whether he has reasonable grounds and to act accordingly. No legislative provisions in the Union can validly exclude this Court from enquiring into the legality or the sufficiency of any decision of a judicial or quasi-judicial body.

Even in *Rex* v. *Secretary of State for Home Affairs* (1), which reaches the high water mark in upholding the doctrine of State necessity, Lord Greene M.R. has said :

> "It is clear that there may be many matters into which the court can and will inquire under the section if occasion arises, for example, the *bona fides* of the Secretary of State, the genuineness of the detention order itself, and the identity of the applicant with the person referred to in the order. Similary, if, for example, a regulation empowered the Home Secretary to detain any person who was in fact an alien, the court could inquire into the nationality of the applicant, since, if it transpired that he was not in fact an alien, his detention would be *ultra vires*."

The qualifying words " for example " make it clear that the Master of Rolls even in this case did not intend the list of matters open to examination by the Court to be exhaustive.

As we have already said before in *Daw Khin Tee* v. *U Chan Tha and one* (2) this Court is not exercising appellate jurisdiction in proceedings in the nature of *habeas corpus*. Its functions are generally to see whether the authority which has directed the detention of a person has or has not acted within the limits of its powers. For this purpose, it must examine the

(1) (1942) 2 K.B. 14 at p. 22. (2) Criminal Misc. Application No. 14 of 1948.

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competency of that authority to make the order complained of. It can also consider whether the authority had before it such materials as would in law justify it to arrive at the conclusion it did; in doing so the Court will bear in mind that action under the Public Order (Preservation) Act is one in the nature of administration of preventive justice and that, as has already been said before, action under the Act has necessarily to be to some extent on anticipation as distinct from proof. The Court may for the purpose of satisfying itself that the authority, whose action has been challenged, had materials before it to arrive at its conclusion, require to be informed of the nature of such materials.

In answer to some of the allegations in the return made by the Commissioner of Police it is said on behalf of the prisoner that whatever may have been the position on the 20th July 1947 when the prisoner was taken into custody and his detention ordered, circumstances have since changed and that by the 4th August 1948 when the application for direction in the nature of *habeas corpus* was filed in this Court, the continued detention of the prisoner on the grounds alleged could no longer be justified. These allegations and counter allegations give rise to the question if, assuming the detention to be legal in its inception, the Court can consider in these proceedings whether because of events subsequently supervening the continuance of the detention is legal or justifiable. On principle, it is clear that the Court must have that power. In an application for directions in the nature of *habeas corpus* the return must state not merely the cause of the caption or the original arrest but also the cause of detention at the date the return is made. If by the time the return is made, either because of lapse of time or because of events supervening, the continued

detention becomes illegal, there can be no doubt that in spite of the legality of the original arrest and detention in its inception, the Court has the power and is under a duty to direct the release of the prisoner.

From what has been said earlier in this judgment, it is clear that the formal legality of the original arrest and detention in this case cannot be questioned. There was an order in writing made on the day the prisoner was taken into custody and that order in writing was made by a person competent to make it. All the formal requisites of such an order are present.

Coming to the merits of the case, the arrest and detention were sought to be justified on the allegations (*a*) that the prisoner together with other persons, who also had been taken into custody about the same time as the prisoner, had been engaged in a murder plot resulting in what is known as the State Assassination wherein several Ministers of the Government of Burma and others were murdered on the 19th July 1947 ; (*b*) that the prisoner was directly and indirectly concerned in the loss of arms and ammunition from the Base Ordnance Depôt, Botataung, in or about the month of July 1947 ; (*c*) that the prisoner and two others, who also have been detained under the Public Order (Preservation) Act, were found on the 6th July 1947 in a jeep in which were found a revolver with ammunition—the revolver and ammunition not being covered by any license under the Arms Act ; and lastly (*d*) that the prisoner is " closely connected with Bo Yan Naing and other ex-Burma Defence Army members (*ye-baw haung ahpwe*) who are actively collecting arms and ammunition to subvert the Government established by law."

Applying the principles already enunciated relating to the administration of preventive justice and the functions of the Court in cases where the detention

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was lawful in its inception though supervening events made no longer justified the continuance of the detention, it appears to us that the allegations relating to the State Assassination and the finding of a revolver and ammunition in a jeep, assuming they justified the original arrest, would not justify the continued detention of the prisoner. It would be well if attention is drawn to the fact that the Public Order (Preservation) Act is not intended to punish a person by indefinite and prolonged detention for a crime he has committed ; it is intended to prevent the commission of a crime endangering public safety and public order. For the revolver and ammunition found in the jeep the prisoner had been sent up for trial under section 19 (f) of the Arms Act and, whether it was for lack of evidence or for technical reasons, that criminal trial had come to an end on the 10th March 1948 with an order of discharge. The allegation of the prisoner's complicity in the loss of arms and ammunition at the Base Ordnance Depôt in or about July 1947 may, *prima facie*, be a good return justifying detention but the Commissioner of Police either because the materials before him were not sufficient for him to form an opinion one way or the other or because he had not attempted to come to a definite conclusion, has been content in the return to allege that the prisoner was "*directly or indirectly concerned in the loss, etc.*" In the events that follow in this case, this is not a matter of importance but we feel we cannot too strongly impress on those who are entrusted with powers to direct the detention, for an indefinite—it may be for a prolonged—period, of a citizen that it is their duty to sift such materials as are before them with care and to form a definite opinion before they take action.

The last ground stated in justification of the detention of the prisoner, however, appears to be

sufficient for the dismissal of the application. The allegation made by the Commissioner of Police that the prisoner was closely connected with Bo Yan Naing and other ex-Burma Defence Army members has not been and cannot be seriously challenged. The admitted incident of the 6th July 1947 when the prisoner Maung Lun Bye was found in the company of Bo Yan Naing in a jeep wherein were also a revolver and ammunition not covered by any license, is sufficient proof, if need be, of the close association between the two. In *Tinsa Maw* v. *The Commissioner of Police and one* (1) we have upheld the detention of Bo Yan Naing under section 5A of the Public Order (Preservation) Act. Given the close association between Bo Yan Naing and Maung Lun Bye and given also the engagement of Bo Yan Naing in subversive activities, it cannot possibly be said that the order of detention, which is a measure of preventive justice, is made other than in anticipation in good faith by the Commissioner of Police of the likelihood of Maung Lun Bye's participation in these activities of Bo Yan Naing and his colleagues.

The application for directions in the nature of *habeas corpus* must stand dismissed.

(1) Criminal Misc. Application No. 15 of 1948 of this Court.

SUPREME COURT.

† S.C. 1948

Oct. 6.

MA AYE KYI (APPLICANT)

v.

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

Order in the nature of habeas corpus—*Detention under Public Order (Preservation) Act—Arrest in Insein and subsequent order by the Commissioner of Police, Rangoon, for detention whether illegal.*

Held: Under Notification No. 519 the power of the Commissioner of Police, Rangoon, to order detention under s. 5A of the Act is limited to residents of Rangoon or the activities must be within the Town of Rangoon. When a person was not a resident in the Town of Rangoon or his activities do not constitute a menace to public safety or public order in the Town of Rangoon, the Commissioner of Police, Rangoon, has no jurisdiction to order detention. If such a person is arrested in Insein District and later brought to Rangoon, the Commissioner of Police cannot order his detention.

A verbal order of detention cannot later be confirmed by a written order of detention. Such orders are illegal.

Bo San Lin v. *Commissioner of Police*, (1948) Bur. L.R. 372, followed.

When a person has been tried for an offence in a court of justice and is acquitted he cannot be arrested on suspicion of committing the same offence under Public Order (Preservation) Act. It would be an abuse of the provisions of the Act.

Applicant in person.

Chan Tun Aung (Assistant Attorney-General) for the respondents.

The judgment of the Court was delivered by

E MAUNG, J.—We are satisfied that the order of detention made by the Commissioner of Police in this case cannot be supported. The applicant's

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* Criminal Misc. Application No. 31 of 1948.

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

husband Maung San Mya, who admittedly is a permanent resident of Thamaing, in Insein District, was taken into custody on the 19th February 1948, by police officers and brought over to Kamayut Police Station which is within the jurisdiction of the Rangoon Town Police. It is quite apparent from the record that immediately after he arrived at the police-station at Kamayut, the Commissioner of Police made a verbal order directing his detention under section 5A of the Public Order (Preservation) Act, 1947. This verbal order was followed, seven days later, by an order in writing which directed that Maung San Mya, son of U Po Myint, be detained in Insein Central Jail until further orders with effect from the 19th February 1948. We find, however, that the man was detained in the Town Lock-up till the 8th March 1948, when he was taken to the Insein Jail. No explanation for this delay in despatching Maung San Mya to Insein Jail has been placed before us by the Assistant Attorney-General who appears on behalf of the Commissioner of Police.

The Commissioner of Police in taking action under section 5A of the Public Order (Preservation) Act is exercising powers which have been delegated to him by the President under section 7 of the Act. His authority under this delegation is limited. By Notification No. 519 of the Home Department, dated the 4th June 1947, the Commissioner of Police was authorized to exercise powers under section 5A of the Act within his jurisdiction. His jurisdiction extends only to the Town of Rangoon. To give him jurisdiction to take action against a person, either that person must, in our opinion, be resident within the Town of Rangoon, or that his activities which constitute a menace to public safety or public order must have been carried on within the Town of Rangoon. In this case it is clear

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E MAUNG, J.

from the return made by the Commissioner of Police that neither condition is fulfilled.

In the first place it has been suggested on behalf of the Commissioner of Police by the learned Assistant Attorney-General that Maung San Mya having been brought in custody to a police-station within the Rangoon Town jurisdiction, the Commissioner of Police was justified in taking action under section 5A of the Public Order (Preservation) Act. We cannot understand how by bringing a person from outside his jurisdiction under arrest, the Commissioner of Police can give himself jurisdiction to act under the Act. It is, in our opinion, an unjustifiable extension of his jurisdiction. Further, the return does not state that the activities which are ascribed to Maung San Mya were carried on within the Town of Rangoon ; it is vaguely said in clause (*i*) of the return that Maung San Mya and others were engaged in unlawful activities which resulted in the theft or misappropriation of civil supplies goods while in transit from Rangoon to the districts. It is clear from this return that the Commissioner of Police has not been able to make up his mind where the loss, if any, took place. In other words, he acted on mere suspicion that somewhere within the Union, either at Rangoon or elsewhere, civil supplies goods have been lost, and that Maung San Mya, a person who has been ordered to be detained, had something to do with the loss. This suspicion, in our opinion, is not enough to justify the Commissioner of Police to act in the manner he did. We have held repeatedly in cases under the Public Order (Preservation) Act that the authority who acts under section 5 or section 5A of the Act has to act in a judicial manner.

In *Bo San Lin* v. *Commissioner of Police* (1) we have already considered the effect of a verbal order of

(1) (1948) Bur. L.R. 372.

detention followed later by a written order of detention, and we have there laid down that the original order as well as the subsequent order of detention would not in any way legalize the detention of a person. That decision in itself would be sufficient to justify our directing the release of Maung San Mya in this case.

It is not necessary for us to go deeply into the further question whether on the merits the detention of Maung San Mya was justified or not. The return states that Maung San Mya, if left at liberty, would be a menace to civil supplies goods. This is not what section 5A of the Public Order (Preservation) Act is intended for. That section speaks of a person whose activities are detrimental to public safety or public order. Further, the materials before us appear to suggest in the detention of Maung San Mya's persecution in respect of an alleged offence for which the authorities had not been able to convict him before a Court of competent jurisdiction. Maung San Mya and others were arrested for alleged offences under sections 409, 414 and 411 of the Penal Code in respect of civil supplies goods valued at Rs. 16,329. They were sent up for trial before Mr. Justice Thaung Sein of the High Court and a Jury, in Criminal Sessions Trial No. 2 of 1948. The accused were all acquitted, and the verdict of the Jury in each case was unanimous. Moreover, as it appears from the summing-up of the learned Judge, even the approver could not say anything against Maung San Mya. Following this acquittal on the unanimous verdict of "not guilty" by the Jury on the 6th February 1948, Maung San Mya was again arrested on the 19th February 1948, and, as is clear from the return, his arrest was sought to be justified for the same offence. This, in our opinion, is an abuse of the provisions of the Act.

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We direct that Maung San Mya, who is at present before us to-day on bail, be released. The bail bond which has been entered into on his behalf will be cancelled.

SUPREME COURT.

MA KYIN HNIN (APPLICANT)

v.

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

†S.C. 1948

Oct. 13.

Order in the nature of writ of habeas corpus—*Detention under s. 5A* (i) (b) *of the Public Order (Preservation) Act, 1947.*

Held: If a man is suspected of habitually committing or abetting the commission of dacoity or protecting or harbouring dacoits he cannot be detained under Public Order (Preservation) Act, 1947. Chapter VIII of the Criminal Procedure Code provided ample machinery for dealing with such a person. It is an abuse of the Public Order Preservation Act, 1947, to employ its summary provisions where action under Chapter VIII of the Criminal Procedure Code should be taken.

Ba Than for the applicant.

Chan Tun Aung (Assistant Attorney-General) for the respondents.

The judgment of the Court was delivered by

E MAUNG, J.—On the 22nd September 1948, we directed the release of Maung Maung, the applicant's husband, and stated that we would give our reasons later. We now proceed to do so.

The applicant's husband Maung Maung was detained under the orders of the Commissioner of Police, Rangoon, on the 10th July 1948, in purported exercise of the powers under section 5A (i) (*b*) of the Public Order (Preservation) Act, 1947. It is sought to justify the detention of Maung Maung on the ground that he was acting in a manner prejudicial to the public safety and maintenance of public order.

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*Criminal Misc. Application No. 28 of 1948.

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

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E MAUNG, J.

It appears that on the 10th July 1948, Maung Maung was arrested by the Pabeidan Police on suspicion in connection with an offence under section 395 of the Penal Code. No prosecution, however, in regard to that offence has been launched, apparently because the police had not been able to obtain sufficient materials on which to base a criminal prosecution.

From the affidavits of the applicant and that of U Tin Maung, the Inspector of Police who initiated the proceedings resulting in Maung Maung being directed to be detained by the Commissioner of Police under the Public Order (Preservation) Act, it appears that on the 24th July 1948, Maung Maung was formally released in relation to the charge under section 395 of the Penal Code and re-arrested under section 5 (ii) of the Public Order (Preservation) Act by U Tin Maung.

From the affidavit of U Tin Maung read together with the affidavit of the Commissioner of Police, we are satisfied that no good ground exists for action being taken against Maung Maung under section 5 or section 5A of the Public Order (Preservation) Act. It is said in justification of the detention of Maung Maung that whilst a village headman in Myaungmya District he actively associated with some known criminals and that he left his village without the permission of the Deputy Commissioner, Myaungmya. It is also said that having come to Rangoon he has been organizing a dacoit gang and that he was suspected to be the brain behind the dacoity in Pabeidan Police jurisdiction involving the loss of gold and jewellery to the value of Rs. 50,000. It was also claimed that an accused person arrested by the Lanmadaw Police admitted to the police that the pistol used by him was supplied by Maung Maung.

The Criminal Procedure Code in Chapter VIII has provided ample machinery for dealing with a person who habitually commits or abets the commission of

dacoity or protects or harbours dacoits. It is, in our opinion, an abuse of the Public Order (Preservation) Act to employ its summary provisions in cases where the Code of Criminal Procedure has already made ample provision with due safeguards both for the police and the person against whom action is to be taken.

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MA KYIN HNIN v. THE COMMISSIONER OF POLICE, RANGOON AND ONE.

E MAUNG, J

FULL BENCH (APPELLATE CRIMINAL).

Before U Thein Maung, Chief Justice, U Tun Byu and U San Maung, JJ.

H.C. 1948

Aug. 18.

THE UNION OF BURMA (COMPLAINANT)

v.

MAUNG NYUN (ACCUSED).*

Penal Code, ss. 299, 300, as amended by the Penal Code Amending Act, 1947—Causing injury which is likely to cause death—If murder.

Held : Where a person caused the death of another person, by causing an injury which was likely to cause death—

(*a*) the offence, in the absence of any circumstance which makes the act one of culpable homicide not amounting to murder, is murder if it can be deduced from a consideration of the whole facts of the case that the "offender caused the death by doing an act with the intention of causing death or with the intention of causing bodily injury as in fact is sufficient in the ordinary course of nature to cause death ;

(*b*) the offence is one of voluntarily causing grievous hurt under s. 325 or 326 of the Penal Code according to the nature of the weapon used if it can be deduced from a consideration of the whole facts of the case that the offender intended only to cause bodily injury which was likely to cause death, as ss. 299 and 300 of the Penal Code as amended do not refer to such intention like the old sections ;

(*c*) the offence is not one under s. 304A of the Penal Code if the bodily injury was caused with criminal intention to cause it, as an act done with such intention cannot be a rash or negligent act ;

(*d*) the offence is one under s. 304A of the Penal Code if the bodily injury was caused by a rash or negligent act *i.e.*, without any criminal intent but with the knowledge that it was likely to cause death ; and

(*e*) the offence is one under s. 299 or s. 300 of the Penal Code even though the bodily injury was caused by a rash or negligent act if the offender knew that the act was so imminently dangerous that it must in all probability cause such bodily injury as is likely to cause death and the court finds under s. 300A (*c*) of the Code that his intention was to cause death or bodily injury as in fact is sufficient to cause death.

Sein Kho v. *The King*, Criminal Appeal No. 1312 of 1947, overruled.

Shwe Ein v. *King-Emperor*, (1905-06) III L.B.R. 122 at p. 123 ; *Nga Na Ban* v. *King-Emperor*, (1904-06) 1 U.B.R. Penal Code 33 ; *Empress of India* v.

* Criminal Reference No. 47 of 1948, being reference made by U SAN MAUNG, J., in Criminal Appeal No. 375 of 1948.

Idu Beg, (1881) I.L.R. 3 All. 776 at pp. 779 and 780 ; *W. H. Smith* v. *Emperor*, (1926) I.L.R. 53 Cal. 333 at p. 338; *Sukaroo* v. *Emperor*, (1887) I.L.R. 14 Cal. 566; *Kyaw We* v. *King-Emperor*, 4 L.B.R. 311 at pp. 313 and 314 ; *Po Tun* v. *King-Emperor*, 4 L.B.R. 306 ; *The King* v. *Aung Nyun*, (1940) Ran. 441 (F.B.) ; *Abor Ahmed* v. *The King*, (1937) Ran. 393 ; *Shwe Hla U* v. *King-Emperor*, 3 L.B.R. 122 ; *Po Sin* v. *King-Emperor*, 5 L.B.R. 80 ; *Apalu* v. *King-Emperor*, 1 Ran. 285 ; *Munilal's* case, A.I.R. (1943) All. 853 ; *Jennings and one* v. *Kelly*, (1940) A.C. 206, referred to.

U THEIN MAUNG, C.J.—The question which has been referred to us is as follows :

" If a person causes the death of another person by causing an injury which is likely to cause death, is the offence murder as is defined in section 300 of the Penal Code in the absence of any of the extenuating circumstances enumerated in section 299 of the Penal Code ? If not, under what section of the Penal Code is such an offence punishable ?"

Now section 300 of the Penal Code as amended by the Penal Code Amendment Act, 1947, provides:

" Whoever, in the absence of any circumstance which makes the act one of culpable homicide not amounting to murder, causes death by doing an act with the intention of causing death, or with the intention of causing bodily injury as in fact is sufficient in the ordinary course of nature to cause death, commits the offence of murder."

And section 299 thereof as amended by the same Amendment Act sets out the circumstances which make the act one of culpable homicide not amounting to murder. The sections as amended do not contain any reference to knowledge or to bodily injury which is likely to cause death.

So far as knowledge is concerned the Legislature appears to have adopted the view that where an act has been done in pursuance of an intention to do bodily harm to another, the case must be decided according to the intention which must be attributed

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to the offender in doing the act although in the majority of cases the question of intention is merely the question of knowledge and in making an inference as to his intention, the knowledge which must be attributed to him must usually be a matter for consideration.

In this connection it must be noted that Fox J. observed in *Shwe Ein* v. *King-Emperor* (1) [which has been followed in *Nga Na Ban* v. *King-Emperor* (2)] :

"The finding, however, appears to me to be inappropriate to a case like the present in which death has been caused by an act done in the intentional causing of bodily injury to a particular individual.

In such a case the question to be considered is with what intention did the accused commit the act. His knowledge of the probable results of his act must almost necessarily be a matter to be considered also, since knowledge and intention are usually closely bound up together. Where the act has been done in pursuance of an intention to do bodily harm to another, the case must, in my opinion, be decided according to the intention which must be attributed to the offender in doing the act, and the words and clause of section 299 and section 300 of the Indian Penal Code, which deal with knowledge, have no direct application to such a case."

He also observed at pp. 125 and 126 *ibid* :

"In the absence of an expression of his intention by the accused previous to or after or at the time of committing the act, his intention can only be inferred from the act itself and the circumstances under which it was done. In making an inference as to the accused's intention, the knowledge which must be attributed to him must usually be a matter for consideration. As Mr. Mayne says in paragraph 201 of his Criminal Law of India :

'Intention is sometimes a presumption of law ; sometimes it is a mere fact to be proved like any other fact. A man is assumed to intend the natural or

(1) (1905-1906) 3 L.B.R. 122 at p. 123.

(2) (1904—1906) 1 U.B.R. Penal Code 33.

necessary consequences of his own act, and in the majority of cases the question of intention is merely the question of knowledge. If I strike a man on the head with a loaded club, I am assumed to know that the act will probably cause death, and if that result follows, I am assumed to have intended that it should follow.'

Thus in a case like the present in which death has been caused by intentional bodily injury inflicted by the accused on the deceased, the question of what knowledge must be attributed to the accused comes in as a means of arriving at his intention when he committed the act which caused the death, and for that purpose, and not for the purpose of deciding whether the case falls within the 4th clause of section 300 or the last part of section 304 must the question be considered."

Cf. section 300A (*c*) of the Penal Code which reads :

" 300A. In sections 299 and 300 :

* * * *

(*c*) the offender's knowledge that an act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, is a relevant factor in proving the nature of his intention."

The legal effect of omission to refer to bodily injury likely to cause death is not so clear. The old sections have been amended by insertion of the words " as in fact is " between the words " bodily injury " and the words " sufficient in the ordinary course of nature " ; but " such bodily injury as in fact is sufficient in the ordinary course of nature to cause death " cannot *in all cases*, include bodily injury likely to cause death.

The distinction between bodily injury likely to cause death and bodily injury (as in fact is) sufficient in the ordinary course of nature to cause death is fine

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and I agree with my brother U San Maung J. that circumstances may indicate the intention was to cause death or such bodily injury as in fact was sufficient to cause death although the bodily injury actually caused was merely likely to cause death. However, there must be cases in which circumstances do not indicate such intention and the bodily injury is only likely to cause death.

In *Sein Kho* v. *The King* (1) a Bench of the late High Court of Judicature at Rangoon convicted under section 304A of the Penal Code a man who stabbed another in the chest " as he must be deemed to have acted with the knowledge that the injury would be likely to lead to death."

Now section 304A provides :

" Whoever causes the death of any person by doing any rash or negligent act not punishable as culpable homicide or murder shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both : provided that, if the act is done with the knowledge that it is likely to cause death, the term of imprisonment may extend to ten years."

The first part of the section which is the principal enactment relates to causing death by rash and negligent act—which is not punishable as culpable homicide or murder, *e.g.* under section 299 or section 300 read with section 300A (*c*). So " the act " mentioned in the second part of the section which is in the form of a proviso, must also be a rash and negligent act. With reference to the section, as it stood before the amendment, Straight J. observed in the *Empress of India* v. *Idu Beg* (2) :

" Section 304A does not say every unjustifiable or inexcusable act of killing not hereinbefore mentioned shall be

(1) Criminal Appeal No. 1312 of 1947.

(2) (1881) I.L.R. 3 All. 776 at pp. 779 and 780.

punishable under the provisions of this section, but it specifically and in terms limits itself to those rash or negligent acts which cause death but fall short of culpable homicide of either description. According to English law, offences of this kind would come within the category of manslaughter, but the authors of our Penal Code appear to have thought it more convenient to give them a separate *status* in a section to themselves, with a narrower range of punishment proportioned to their culpability. It appears to me impossible to hold that cases of direct violence, wilfully inflicted, can be regarded as either rash or negligent acts * * * Although I do not pretend for a moment to exhaust the category of cases that fall within section 304A, I may remark that criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted."

[*Cf.* Cuming J. in *W. H. Smith* v. *Emperor* (1).]

The same may still be said of the new section 304A in spite of the insertion of the proviso. Rash acts can be said to be intentional or deliberate only in the sense that the risk of causing injury is run deliberately or intentionally and not in the sense that they are done with the deliberate object or intention of causing injury to any particular individual. [Cf. *Sukaroo v Empress* (2).] So the proviso is not applicable to "cases of direct violence, wilfully inflicted", *i.e.* to cases of causing bodily injury with the criminal intention to cause such injury, *e.g.* by deliberately stabbing or cutting a man with a knife. It applies only to cases of hazarding dangerous or wanton acts with the knowledge

(1) (1926) I.L.R. 53 Cal. 333 at p. 338. (2) (1887) I.L.R. 14 Cal. 566.

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that they are so or with recklessness or indifference as to the consequences—but without any criminal intention to cause bodily injury to any particular individual.

For the above reasons we cannot follow the ruling in *Sein Kho* v. *The King* (1) and we would answer the questions under reference in the abstract, *i.e.* without considering the facts of the particular case as follows :

Where a person caused the death of another person by causing an injury which was likely to cause death—

(*a*) the offence, in the absence of any circumstance which makes the act one of culpable homicide not amounting to murder, is murder if it can be deduced from a consideration of the whole facts of the case that the offender caused the death by doing an act with the intention of causing death or with the intention of causing bodily injury as in fact is sufficient in the ordinary course of nature to cause death ; see *Kyaw We* v. *King-Emperor* (2) in which Hartnoll J. observed :

> " Intention cannot in my opinion be correctly inferred merely from a consideration of the injuries inflicted—the results of the act—though in many cases the nature of the injuries forms a valuable piece of evidence in deducing it ; but it must also be deduced from a consideration of the whole facts of the case."

See also *Po Tu* v. *King-Emperor* (3).

(*b*) the offence is one of voluntarily causing grievous hurt under section 325 or 326

(1) Criminal Appeal No. 1312 of 1947.

(2) 4 L.B.R. 311 at pp. 313 and 314.

(3) 4 L.B.R. 306.

of the Penal Code according to the nature of the weapon used if it can be deduced from a consideration of the whole facts of the case that the offender intended only to cause bodily injury which was likely to cause death, as sections 299 and 300 of the Penal Code as amended do not refer to such intention like the old sections [Cf. *Empress of India* v. *Idu Beg* (1)] ;

(*c*) the offence is not one under section 304A of the Penal Code if the bodily injury was caused with criminal intention to cause it, as an act done with such intention cannot be a rash or negligent act ;

(*d*) the offence is one under section 304A of the Penal Code if the bodily injury was caused by a rash or negligent act, *i.e.* without any criminal intent but with the knowledge that it was likely to cause death ; and

(*e*) the offence is one under section 299 or section 300 of the Penal Code even though the bodily injury was caused by a rash or negligent act if the offender knew that the act was so imminently dangerous that it must in all probability cause such bodily injury as is likely to cause death and the Court finds under section 300A (*c*) of the Code that his intention was to cause death or bodily injury as in fact is sufficient to cause death. (*Cf.* the old section 300 Fourthly and Illustration (*d*) thereto.)

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(1) (1881) I.L.R. 3 All. 776 at pp. 779 and 780.

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U TUN BYU, J.—I agree.

U SAN MAUNG, J.—In a case before me which occurred after the 1st of August 1947, a person caused the death of another by deliberately cutting him on the back with a *dah* thus causing an injury likely to cause death ; and the question which I have referred for the decision of a Bench or a Full Bench, according as my Lord the Chief Justice may direct, is as follows :

> " If a person causes the death of another by causing an injury which is likely to cause death, is the offence murder as defined in section 300 of the Penal Code in the absence of any of the extenuating circumstances enumerated in section 299 of the Penal Code? If not, under what section of the Penal Code is such an offence punishable ? "

The sections referred to in the question propounded, are sections of the Penal Code as substituted by the Penal Code (Amendment) Act, 1947, Burma Act, No. XXXIII of 1947, by which the law relating to culpable homicide was amended with effect from the 1st August 1947. The law as it stood before the amendment came into force has been fully explained in the judgment of Roberts C.J. in *The King* v. *Aung Nyun* (1) where it was pointed out that the second clause of section 299 (old) refers to intention apart from knowledge, and that the offence of culpable homicide by doing an act by which the death is caused with the intention of causing such bodily injury as is likely to cause death can exist independently of section 300 (old) of the Penal Code and is punishable under the first part of section 304 (old) of the Penal Code.

Under the law, as now amended, the definition of the offence of murder appears in section 300 (new) of

(1) (1940) Ran. 441 (F.B.).

the Penal Code which is as follows :

" 300. Whoever, in the absence of any circumstance which makes the act one of culpable homicide not amounting to murder, causes death by doing an act with the intention of causing death, or with the intention of causing bodily injury as *in fact* is sufficient in the ordinary course of nature to cause death, commits the offence of murder."

The italicized is mine.

The circumstances which make the act, one of culpable homicide not amounting to murder are those which are set out in Clauses (A), (B), (C), (D) and (E) of section 299 (new) of the Penal Code which enacts that where any of these circumstances are present, the offence committed is culpable homicide not amounting to murder.

In so far as is relevant for the purpose of this reference, a comparison of the old section 300 of the Penal Code and the new section 300 shows that culpable homicide is murder under both the old and the new section 300 if death is caused by doing an act with the intention of causing death. Therefore, those acts which were held to be murder because they fell within the meaning of the first clause of section 300 (old) of the Penal Code will still be murder as defined in section 300 (new) of the Penal Code. Now, as observed by Hartnoll J. in *Kyaw We* v. *King-Emperor* (1) the intention of a person cannot be correctly inferred merely from a consideration of the injuries inflicted—the result of the act—though in many cases the nature of the injuries forms a valuable piece of evidence in deducing it; but it must also be deduced from a consideration of *the whole facts of the case.* So also, in the case of *Po Tu* v. *King-Emperor* (2) where the accused cut another person on the head with a heavy

(1) 4 L.B.R. 311 at p. 313. (2) 4 L.B.R. 306.

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chopper, slicing off a bit of the frontal bone and cutting the brain and the victim died from the effect of the injury, it was held that though the medical evidence showed that the wound was not certain, although likely to cause death, that the accused's intention must be inferred not merely from the actual consequences of his act, but from the act itself; and as the natural consequence of an act of the kind in question would be death, the accused must be presumed to have intended to cause death. In this case, there was a difference of opinion between Ormond J. who held that the offence committed by the accused was culpable homicide not amounting to murder punishable under the first part of section 304 of the Penal Code because the accused's intention must be gathered solely from the facts of his act as disclosed in the medical evidence, and Hartnoll, J. who held that the offence committed by the accused was murder because the intention of the accused must be gauged not only from the result of his act, but also from the other facts of the case. On a reference being made to Irwin O.C.J., the learned Officiating Chief Justice, made the following remarks which appear to me to be most apposite :

"I do not think it is necessary to dissent from the proposition that in this particular case the accused's intention must be gathered solely from the one act of cutting, but I cannot agree that it must be gathered solely from the effects of that act as disclosed in the medical evidence. Such an inference necessarily implies that the accused intended to cut a slice off his grandfather's head of the precise size that he did in fact cut off, without varying a hair's breadth one way or the other. Not one man in a million is capable of doing that. Suppose the accused had taken the chopper with both hands and struck with sufficient force to cleave the skull from forehead to chin, but had missed his aim and only slightly grazed the forehead, would it be possible to avoid the inference that he intended to cause death? Or suppose a man fires a bullet at another, misses his heart by an

inch or two, and pierces the lung. A bullet wound through a lung, I believe, is not necessarily fatal, but if in the case I put it did prove fatal, I have no doubt that the crime would be murder.

In the present case then I would infer the accused's intention from his act, but not solely from the consequences of that act. I think it is a matter of common knowledge that the result of cutting a man on the head with a heavy chopper is generally death, and the appellant must be held to have known that that is the natural consequence of such an act; and he must therefore be presumed to have intended to cause death."

In my opinion, the law has been correctly laid down in *Po Tu* v. *King-Emperor* (1) which has not yet been overruled since it was made 40 years ago. Therefore, when a person causes the death of another by causing an injury, which according to the medical evidence, is only likely to cause death, the offence may be murder as defined in section 300 (new) of the Penal Code, if the other circumstance appearing in evidence shows that there was intention on the part of the person causing the injury to cause the death of the other.

One of these circumstances is indicated in Clause (*b*) of section 300 A of the Penal Code which provides that where death is caused by bodily injury, the offender's knowledge of the weakness or infirmity of the person on whom the bodily injury is inflicted is a relevant factor in proving the nature of his intention. This clause may be compared with the second clause of section 300 (old) of the Penal Code and Illustration (*b*) thereto.

The next question which arises for consideration is "What offence is committed by a person who causes the death of another by causing an injury which is likely to cause death, if the circumstances appearing in evidence do not show that there is intention on the

(1) 4 L.B.R. 306.

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part of the person causing the injury to cause the death of the other ?"

Now, on a comparison of the third clause of section 300 (old of the Penal Code and the new section 300 it is clear that a radical change in the law has taken place regarding the presumption to be drawn when the result of an act of a person is the causing of death of another by causing an injury as *in fact*, is sufficient in the ordinary course of nature to cause death. According to the law as it stood before Burma Act XXXIII of 1947 came into force, though an injury caused by a person to another may, in fact, be sufficient in the ordinary course of nature to cause death, it is not murder unless it was also intended that the injury should be sufficient in the ordinary course of nature to cause death. Such an intention is ordinarily presumed if the injury is inflicted on a vital part of the body. However, where the accused in an altercation smote the deceased with great force on the leg above the ankle with his *dah* with such force that he cut through the bones and the arteries and as a result the man died four days later, it was held that though the accused did *in fact* inflict an injury sufficient in the ordinary course of nature to cause death, the intention to cause such injury could not be imputed to him, and that he should be convicted under the first part of section 304 of the Penal Code. So in that case although the injury caused was in fact sufficient in the ordinary course of nature to cause death the accused was held to have caused the death by doing an act with the intention of causing such bodily injury as is likely to cause death within the meaning of the second clause of section 299 (old) of the Penal Code. See *Abor Ahmed* v. *The King* (1).

(1) (1937) Ran. 393.

Under the law as now amended the accused in *Abor Ahmed*'s case would be deemed to have committed murder as defined in section 300 (new) of the Penal Code. This change in the law has obviously been made with a view to simplify, as far as is possible, the deduction to be drawn from the proved facts, when one of the facts proved is that an accused person has caused an injury which is, in fact, sufficient in the ordinary course of nature to cause death, regard being had to the medical evidence in the case. When this fact is on record, the offence is *prima facie* murder whatever may be the other circumstances appearing in the case, namely, the number of blows given, the nature of the weapon used, and the part of the body on which the injury or injuries have been inflicted.

In cases where death is caused medical witnesses are wont to classify the injury received by the deceased person under one or other of the following categories :

(1) Necessarily fatal,
(2) Sufficient in the ordinary course of nature to cause death,
(3) Likely to cause death.

There can be no difficulty where the injury is classified as necessarily fatal because an intention to cause death can, in the generality of cases, be presumed, on the maxim that a man is presumed by law to intend the ordinary and natural as well as necessary consequences of his act. The difficulty that will arise is in regard to injuries which the medical officer classified under the second or third category. As pointed out in *Shwe Hla U* v. *King-Emperor* (1) between the degree of bodily injury intended as expressed by the words "such bodily injury as is likely to cause death" in section 299 (old) of the Penal Code and by the words "bodily

(1) 3 L.B.R. 122.

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injury sufficient in the ordinary course of nature to cause death" in section 300 (old) of the Penal Code, is fine, though appreciable, and depends upon the degree of probability of death resulting from the act. *See* also *Po Sin* v. *King-Emperor* (1) and *Apalu* v. *King-Emperor* (2). So, where the medical officer makes a distinction between an injury sufficient in the ordinary course of nature to cause death and an injury likely to cause death, great care will have to be exercised to examine him carefully as to his reason for the classification, as, if the injury is held to be, in fact, sufficient in the ordinary course of nature to cause death, the offence is *prima facie* murder as defined in section 300 (new) of the Penal Code.

Assuming that the injury caused is *in fact* only likely to cause death and the circumstances from which an intention to cause death may be inferred are absent, what offence will the person causing the injury have committed after the law relating to culpable homicide has been amended by Burma Act XXXIII of 1947? In this connection, our attention has been drawn to the case of *Sein Kho* v. *The King* (3) where the accused Sein Kho caused the death of one Nyi Aung by stabbing him with a spear and causing an injury which was held to be likely to cause death, and it was held by a Bench of the late High Court of Judicature at Rangoon that the conviction should be one under section 304A of the Penal Code as substituted by section 7 of the Burma Act XXXIII of 1947. This section reads as follows:

"Whoever causes the death of any person by doing any rash or negligent act not punishable as culpable homicide or murder shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with

(1) 5 L.B.R. 80. (2) 1 Ran. 285.
(3) Criminal Appeal No. 1312 of 1947.

both ; provided that, if the act is done with the knowledge that it is likely to cause death, the term of imprisonment may extend to ten years."

I have carefully read the judgment in *Sein Kho*'s case and with great respect I must say that the learned Judges who decided that case had apparently overlooked the fact that as the offence took place on the 4th March 1947, before Burma Act No. XXXIII of 1947 came into force, the reference to section 304A of the Penal Code as inserted by section 7 of the aforesaid Act was irrelevant and that Sein Kho should have been convicted under the first part of section 304 of the Penal Code, *vide* the ruling in the case of *The King* v. *Aung Nyun* (1). Furthermore, the learned Judges' observation that since the injury caused by the accused was merely likely to cause death the offence would be one falling within part 2 of section 304 of the Penal Code, if the matter fell to be determined under the old law, is incorrect. There is ample authority for the view that the offence punishable under the second part of section 304 of the Penal Code, is culpable homicide under the circumstances mentioned in the last part of section 299 (old) of the Penal Code, that is to say where death is caused by doing an act with the knowledge that it is likely to cause death. In *Shwe Ein* v. *King-Emperor* (2) Fox J. observed, "where the act has been done in pursuance of an intention to do bodily harm to another the case must, in my opinion, be decided according to the intention which must be attributed to the offender in doing the act, and the words and clause of section 299 and section 300 of the Indian Penal Code, which deal with knowledge have no direct application to such a case." *See* also the case of *Munilal* (3) where it was held that the second

(1) (1940) Rán. 441 (F.B.). (2) 3 L.B.R. at p. 122.
(3) A.I.R. (1943) All. at p. 853.

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part of section 304 of the Penal Code is to be read with the last few words of section 299 and has no reference to section 300 or to the exceptions therein.

Apparently, it is the mistaken assumption that the offence would be one falling within the second part of section 304 of the Penal Code under the old law, which has led the learned Judges in *Sein Kho*'s case to assume that it would fall within the second part of section 304A of the Penal Code as substituted by Burma Act No. XXXIII of 1947. No reason has been given why the act done by the accused Sein Kho who had stabbed the deceased Nyi Aung on the chest with a spear thus causing an injury likely to cause death should be regarded as a rash or negligent act done with the knowledge of its likelihood to cause death within the meaning of section 304A (new) of the Penal Code and the proviso thereto. In my opinion, such an act as was done by the accused Sein Kho cannot possibly be regarded as a rash and negligent act within the meaning of that section.

Under the old law the causing of death by rash and negligent act was punishable under section 304A which reads :

> "Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

Undoubtedly, this section was not in existence when the Indian Penal Code was enacted in 1860 and was only inserted therein by Act No. XXVIII of 1870. However, offences requiring proof of rashness or negligence as an essential ingredient for the commission thereof were in the Indian Penal Code as it was originally enacted in 1860, for example, section 279 of the Penal Code punishes rash driving

or riding on a public way, section 280 of the Penal Code punishes rash navigation of vessel, section 284 punishes rash and negligent conduct with respect to poisonous substance, section 285 punishes rash and negligent conduct with respect to fire or combustible matter, etc. Now, the following commentary to section 279 which appears under the heading "So rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person" in Ratanlal and Thakore's Law of Crimes, Sixteenth Edition, seems to be apposite :

"A rash act is primarily an over-hasty act and is thus opposed to a deliberate act, but it also includes an act which though it may be said to be deliberate, is yet done without due deliberation and caution. The most formally scientific analysis of negligence is that of Austin. He draws a distinction between negligence, heedlessness, and rashness, which, though closely allied, 'are broadly distinguished by differences.'

In cases of Negligence, the party performs not an act to which he is obliged. He breaks a positive duty.

In cases of Heedlessness or Rashness, the party does an act from which he is bound to forbear. He breaks a negative duty.

In cases of Negligence, he adverts not to the act, which it is his duty to do.

In cases of Heedlessness, he adverts not to *consequences* of the act which he does.

In cases of Rashness, he adverts to those consequences of the act ; but, by reason of some assumption *which he examines insufficiently* he concludes that those consequences will not follow the act in the instance before him.

'Negligence' has been defined to be the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

Viewed in the light of these observations when a person deliberately attacks another with a *dah* or with a spear and causes his death by causing an injury

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which is likely to cause death, the offence can hardly be one coming within the ambit of section 304A (new) of the Penal Code. Perhaps, it may be argued that the proviso to section 304A should not be construed with reference to the main provision therein. However, as held by the House of Lords in *Jennings and another* v. *Kelly* (1), there is no rule that the first or enacting part of an act is to be construed without reference to the proviso and 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. Maxwell on Interpretation of Statutes, at page 165 of the Ninth Edition.

Therefore, in my opinion, when a person causes the death of another by causing an injury which is likely to cause death, if the circumstances appearing in evidence do not show an intention to cause death, he should be convicted under section 325 or under section 326 of the Penal Code as the case may be, regard being had to the nature of the weapon or means used in causing the injury. As observed by Fox J. in *Shwe Ein* v. *King-Emperor* (2):

> "There are cases in which, although an offender has actually caused death as a consequence of bodily injury inflicted by him, he has been held liable for only one or other of the minor offences of grievous hurt or hurt."

My answer to the question propounded will, therefore, be in the sense indicated above.

I also agree to the answers proposed by my Lord.

(1) (1940) A.C. 206. (2) 3 L.B.R. at p. 122.

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.

Failure of the Respondent to take cross-objection under Order XLI, Rule 22 of the Code of Civil Procedure against the order under appeal—Its legal effect —S. 148 of the Code—Whether time granted by a decree or an order having the force of a decree could be enlarged.

The Rangoon City Civil Court passed an ejectment order; but thereafter under the the provisions of s. 14 (3) of the Urban Rent Control Act, as substituted by Act XXVI of 1947, passed an order that if the present appellant deposited a sum of money by a particular date the decree will be unexecutable so long as the appellant paid the monthly rent by a particular date. The appellant appealed against the order, but the respondent did not take any cross-objection against the order appealed against and the appeal was dismissed.

Held: That the appellant could not at that stage question the propriety or validity of the order in the trial court in an appeal against an order for non-compliance of the order modifying the order of ejectment.

Provision under s. 148 of the Code of Civil Procedure giving power to the court to extend the time does not apply where time is allowed for doing an act by a decree or an order, having the force of a decree.

Hukam Chand and others v. *Hayat and others*, (1912) Punjab Record, Vol. 47, 343 (Civil Judgments 99); *Dharmaraja Ayyar and one* v. *K. G. Srinivasa Mudaliar and four others*, I.L.R. 39 Mad. 876; *Maslahuddin* v. *Ram Kishen and one*, A.I.R. (1928) Oudh 32; *Kshetra Mohan Ghosh and one* v. *Gour Mohan Kapali*, 147 Indian Cases 1025, followed.

Kyaw Htoon for the appellant.

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 was

* 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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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 20th December 1946 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 confimed 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 the learned

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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 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 *Dharmaraic 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 *Maslahuddin* v. *Ram Kishen and another* (3) a Bench of 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 decree in a suit. In

(1) (1912), Punjab Record, Vol. 47, p. 343 (Civil Judgments 99).

(2) 39 Mad. 876.

(3) A.I.R. (1929), Oudh p. 32.

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.

U THEIN MAUNG, C.J.—I agree.

(1) 147 Indian Cases 1025.

CIVIL REFERENCE.

Before U Thein Maung, Chief Justice and U San Maung, J.

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July, 26.

A. M. H. YEZDI AND ONE (CLAIMANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

Requisitioning (Claims and Compensation) Order, 1947, Clause 13—Whether defective or ultra vires*—Loss of profits—Whether a part of loss under Rule 96 (1), Defence of Burma Rules.*

A restaurant business and the premises were requisitioned. The owner claimed that conditions or facts beyond those referred to in Rules 7, 8 and 9 made under the requisitioning (Claims and Compensation) Order, 1947 should be taken into consideration and in the alternative that the said Rules are *ultra vires* as they restricted the right to compensation.

Held : That the maxim *expressio unuis est exclusio alterius* is applicable to the interpretation of the said Clauses and regard shall be had only to the conditions prescribed.

Held further : That the Claimants are entitled only to such compensation as may be fixed under the Rules and Orders and it must be regarded as fair. Loss of profits is only notional loss and the Claimants were not entitled to it.

In re An Arbitration between the London, Tilbury and Southern Railway Co. and The Trustees of the Gower's Walk Schools, (1890) L.R. 24 Q.B.D. 326); *Newcastle Breweries, Ltd. v. The King*, (1920) L.R. I.K.B. 854, distinguished.

In re An Arbitration between the Mersey Docks and Harbour Board and The Lords Commissioners of the Admiralty, (1920), L.R. 3 K.B. 223; *The Marpessa* (1906) Pro. 14, 33, affirmed in *ibid* 95, applied.

E. C. V. Foucar for the claimants.

Chan Tun Aung (Assistant Attorney-General) for the respondent.

U THEIN MAUNG, C.J.—The following questions have been referred to us under Clause 13 of the Requisitioning (Claims and Compensation) Order, 1947 :

1. Where a requisition of a restaurant business together with its premises has been made, is a notional loss of profits resulting from such requisition a part of the "loss" contemplated by Rule 96 (1) of the Defence of Burma Rules ?

* Civil Reference No. 4 of 1948 made by the Chief Judge of Rangoon City Civil Court under Clause 13 of the Requisitioning (Claims and Compensation) Order, 1947.

2. Is the Requisitioning (Claims and Compensation) Order, 1947, defective or *ultra vires* for the reasons given in the abovementioned statement of the case ?

The claimants' case is that hotel and restaurant business was being actively conducted by them in the building known as No. 384, Dalhousie Street, Rangoon, when the said building was requisitioned together with all fixtures, fittings, furniture and other things therein under Rule 76 of the Defence of Burma Rules and that the closure of their business resulting from the requisition and their consequent failure to earn any profits are essentially a part of the loss sustained by them.

The respondents contend that the claimants had closed down the business before the building was requisitioned, that there accordingly was no loss of business and that in any case the claimants are not entitled to compensation for notional loss of profits.

However, for the purpose of this reference it has been agreed between the claimants and the respondents that it may be assumed that the claimants were carrying on the business there at the time of the requisition.

Now compensation must be assessed and paid in accordance with Rule 96 of the Defence of Burma Rules which reads :

96. (1) Whenever in pursuance of any of Rules 49, 66, 72, 76, 78, 79, 80 and 89A, any property is removed, destroyed, rendered useless, used, requisitioned or acquired by, or therwise placed at the disposal or under the control of the Governor, and the circumstances are not such as to render the provisions of section 17 of the act applicable, the owner of such property shall be paid such compensation for any loss he may have sustained as a result of such removal, destruction, rendering useless, use requisitioning, acquisition, disposal or control, as may be fixed in accordance with the provisions of this rule.

(2) In default of agreement between Government and the owner of the property, the Governor shall by general or special order specify the authority or person through which or whom any

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claim for compensation under sub-rule (1) shall be submitted and the authority or person by which or whom any such claim shall be adjudged and awarded.

(3) The Governor may further by general or special order prescribe the conditions to which the authority or person responsible for adjudging or awarding claims for compensation shall have regard when determining the amount of compensation payable, and may give such supplementary orders as to the assessment and payment of compensation as may appear to him to be necessary or expedient.

According to sub-rule (1) the claimants are entitled only to "such compensation for any loss" they may have sustained as a result of the requisitioning "as may be fixed in accordance with this Rule", *i.e.* as may be fixed in accordance with sub-rule (2) and the Governor's orders under sub-rule (3); and the Requisitioning (Claims and Compensation) Order, 1947, is an order made by the Governor in exercise of the powers conferred by Rule 96. So they are entitled only to such compensation as may be fixed in accordance with the said Order.

The following are the provisions of the said Order which are relevant to the questions under reference :

"7. In determining the amount of compensation payable as a result of the operation of an order made under Rules 49, 66, 76, 78, 79 and 80 of the rules, as the case may be, regard shall be had to any expenses incurred, or services rendered, by such owner in complying with such order."

"8. In determining the amount of compensation, regard shall also be had—

(1) in the case of immovable property;

(*a*) to the monthly rent which but for any appreciation of value due to any emergency might reasonably be expected to be payable by a tenant in occupation of the property during the period of requisition under a lease granted immediately before the beginning of the period whereby the tenant undertook to bear any rates, taxes or cess

payable in respect of the property and the cost of repairs and other expenses, if any, necessary to maintain the property in the state to command such rent and which, in the absence of other indications, may be deemed to be the 1941 assessment for rates."

"9. In determining the compensation payable in respect of any movable property, regard shall also be had—

(*a*) to the sum which but for any appreciation of value due to any emergency might reasonably be expected to be payabale for the hire of the property during the period of requisition under a contract entered into immediately before the beginning of the period of requisition for the use of the property in the same manner and subject to the same conditions as it is used " ;

The learned Advocate for the claimants has contended that the said provisions do not preclude other conditions or facts being taken into consideration by the authority or person responsible for adjudging or awarding claims for compensation and in the alternative that they must be *ultra vires* if they do so inasmuch as they restrict the right to compensation which is given by sub-rule (1) of Rule 96.

With reference to the first contention he relies on the phrase "regard shall also be had" which appears in both Clause 8 and Clause 9 of the Order. However, we are of the opinion that the word "also" has been inserted in the said clauses as they are to be read together with Clause 7, *i.e.* as they prescribe further conditions to which regard shall be had in connection with the respective cases. Besides, the Order has been made by the Governor in exercise of his power under sub-rule (3) to prescribe conditions to which regard shall be had; and prescription of such conditions will be meaningless if in spite thereof the authority or person responsible for adjudging or awarding claims for compensation can or must have regard to other

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conditions as well. So we are of the opinion that the maxim *expressio unuis est exclusio alterius* is applicable to the interpretation of the said clauses.

With reference to his contention in the alterantive he has invited our attention to *In re An Arbitration between the London, Tilbury and Southern Railway Co. and The Trustees of the Gower's Walk Schools* (1). However, that was a case under section 16 of the Railway Clauses Act, 1845, which provided " the company shall make *full* satisfaction to all parties interested for *all* damage", and Lord Esher M.R. observed in the course of his judgment therein (at p. 331).

> " The ratio decidendi is this—if you can bring the case within the statute, then the words 'full satisfaction for all damages,' are to give not only that which would be legal damage in an action but compensation for all the damages which the property has in fact suffered."

He has invited our attention to *Newcastle Breweries Ltd.* v. *The King* (2) also. However, that is a case in which a part of Regulation 2B of the Defence of the Realm Regulations made under section 1 of the Defence of the Realm Consolidation Act, 1914, is held to be *ultra vires* as " it deprives the owner of his *statutory* right to the fair market value " of the goods acquired. (*See* p. 865 of the ruling.) In the present case the claimants are entitled only to such compensation as may be fixed under the Rule ; the Order, which has been made under the Rule by the same authority, must be deemed to be a part of the Rule ; and the Order provides for payment of what may be regarded as fair rent.

The learned Advocate for the claimants has not been able to cite any ruling to show that compensation for notional loss of profit has ever been awarded. On

(1) (1890) L.R. 24 Q.B.D. 326. (2) (1920) L.R. I.K.B. 854.

the other hand there is the ruling *In re An Arbitration between the Mersey Docks and Harbour Board and the Lords Commissioners of the Admiralty* (1). In that case a barge, which was being constructed for the Board, was requisitioned by the Admiralty when it was nearing completion ; and it was found as a matter of fact that it could not be replaced in less than three years. And yet it was held—

> "that the Board were not entitled to any compensation for the loss of the services of the barge during the above-mentioned period of three years, the damage thereby caused being too remote."

Moreover, The Earl of Reading C.J. observed in the course of his judgment therein—

> "I think however that the principle applicable to cases of this kind is well settled, and I am satisfied that it would exclude compensation for loss of the services of the barge. In none of the numerous cases in which the Court has had to assess the compensation to be paid to a person who has been deprived of his property by a Government requisition has it ever been held that such damages could be recovered as are mentioned in the third question put to us by the arbitrator."

Avory J. agreed and only added a quotation from *The Marpessa* (2), which reads :

> "This tribunal, in assessing . . . . . damages, may say as a jury would do, 'We must act with some reasonable certainty, and you, the plaintiffs are reasonably compensated by being awarded a sum which we are fairly satisfied you may have lost, but we cannot follow you into mere speculation'."

Both of the questions under reference are answered in the negative. The claimants must bear the costs of this reference. Advocate's fee ten gold mohurs.

U SAN MAUNG, J.—I agree.

(1) (1920) L.R. 3 K.B. 223. (2) (1906) L.R. P. 14, 33, affirmed in *ibid*. 95.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

H.C. 1948

Aug. 18.

EU HPE YAR AND ONE (APPELLANTS)

v.

TEH LU PE (RESPONDENT).*

Evidence Act, s. 63 (5)—Secondary evidence—Stamp Act, s. 2 (11) duly stamped—New point in appeal—When permissible.

A suit upon two promissory notes said to have been lost by fire after Japanese invasion was first dismissed by the Trial Court but the High Court remanded the case for evidence, and for decision and a decree was passed. Upon appeal it was contended—

(1) that the evidence of the plaintiff and one U Ba Pe was not admissible as secondary evidence,

(2) that the promissory notes were not legally executed as the originals were payable to bearer,

(3) that the promissory notes were not duly stamped since postage stamp of Re. 1 was affixed on each of the promissory notes and therefore secondary evidence was inadmissible and that leave should be granted to raise this point on appeal.

Held : The learned Judges who remanded the case had decided that the evidence of the plaintiff and his witnesses amounted to an admission and that it was not necessary for the promisee and the witnesses to read the whole of the promissory notes themselves.

Ma Mi and one v. *Kallander Ammal*, 5 Ran. 18 ; *Kalenther Ammal* v. *Ma Mi and one*, I L.R. (1924) 2 Ran. 400, distinguished.

Held further : That secondary evidence having been admitted, that admission cannot be called in question under s. 36 of the Stamp Act.

Maung Po Htoo and three others v. *Ma Ma Gyi and one*, I.L.R. (1926) 4 Ran. 363, referred to and followed.

The Court of appeal should not allow a new line attack of which the party affected had no notice during the hearing of the suit.

Nathu Piraji Marwadi v. *Umedmal Gadumal*, I.L.R. (1909) 33 Bom. 35 ; *Sreemutty Dossee* v. *Ranee Lalumonee*, 12 Moores Indian Appeal, s. 470 ; *Gajapati Radhika* v. *Vasudeva Santa Singaro*, (1891-92) L.R. 19 I.A. 179 at p. 183.

No plaintiff should lose his money because of a technical error in the execution of a promissory note and if necessary leave should be granted to amend, basing the claim on the original cause of action.

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* Civil First Appeal No. 24 of 1948 against the decree of the District Court of Tavoy in Civil Regular Suit No. 1 of 1946, dated the 4th March 1948.

Krishna Prasad Sindh and one v. *Ma Aye and others*, (1936-37) I.L.R. 14 Ran. 383 : *Maung Chit and one* v. *Roshan N.M.A. Kareem Coomer & Co.*, (1934) I.L.R. 12 Ran. 500, referred to.

A plaintiff can recover on the original consideration if the claim is set out in the plaint as a cause of action.

Ram Rughubhir Lal and others v. *The United Refineries (Burma), Ltd.*, (1931) I.L.R. 9 Ran. 56 at p. 63 ; *Maung Po Chein* v. *C.R.V.V.V. Chettyar Firm*, A.I.R (1935) Ran. 282, referred to and followed.

The object of the Stamp Act and the Stamp Rules is to get revenue and to prevent evasion of liability therefrom and not to create pitfalls and in this case the basic requirement that the promissory notes must bear adhesive stamps of not less than the proper amount, has been fulfilled.

Radha Bai v. *Nathu Ram*, (1891) I.L.R. 13 All. 66 at p. 73 ; *Bank of Madras* v. *Subbarayalu and one*, (1891) I.L.R. 14 Mad. 32 at p. 35, applied.

The award of interest from the date of the decree is discretionary and the High Court will not as a rule interfere with such orders but in this case the District Judge had not considered the question of subsequent interest at all.

Sourendra Mohan v. *Hari Prasad*, 52 I.A. (418), applied.

K. R. Venkatram for the appellants.

T. Wan Hock for the respondent.

U THEIN MAUNG, C.J.—This is an appeal from a decree for recovery with costs of the amounts due on two promissory notes in which the plaintiff-respondent has filed a cross-objection claiming further interest and costs.

The plaintiff-respondent's case is that the defendants-appellants, who are husband and wife, jointly borrowed from him the total sum of Rs. 10,000 in December 1941 and that they jointly executed two on-demand promissory notes for Rs. 5,000 each with interest at one per cent per mensem in his favour. He is unable to produce the promissory notes as he has lost them in the fire which destroyed not only his house but hundreds of other houses in Tavoy at the time of the Japanese invasion thereof, *i.e.* in the month of January 1942. The defendants have not made any payment towards the debt due on the two promissory notes although he has made demands for payment and

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they have not even replied to his lawyer's notice for payment dated the 28th of November 1946 (Exhibit A).

The appellants' defence is that although they took a loan of Rs. 10,000 executing two promissory notes of Rs. 5,000 each in December 1941, the loan was taken not from the plaintiff-respondent alone but from him and his wife Daw E Mya and the promissory notes were accordingly executed in favour of the plaintiff-respondent and Daw E Mya, that the rates of interest mentioned in the promissory notes were only twelve annas per cent per mensem and not one per cent per mensem, that they have repaid the loan in full by two cheques for Rs. 8,000 each (drawn on the Chinese Overseas Bank) on the 2nd of January 1942, that they have got the promissory notes back from the plaintiff-respondent on such payment and that the promissory notes which have been produced by them and which have since been marked as Exhibits 1 and 2 are the promissory notes on which the said notes were taken.

It is common ground that the promissory notes were written up by the 2nd appellant Ma Kyin Hla in a book of promissory note forms with inner foils in the presence of the 1st appellant, the respondent and two witnesses namely U Ba Pe (P.W. 1) and U Sein Gaung, since deceased, that the appellants executed the promissory notes in the presence of the respondent and the two witnesses and that the two witnesses signed on the inner foils of the promissory notes as witnesses.

The learned District Judge, who heard all the evidence in the case, dismissed the suit holding that neither the respondent nor his witness U Ba Pe could be said to have seen the two promissory notes within the meaning of section 63 (5) of the Evidence Act, and that there accordingly was no evidence which was

admissible as secondary evidence of the contents thereof.

The plaintiff-respondent then appealed to the then High Court of Judicature at Rangoon and a Bench thereof remanded the case to the District Court for the trial of the following issues :

(1) Did the defendants, or either, and which of them, execute the promissory notes sued on, or either, and which of them ?

(2) If so, what has become of that note or those notes ?

(3) What sum or sums, if any, have been repaid by the defendants, or either of them, to the plaintiff on account of the said notes, or either of them, and on what dates ?

(4) To what, if any, relief is the plaintiff entitled ?

In the course of the order of remand, the learned Judges observed :

" The learned District Judge was impressed by the decision of their Lordships of the Privy Council in *Ma Mi and another* v. *Kallander Ammal* (1) that decision is, of course, binding on us and is obviously in acordance with general principles—where it was held that oral evidence of the contents of a document is admissible as secondary evidence only if the witness himself read the document. Of course, it is true that if the witness only heard a third person reading what he (the third party) said was the document aloud that evidence infringes the hearsay rule, but the learned District Judge overlooked the fact that, according to his story, the plaintff in the present case took the documents away with him and presumably saw with his own eyes what their contents were. It would be a strange thing if he had been content having advanced, as he says, Rs. 10,000, to take with him two pieces of paper and never to satisfy himself that they were not, for instance, blank pieces of paper. Apart from that, the learned District Judge has, in my opinion, been misled by the decision on which he relied because in the present case the person who, according to the plaintiff,

(1) 5 Ran. 18.

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read the documents aloud was actually one of the defendants herself. One of the persons who heard the reading aloud and might have been expected to protest if he did not agree with the document which it was proposed he should execute was the other defendant, and therefore, in my opinion the evidence given by the plaintiff on this subject was admissible on another ground, namely that if true—and, of course, I express no opinion as to its truth or otherwise—but, if true, it showed that there had been an admission, expressly by one defendant and impliedly by the other of the contents of the document which, according to the plaintiff he has lost."

(*See* Civil First Appeal No. 41 of 1947 in the High Court of Judicature at Rangoon.)

After the said order of remand, the parties filed a joint application in the District Court praying that the evidence already recorded might be used for final disposal of the case and they have not adduced any further evidence at all.

The learned District Judge, who, by the way, is not the same District Judge as the one who dismissed the suit, as we have stated above, has decided all the issues in favour of the plaintiff-respondent and granted him a decree.

The decree, however, is only for recovery of the principal sum of Rs. 10,000 with costs ; and costs, inculding the court-fee for the plaint, have been calculated on Rs. 10,000 only. He has disallowed all interests under section 3 of the Accrual of Interest (War-Time Adjustment) Act, 1947.

So, the defendants-appellants have appealed from the entire decree, and the plaintiff-respondent has filed a cross-objection claiming that he is entitled to further interest and more costs.

In view of the appellants' defence the question as to whether the promissory notes have been lost by the respondent in the fire, as alleged by him, is bound up with the question as to whether the promissory notes

produced by the appellants, namely Exhibits 1 and 2, are the very promissory notes which were executed when the loans were taken ; and this question is again bound up with the question as to whether the amounts due on the promissory notes have been paid in full as alleged by the appellants. However, to avoid confusion, we must deal with the said questions one by one.

The appellants admit that there was a great fire in Tavoy at the time of the Japanese invasion thereof and that the plaintiff's house as well as theirs were burnt down. However, they contend that the respondent must have removed the promissory notes from Tavoy to other places to which he had admittedly removed other properties. As the learned District Judge has rightly pointed out the respondent, who had no previous experience of a great war, might have thought that it was safer to keep his properties in two or three different places instead of keeping them all together in one place. Besides, Maung Thi (P.W. 2) has given evidence of his having found three iron safes, which had been forced open, and seen papers littered about the house of the respondent shortly after it had been destroyed by fire. U Ba Pe (P.W. 1) has also corroborated the evidence of the respondent, stating that the latter informed him of the loss in the fire of the two promissory notes and other valuable documents as well as some cash and gold about ten days after the Japanese invasion, *i.e.* about ten days after the fire.

The appellants have also contented that the respondent did not lose the promissory notes in the fire as he has returned them to the first appellant on the 2nd January 1942, *i.e.* before the fire, when the latter gave him two cheques for Rs. 8,000 each. However, there is only the evidence of the first appellant to show that the amounts due on the two promissory notes had been paid by

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cheques. Before the hearing of the suit the respondent made an application for particulars with reference to the cheques, but the appellants refused to give them. The second appellant does not know anything about the cheques, and the first appellant has stated that one cheque was from Kean Eng Company and that the other cheque was from Q. Han Choon of Tavoy. According to him, the first cheque was brought to him by his nephew Shin Ngar and the second cheque was brought to him by Ah Choon ; but neither Shin Ngar nor Ah Choon nor any representative of Lami Co., which is alleged to have instructed Q. Han Choon to give him the second cheque, has given evidence in the case. Ong Kar Hyouk (P.W. 1) has given evidence about his having paid Rs. 13,000 to the first appellant in the name of Kean Eng Co. just before the Japanese invasion of Tavoy. However, he made the following contradictory statements :

> "I made a cheque for a sum of Rs. 13,000 payable to Khay Seng Company, Tavoy (*i.e.* the first appellant). I cannot say as I do not remember now whether I gave two cheques or one cheque for that amount. * * *
> The amount written in the cheque was written of my own accord. Eu Hpe Yar (the first appellant) did not tell me for what amount the cheque is to be written ; neither did he tell me in how many cheques the amount of Rs. 13,000 was to be made payable."

Besides, he cannot say whether the cheque for the amount of Rs. 13,000 has been cashed or not. It would appear from the evidence of this witness that the first appellant got from Kean Eng Co. a cheque not for Rs. 8,000 only as alleged by him, but for Rs. 13,000. The first appellant has not alleged in his evidence that although the total amount due to him was Rs. 13,000 he asked the witness to give him that amount in two cheques, one of which was for Rs. 8,000 only.

Apart from the fact that there is no satisfactory evidence of the first appellant having got two cheques for Rs. 8,000 each as alleged by him, the allegation that he made over the cheques for Rs. 16,000 in all, when the amount due on the promissory note was Rs. 10,075 only, does not at all sound convincing. He did not even get a receipt for the sum of Rs. 5,925 which was to be returned to him as surplus by the respondent. Besides, both the appellants have admitted that about 8 days before the loan of Rs. 10,000 was taken by them on the promissory notes the second appellant had pledged some gold ornaments with the respondent's wife Daw Aye Mya for Rs. 3,000 with interest at ten annas per cent per mensem. The sum of Rs. 5,925 which the first appellant is alleged to have paid in excess of the amount due on the promissory notes was more than sufficient for redemption of the pledged articles, and yet the first appellant did not ask for return of the pledged articles at the time of the alleged payment.

Within a few months after the reoccupation of Tavoy by the British, C. Su Tha (P.W. 5) went and asked the appellants to redeem the pledged articles and pay the money due on the promissory notes at the instance of the respondent for Daw Aye Mya. They did not tell him then that they had repaid the loans on the two promissory notes, that there, in fact, was an overpayment by two cheques, that the sum of Rs. 5,925 was still due to them on account of such overpayment, and that the debt due on the pledge of the said articles could be set off against that amount. On the other hand, they admittedly went carrying cash with them to redeem the said articles about a month after the witness had spoken to them on behalf of Daw Aye Mya. The appellants went to redeem the said articles on four different

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occasions after the witness had spoken to them; and the first appellant has stated:

"On all the four occasions that I went to Teh Lu Pe's house for redemption of the pledged gold as well as to have a talk about the loan of Ps. 10,000 taken from him, I did not on any of those occasion tell Teh Lu Pe that I had the two discharged promissory notes with me, and that I had already repaid the loan. I did not tell him about that, because I thought the only way by which I could get back the balance sum of Rs. 5,925 from Teh Lu Pe is if he files a suit against me for the loan of Rs. 10,000. * * When we went to the plaintiff's house to redeem the pledged gold we took cash with us for redemption of our pledged gold."

The second appellant has also stated:

"When we went to Teh Lu Pe and Daw Aye Mya to redeem our pledged gold from them, we took money with us for redemption of our gold. * * * * I did not tell Teh Lu Pe or his wife Daw Aye Mya to set off the principal of Rs. 3,000 and interest due on our pledged gold from the amount of Rs. 5,925 which we were to get back from Teh Lu Pe, because I had in mind that we would get back that amount of Rs. 5,925 if Teh Lu Pe files a suit against us for the loan of Rs. 10,000."

The reason they have assigned for their silence about their having repaid the amounts due on the two promissory notes and about there being a sum of Rs. 5,925 to be refunded to them is not at all convincing; and although the respondent has filed a suit on the two promissory notes, they have neither filed a cross suit nor made a cross claim for recovery of the said sum of Rs. 5,925 at all. They have also admitted that they have not shown the promissory notes, Exhibits 1 and 2, to any one except their lawyer before they where actually produced in Court in the course of the first appellant's evidence in chief on the 1st April 1947. They did not reply to the notice of demand by the learned advocate for the respondent (Exhibit A), and they actually refused to let him inspect Exhibits 1 and 2 and opposed

the respondent's application for permission to inspect them.

Under these circumstances, we are of opinion that the learned District Judge is right in holding that the amounts due on the promissory notes have not been repaid as alleged or at all and that the promissory notes executed by the appellants have not been returned by the respondent to the first appellants.

The respondent's case that the loans were taken from him alone and that the promissory notes were executed only in his favour—and not in favour of his wife Daw Aye Mya and himself—is supported not only by Daw Aye Mya but also by U Ba Pe, and the first appellant has stated " I gave Rs. 3 each to U Sein Gaung and Maung Ba Pe for being present as witnesses." The respondent and Daw Aye Mya have also explained that the former used to lend out money on mortgages and promissory notes and that the latter used to lend money on pledges of moveables such as jewellery ; and their explanation is supported to a certain extent by the fact that the second appellant herself pledged her gold with Daw Aye Mya alone.

For the above reasons we are of the opinion that the learned District Judge is right in holding that Exhibits 1 and 2 in favour of the respondent and Daw Aye Mya are not the promissory notes, which were executed by the appellants at the time of the loan, and that the promissory notes, which were executed then, have really been lost.

It has been contended by the learned Advocate for the appellants on the authority of *Ma Mi and another* v. *Kallender Ammal* (1) confirming the decree of the High Court of Judicature at Rangoon in *Kalenther Ammal* v. *Ma Mi and one* (2) that even if the promissory notes have been lost the learned district Judge

(1) 5 Ran. 18. (2) (1924) I.L.R. 2 Ran. 400.

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erred in admitting the evidence of the respondent and U Ba Pe as secondary evidence of the contents thereof under section 63 (5) of the Evidence Act inasmuch as they had not seen (*i.e.* had not read) them. However, the learned Judges who remanded the case for trial have given reasons for distinguishing those rulings and for holding that the evidence is admissible as good secondary evidence of the contents of the promissory notes in the case of their loss having been proved; and we are in entire agreement with them. This is a case in which promissory notes were filled up in a book of printed forms with inner foils by one of the joint promisors at the time of the loans in the presence of the promisee, the other joint promisor and two witnesses who were present on special invitation to witness the loan and the execution of the promissory notes and who actually had to sign the inner foil as witnesses. It was not necessary for the promisee and the witnesses to read the whole of the promissory notes which admittedly were in the usual printed form. It was quite sufficient for them to see how the blanks as to the date, the amount, the names of the promisors and the rate of interest were filled up; a glance or two at each promissory note would have been enough to check the said entries (*see* Exhibits 1 and 2); and we cannot believe that the respondent, who was lending out as much as Rs. 10,000 did not take the trouble to check the entries or that the witnesses, who signed in the inner-foils, did not actually see the entries. *Kalenther Ammal* v. *Ma Mi and one* (1) was a case in which the writer of the document was not called as a witness and the witnesses' accounts of the contents of the document were "obviously derived from another source than seeing it." [*See* pages 402 and 405 of (1924) I.L.R. 2 Ran.] Besides, as has been observed in the said order of remand

(1) (1924) I.L.R. 2 Ran. 400.

the evidence of the respondent and U Ba Pe is admissible to show that there was an admission, expressly by one defendant and impliedly by the other, of the contents of the promisscry notes. (*See* section 22 of the Evidence Act.) In this connection we are of the opinion that the learned District Judge is right in holding on the evidence of the respondent and U Ba Pe—and on probabilities—that the second appellant did read out the promissory notes in the presence and hearing of the respondent, the first appellant and the witnesses before they were signed. For the above reasons we are of the opinion that the learned District Judge is right in admitting the evidence of the respondent and U Ba Pe as good secondry evidence of the contents of the promissory notes.

The learned Advocate for the appellants has also contended that the promissory notes were not valid as they were payable to bearer. It is not the appellants' case that they were payable to bearer. On raising this objection the learned Advocate is taking advantage of the respondent having stated under lengthy cross-examination " The usual term in the promissory note for the borrower of money is for the borrower to promise to pay the lender or the bearer of that promissory note. As far as I remember both those two promissory notes contained that clause." However, it is common ground that the promissory notes were written in a book of printed forms and such forms usually are of promissory notes payable to order like Exhibits 1 and 2 ; and the actual Burmese words used by the respondent in the said statement have not been recorded ; and we are not satisfied that the Paper Currency Act has in fact been infringed or that the said statement amounts to an admission of its infringement.

Ultimately the learned Advocate for the appellants wishes to argue (1) that the promissory notes were not

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"duly stamped" according to the definition in section 2 (*11*) of the Stamp Act since the respondent has stated "A postage stamp of Re. 1 was affixed on each of the promissory notes" and Rule 16 of the Burma Stamp Rules, 1940, provides that "the adhesive stamps used to denote duty shall be the requisite number of stamps of the value of four annas or two annas or one anna or half anna". (2) that the promissory notes themselves must be held to be inadmissable in evidence under Proviso (*a*) to section 35 of the Stamp Act, and (3) that secondary evidence of the contents of the promissory notes is therefore inadmissible.

However these questions were not raised in the District Court. The respondent made the said statement on the 29th November 1946, and if the questions had been raised before the 31st March 1947, the respondent could have amended the plaint, if amendment was necessary at all, so as to base the cause of action on the original consideration for the promissory notes. Even if the questions had been raised in the District Court after the 31st March 1947, and after the said order of remand, which was passed on the basis of the promissory notes having been duly stamped, the respondent could have been allowed to amend the plaint, if necessary, for the said purpose in accordance with the ruling in *Krishna Prasad Singh and another* v. *Ma Ave and others* (1), wherein Dunkley J. observed:

> "It would be monstrous, to my mind, that the plaintiff should lose his money merely because of a technical error in the execution of the promissory note, which is no more than a conditional payment and not a discharge of the debt. [*Maung Chit and another* v. *Roshan N.M.A. Kareem Oomer & Co.* (2)]."

Moreover, the said questions have not been raised in the memorandum of Appeal. There is a reference in

(1) (1936-37) I.L.R. 14 Ran. 383. (2) (1934) I.L.R. 12 Ran 500.

ground of Appeal No. 3 (v) (*b*) to the allegation by the respondent that on the promissory notes for Rs. 5,000 each, postage stamp of Re. 1 each was affixed, but the context show that the object of the reference thereto is not to show that the promissory notes were not duly stamped but to show that the allegation is improbable as the respondent is an experienced money-lender and that the promissory notes were really stamped as alleged by the appellants with a four annas stamp each in accordance with the Stamp Act and the Stamp Rules.

Under these circumstances the learned Advocate for the respondent has submitted (1) that secondary evidence having in fact been admitted, that admission cannot be called in question now on the ground that the promissory notes were not duly stamped, (2) that leave under Order 41, Rule 2, of the Code of Civil Procedure might not be granted to the appellant to urge the said grounds of objection, (3) that in the case of such leave being granted, he might be allowed to amend the plaint and claim a decree on the original consideration even at this stage, if we are of the opinion that such amendment is necessary and (4) that amendment of the plaint is really unnecessary as it discloses a cause of action on the original consideration on which the respondent can succeed independently of the promissory notes.

With reference to his first submission it has been held in *Maung Po Htoo and three* v. *Ma Ma Gyi and one* (1) that section 35 of the Stamp Act, read with the provisions of the Evidence Act, renders inadmissible in evidence both the original instrument, if not duly stamped, as well as secondary evidence of its contents. But under section 36, when either the original instrument itself or secondary evidence of its contents has in fact been admitted, that admission may not be

(1) (1926) I.L.R. 4 Ran. 363.

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called in question in the same suit, on the ground that the instrument was not duly stamped. The learned Advocate for the appellants relies on the ruling in the *Rajah of Bobbili* v. *Inuganti China Sitarasami Garu* (1); but that is a case in which the question under section 36 does not arise as secondary evidence has never been admitted.

With reference to his second submission, a Bench of the Bombay High Court has held in *Nathu Piraji Marwadi* v. *Umedmal Gadumal* (2):

"A litigating party can only succeed *secundum allegata et probata*, and the Courts should check the tendency of defeated litigants to evade their defeat by devising a new case which was never set up when it should have been set up.

A Court of appeal is not justified in exposing a party after he has obtained his decree to the brunt of a new attack of which he had never had notice during the hearing of the suit."

Their Lordships of the Privy Council also have observed in *Sreemutty Dosse* v. *Ranee Lalunmonee* (3), cited with approval in *Gajapati Radhika* v. *Vasudeva Santa Singaro* (4):

"Their Lordships cannot but feel that it would be most mischievous to permit parties who had had their case upon one view of it fairly tried, to come before this Board and to seek to have the appeal determined upon grounds which have never been considered, or taken, or tried in the Court below. It is obvious that if they wished to make the case which they now make they would, by their answer, have put the case in the alternative."

His third submission is in accordance with the ruling in *Krishna Prasad Singh and another* v. *Ma Aye and others* (5) and Dunkley J.'s observations therein which have already been quoted.

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(1) (1899) L.R. 26 I.A. 262.
(2) (1909) I.L.R. 33 Bom. 35.
(3) 12 Moore's Indian Appeals, 470.
(4) (1891-92) L.R. 19 I.A. 179 at p. 183.
(5) (1936-37) I.L.R. 14 Ran. 383.

His fourth submission is supported by the ruling in *Ram Ragubhir Lal and others* v. *The United Refineries (Burma) Limited* (1), which has been followed in *Maung Po Chein* v. *C.R.V.V.V. Chettyar Firm* (2). According to the said ruling "where a promissory note is inadmissible in evidence, as being not duly stamped, the plaintiff can still recover on the original consideration, if set out in the plaint as a cause of action." In the course of his judgment therein, Carr J. observed :

"I have no doubt that the plaint was originally drawn as one in a suit on a pro-note, but its sufficiency as a plaint on the original consideration seems to me to depend on whether it discloses a cause of action on which the plaintiff can succeed independently of the pro-note. And in my opinion it satisfies this test, though it would have simplified matters had it been amended. If we omit from the plaint all references, direct or indirect, to the promissory note, we still have a clear statement that there is still owing to the plaintiff the sum of two lacs of rupees on account of the sale price of the refinery, and that is I think a sufficient disclosure of a cause of action for the relief claimed."

In the present case the very first paragraph of the plaint discloses a cause of action on the original consideration. It reads :

"That, at Tavoy, in the month of December 1941, the defendants abovenamed jointly borrowed on the same day a total sum of Rs. 10,000 in two sums of Rs. 5,000 each from the plaintiff and in consideration thereof, they have jointly executed on the very day two on-demand notes of Rs. 5,000 each, with interest payable on each of them at the rate of Re. 1 per cent per mensem in favour of the plaintiff."

Besides the appellants have stated in paragraph 2 of their written statement that they executed the promissory notes "as collateral security for two loans."

(1) (1921) I.L.R. 9 Ran. 56 at p. 63. (2) A.I.R. 1935 Ran. 282.

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So we hold that it is not open to the appellants to raise the said objections at this stage and that if it were still open to them to do so, a decree on the original consideration would, in the interests of Justice, have to be granted to the respondent.

At the same time we are also of the opinion that the pro-notes were not invalid merely because they were stamped with one rupee postage stamps instead of four-anna postage stamps and that the learned District Judge was right in passing a decree upon them, *i.e.* in acting upon them within the meaning of section 35 of the Stamp Act. The greater includes the less and the basic requirement that they must bear adhesive stamps of not less than the proper amount has been fulfilled. The object of the Stamp Act and the Stamp Rules is to get revenue and to prevent evasion of liability, therefore and not to create pitfalls. Straight J. has observed in *Radha Bai* v. *Nathu Ram* (1):

"Now it is, I believe, a golden rule of all Judges who have to administer the laws relating to stamps and cognate matters that the provisions of such laws are to be construed strictly, and whenever there is any ambiguity or doubt, in favour of the subject. Consequently, following such rule and believing it to be a sound and just rule, I shall not hold that this document is an unstamped document unless I find anything in the Governor-General's rules which places it beyond all doubt that this is so."

Mahmood J. also cited therein the following passage from a judgment of Sir Michael Westropp:

"The imposition of such excessive and minute details would be pitfalls to the unwary and would, by frequently invalidating documents, press harshly upon the illiterate classes, and overthrow thousands of honest transactions without producing any such advantageous results, in the form of revenue to the State, as would compensate it for the discontent which would be occasioned. The Legislature has avoided such

(1) (1891) I.L.R. 13 All. 66 at p. 73.

stringent details, and it seems to us to have satisfied itself by legislating against defacement of the impressed stamp, and against such a mode of pending the document as would admit of that stamp being used for or applied to any other instrument."

The respondent has explained that the promissory notes were stamped with Re. 1 stamps to be on the safe side. He probably did not know the exact amount of stamp duty for a promissory not for Rs. 5,000 as the rates of stamp duty for promissory notes had been varied from time to time, and it will be absolutely unjust to punish him by the invalidation of the promissory notes for having paid more revenue than was really necessary. In the words of Edge C.J. in *Radha Bai* v. *Nathu Ram* (1) " such a prohibition as is contended for in this case must be specifically enacted, if any such prohibition is intended." (Cf. *Bank of Madras* v. *Subbarayalu and another* (2), wherein Best J. observed :

"To justify the exclusion from evidence of a document like A (which is admittedly executed on an impressed sheet of the proper value) on the ground that the stamp bears the word hundi, there must be a distinct and positive rule against the employment of such paper for the purpose and not merely a dubious inference as to the intention of the framers of the rules."

And there is no express prohibition in Rule 16 of the Stamp Rules of adhesive stamps of higher denominations being used. The Rule probably did not mention stamps of higher denomination than four annas, as four annas was the maximum stamp duty for promissory notes, when it was made.

The appeal fails and must be dismissed with costs.

As regards the cross-objection, the plaintiff-respondent, who has waived interest from December

(1) (1891) I.L.R. 13 All. 66 at p. 73 (2) (1891) I.L.R. 14 Mad. 32 at p. 35.

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1941 to the 31st January 1942 even before the Accrual of Interest (War-Time Adjustment) Act, 1947, was enacted and who has been deprived of all interest from the 8th December 1941 to the 31st March 1947, should in fairness have been awarded interest at the contract rate from the 1st April 1947 up to the 8th March 1948, which is the date of the decree under section 34 of the Code of Civil Procedure.

He should also have been awarded interest at the Court rate of 6 per cent per annum on the aggregate of the decretal amount from the date of the decree up to the date of realization under the same section of the Code. It is true that the award of interest under the said section is discretionary and that this Court will not, as a rule, interfere with a lower Court's order refusing to order such interest to be paid [Cf. *Sourendra Mohan* v. *Hari Prasad* (1)]. However, in this case the learned District Judge does not appear to have considered the question of awarding interest under the section at all.

The respondent is entitled to the costs of Civil First Appeal No. 41 of 1947 in the High Court of Judicature at Rangoon, *i.e.* the appeal in which the order of remand was passed. The order therein expressly stated " the costs of the abottive hearing (in the District Court) and proceedings before us should abide the event of the new trial ;' and the learned District Judge has obviously overlooked it.

The respondent is also entitled to the full amount of the Court Fees that he has paid on his plaint before the Accrual of Interest (War-Time Adjustment) Act, 1947 came into force. He had to pay Court Fees on interest also in accordance with the law as it stood then, and it is but fair that the defendants-appellants, who get

(1) 52 I.A. 418.

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the benefit of the Act having been enacted subsequently, should be made to bear the full Court Fee as part of the costs.

So we allow the cross-objection *in toto*, order that the decree of the District Court be amended accordingly and dismiss the appeal with costs.

U SAN MAUNG, J.—I agree.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice and U San Maung, J

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Aug. 24.

ABDUL RAZAK (APPELLANT)

v.

U PAW TUN AUNG & Co. (RESPONDENTS).*

Appeal under s. 20 of the Union Judiciary Act—Order XLI, Rule 22, Civil Procedure Code—Cross-objection—Whether can be filed—Pledge of jewellery with contract that after a period it will be irredeemable—Ss. 176 and 177 of the Contract Act—Sale by the pledgee after the period—Conversion—Measure of damages whether to be determined at the date of the conversion or at the date of the suit.

Held : Under Order XLI, Rule 22 of the Code of Civil Procedure cross-objection can be filed in an appeal under s. 20 of the Union Judiciary Act, 1948 (Corresponding to letters patent appeal).

Abhlakh Baksh Singh and others v. *Thakur Prasad and others*, (1943) I.L.R. 18 Luck. 256 ; *Abhilakhi* v. *Sada Nand*, (1931) I.L.R. 53 All. 535 (F.B.) ; *Saibitri Thakurain* v. *Savi*, (1921) I.L.R. 48 Cal. 481 ; *Sein Dass* v. *Lakhajee and another*, (1940) R.L.R. 393 ; *M. D. Venkatasam Chetty and one* v. *Mathichand Gulabchand*, (1926) I.L.R. 49 Mad. 291, followed.

Lala Khazanchi Shah v. *Haji Niaz Ali*, A.I.R. (1940) Lah. 438 at p. 441 ; *Mir Ghulam Hussain Sahib* v. *Ayesha Bibi and twelve others*, I.L.R. (1941) Mad. 775 (F.B.), referred to.

Even though a pledger agrees that he will have no right of redemption after a certain period still his right of redemption continues under ss. 176 and 177 of the Contract Act. The pledger cannot contract himself out of his statutory right given by ss. 176 and 177 of the Contract Act and if the pledgee sells the pledged articles without due notice as provided in the act, he is guilty of conversion.

The Co-operative Hindusthan Bank, Limited v. *Surendranath De*, (1932) I.L.R. 59 Cal. 667 at p. 668, followed.

The B.I.S.N. Company, Limited v *Alibhai Mahomed*, (1919-20) 10 L.B.R. 292 (F.B.) ; *Fut Chong* v. *Maung Po Cho*, (1929) I.L.R. 7 Ran. 339 ; *The Bombay Steam Navigation Company, Limited* v. *Vasudev Baburao Kemat*, (1928) I.L.R. 52 Bom. 37 ; *Lakhaji Dullaji & Co.* v. *Boorugu Mahades Rajanna and one*, A.I.R. (1939) Bom. 101 ; *Brij Coomaree* v. *Salamander Fire Insurance, Company*, (1905) I.L.R. 32 Cal. 816 at p. 823, referred to.

Dwarika v. *Bagawati*, A.I.R. (1939) Ran. 413 at p. 414, dissented from.

Measure of damages in a suit for conversion of pledged goods made *bona fide* is the market value of the goods sold at the time of conversion and not at the time of the institution of the suit.

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* Special Civil Appeal No. 4 of 1948 under s. 20 of the Union Judiciary Act against the judgment and decree of U THAUNG SEIN, J. in Civil 2nd Appeal No. 129 of 1947 reported in (1948) Bur. L.R. 182.

S.L. Ramaswamy Chettiar and one v. *M.S.A.P.L. Palaniappa Chettiar*, A.I.R. (1930) Mad. 364 ; *Alliance Bank of Simla (in Liquidation)* v. *Ghamandi Laljaini Lal*, (1927) I.L.R. 8 Lah. 373 ; *Bhimji N. Dalal* v. *Bombay Trust Corporation, Limited*, A.I.R. (1930) Bom. 306 ; *Shivaprasad Singh* v. *Prayagkumari Debee*, (1934) I.L.R. 59 Cal. 711 at pp. 738 and 739 ; *Motilal* v. *Lakshmichand*, A.I.R. (1943) Nag. 163 ; *Solloway and one* v. *McLaughlin*, (1938) A.C. 247 ; *Brierly* v. *Kendall*, (1852) 117 E.R. 1540; *Johnson* v. *Stear*, (1863) 143 E.R. 812 ; *Owners of Steamship Celia* v. *Owners of Steamship Volturno*, (1921) A.C. 544 (House of Lords) ; *Owners of Dredger Leisbosch* v. *Owners of Steamship Edison*, (1933) A.C. 449 (House of Lords) ; *SS. Celia* v. *SS. Volturno*, (1921) 2 A.C. 544 at pp. 562 to 564, followed.

Louis Dreyfu & Co. v. *Firm of Ghandamal & Co.*, (1919) 52 I.C. 878 ; *Bansidhar* v. *Sant Lal*, 10 All. 133 ; *Ma Me Shin* v. *Rm.R.n. N. Chettyar Firm*, A.I.R. (1933) Ran. 76 ; *Greening* v. *Wilkinson*, (1825—29) R.R. 790 ; *Rosenthal* v. *Alderton & Sons Ltd.*, (1946) K.B. 374, distinguished.

Donald v. *Suckling*, (1866) L.R. 1 Q.B.D. 585 ; *Wilkinson* v. *Verity*, (1871) L.R. 6 C.P. 206 ; *Beaman* v. *A.B.T.S., Limited*, (1948) 64 T.L.R. 285 at p. 287 ; *Clayton* v. *Le Roy*, 27 T.L.R. 479 (1911) 2 K.B. 1031 ; *Sachs* v. *Miklos*, (1947) 64 T.L.R. 181 ; *France* v. *Gaudet*, (1871) L.R. 6 Q.B.D. 199 referred to.

Tun Sein for the appellant.

P. K. Basu for the respondents.

U THEIN MAUNG, C.J.—This is an appeal under section 20 of the Union Judiciary Act, 1948, in which cross-objections have been filed by the respondent.

The facts are as follows. The appellant filed a suit for redemption of gold ornaments or for recovery of their value alleging that he had made over his gold ornaments to the respondent as security for a loan of Rs. 950 with interest at annas ten per cent per mensem on the 17th January 1941, and that the respondent has failed to allow redemption and to deliver the gold ornaments inspite of repeated demands therefor.

The respondent's defence was that the appellant had lost his title to the gold ornaments as " under the terms of the pledge (Ex. A and Ex. 1) the plaintiff was to redeem the gold by the end of Tagu, 1302 B.E. (circa April 1941) failing which he was to lose his title

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to the said gold in favour of the defendant " and " the plaintiff failed to turn up to redeem the gold within the stipulated time."

The Court of First instance decreed the suit as the respondent was found to have sold the gold ornaments on the 14th September 1942 without having given notice to the appellant of his intention to do so as required by section 176 of the Contract Act and directed the respondent to pay Rs. 2,747-5 as compensation at " the present market value of gold " minus what was due on the pledge at the date of the sale if the gold ornaments could not be returned.

The Court of First Appeal confirmed the decree. However, the Court of Second Appeal modified the decree by reducing the amount of compensation to Rs. 308-14 on the basis of the market value of gold on the date of conversion, *i.e.* on the 14th September 1942.

The appellant now contends that he is entitled to compensation on the basis of the market value on the date of the judgment of Court of First Instance and the respondent has filed cross-objections claiming that the suit should have been dimissed.

We shall consider the cross-objections first as the appeal must fail if the cross-objections prevail. The learned Advocate for the appellant has contended that no cross-objection can be filed in an appeal under section 20 of the Union Judiciary Act, 1948 ; and he has invited our attention to *Abhlakh Baksh Singh and others* v. *Thakur Prasad and others* (1) and *Abhilakhi* v. *Sada Nand* (2).

However *A. B. Singh*'s case (1) is one in which cross-objections were filed by a person who had no right

(1) (1943) I.L.R. 18 Luck. 256. (2) (1931) I.L.R. 53 All. 535 (F.B.).

of appeal under any law whatsoever and the Court observed :

" Where the law confers no right upon a party to file an appeal, it follows that he is precluded from filing cross-objections to the appeal."

Abhilakhi v. *Sada Nand* (1) is a case in which it was held that " while the procedure of the Civil Procedure Code does apply to the hearing of Letters Patent appeals and to the consequent decrees, the jurisdiction in the exercise of which the judgments are made is derived from the Letters Patent and not from the Code " and that no application lies for review of a judgment passed in an appeal under clause 10 of the Letters Patent. However, that was a case which the Court decided on the special wording of section 114 of the Code of Civil Procedure that an appeal from the judgment in a Letters Patent appeal was not an appeal allowed " By the Code." Banerji and Bennet JJ. actually observed in the course of their judgment :

" If we were to hold that section 114 would allow reviews of judgments passed in exercise of jurisdiction derived from other laws, then the section would fail to attain its object."

There is no question of the interpretation of section 114 of the Code in the present case just as there was no question of the interpretation of Order 41 of the Code in that case. (*See* p. 551 *Ibid.*)

On the other hand under section 121 of the Code the Rules in the First Schedule (including Order 41) have effect as if enacted in the body of the Code ; under section 117 the provisions of the Code apply to the High Court ; they remain so applicable except in so far as they are inconsistent with or contrary to the Appellate Side Rules of Procedure (Civil) (*see* p. 489

(1) (1931) I.L.R. 53 All. 535 (F.B.).

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of the Rules and Orders applying to the High Court of Judicature at Rangoon) and Order 41, Rule 22 is not inconsistent with any such rule ; so far as Order 41 is concerned Rule 35 is the only rule of it which has been made inapplicable to the High Court in the exercise of its appellate jurisdiction by Order 49 ; Their Lordships of the Privy Council have held in *Sabitri Thakurain* v. *Savi* (1) that Order 41, Rule 10 applies to a Letters Patent Appeal ; and the High Court of Judicature at Rangoon has applied Order 41, Rule 33 to a Letters Patent Appeal in *Sein Dass* v. *Lakhajee and another* (2).

A Full Bench of the Madras High Court has held in *M.D. Venkatasam Chetty and another* v. *Mathichand Gulabchand* (3) that the provisions of Order 41, Rule 22 do apply to appeals from the Original Side of a High Court and that cross objections may be filed therein.

Dalip Singh, J. observed in *Lala Khazanchi Shah* v. *Haji Niaz Ali* (4) " The matter might be different in the case of a second appeal, for a Letters Patent Appeal in such a case is only permissible with the certificate of the Judge who heard the case in single Bench." However, as has been held in *Mir Ghulam Hussain Sahib* v. *Ayesha Bibi and twelve others* (5) " Where a single Judge of the High Court grants a certificate under clause 15 of the Letters Patent he can only declare that the case is a fit one for appeal. He has no power to limit the certificate to certain points only." The case having been certified to be a fit one for appeal, the appellate Court has jurisdiction over and seisin of the whole of it. No further certificate is necessary to give the appellate Court jurisdiction to

(1) (1921) I.L.R. 48 Cal. 481.
(2) (1940) R.L.R. 693.
(3) (1926) I.L.R. 49 Mad. 291.
(4) A.I.R. 1940 Lah. 438 at p. 441.
(5) I.L.R. (1941) Mad. 775 (F.B.)

deal with such questions as may be raised in cross-objections ; and the requirement to file cross-objections within the prescribed period is only a matter of procedure. Besides Order 41, Rule 22 unlike section 114 of the Code does not contain anything to show that cross-objection can be filed only in appeals which are allowed by the Code. So the mere fact that the appellate Court derives jurisdiction to hear an appeal from the Letters Patent and not from the Code cannot make any difference.

We accordingly hold that Order 41, Rule 22 applies also to a Letters Patent Appeal which is only permissible with the certificate of the Judge ; and as an appeal under section 20 of the Union Judiciary Act, 1948 is of the same nature as such a Letters Patent Appeal we hold that Order 41, Rule 22 applies to it also and that cross-objections can be filed in it.

The most important cross-objection is " that the respondent had right to sell the property as they did because the transaction was not a pledge in the ordinary sense but was a conditional sale " ; and with reference to this objection we are in entire agreement with the learned Judge who has observed in the course of his judgment :

> " The question whether the transaction was a pledge or a conditional sale depends mainly on the construction to be put on Exhibit A. At the outset I would say that this document is very vaguely worded and reads as follows : ' If the goods are not redeemed by Tagu (April) 1302 B.E U Paw Tun Aung and Company will take the same. There will be no right to object to anything.' The document does not read as if it were a sale deed, and as far as I can see from the evidence on record the parties did not regard it as anything more than a document of pledge."

It has been contended that the transaction is not an ordinary pledge but one in which the pledgor has

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contracted himself out of his statutory rights under sections 176 and 177 of the Contract Act. However the Calcutta High Court has held in *The Co-operative Hindusthan Bank, Ltd.* v. *Surendranath De* (1) :

"Section 176 of the Contract Act, unlike some other sections, *e.g.*, sections 163, 171 and 174, does not contain a saving clause in respect of special contracts contrary to its express terms. The section gives the pawnee the right to sell only as an alternative to the right to have his remedy by suit. Besides, section 177 gives the pawnor a right to redeem even after the stipulated time for payment and before the sale.

In view of the wording of section 176 as compared with the wordings of the other sections of the Contract Act referred to and also in view of the right, which section 177 gives to the pawnor, and in order that the provisions of that section may not be made nugatory, the proper interpretation to put on section 176 is that notwithstanding any contract to the contrary notice has to be given, which, in the words of the section, should be a reasonable notice of the sale."

The learned Advocate for the Respondent has invited our attention to *The B.I.S.N. Co., Ltd.* v. *Alibhai Mahomed* (2), *Fut Chong* v. *Maung Po Cho* (3), *The Bombay Steam Navigation Co., Ltd.* v. *Vasudev Baburao Kamat* (4), and *Lakhaji Dollaji & Co.* v. *Boorugu Mahadeo Rajanna and another* (5). But these are authorities only for the view that section 152 of the Contract Act enables a bailee to contract out of his liability under section 151 thereof. Twomey C.J. actually observed in the case of *The B.I.S.N. Co., Ltd.* v. *Alibhai Mahomed* (2) :

"It is not clearly deducible from the terms of section 152 that a bailee may only make a special contract increasing his responsibility, and that he cannot make a special contract reducing it. This is a proposition curtailing the ordinary right of

(1) (1932) I.L.R. 59 Cal. 667 at p. 668.
(2) (1919-20) 10 L.B.R. 292 (F.B.).
(3) (1929) I.L.R. 7 Ran. 339.
(4) (1928) I.L.R. 52 Bom. 37.
(5) A.I.R. (1939) Bom. 101.

freedom of contract, and we must hesitate to give effect to such a proposition on the strength of a mere inference and in the absence of express enactment."

In the case of section 176 of the Contract Act there is no provision whatsoever under which the pledgor can contract himself out of his right thereunder ; and as Maclean C.J. has pointed out in *Brij Coomaree* v. *Salamander Fire Insurance Company* (1) :

"There is nothing to prevent traders from making any contract they like, so long as the incidents of that contract are not inconsistent with the provisions of the Contract Act. But, if you find in a contract certain terms from which, when they exist, the Legislature says that certain consequences shall ensue, these consequences must ensue ; otherwise, it is difficult to see what object there can be in codifying the law upon the question."

It is true that Mackney J. has held in *Dwarika* v. *Bagawati* (2) :

"The principle of avoiding clog on the equity of redemption does not apply to pledges and hence parties can by special agreement introduce a clause into the agreement that on failure to redeem within a certain time the property pledged would become the property of the pledgee."

But his Lordship decided that case without any reference whatsoever to sections 176 and 177 of the Contract Act, *i.e.* without considering whether the pledgor could contract himself out of his rights thereunder and inspite of the following passage from Story on Bailments which he himself has quoted (at p. 416 of the Report) :

"If a clause is inserted in the original contract, providing that, if the terms of the contract are not strictly fulfilled at the time and in the mode prescribed, the pledge shall be irredeemable, it will not be of any avail. For the common law deems

(1) (1905) I.L.R. 32 Cal. 816 at p. 823.

(2) A.I.R. (1939) Ran. 413 at p. 414.

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such a stipulation unconscionable and void, upon the ground of public policy, as tending to the oppression of debtors. The Roman law treated a similar stipulation (called in that law lex commissoria) in the same manner, holding it to be a mere nullity."

So we hold that the transaction is an ordinary pledge, that the pledgor cannot contract himself out of rights under sections 176 and 177 of the Contract Act, and that the respondent is liable in damages to the appellant for having sold the pledged articles without notice of the sale.

To turn now to the main appeal as to the measure of damages, C. Kameswara Rao has stated at page 1081 of his book on the Law of Damages and Compensation :

"So, where the pledgee of chattels with a power of sale, which can only be exercised under certain conditions, sells the chattels without performing the conditions, he is no doubt guilty of conversion, but the measure of damages is the value of the chattels at the time of conversion less the amount for which they were pledged. The sale by the pledgee, though unauthorized, does not put an end to the pledge, so as to entitle the pledgor to have return of the goods pledged, for in such cases, the pledgor's right of possession will not, *ipso facto*, revert so as to enable him to sue for conversion.

An action for breach of contract of pledge will, however, lie in such a case, but the damages will not be the full value of the goods, but only the damage done to the pledgor's interest."

Illustration (3) to section 10 of the Specific Relief Act reads :

"(*b*) **A** pledges certain jewels to **B** to secure a loan. **B** disposes of them before he is entitled to do so. **A**, without having paid or tendered the amount of the loan, sues **B** for possession of the jewels. The suit should be dismissed, as **A** is not entitled to their possession, whatever right he may have to secure their safe custody." [See *Donald* v. *Suckling* (1).]

(1) (1866) L.R. 1 Q.B. 585.

It has also been held in *S. L. Ramaswamy Chetty and another* v. *M.S.A.P.L. Palaniappa Chettiar* (1) that where the pledgee is guilty of an unauthorized conversion, the pledgor is entitled to his property back or its full value but only on payment of the debt. So the appellant has been rightly held to be entitled only to the excess of the value of the gold ornaments over the amount due to the respondent in respect of (1) the debt and (2) extraordinary expenses incurred by the respondent for their preservation under section 175 of the Contract Act.

The real bone of contention between the parties is as to whether compensation for conversion of the gold ornaments should be assessed with reference to the market value of gold at the time of conversion or to the market value of gold at the date of the institution of the suit. The difference is considerable as the market rate at the time of convertion was only Rs. 60 per tical whereas the market rate at the date of the institution of the suit was as much as Rs. 160 per tical.

There is a fair consensus of opinion among the Indian High Courts that the measure of damages for conversion is the market value of the goods at the date of conversion. See *Alliance Bank of Simla in Liquidation* v. *Ghamandi Lal Jaini Lal* (2), *Bhimji N. Dalal* v. *Bombay Trust Corporation Limited* (3), *Shivaprasad Singh* v. *Prayagkumari Debee* (4) and *Motilal* v. *Lakshmichand* (5). Of these the first and last cases are direct authorities on the question under discussion as they relate to conversion of pledged articles by sale without notice to pledgor.

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(1) A.I.R. (1930) Mad. 364.
(2) (1927) I.L.R. 8 Lah. 373.
(3) A.I.R. (1930) Bom. 306.
(4) (1934) I.L.R. 61 Cal. 711 at pp. 738-739.
(5) A.I.R. (1943) Nag. 163.

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The only Indian ruling which has been cited as authority for the contrary view is *Louis Dreyfus & Co.* v. *Firm of Chandamal & Co.* (1). That, however, was a case of fraudulent conversion and the Bench observed in the course of its judgment :

> " In actions of contract, as a rule, the motives or conduct of the defendant are not to be taken into account in assessing damages whereas in actions of tort which affect property, the conduct of the defendant may be so taken into account (Halsbury's Laws of England, Volume X, Articles 593 and 598 at pages 323, 325).
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> * * * *
>
> There is also, as pointed out in the judgment of the Court below, reason to believe that appellants actually realized more than the amount for which they have been made liable, and if the sale price had been disclosed, the Court might have held this to be a proper measure of damages, Cf. *Bansidhar* v. *San Lal* (2)."

Even as regards conversion, which formed a part of a fraudulent system of business, their Lordships of the Privy Council have held in *Solloway and another* v. *McLaughlin* (3) the measure of damages was the value of the (converted) shares at the date of their conversion (less the value of shares received by the plaintiff at the time he received them).

Incidentally, in the present case the learned Judge has found as a matter of fact that " the sale of the pledged jewellery in September 1942 was probably under the *bona fide* belief that the ownership in them had passed to the appellant (now respondent) "; and we are of the same opinion.

The learned Advocate for the appellant has relied on *Ma Me Shin* v. *R.M.R.M.N. Chettyar Firm* (4) as an authority for the contrary view. That was a case

(1) (1919) 52 I.C. 878.
(2) 10 A.133.
(3) (1938) A.C. 247.
(4) A.I.R. (1933) Ran 76

in which the creditor, with whom certain jewels had been deposited as collateral security for two promissory notes, sold the jewels without proper notice to the creditor and filed a suit on the promissory notes, and the judgment therein appears to have been passed by consent as the Bench did not discuss the law on the assessment of damages and merely stated (at p. 79):

"I understand that it is agreed by the parties that that being so the respondents are entitled to claim the amount due on the promissory notes after deducting what is a reasonable value for the jewellery deposited. The value must be taken as the value at the date of suit, that is 20th June 1930."

In England also there was a fair consensus of opinion that the measure of damages for conversion is the market value of the goods at the time of the conversion. [See *Brierly* v. *Kendall* (1); *Johnson* v. *Stear* (2); *Owners of Steamship Celia* v. *Owners of Steamship Volturno* (3) and *Solloway and another* v. *McLaughlin* (4) (Privy Council); and Cf. *Owners of Dredger Liesbosch* v. *Owners of Steamship Edison* (5).]

Lord Wrenbury put it so succinctly in *S.S. Celia* v. *S.S. Volturno* (6) that we must quote at some considerable length from his Lordship's judgment therein:

"Assume that a judge is sitting in July to try an action for damages for a tort committed on the preceding January 1. Let me express the judgment in the form of a declaration, followed by an adjudication upon it. The judgment should, I think, be as follows: Declare that on January 1 the plaintiff suffered by reason of the defendant's tort a loss of 300,000 lire. Declare that on January 1 the equivalent sum in British currency was (say) 7,500 lire. Adjudge that the plaintiff recover against the defendant 7,500 lire. There is no difference of principle arising from the fact that the loss is of lire as distinguished from (say)

(1) (1852) 117 E.R. 1540.
(2) (1863) 143 E.R. 812.
(3) (1921) A.C. 544 (House of Lords).
(4) (1938) A.C. 247.
(5) (1933) A.C. 449 (House of Lords).
(6) (1921) 2 A.C. 544 at pp. 562 to 564.

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cows. If the plaintiff had been damaged by the defendant tortiously depriving him of three cows the judgment would be : Declare that on January 1 the plaintiff suffered by the defendant's tort a loss of three cows. Declare that on January 1 the plaintiff would have been entitled to go into the market and buy three similar cows and charge the defendant with the price. Declare that the cost would have been 150 lire. Adjudge that the plaintiff recover from the defendant 150 lire. It would be *nihil ad rem* to say that in July similar cows would have cost in the market 300 lire. The defendant is not bound to supply the plaintiff with cows. He is liable to pay him damages for having, on January 1, deprived him of cows. The plaintiff may be going out of farming and may not want cows, or, when judgment is given, he may have enough already. The plaintiff is not bound to take cows and the defendant is not bound to supply them. The defendant is liable to pay the plaintiff damages, that is to say, money to some amount for the loss of the cows : the only question is, how much ? *The answer is, such sum as represents the market value at the date of the tort of the goods of which the plaintiff was tortiously deprived.*

The argument to the contrary is that the defendant is bound by a pecuniary payment to put the plaintiff in a position as good as that in which he stood before the tort was committed. That is true, but it is necessary to add the consideration of which we have recently heard so much, in the form of a fourth dimension—namely, that of time. The defendant is bound to make such pecuniary payment as would put the plaintiff at the date of the tort in as good a position as he would have been in had there been no tort. If the date taken be that not of the tort but of the judgment, it is giving the plaintiff not damages for the tort, but damages also for the postponement of the payment of those damages until the date of the judgment. If such later damages can be recovered, as under circumstances they may be if the defendant improperly postpones payment, they would be recovered in the form of interest. They would be damages not for the original tort, but for another and a subsequent wrongful act."

Abbott C.J. did hold in *Greening* v. *Wilkinson* (1) :

" In trover, the jury are not limited to find as damages the mere value of the property at the time of the conversion, but they

(1) (1825—29) R.R. 790.

may find as damages the value at a subsequent time, in their discretion."

But Clerk and Lindsell have stated in their Law of Torts, Tenth (1947) Edition :

"In actions of trover and conversion, where the value has fluctuated it must be taken as it stood at the time of the wrongful act [The Arpad (1934), p. 189] * * * * There does not appear to be any reported case in which *Greening* v. *Wilkinson* (1) has been either questioned or followed, but it has been frequently laid down, and the rule now appears to be established, that the proper measure of damages is the market value of the goods at the time of the conversion."

Winfield has also stated at page 363 of his Text Book on the Law of Tort, Third (1946) Edition :

"On principle, it seems better to select the moment of conversion as the punctum temporis for assessing damages, for the opposite rule would introduce an undesirable element of speculative profit or loss to the parties in an action of this kind."

However, the rule cannot be said to be established in England as the Court of Appeal has decided in *Rosenthal* v. *Alderton and Sons, Limited* (2), "In an action of detinue, the value of the goods to be paid by the defendant to the plaintiff in the event of the defendant failing to return the goods to the plaintiff must be assessed as at the date of the verdict or judgment in his favour and not at that of the defendant's refusal to return the goods, and the same principle applies whether the defendant has converted the goods by selling them or has refused to return them for some other reason." That was a case in which the plaintiff, who had by arrangement with the defendants left certain goods on the defendants' premises, demanded the return of the goods and, on the defendants' refusal to comply, brought an action against them claiming the

(1) (1825—29) R.R. 790. (2) (1946) K.B. 374.

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return of the goods and, in the alternative, payment to him of their value and damages for their retention; and the Court observed in the course of its judgment, "In an action of detinue the value of the goods claimed but not returned, ought, in our judgment, to be assessed as at the date of the judgment or verdict . . . . . the defendant's failure to return the goods after that date (*i.e.* the date of the refusal of the plaintiff's demand) becomes *and continues to be wrong*. The judgment was on the basis of detinue being a continuing wrong; but the Court has added after referring to *Wilkinson* v. *Verity* (1) a case of detinue with misconduct "in fraud of the bargain":

"But the bailor can, in such circumstances elect to sue in detinue (at any rate where he was not aware of the conversion at the time), and there is no reason why the value of the goods in fact converted should be assessed on a different basis from the value of the goods which the bailee has not converted but which for some other reasons he fails to re-deliver."

However, in *Beaman* v. *A.R.T.S., Limited*.(2) Denning J. has pointed out the essential difference between the cause of action in conversion and the cause of action in wrongful detention as follows:

"I attempt no precise definition, but, broadly speaking the cause of action in conversion is based on an unequivocal act of ownership by the defendant over the goods of the plaintiff without any authority or right in that behalf. The act must be an unequivocal act of ownership, that is, an act such as acquiring, dealing with, or disposing of the goods, which is consistent only with the rights of an owner as distinct from the equivocal acts of one who is entrusted with the custody of handling of carriage of goods. A demand and refusal is not, therefore, itself a conversion, but it may be evidence of a prior conversion. The cause of action in wrongful detention is based on a wrongful withholding of the plaintiff's goods. It depends on the defendant's being in

(1) (1871) L.R. 6 C.P. 206. (2) (1948) 64 T.L.R. 285 at p. 287.

possession of the plaintiff's goods. If such a defendant without any right so to do withholds the goods from the plaintiff after the plaintiff has demanded their return, he is, for such time as he so withholds them, guilty of wrongful detention : see *Clayton* v. *Le Roy et Fils* (1). This is the tort of which a bailee or finder is guilty who is in possession of the goods and fails to deliver them up within a reasonable time after demand, though it may also, in the case of a bailee, be a breach of contract. If the bailee or finder subsequently disposes of the goods, he is guilty of conversion, *but the wrongful detention then comes to an end and is swallowed up in the conversion.*"

Denning J. has also made the following observations on *Rosenthal* v. *Alderton and Sons, Limited* (2) in the course of the same judgment :

" But when does the cause of action accure in such cases as the present ? In my opinion it accrues at the date of the original conversion or the initial withholding of the goods. A recent decision of the Court of Appeal holds that the damages in such cases are to be assessed at the date of the judgment or verdict in the plaintiff's favour : see *Rosenthal* v. *Alderton and Sons Limited* (2), but that does not mean that the cause of action accrued at that time. The observations of the Lord Chief Justice in *Sachs* v. *Miklos* (3) considerably limit the scope of *Rosenthal* v. *Alderton and Sons Limited* (Supra) and, should prices hereafter fall, the Courts will probably be faced with the task of reconciling *Rosenthal* v. *Alderton and Sons, Limited* (Supra) with the settled rule that damages, whether in contract or tort, are to be assessed as at the date of the accrual of the cause of action, and that subsequent fluctuations upwards or downwards in rates of exchange or commodity prices before or during legal proceedings are irrelevant : *see* the decision of the House of Lords in *SS. Celia (Owners of)* v. *SS. Volturno (Owners of)* (4), particularly the speech of Lord Buckmaster (at pages 970 and 548 of the respective reports) of Lord Sumner (at page 556) and of Lord Wrenbury (at page 563), and the long line of cases of buyers who sued sellers for conversion of or for failure to deliver goods bargained and sold, such as *France* v. *Gaudet* (5),

(1) 27 T.L.R. 479 (1911) 2 K.B. 1031. (3) (1947) 64 T.L.R. 181.
(2) (1946) K.B. 374. (4) (1921) 2 A.C. 544 at pp. 562 to 564.
(5) (1871) L.R. 6 Q.B. 199.

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where the damages were always assessed as at the date of the breach." [We have already quoted the speech of Lord Wrenbury in *SS. Celia* v. *SS. Volturno* (1) at some considerable length.]

In *Sachs* v. *Miklos* (2) which has been referred to by Denning J., the action was one *for detinue and conversion* against an ordinary bailee and the case was remanded by the Lord Chief Justice to determine whether the plaintiff knew or ought to have known that the defendant intended to sell the goods and if he neither knew nor ought to have known that his goods would be sold whether he found out, only on the date of the suit that his goods had been sold. At the same time the Lord Chief Justice observed, " the measure of damages is the same in conversion as it is in detinue, where the facts are only that the defendant has the goods in his possession and could hand them over but would not " (p. 183) ; and as we have stated above Denning J. said in *Beaman* v. *A.R.T.S., Limited* (3), " If the bailee or finder subsequently disposes of the goods, he is guilty of conversion, but the wrongful detention then comes to an end and is swallowed up in the conversion. "

The authority of the ruling in *Rosenthal* v. *Alderton and Sons, Limited* (4) has been shaken considerably by the observation in the two subsequent rulings. Besides, in the present case the respondent is not an ordinary bailee who " has the goods in his possession and could hand them over but would not " but a pledgee who has actually sold the goods about four and a half years before the institution of the suit in good faith believing that he had become the full owner thereof in accordance with the terms of the agreement of pledge Ex. A and Ex. 1 ; and as has been pointed

(1) (1921) 2 A.C. 544 at pp. 562 to 564.
(2) (1947) 64 T.L.R. 181.
(3) (1948) 64 T.L.R. 285 at p. 287.
(4) (1946) K.B. 374.

out in the *Aliance Bank of Simla in Liquidation* v. *Ghamandi Lal Jaini Lal* (1) the rights of a pledgee are higher than those of an ordinary bailee. On the other hand the appellant is a pledgor who failed to redeem the pledged articles in March or April 1942, in accordance with the terms of the said agreement and who has filed the suit for redemption of the pledged articles or for recovery of their value only on the 31st March 1947, taking advantage (1) of the Accrual of Interest (War-Time Adjustment) Act, 1947, according to which he cannot be required to pay interest up to the date of the suit and (2) also of the abnormal rise in the price of gold after the termination of the war. He did not file the suit earlier although according to his own evidence-in-chief he was informed by the respondent's agent above the end of April 1944, that he had lost his right of redemption.

Under these circumstances, we choose to follow the rulings of the House of Lords, the Privy Council, the Indian High Courts and the opinion of the learned Authors which we have set out above in preference to the ruling of the Court of Appeal in *Rosenthal* v. *Alderton and Sons, Limited* (2); and we uphold the decision of the learned Judge that under the circumstances of the case, damages for the conversion of the pledged articles must be assessed with reference to their market value at the date of conversion.

The remaining grounds of appeal and cross-objections have not been pressed by the learned Advocate and we find that they are really unsustainable.

The appeal and the cross-objections are dismissed; and the decree under appeal is confirmed. No order as to the costs of the appeal and the cross-objections.

U SAN MAUNG, J.—I agree.

(1) (1927) I.L.R. 8 Lah. 373. (2) (1946) K.B. 374.

APPELLATE CRIMINAL.

Before U San Maung and U Thaung Sein, JJ.

H.C. 1948

June 9.

THAN KHE (*a*) WAI TUN PRU (*a*) KRAUNG SHAY (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Appeal against conviction under s. 302 (2), Penal Code—Whether can be converted to one under s. 302 (1) of the Penal Code—Ss. 423 and 439, Criminal Procedure Code.

The question arose whether in appeal against conviction under s. 302 (2) of the Penal Code the finding can be altered to one under s. 302 (1) which would be tantamount to a finding of a more serious offence.

Held: That the court is competent to do so. Case law on the point considered.

U Saw and others v. *The Union of Burma*, (1948) Bur. L.R. 217; *On Shwe* (a) *Kalaw* v. *King-Emperor*, 1 Ran. 436; *Sarda Prasad* v. *Emperor*, A.I.R. (1937) All. 240; *Bawa Singh* v. *The Crown*, I.L.R. 23 Lah. 129; *Ranjha and one* v. *Emperor*, A.I.R. (1948) Lah. 74, considered.

Ba Shun (Government Advocate) for the respondent.

U SAN MAUNG, J.—In Criminal Regular Trial No. 21 of 1948 of the Special Judge (U Pha Tha Htaw) of Akyab, the appellant Than Khe was convicted under sub-section 2 of section 302 of the Penal Code as amended by the Penal Code (Amendment) Act, 1947 (Burma Act No. XXXIII of 1947) and was sentenced to 10 years' rigorous imprisonment. As the alleged took place on the 20th of February 1947, before Burma Act No. XXXIII of 1947 came into force, the appellant should have been convicted under section 302 of the Penal Code if the offence committed by him was in

* Criminal Appeal No. 692 of 1948, from the Order of Special Judge, Akyab, in Special Trial No. 21 of 1948, dated the 9th June 1948.

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fact murder. Accordingly the appellant has been called upon to show cause why his conviction should not be altered to one under section 302 of the Penal Code and as the offence punishable under that section is punishable only with death or transportation for life he has also been called upon to show cause why his sentence should not be enhanced in revision. *See* Criminal Revision No. 185 (A) of 1948 of this Court.

The facts of the case are simple and in my opinion the evidence on record leaves no room for any possible doubt that it was the appellant Than Khe who had caused the death of the deceased Nga Krwin Aung by cutting him with a *dah*. Nga Krwin Aung lived with his wife Sein Mra U (P.W. 7) on the outskirts of Hteikwabyin village near the village tank. At about 8 a.m. on the day of occurrence, Nga Nyein (P.W. 1) went to Nga Krwin Aung's *talin* to take delivery of the paddy due to him as cattle hire. Then, while he and one Khwe Dee Aung were measuring out the paddy, the appellant Than Khe arrived and asked Nga Krwin Aung whether he would be going to Leikma the following morning. On Nga Krwin Aung's replying in the affirmative, the appellant told him that he would accompany Nga Krwin Aung. The appellant then started splitting bamboo at a spot about a bamboo length away from where Nga Nyein was measuring out the paddy. After he had made three *hnees* the appellant suddenly came and cut Nga Krwin Aung who at that moment was in the act of bending and putting the paddy from the heap into the measuring basket. The blow fell on the base of the head above the nape of the neck and Nga Krwin Aung dropped into a sitting position and at the same time tried to stench the blood which flew out of the wound. In the meantime the appellant ran away towards the east taking the *dah* with him.

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Sein Mra U (P.W. 7) was actually cooking rice near the place where the paddy was being measured at the time the incident took place. She happened to look towards her husband and saw him in a sitting posture at the place where he was measuring paddy. He was covered with blood. She shouted out to him as to who had cut him and her husband told her that he was cut by Wai Tun Pru. Neither Nga Nyein nor Khwe Dee Aung were near her husband at that time. She then went to the village outpost and reported to Head-constable San Tun U (P.W. 2) that her husband had been cut by Wai Tun Pru. When the Head-constable came back with her, her husband was still alive but he was unable to speak very coherently. Her husband died in the afternoon and his body was taken to the hospital by Wai Htu and others. It should be noted that Wai Tun Pru is one of the *aliases* of the appellant Than Khe. San Tun U (P.W. 2), who was then outpost officer-in-charge of Hteikwabyin police outpost said that when Sein Mra U came and reported to him that her husband was cut by Than Khe (*alias*) Wai Tun Pru, he at once went to her house and there found Nga Krwin Aung lying under the small hut at a *talin* on the north of his house with an injury at the base of the head. Nga Krwin Aung was able to speak though with great difficulty and his statement which was recorded by San Tun U was signed by Nga Krwin Aung himself. In that statement (Ex. A) it is mentioned that the assailant was Wai Tun Pru (*alias*) Than Khe. Nga Krwin Aung died about half an hour later and San Tun U then went in search of the appellant Than Khe whose permanent residence was Hteikwabyin village. The appellant was not to be found and was apparently absconding.

According to the medical evidence Nga Krwin Aung received a *dah* cut wound 6″ × 1″ at the back of the

head just below the occipital protuberance cutting the brain underneath and the brain itself was cut to the extent of $3'' \times 1/5'' \times 1''$ deep. The thickness of the skull was normal and the injury was necessarily fatal. *See* the statement of Dr. Bhattercherjee (P.W. 3).

The appellant who was charged under section 302 of the Penal Code pleaded not guilty and offerred to give evidence on behalf of his own defence which was an *alibi*. The appellant denied his visit to Nga Krwin Aung's *talin* that morning and stated that he went out to a nearby jungle called Linmrindaung to collect fuel and that he was arrested there by 6 *Pyaukkyas* and abducted to their headquarters. It was only in March 1948, that he succeeded in escaping from them and came back to Hteikwabyin. When he reached home he learnt that those who had joined *Pyaukkyas* should surrender and he therefore surrendered himself to the Burma Rifles at Thayettabin. The appellant cited 7 witnesses in support of his defence but as pointed out by the learned Special Judge none of them could really substantiate his defence. Kyaw Hla Pru (D.W. 2) and Pan Aung (D.W. 3) could say nothing useful to him. Ma Shan Bon (D.W. 4) and Tun Kra Aung (D.W. 5) who were the neighbours of Nga Krwin Aung were away from home at the time of the occurrence and therefore could not say what happened then. Hla Tun Pru (D.W. 6), brother-in-law of the appellant said that the appellant disappeared from his house during the *Lazok of Tabodwe* before Nga Krwin Aung met his death. However, it is only natural that Hla Tun Pru would try and save his own brother-in-law at any cost. Bar Loon Sein (D.W. 8) admitted that before he went to Kyauktaw one day before the murder of Nga Krwin Aung the appellant was at Hteikwabyin and that when he returned to Hteikwabyin from Kyauktaw, the day after the incident, the

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police were on the look out for the appellant in connection with Nga Krwin Aung's murder. His evidence, therefore, tends to support the prosecution rather than the defence.

Therefore in view of the evidence of the eye witness Nga Nyein and the evidence of Sein Mra U and San Tun U regarding the denunciation made by the deceased Nga Krwin Aung and the fact that the appellant absconded from Hteikwabyin village after the incident took place, the appellant has been rightly held to be the assailant of Nga Krwin Aung.

The question which now arises for determination is whether in appeal against the conviction under section 302 (2) of the Penal Code, the finding can be altered to one under section 302 of the Penal Code as it stood before Burma Act No. XXXIII of 1947 came into force. In the case of *U Saw and others* v. *The Union of Burma* (1) where the appellants were convited under section 302 (1) (*b*) of the Penal Code by the Special Crimes Tribunal, a Special Bench of this Court altered in appeal the finding to one under section 302 of the Penal Code as the offence was committed before Burma Act No. XXXIII of 1947 came into force. However, in the case now under consideration, the appellant was convicted under section 302 (2) of the Penal Code which is a lesser offence than one punishable under section 302 (1) of the Penal Code, being only punishable with transportation for life or rigorous imprisonment for a term which may extend to ten years, whereas an offence under section 302 (1) is punishable with death. An alteration of the finding from one under section 302 (2) of the Penal Code to one under section 302 of the Penal Code as it stood before Burma Act No. XXXIII of 1947 came into force would therefore be tantamount to alteration

(1) (1948) Bur. L.R. 217.

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of the finding from a lesser to a more serious offence. However, in the case of *On Shwe* (a) *Kalaw* v. *King-Emperor* (1) a Bench of the late High Court of Judicature at Rangoon held that where there is an appeal by a prisoner from a conviction under section 304 of the Penal Code (he having been committed to stand his trial under section 302 of the Penal Code), and in addition, the High Court takes seizin of the case under its revisional jurisdiction, the conviction for the lesser offence under section 304 of the Penal Code can be converted into one under section 302 of the Penal Code, and the sentence can be enhanced accordingly under the combined provisions of sections 423 and 439 of the Criminal Procedure Code. In *Sarda Prasad* v. *Emperor* (2) the Allahabad High Court has taken a different view and has laid down that where the Court below has either acquitted an accused expressly or by necessary implication, then unless there is an appeal from the acquittal the finding cannot be converted into one of conviction. The matter has been elaboratedly discussed by a Full Bench of Lahore High Court in *Bawa Singh* v. *The Crown* (3) where the question referred to the Full Bench was whether in the absence of an appeal by the Provincial Government it is within the powers of the High Court to set aside an order of acquittal under section 302 either *suo moto* or on the application of the complainant under the combined effect of sections 423 and 439 of the Criminal Procedure Code and I would respectfully adopt the reasoning of Dalip Singh J. who held that the ruling in the case of *On Shwe* v. *King-Emperor* (1) was correct. The most recent case on the subject is *Ranjha and another* v. *Emperor* (4) which followed the case of *Bawa Singh* v. *The Crown* (3). Therefore following the ruling in

(1) 1 Ran. 436.
(2) A.I.R. (1937) All. 240.
(3) 23 I.L.R. Lah. 129.
(4) A.I.R. (1948) Lah. 74.

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Ohn Shwe v. *King-Emperor* (1) I would hold that in this appeal it is competent for this Court to alter conviction of the appellant under section 302 (2) of the Penal Code to one under section 302 of the Penal Code as it stood before Burma Act No. XXXIII of 1947 came into force. The conviction of the appellant Than Khe (*a*) Wai Tun Pru will accordingly be altered to one under section 362 of the Penal Code and his appeal otherwise dismissed.

U THAUNG SEIN, J.—I agree.

(1) 1 Ran. 436.

CIVIL REVISION.

Before U Tun Byu, J.

H.C. 1948

Aug. 5.

N.PL.ST. MUTHAYA CHETTIAR (APPLICANT)

v.

Rm.A.Rm. CHETTYAR FIRM AND ONE (RESPONDENTS). *

Amendment of pleading—Order 6, Rule 17, Code of Civil Procedure—Period of limitation expired—Amendment when permissible—Principles applicable.

A plaint filed on the last day of limitation was sought to be amended after the period of the expiry of limitation by substituting allegation of payment to the grandson of the plaintiff in place of allegation of payment to plaintiff and by adding that the person receiving payment had no right to receive on behalf of the plaintiff. The trial court dismissed the application for amendment of the plaint.

Held : That though the powers of amendment under Order 6, Rule 17 of the Code of Civil Procedure ought to be liberally exercised, one cause of action cannot be substituted for another.

P.M.Chettyar Firm v. *Ma Shwe Pon and two others*, 5 Ran. 115, considered.

Ma Shwe Myat v. *Maung Mo Hnaung*, I.L.R. 48 Cal. 832 at p. 835, applied.

The introduction of a new matter which would deprive the defendant of the benefit of the statutory defence of limitation cannot be permitted and it is a settled rule of practice that such amendments are not admissible.

Byash Chandra Roy v. *Ajodhynath Deb and others*, 10 Ran. 74 at p. 75; *Weldon* v. *Neal*, (1887) 19 Q.B.D. 394, referred to and followed.

It is only in exceptional cases where plaintiff ought not to be deprived of his money for technical error that amendments can be allowed and it does not appear that any objection was raised to the amendment in *Krishna Prasad Singh and one* v. *Ma Aye and others*, (1936-37) 14 Ran. 383.

Tun I for the applicant.

C. A. Soorma for the respondent.

U TUN BYU, J.—This is an application to revise the order of the Second Judge of the Rangoon City Civil Court, dated the 24th November 1947, refusing to

* Civil Revision No. 12 of 1948 against the order of the 2nd Judge of the City Court, Rangoon, in C.R. No. 924 of 1947, dated 24th November 1947.

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allow the plaintiff-applicant N.PL.ST. Muthaya Chettyar to amend his plaint filed in Civil Regular No. 924 of 1947. The relevant paragraphs of the plaint are as follows :

"2. That the sum has not been repaid in money or currency of legal tender, but the plaintiff was given by the said Ganapathi agent of the 1st defendant Rs. 2,315-13-6 in Japanese currency which had no value and was not a legal tender on the 17th of April 1945 and the plaintiff was obliged to return the said pronote.

3. Plaintiff submits that the Japanese currency being no legal tender had no value, the plaintiff was deprived of the said pronote for no consideration and is entitled to sue the defendants on the original consideration which was paid to the defendants in British money of value which was a legal tender.

4. Plaintiff therefore bases his suit on the original consideration for value paid in cash of legal tender, and claims a sum of Rs. 2,028-2-0 as per particulars given below. . . ."

It might be mentioned that the promissory note was said to be executed on the 23rd July 1941. It will be observed from paragraph 2 of the plaint that the plaintiff in effect stated that he had himself received the sum of Rs. 2,315-13-6 in Japanese currency which had been paid in on behalf of the first defendant. Paragraphs 3 and 4 of the plaint also show what the real issue which the plaintiff raised was. The question which would arise in accordance with the plaint was whether payment in Japanese currency would constitute a valid discharge for the amount due on the promissory note which was executed on the 23rd July 1941, and that appears to be the real point for consideration. The plaint was filed on the 31st March 1947, and the application to amend the plaint was made on the 23rd September 1947, after the written statement had been filed. It is proposed to substitute paragraphs 2, 3 and 4 of the plaint by

the following paragraphs in the proposed amended plaint:

"2. That the sum has not been repaid to the plaintiff but a sum of Rs. 2,315-13-6 was paid in Japanese currency to one Muthaya, grandson of the plaintiff, who was a school-boy of the age of 19 years and had no power of authority to receive the same on behalf of the plaintiff to the knowledge of the defendants, or to return the pronote to the defendants.

3. That the money being paid to an unauthorized person the defendants have not discharged the payment of the amount which was actully due to the plaintiff and not the said Muthaya.

4. The plaintiff bases his suit on the original consideration for value paid in cash as he has been deprived of the promissory note illegally through a person who is not an authorized agent or attorney of the plaintiff, and claims a sum of Rs. 2,028-2-0 as per particulars given below. . . ."

There can be no doubt that paragraphs 2, 3 and 4 of the proposed amended plaint introduced new matters which were not contained in the original plaint and that they set out a new issue between the parties. The proposed new paragraph 2 of the plaint implied that the plaintiff had not received the sum of Rs. 2,315-13-6 in Japanese currency from the defendents, which is inconsistent with paragraph 2 of the original plaint. It is difficult to accept the suggestion that the plaintiff did not know all the facts and circumstances surrounding the case when the plaint was filed on the 31st March 1947, which was nearly two years after the British reoccupation of Burma. It is clear that the proposed amendments sought to raise a new issue which did not arise in the original plaint, and it is also clear that the new issue which is sought to raise in the proposed amended plaint is not an issue which incidentally arises or is connected with the issue raised in the original plaint. It is however contended on behalf of the plaintiff that the power to allow the amendment of a plaint

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under Rule 17 of Order VI of the Code of Civil Procedure ought to be liberally exercised, and the case of *P.M. Chettyar Firm* v. *Ma Shwe Pon and two others* (1) was cited to show that the plaint ought to be allowed to be amended unless the amendment is intended to set up a distinctly inconsistent case with the case set out in the original plaint. In *P.M. Chettyar Firm*'s case (1) the plaintiff appears to have based his case in the original plaint on an ordinary registered mortgage but in the amended plaint he however alleged that the money was lent on the security of an equitable mortgage. There it was observed that the primary relief which was sought was for repayment of the money lent with interest, and it was accordingly considered that the claim as set up in the amended plaint was not clearly inconsistent with the claim set out in the original plaint. In the present case under consideration the question of the loan is not disputed, and the real issue which arises under the original plaint is quite different from the issue which arose in the case of *P.M. Chettyar Firm* (1).

The observation of Lord Buckmaster in the case of *Ma Shwe Myat* v *Maung Mo Hnaung* (2) appears to be appropriate and it is as follows :

> "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."

It appears to me that if the amendments which have been proposed by the plaintiff had been allowed, it could properly be said that the plaintiff was setting up

(1) 5 Ran. 115. (2) I.L.R. 48 Cal. 832 at p. 835

an inconsistent case with what he had set up in the original plaint in that the plaintiff attempted impliedly through the proposed amendments to deny that he had received the sum of Rs. 2,315-13-6 in Japanese currency from the first defendant, and thus it could be said that the proposed amendments of the plaintiff come within the mischief indicated in the latter portion of the observation made by Lord Buckmaster as quoted above.

In the case of *Byash Chandra Roy* v. *Ajodhynath Deb and others* (1) Cunliffe J. observed as follows :

"The plaintiff does not actually seek to set up a new cause of action, but he does seek to introduce fresh matter into his plaint which it is admitted on both sides would deprive the defendants of the benefit of their statutory defence set up by virtue of the Limitation Act.

The question at issue was decided many years ago in England by the Court of Appeal, notably in the case of *Weldon* v. *Neal* (2). Lord Esher in that case said : 'We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments.' And on the particular facts of that case Lord Lindley said : 'I do not think it would be just to the defendant to allow these amendments, the effect of which would be to deprive him of his defence under the Statute of Limitations.' "

The above quotations apply appropriately to what is proposed to be done in the present case. If the plaintiff in the present case is to withdraw his suit with leave to file a fresh suit against the defendants, the fresh suit would have been barred in that it would be filed a considerable time after the period of limitation in favour of the defendants had lapsed. It seems to be clear that a Court will not ordinarily allow an amendment of the plaint where the effect of allowing

(1) 10 Ran. 74 at p. 75. (2) (1887) 19 Q.B.D. 394.

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the amendment would be to deprive the plaintiff of some legal right which had accrued to him by lapse of time, and that, if any amendment is allowed in that circumstance, it would be only in very exceptional cases.

The case of *Krishna Prasad Singh and another* v. *Ma Aye and others* (1) was an exceptional case, and it was obviously a case where the plaintiff ought not to have been deprived of his money for a mere technical error in the execution of a promissory note upon which his case was originally founded. In *Krishna Prasad Singh*'s case (1) it also does not appear that any objection was raised to the amendment of the plaint. In the present case there does not appear to be any exceptional circumstance by which the Court might be influenced to allow the plaint to be amended after the period of limitation, in which the promissory note could have been sued, had expired..

In the circumstances the order of the Second Judge of the Rangoon City Civil Court, dated the 24th November 1947, passed in Civil Regular No. 294 of 1947, must be considered to be correct. The application is accordingly dismissed with costs. Advocate's fee three gold mohurs.

(1) (1936-37) 14 Ran. 383.

CRIMINAL REVISION.

Before U San Maung, J.

MA THEIN YIN (APPLICANT)

v.

MA KYIN SHEIN (RESPONDENT).*

H.C. 1948

Aug. 18.

Criminal Procedure Code, s. 261.—Trial by bench invested with second class powers—Appeal lies to District Magistrate—Whether revision competent—S. 439 (5), Criminal Procedure Code.

Held: Every bench of Magistrates invested with the powers of a Magistrate of the Second Class can try summarily under s. 261, Criminal Procedure Code but the decision is subject to appeal to the District Magistrate under s. 407 (1), Criminal Procedure Code.

Queen-Empress v. *Narayanasamy*, I.L.R. 9 Mad. 36, referred to.

As the applicant filed revision before the learned Sessions Judge it could not be entertained at the instance of a party who could have appealed. In the present case s. 439 (5), Criminal Procedure Code is clearly in the way of the applicant, as the reference is not on a report by the Sessions Judge or a District Magistrate.

King-Emperor v. *Appulsamy*, 1 L.B.R. 209, distinguished.

Ba Shun (Government Advocate) for the respondent.

U SAN MAUNG, J.—This is a recommendation by the learned Sessions Judge of Bassein that the conviction of the applicant Ma Thein Yin under section 278 of the Penal Code and the sentence of fine of Rs. 8 or seven days' imprisonment passed upon her by a Bench of Honorary Magistrates at Yegyi in Criminal Regular Trial No. 4 of 1948 be set aside. The Honorary Magistrates at Yegyi were invested with powers of a magistrate of the third class but when they sit as a Bench, the Bench is invested with the powers of a magistrate of the second class. *See* Rule 3 of the Rules and Orders for regulating the

* Criminal Revision No. 92 (B) of 1948 being review of order of Honorary Magistrates of Yegyi, dated the 18th May 1948, passed in Criminal Regular Trial No. 4 of 1948.

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powers and procedure of Benches of Magistrates reproduced in paragraph 380 of the Courts Manual. Every Bench invested with the powers of a Magistrate of the second class is empowered to try summarily the offences mentioned in section 261 of the Code of Criminal Procedure. *See* Rule 7 of the aforesaid rules. However, whether the Bench invested with the second class powers tries a case summarily or in a regular way its decision is subject to appeal to the District Magistrate under section 407 (1) of the Code of Criminal Procedure. See *Queen-Empress* v. *Narayanasami* (1). Instead of appealing against the conviction and sentence before the District Magistrate, Bassein, the applicant has filed an application for revision before the learned Sessions Judge who has apparently overlooked the provisions of sub-section 5 of section 439 of the Code of Criminal Procedure. It reads :

"Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed."

No doubt, in the case of *King-Emperor* v. *Appulsamy* (2) it was held that sub-section (5) of section 439, Criminal Procedure Code, does not debar the Chief Court from dealing with a case on revision reported by the Sessions Judge or District Magistrate of his own motion and not on the application of the accused who could have appealed but did not do so However, in the present case, section 439 (5) of the Criminal Procedure Code is clearly in the way. The application for revision should have been dismissed by the learned Sessions Judge. His recommendation cannot therefore be accepted, and I direct that the proceedings be returned to him.

(1) I.L.R. 9 Mad. 36. (2) 2 L.B.R. 209.

CRIMINAL REVISION.

Before U Aung Tha Gyaw, J.

MAUNG ANT BWE AND ONE (APPLICANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

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Aug. 18.

Criminal Procedure Code, s. 256 (1) and (2)—Non-compliance—Effect of.

Held: The right to recall prosecution witnesses is given by section 256 (1), Criminal Procedure Code and the right to give evidence on his own behalf is provided for in the second part of the section. The terms of these sub-sections are in their nature and wording mandatory in character. Any failure on the part of the trying Magistrate to comply with these provisions must be regarded as vitiating the trial irrespective of whether any failure of justice is occasioned thereby.

Madura Muthu Vannian and six others, I.L.R. 45 Mad. 820, applied.

U AUNG THA GYAW, J.—The two applicants were charged and convicted under section 427 of the Penal Code and were each sentenced to pay a fine of Rs. 30 with the option of three weeks' rigorous imprisonment in default.

The learned trying Magistrate conducted the trial summarily as provided in Chapter XXII of the Code. A perusal of the trial record shows that there was no compliance with the provisions of section 256 of the Code and the learned Sessions Judge (Magwe) has accordingly recommended that the convictions and sentences passed upon the applicants be quashed.

The learned Sessions Judge's recommendations must be unreservedly accepted. In the trial of warrant cases by Magistrates either ordinarily or summarily, the procedure provided in Chapter XXII of the Code must be strictly observed and the trial record must clearly show this compliance with the law.

* Criminal Revision No. 127B of 1948 being review of order of Headquarters Magistrate, Minbu, dated the 8th June 1948, passed in Criminal Summary Trial No. 28 of 1948.

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U AUNG THA GYAW, J.

In the present case there is no record of the fact that either section 256, sub-section (1) or sub-section (2) has been duly complied with. The terms of both these sub-sections are both in their nature and in their wording mandatory in character and any failure on the part of the trying Magistrate to comply with these provisions must be regarded as vitiating the trial irrespective of the question as to whether any failure of justice had in fact occasioned thereby. Under the first part of the section after the accused has claimed to be tried he shall be required to state forthwith whether he wishes to cross-examine any, and if so, which of the witnesses for the prosecution whose evidence has been taken. The accused shall then be called upon to enter upon his defence. Then under the second part of the section the accused shall be asked whether he desired to give evidence on his own behalf and the Magistrate shall warn him in the manner required by sub-section (1) of section 342 of the Code of Criminal Procedure.

The right to recall prosecution witnesses provided in the first part of the section and the right to give evidence on his own behalf provided in the second part of the section are statutory rights which cannot be lightly denied to an accused person. In fact, there is no provision in the Code by which an accused person can be deemed to have waived or forfeited his right and as the Code now stands as amended it is the bounden duty of all Magistrates to see that accused persons are given the opportunity to exercise these rights. Failure to observe the requirements of these two sub-sections must be regarded as an illegality which vitiates the whole trial. Failure to re-examine an accused person after the further cross-examination of prosecution witnesses has been regarded as an illegality having the same consequence to the trial.

[*Madura Muthu Vannian and six others* (1)]. Failure to give an accused person an opportunity of explaining the evidence against him in the manner allowed to him by law would appear to be an illegality of equal importance.

Accordingly the conviction and sentences passed upon the two applicants will be set aside and they shall be set at liberty so far as this case is concerned The fines, if paid by them, will be refunded.

(1) I.L.R. 45 Mad. 820.

ORIGINAL CIVIL.

Before U Bo Gyi, J.

H.C. 1948

Sept. 7.

U ZAGARA (PLAINTIFF)

v.

U SANDAWBATHA (DEFENDANT).*

Burmese Buddhist Law—Sanghika *property—Burma Laws Act, s. 13, clause* (1)—*Rules of* Vinaya *and Transfer of Property Act—Succession to* kyaungdike—*Right of possession, control and management.*

Held: Buddhist Priest-hood is a religious institution and devolution of a *pongyi kyaung* is a question of religious usage within the meaning of s. 13 (*1*) of Burma Laws Act.

In this matter the rules of the *Dhammathats* are applicable to the laity and the rules of the *Vinaya* govern the clergy.

The rules of the *Vinaya* in respect of a gift have however been altered by s. 123, Transfer of Property Act. The Civil Courts under s. 226 of the Constitution are bound to administer justice according to law, canon as well as lay.

Shwe Ton v. *Tun Lin*, 9 L.B.R. 220 at p. 242; *A.R.L.P. Firm* v. *U Po Kyaing and one*, (1939) Ran. L.R. 311; *U Zayanta* v. *U Naga*, 9 L.B.R. 258 *U Pandawun* v. *U Sandima and one*, I.L.R. 2 Ran. 131 at p. 142, followed.

U Pinnya v. *Maung Law*, I.L.R. 7 Ran. 677, not followed.

Where the gift of a *kyaungdike* is invalid for want of a registered deed it must be considered to be *Sanghika* property. On the death of the presiding monk it is the duty and the privilege of the *Sangha* to elect a successor to the deceased—presiding monk and a monk does not automatically become the successor of the presiding monk by reason of age and seniority. But where the senior monk is tacitly acknowledged by the monks of a *Sanghika Kyaungdike* he becomes the presiding monk with powers of control and management. But where the authority of seniormost monk is not acknowledged either expressly or tacitly the presiding monk must be elected by the monks of *kyaungdike* or the majority of them.

U Thuseitta v. *U Eindawuntha*, (1940) Ran. L.R. 97 at p. 102, followed.

Apart from the presiding monk none of the *Sangha* living in a *Sanghika kyaungdike* is entitled to possession, control and management.

U Zawtipala v. *U Thatdama*, A.I.R. (1939) Ran. 21, followed.

Hla Tun Pru for the plaintiff.

Khoo, for the defendant.

* Civil Regular No. 23 of 1947 of the High Court, Rangoon.

U BO GYI, J.—This suit is between two Buddhist monks and concerns religious property. The plaintiff U Zagara claiming to be the *poggalika* owner and/or the presiding or seniormonk of the West Peinnegon *Kyaungdike* sues to evict the defendant U Sandawbatha from the premises of the *Kyaungdike* on the ground, it is said, of the latter having committed a serious breach of monastic discipline in that he on or about the 16th October 1947 pulled down a dilapidated *kyaung* within the *kyaungdike* and constructed a new *kyaung* on the old site in spite of a lawyer's notice forbidding him so to do and in open defiance of the plaintiff's authority. The defendant admits having done so, but denies the plaintiff to be the *poggalika* owner or presiding monk of the *kyaungdike*. In paragraph 10 of his written statement he claims to have received the dilapidated *kyaung* together with the Lower Tavoy *kyaung* nearby from their *poggalika* owner U Thagaya in reversion but he admits that the sites of those *kyaungs* "form part of the Peinnegon *Kyaungdike*, which site was the *poggalika* property of the late U Eindawun, a Burmese Buddhist monk." He denies the plaintiff to have any cause of action against him.

There are four principal *kyaungs* in the suit *kyaungdike*: the Daung *kyaung* consisting of two buildings one of which is known as the pucca building, the Poppa *kyaung*, the Upper Tavoy *kyaung*, and the Lower Tavoy *kyaung* which comprises the dilapidated *kyaung* abovementioned and the main *kyaung* which is occupied by the defendant. The plaintiff's case is that the suit *kyaungdike* together with three other *kyaungdikes* belong to the late U Eindawun (also spoken of as U Eindawuntha), who on the eve of his departure for Thayetmyo during the Japanese occupation orally gave all the four *kyaungdikes* to a lay devotee of his, Daw Sint, who on hearing of his death gifted the

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kyaungdikes to the plaintiff in the same manner in the presence of monks and laymen. Alternatively, he claims to be the presiding monk of the suit *kyaungdike* or, at any rate, the seniormost monk. That the plaintiff is the seniormost monk of the suit *kyaungdike* is not denied by the defendant. They both appear to have started living there some twenty years ago, the plaintiff as U Eindawuntha's invitee living at the Daung *kyaung* and the defendant on his part as U Thegaya's donee of the Lower Tavoy *kyaung*, and they have lived in their respective *kyaungs* ever since.

The plaintiff and his witnesses speak to the suit *kyaungdike* being U Eindawuntha's *poggalika* property but most of the *Sayadaws* who say so do not appear to have directed their minds to the question whether the site of the *kyaungdike* together with the buildings thereon or the site alone was *poggalika* property. U Thippa (P.W. 9) who is the grandson of the alleged original owner U Withokda on his mother's side and also of U Eindawuntha on his father's side states that he knows the site of the suit *kyaungdike* to be U Eindawunthaw's grant but does not know who owns the buildings thereon. Indeed, the plaintiff himself does not know to whom the buildings of the Lower Tavoy *kyaung* actually belong. There is, too, the record of the Rangoon Development Trust, *vide* Exhibit D, which admittedly is in respect of the suit *kyaungdike*, which shows one U Nya Neinda to be in possession under Government. In any case, however, the defendant, as mentioned earlier, has admitted that the site of the *kyaungdike* was U Eindawuntha's *poggalika* property. The issues have been fixed, and evidence led, on the basis of the pleadings and the defendant cannot now go back on his own admission. The site, at any rate, of the *kyaungdike* must for the purposes of the suit be deemed to be U Eindawuntha's

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poggalika property. The plaintiff, however, has failed to show that the two buildings of the Lower Tavoy *kyaung* belonged to U Eindawuntha.

The substantial questions raised in this case are embodied in the first issue which is whether the plaintiff is *poggalika* owner or *Sayadaw* (presiding monk) or seniormonk of the suit *kyaungdike*. Since a considerable portion of the *Vinaya* is still unexplored territory to secular Courts I have admitted oral evidence as to the alleged gift by U Eindawuntha to Daw Sint and by her in turn to the plaintiff in case a text of the *Vinaya* might be discovered of such potency as to override the imperative requirements of the Registration Act. No such text has however been brought to my notice.

Now, the Buddhist priesthood is undoubtedly a religious institution and the question of the devolution of a *pongyi kyaung* is a question, if not of inheritance, at least of religious usage. Section 13 (*1*) of the Burma Laws Act, so far as material to the present suit, is :

> "Where in any suit or other proceeding in Burma it is necessary for the Court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution—
>
> (*a*) The Buddhist law in cases where the parties are Buddhists
>
> shall form the rule of decision, except in so far as such law has by enactment been altered or abolished, or is opposed to any custom having the force of law."

The question is whether the rules of *Vinaya* are part of the Buddhist Law within the meaning of section 13 of the Burma Laws Act. In *Shwe Ton* v. *Tun Lin* (1) it was held by a Bench of five judges : "The *Vinaya* and its commentaries form part of the Buddhist Law and where the devolution of the property of a *pongyi* is

(1) 9 L.B.R. 220 at p. 242.

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concerned it seems right that this branch of the law should govern the decision. . . . . ." Divergent views were expressed on this question in *U Pyinna* v. *Maung Law* (1). But the view expressed in *Shwe Ton*'s case (2) was confirmed by a five judge Full Bench of the late High Court in *A.R.L.P. Firm* v. *U Po Kyaing and another* (3). It seems that, so far as concerns matters mentioned in section 13 of the Burma Laws Act, the Buddhist Law governing them consists *inter alia* of the rules of the *Dhammathats* applicable to the laity and the rules of the *Vinaya* governing the clergy. If these sets of rules have not been promulgated by sovereign authority, they are in any event rules of Customary Law in their respective spheres.

The next question is whether the rules of *Vinaya* as part of the Buddhist Law have in any respect been altered by an enactment. Section 129 of the Transfer of Property Act, as it stood before its amendment, ran: "Nothing in this Chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammedan law, or, save as provided by section one hundred and twenty-three, any rule of Hindu or Buddhist Law." In this section, as amended by the Amending Act XX of 1929, the words "or, save as provided by section 123, any rule of Hindu or Buddhist Law" have been omitted. Mulla in his commentary on the section says: "The reference to Buddhist Law has been omitted as it was considered "that the chapter was consistent with Buddhist Law." I must hold therefore that the rules of the *Vinaya* in respect of gifts have been altered by section 123 of the Transfer of Property Act. In *U Zayanta* v. *U Naga* (4) it was held that Buddhist religious gifts are not excepted from the operation of

(1) I.L.R. 7 Ran. 677.
(2) 9 L.B.R. 220 at p. 242.
(3) (1939) R.L.R. 311.
(4) 9 L.B.R. 258.

section 123 of the Transfer of Property Act. Later on, in *U Pandawun* v. *U Sandima and one* (1) Lentaigne J. observed .

" I am satisfied that, if sections 123 and 129 of the Transfer of Property Act, 1882, are read together, section 123 must be construed as enumerating the *formalities* requisite for the making of valid gifts by Hindus and Buddhists, provided that the gifts are otherwise valid under the personal law applicable to the donor."

I may here mention also that if the question of the validity of a gift of a *kyaung* by a *pongyi* to a laywoman or *vice versa* is not a matter of religious usage or institution, then *a fortiori* the provisions of section 123 of the Transfer of Property Act would operate fully and effectively without being under any sort of cloud.

Now, no text of the *Vinaya* overriding section 123 of the Transfer of Property Act has been brought to my notice, but, on the other hand, the *Vinaya*, as shown above, has been modified by modern legislative enactment in so far as religious gifts are concerned. The ecclesiastical authorities may consider themselves amenable to the *Vinaya* only, but the civil Courts are under section 226 of the Constitution bound to administer justice according to law, canon as well as lay. In point of fact, the President of the Maha Sangha Aphwe, *Sayadaw* U Khemasara himself recognizes that religious gifts of *kyaungs* are compulsorily registrable. I must hold therefore that the alleged gifts of the *kyaungdikes* to and by Daw Sint were invalid.

Such being the legal position, the evidence of U Ba Thaw (P.W. 2) and others who speak to the gift of the suit *kyaungdike* and other *kyaungdikes* by U Eindawuntha to Daw Sint as also the evidence

(1) I.L.R. Ran. 2, 131 at p. 142.

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of U Khemasara (P.W. 4) and the other reverend *Sayadaws* who speak to the gifts of the said *kyaungdikes* by Daw Sint to the plaintiff would be inadmissible under section 91 of the Evidence Act. Since the evidence is inadmissible, I shall not go into the question of its credibility.

Now, it has been held in *U Thila* v. *U Arseinna* (1) that, according to the opinion of the *Thathanabaing*, the *poggalika* owner of a *kyaungdike* has a right to surrender to the donor of the *kyaungdike* the power to appoint on his death his *poggalika* successor to the *kyaungdike*. But Daw Sint had not donated the *kyaungdikes* and when I asked U Hla Tun Pru, the learned Advocate for the plaintiff, during argument as to the exact nature of the plaintiff's case, he replied: "My case is that U Eindawuntha made an outright gift of the *kyaungdikes* to Daw Sint who in her turn made an outright gift of the same to plaintiff." Evidence that has been led is to the same effect. Consequently, this is not a case where delegation of power by a *poggalika* owner of a *kyaung* to his donor to appoint his successor is either alleged or proved.

It is argued as a last resort that in the event of the gifts being held invalid for want of registration, it should be held that, as religious property was involved, Daw Sint became the trustee of the property. But there was no declaration of a trust in this case; and a trust of immoveable property must under section 5 of the Trusts Act be registered.

For all the above reasons I hold that the plaintiff is not the *poggalika* owner of the suit *kyaungdike*.

Inasmuch as the gifts have been held invalid, the suit *kyaungdike* must be considered to be *Sanghika* property of the kind known as *Mata Sanghika*. In

(1) (1938) R.L.R. 678.

Shwe Ton's case (1) cited above it was observed : "The general rule to be drawn from the *Vinaya* (*See Mahavagga*, Volume 8, Chapter 27, section 5) is that religious property belonging to a *Bikkhu* or *Rahan* passes on his death to the *Sangha*." The reverend *Sayadaws* examined on either side in this suit are in no two minds about this. The question that arises in these circumstances is whether the plaintiff can be regarded as the presiding monk of the suit *kyaungdike* the whole of which may for the purpose in hand be deemed to be *Sanghika* property although there is evidence tending to show that the Lower Tavoy *kyaung* buildings are *poggalika* property. *Sayadaw* U Khemasara states that even if U Eindawuntha had not gifted the *kyaungdike*, the plaintiff as the seniormost monk could control the *kyaungdike*, election or no election ; but the *Sayadaw* concedes that in case the plaintiff's management is not submitted to, an election might be held of the presiding monk. *Sayadaw* U Arloka and U Kusala (P.Ws. 5 and 6) give their views in much the same vein. *Sayadaw* U Dhamathara (P.W. 7) begins by saying that, when the head monk of a *kyaungdike* dies, generally speaking the seniormost surviving monk of the *kyaungdike* must be regarded to have succeeded to the headship. The *Sayadaw* then adds : "If a monk is elected as presiding monk by the *Sangha* of a *Sanghika kyaungdike*, his authority must be submitted to ; but he need not be submitted to, if he has not been so elected." In re-examination, however, the *Sayadaw* veers round to his former opinion. On the other hand, *Sayadaw* U Pyinnawuntha (D.W. 3) is positive that in the case of *Mata Sanghika* property it is only the monk duly elected by the monks of the *kyaungdike* who can become presiding monk ; and the *Sayadaw* has at my request forwarded through

(1) 9 L.B.R. 220 at p. 242

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defendant's advocate textual authorities in support of his view which authorities have been set out in Annexure IV.

Reading the views of the *Sayadaws* together, they seem to resolve themselves into this : if the monks of a *Sanghika kyaungdike* tacitly acknowledge the authority of a monk, generally the seniormost monk of the *kyaungdike*, such monk becomes the presiding monk with powers of control and management. *Sayadaw* U Khemasara instances the Weluwun, Salin and Normal *kyaungdikes*, all *Sanghika*, where he says, on the death of the presiding monk the seniormost surviving monk stepped into his shoes. The *Sayadaw* does not mention whether any objection had been raised regarding the right of succession : probably in those *kyaungdikes* the monks tacitly acknowledged the authority of the seniormost monk as their head. But, on the other hand, if the authority of the seniormost monk is not acknowledged either expressly or impliedly, the presiding monk must be elected by the monks of the *kyaungdike* or the majority of them. It was observed in *U Thuseitta* v. *U Eindawuntha* (1) that it was the privilege and duty of the *Sangha* to elect the presiding monk of a *Sanghika kyaungdike*. This is as it should be ; for if the seniormost monk happened to be too old and infirm and ignorant to discharge the duties of management and control it would be unreasonable to require the other monks, however learned and however capable, to submit to his authority. To take an extreme case, if the seniormost monk is in his dotage, should the other monks in the *kyaungdike* submit to his authority ? I suppose not. It would seem to follow, therefore, that a monk does not automatically succeed to the headship of a *Sanghika kyaungdike* by reason only of his age and seniority.

(1) (1940) R.L.R. 97 at p. 102.

No text of the *Vinaya* has been cited to prove the contrary. There must be tacit or express consent of the majority of the *Sangha* residing in the *kyaungdike* to such succession. Such consent is all that matters, election or tacit acknowledgment being merely an outward manifestation and evidence of consent. After all, as *Sayadaw* U Khemasara says, nowadays people throughout Burma, ecclesiastical or lay, must be governed by methods of democracy. In fact, the Buddhist Brotherhood is a democratic institution and there is a saying, "သံဃာဆာ ဘုရားသော်ဖွ ဆန္ဒသာ။" which is the Burmese equivalent of *vox populi vox dei.* On the facts of the case, therefore, I must hold that the plaintiff is not the presiding monk of the suit *kyaungdike.* Admittedly, he has not been elected as such and the presiding monks of the other *kyaungs* in the *kyaungdike* refuse to acknowledge his authority. Although some *Sayadaws* not belonging to the suit *kyaungdike* recognize the plaintiff as the west Peinnegon *Sayadaw*, the resident monks of the said *taik* who are the electorate do not acknowledge him as such, and the plaintiff states that after U Eindawuntha's death the relations between him and the other monks continued as before and no one either acknowledged or repudiated his authority.

It is pressed on me that since the defendant was present at the feeding of the monks where Daw Sint gifted the *kyaungdike* it must be held that he consented to the plaintiff assuming the rôle of the head of the *taik*. The plaintiff states that at the time of the gift there were six monks in the *kyaungdike*. Of them, U Ba Thaw says, U Ariya, U Pyinnazawta, U Thondara and defendant attended the function. All these monks denied having witnessed any gift at the function, and there is no evidence that they stayed on after the feeding. Possibly, they were among those who

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according to U Aindriya, left the function after the feeding was over. Granted for argument's sake that they witnessed the gift and raised no objection, no estoppal can be pleaded against them as there can be no estoppal against an Act of Legislature ; and, furthermore, they had not been asked to attend an election meeting and could have ignored the oral gift.

It is further contended that granting that the plaintiff is not either the *poggalika* owner or presiding monk of the *kyaungdike*, nevertheless as the senior monk he has a right to object to defendant's demolishing the old *kyaung* and erecting a new *kyaung* in its place and in the event of defendant's recalcitrance to evict him from the *kyaungdike*. *Sayadaw* U Khemasara in his evidence and his advice (Annexure I) supports this view. The plaintiff as one of the resident monks may have a right to object ; but the question whether he can evict the defendant is not free from difficulty. No tetxual authority has been cited in support of the view that a resident monk who is not the presiding monk of a *Sanghika kyaungdike* can alone evict a recalcitrant monk from the *kyaungdike*. On the contrary, it has been held in U *Zawtipala* v. *U Thatdama* (1) that apart from the presiding monk none of the *Sangha* living in a *Sanghika kyaungdike* is entitled to possession, control and management. If the case were to be decided according to justice, equity and good conscience as required under sub-section (*3*) of section 13 of the Burma Laws Act, the result would be the same : for no co-owner of property can oust the other co-owner from the property, each being equally entitled to possession.

Now, since the plaintiff has failed to establish his *locus standi* to bring the present suit I need not try the

(1) A.I.R. (1939) Ran. 21.

remaining issues. Before parting with the case, I cannot help remarking that if this dispute were adjudicated on by ecclesiastical authorities, the result might be different, the learned *Sayadaws* on both sides being agreed that under the *Vinaya* U Eindawuntha could make a valid gift of the *kyaungdike* (assuming it to be his *poggalika* property) to Daw Sint, who in her turn could validly gift it to the plaintiff. But modern law impinges on the rules of an ancient civilization and the Civil Courts have to have regard to both.

In the result, the suit is dismissed. Both parties being Buddhist monks, there will be no order as to costs.

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AGRICULTURAL DEBTS MORATORIUM ACT (BURMA ACT XXIV OF 1947)—*Ss. 2 (b) and 3—S. 2 (b) when applicable—S. 3 when applicable to pending cases. Held*: S. 3 of the Act does not apply to pending suits. In pending suit the plaintiff seeks to have defendant's liability declared. Before he can reap the fruits of that decree he must apply for execution. It is at that stage that s. 2, clause (*b*), comes into play and it would then be for

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the defendants to claim that the decree could not be enforced and it must be kept under suspension.

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AMENDMENT OF PLEADING—*Order 6, Rule 17, Code of Civil Procedure —Period of limitation expired—Amendment when permissible—Principles applicable.* A plaint filed on the last day of limitation was sought to be amended after the period of the expiry of limitation by substituting allegation of payment to the grandson of the plaintiff in place of allegation of payment to plaintiff and by adding that the person receiving payment had no right to receive on behalf of the plaintiff. The trial Court dismissed the application for amendment of the plaint. *Held :* That through the powers of amendment under Order 6, Rule 17 of the Code of Civil Procedure ought to be liberally exercised, one cause of action cannot be substituted for another. *A.V. Chettyar Firm* v. *Ma Shwe Pon and two others,* 5 Ran. 1 considered. *Ma Shwe Myat* v. *Maung Mo Hnaung,* I.L.R. 48 Cal. 832 and 835, applied. The introduction of a new matter which would deprive the defendant of the benefit of the statutory defence of limitation cannot be permitted and it is a settled rule of practice that such amendments are not admissible. *Byash Chandra Roy* v. *Ajodhynath Deb and others,* 10 Ran. 74 and 75 ; *Weldon* v. *Neal,* (1887) 19 Q.B.D 394, referred to and followed. It is only in exceptional cases where plaintiff ought not to be deprived of his money for technical error that amendments can be allowed and it does not appear that any objection was raised to the amendment in *Krishna Prasad Singh and one* v. *Ma Aye and others,* (1936-37) 14 Ran. 383.

N.P.L.ST. MUTHAYA CHETTYAR *v.* RM.A.RM. CHETTYAR FIRM AND ONE 855

APPEAL AGAINST CONVICTION UNDER S. 302 (2) PENAL CODE—*Whether can be converted to one under s. 302 (1) of the Penal Code—Ss. 423 and 439, Criminal Procedure Code.* The question arose whether in appeal against conviction under s. 302 (2) of the Penal Code the finding can be altered to one under s. 302 (1) which would be tantamount to a finding of a more serious offence. *Held :* That the Court is competent to do so. Case law on the point considered. *U Saw and others* v. *The Union of Burma,* (1948) B.L.R. 217 ; *On Shwe (a) Kalaw* v. *King-Emperor,* 1 Ran. 436 ; *Sarda Prasad* v. *Emperor,* A.I.R. (1937) All. 240 ; *Bawa Singh* v. *The Crown,* I.L.R. 23 Lah. 129 ; *Ranjha and one* v. *Emperor,* A.I.R. (1943) Lah. 74, considered.

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APPEAL UNDER S. 20 OF THE UNION JUDICIARY ACT—*Order XLI, Rule 22, Civil Procedure Code—Cross-objection—Whether can be filed—Pledge of jewellery with contract that after a period it will be redeemable—Ss. 176 and 177 of the Contract Act—Sale by the pledgee after the period—Conversion—Measure of damages whether to be determined at the date of the conversion or at the date of the suit. Held :* Under Order XLI, Rule 22 of the Code of Civil Procedure, cross-objection can be filed in an appeal under s. 20 of the Union Judiciary Act, 1948. (Corresponding to letters patent appeal). *Abhlakh Baksh Singh and others* v. *Thakur Prasad and others,* (1943) I.L.R. 18

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Luck, 256 ; *Abhilakhi* v. *Sada Nand*, (1931) I.L.R. 33 All. 533 (F.B.) ; *Sabitri Thakurain* v. *Savi*, (1921) I.L.R. 48 Cal. 481 ; *Sein Dass* v. *Lakhajee and another*, (1940) R.L.R. 393 ; *M.D. Venkatasam Chetty and one* v. *Mathichand Gulabchand*, (1926) I.L.R. 49 Mad. 291, followed, *Lala Khazanchi Shah* v. *Haji Niaz Ali*, A.I.R. (1940) Lah. 438 at p. 441 ; *Mir Ghulam Hussain Sahib* v. *Ayesha Bibi and twelve others*, I.L.R. (1941) Mad. 775 (F.B.), referred to. Even though a pledger agrees that he will have no right of redemption after a certain period still his right of redemption continues under ss. 176 and 177 of the Contract Act. The pledge cannot contract himself out of his statutory right given by ss. 176 and 177 of the Contract Act and if the pledgee sell the pledged articles without due notice as provided in the act, he is guilty of conversion. *The Co-operative Hindusthan Bank, Limited* v. *Surendranath De*, (1932) I.L.R. 59 Cal. 667 at p. 668, followed. *The B.I.S.N. Co., Ltd.* v. *Alibhai Mahomed*, (1919-20) 10 L.B.R. 292 (F.B.) ; *Fut Chong* v. *Maung Po Cho*, (1929) I.L.R. 7 Ran. 339 ; *The Bombay Steam Navigation Company, Limited* v. *Vasudev Baburao Kamat*, (1928) I.L.P. 52 Bom. 37 ; *Lakhaji Dollaji & Co.* v. *Boorugu Mahadeo Rajanna and one*, A I.R. (1939) Bom. 101 ; *Brij Coomaree* v. *Salamander Fire Insurance Co.*, (1905) I.L.R. 32 Cal 816 at p. 823, referred to. *Dwarika* v. *Bagawati*, A.I.R. (1939) Ran. 413 at p. 414, dissented from. Measure of damages in a suit for conversion of pledged goods made *bona fide* is the market value of the goods sold at the time of conversion and not at the time of the institution of the suit. *S.L. Ramaswamy Chettiar and one* v. *M.S.A.P.L. Palaniappa Chettiar*, A.I.R. (1930) Mad. 364 ; *Alliance Bank of Simla (In Liquidation)* v. *Shamandi Laljaini Lal*, (1927) I.L.R. 8 Lah 373 ; *Bhimji, N. Dalal* v. *Bombay Trust Corporation, Limited*, A.I.R. (1930) Bom. 306 ; *Shivaprasad Singh* v. *Prayagkumari Debee*, (1934) I.L.R. 59 Cal. 711 at pp. 738-739 ; *Motilal* v. *Lakshmichand*, A.I.R. (1943) Nag. 163 ; *Sollowy and one* v. *Mc Laughlin*, (1938) A.C. 247 ; *Brierly* v. *Kendall*, (1852) 117 E.R. 1540 ; *Johnson* v. *Stear*, (1863) 143 E.R. 812 ; *Owners of Steamship Celia* v. *Owners of Steamship Volturno*, (1921) A.C. 544 (House of Lords) ; *Owners of Dredger Leisbosch* v. *Owners of Steamship Edison*, (1933) A.C. 449 (House of Lords) ; *S.S. Celia* v. *S.S. Volturno*, (1921) 2 A.C. 544 at pp. 562 to 564, followed. *Louis Dryfus & Co.* v. *Firm of Ghandamal & Co.*, (1919) 52 I C. 878 ; *Bansidhar* v. *Sant Lal*, 10 All. 133 ; *Ma Me Shin* v. *R M.R.M.N. Chettyar Firm*, A.I.R. (1933) Ran. 76 ; *Greening* v. *Wilkinson*, (1825—29) R.R. 790 ; *Rosenthal* v. *Alderton & Sons, Ltd.*, (1946) K.B. 374, distinguished. *Donald* v. *Suckling*, (1866) L.R. 1 Q.B.D. 585 ; *Wilkinson* v. *Verity*, (1871) L.R. 6 C.P. 206 ; *Beaman* v. *A B T.S. Ltd.*, (1948) 64 T.L.R. 285 at p. 287 ; *Clayton* v. *Le Roy*, 2 T.L.R. 479 (1911) 2 K.B. 1031 ; *Sachs* v. *Miklos*, (1947) 64 T.L.R. 181 ; *France* v. *Gaudet*, (1871) L.R. 6 Q.B.D. 196, referred to.

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APPOINTMENT OF RECEIVER—*Grounds—Application for* interim *receiver dismissed—Subsequent appointment of receiver—Whether discretion properly exercised according to guiding principles—Powers of Appellate Court. Held :* That in an application for appointment of a receiver the court has to consider whether special interference with the possession of a defendant is required, there being a well-founded fear that the property in question will be dissipated or that irreparable mischief may be

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done unless the Court gives its protection. *Benoy Krishna Mukherjee and others* v. *Satis Chandra Giri and others*, I.L.R. 55 Cal. 720 (P.C.), followed. Power conferred by the Code on court for appointment of receiver should be exercised with greatest care and caution. Violent and wholesale charges by plaintiff of waste and malversation by the defendant in possession is not sufficient, unless facts averred and established show that there has been an abuse or danger of abuse by the defendant in possession. *S.B. Devi and another* v. *B. N. Rai and another*, I.L.R. 5 All. 556, followed. *Held further*: That an order for appointment of a receiver is discretionary, and the discretion is that of the court in which the suit itself is pending. But where the trial Court did not exercise its discretion in accordance with legal principles the court of appeal can exercise its discretion in the matter. *Benoy Krishna Mukherjee and others* v. *Satis Chandra Giri and others*, I.L.R. 55 Cal 720 (P.C.), applied and followed. Where application for *ad interim* receiver is dismissed and no new facts or circumstances are brought forward for appointment of a receiver, the court will not disturb person rightly in possession unless there is an equitable ground for interference Mere fact that person in possession is poor is not adequate reason for appointing a receiver. *Muhammad Askari* v. *Nisar Husain*, I.L.R. 43 All. 311 at p. 313, referred to.

DAW SEIN YIN *v.* U ON KHIN 487

ARBITRATION ACT, 1944, ss. 32, 33. *Held*: In view of ss. 32 and 33 of the Act no suit lies on any ground whatsoever for a decision upon the validity of an award or to set it aside. The procedure laid down in the Act must be followed.

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ARBITRATION CLAUSE IN CONTRACT 527

ARBITRATOR. FUNCTIONS OF 527

ARMS ACT, S. 19 (*f*)—*Sanction filed during the course of trial—Evidence previously recorded if admissible—S. 29, Arms Act—Proceedings instituted: meaning.* Maung San Tin was found in possession of a hand-grenade on 6th October 1947 and was sent up for trial under s. 20, Arms Act. The Magistrate after recording evidence felt that a *prima facie* case under s. 19 (*f*), Arms Act had been made out. He adjourned the hearing and the sanction was produced from the District Magistrate later. A charge under s. 19 (*f*) was framed and the accused pleaded guilty. He was convicted and an appeal to the Sessions Judge was dismissed; but the proceedings were submitted to the High Court. *Held*: That the proceedings were instituted when the police drew up a charge sheet and sent the accused for trial S. 29, Arms Act forbids institution except with sanction of the District Magistrate. As no such sanction was obtained before the accused was sent up the proceedings were void. The defect is not cured by filing the sanction later. *In re Po Chein, Magunia, Po Aung* v. *King-Emperor*, 8 L.B.R. 452, followed. *Kaka* v. *King-Emperor*, 4 L.B.R. 247, not followed. The proceedings are therefore entirely without jurisdiction and invalid. The evidence recorded prior to the filing of the sanction could not therefore be used subsequently.

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ARMS ACT, S. 19 (*f*) AS AMENDED BY ACT LXIV OF 1947—*Anomaly—Hiding of rifle by burying it—Presumption.* Under s. 19 (*f*) of the Arms Act an offence is punishable with imprisonment for three years only while an offence under s. 20 is punishable with

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rigorous imprisonment up to seven years. After the amendment by Burma Act LXIV of 1947 when a person is in possession of a rifle in contravention of s. 14 or s. 15, he is punishable under s. 19 (*f*) with transportation for life or with death. If he is in possession of the same rifle in such manner that his possession may not be known to any public servant he is only punishable with rigorous imprisonment up to seven years under s. 20. This anomaly has been overlooked by the Legislature. The accused had hidden a rifle by burying it under the earth. He must be presumed to have intended to keep his possession hidden from the knowledge of a public servant. This case is distinguishable from where the concealment was under the floor-board of the cattle shed which adjoined the house. *Maung Hla Sein* v. *The King*, (1947) R.L.R. 53.

NGA SAW SHWE *v.* THE UNION OF BURMA 658

ARMS ACT, s. 19 (*f*)—*Possession of Arms—Meaning of—Evidence Act, s. 27—Admissibility. Held :* From mere fact that a person is able to point out the place where a fire-arm is hidden there is no presumption that he himself hid it there in the absence of other evidence of possession. *Khuda Bakhsh* v. *The Crown*, A.I.R. (1923) Lah. 283 ; *Gian Chand* v. *Emperor*, A.I.R. (1933) Lah. 314, referred to. If a person is able to point out where a fire-arm is hidden it only means that he knows the hiding place, not that the fire-arm is in his possession or under his control. Under s. 27 of the Evidence Act the portion of the information given by the accused which was the immediate or approximate cause of the fact is provable. *Naurang Singh* v. *Emperor*, 28 Cr.L.J. 250 ; *Emperor* v. *Chokhey*, A.I.R. (1937) All. 497 ; *Sukhata* v. *The Crown*, 10 Lah. 283 ; *Pulukuri Kotayya and others* v. *King-Emperor*, (1947) 74 I.A. 65, referred to and followed. The statement to the Police by the accused to the effect that the revolver was hidden by him was made either at the time when the revolver was actually pointed out or after the revolver was pointed out. Such a statement is inadmissible in evidence under s. 162, Cr.P.C. *Tha Nge Gyi and one* v. *The King*, (1946) Ran. 229. In a Criminal Case onus is upon the prosecution to prove its case beyond reasonable doubt and not for the accused to prove his innocence. *U Dhamapala* v. *King-Emperor*, 14 Ran. 666.

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ATTACHMENT OF IMMOVABLE PROPERTY—*Order for sale under Rule 64 of Order 21—Effect of attachment—Subsequent mortgage suit—Attaching creditor not made party—Purchase in money decree—Suit for declaration that preliminary mortgage decree fraudulent—Properties sold under mortgage decree during the pendency of that suit*—Lis pendens—*S. 52, Transfer of Property Act—How long* lis pendens *continues. Held :* Attachment (unaccompanied by any order for sale) creates a charge over the property in the general sense of the word but not in its legal sense ; such general charge does not create any interest in the attached property in favour of the attaching creditor. *Baiju Lal Marwari* v. *Thakur Prasad Marwari*, I.L.R. 18 Pat. 157 ; Mayne on Hindu Law (9th Edn.), p. 450, followed. *Bunsi Koer* v.

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Sheo Proshad Singh, (1879) L.R. 6 I.A. 88, explained. *Moti Lall* v. *Karrah-ul-din*, (1879) L.R 24 I.A. 170 ; *Raghunath Das* v. *Sunder Das Khetri*, (1914) L.R. 41 I.A. 251 ; *Gummidelli Anantapadmanabhaswamy* v. *Official Receiver*, (1933) L.R. 60 I.A. 167 ; *Krishnasawmy Mudaliar* v. *Official Assignee*, I.L.R. 26 Mad. 673 ; *Frederick Peacock* v. *Madan Gopal*, I.L.R. 29 Cal. 428 (F.B.), referred to. Such attaching creditor is not a necessary party in a mortgage suit under Order 34, Rule 1, of the Code of Civil Procedure. *Baiju Lal Marwari* v. *Thakur Prasad Marwari*, I.L.R 18 Pat. 157 ; *Subramania* v. *Sinnamal*, I.L.R. 53 Mad. 881 (F.B.) ; *Mahanath Singh* v. *Arjandas*, A.I.R. (1936) Nag. 209, followed. *Held by Chief Justice :* Principle of *lis pendens* applies to involuntary sales. Purchaser under a sale execution of money decree is affected by the doctrine of *lis pendens* if he purchased during the pendency of a mortgage suit. His subsequent suit to declare the preliminary mortgage decree as fraudulent which is later dismissed does not keep alive the right of *lis pendens* for his benefit.

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Ittipa PROPERTY OF A PREVIOUSLY MARRIED PARTY 1

utre foi acquit—S. 403 of the Code of Criminal Procedure—Offence under s 19 (f), Arms Act—Acquittal for want of sanction under s. 29—Whether it bars a subsequent prosecution with sanction of the District Magistrate. Held : That where an accused person was acquitted in a trial for an offence under s 19 (*f*) of Arms Act, on the ground of the absence of sanction of the District Magistrate, s. 403 of the Code of Criminal Procedure does not bar a subsequent prosecution with the sanction of the District Magistrate for the same offence, as the Court was not acting as a Court of competent jurisdiction when he took cognizance at the time of the first trial with sanction. *San Baw and others* v. *The Crown*, 1 L.B.R. 340 (F.B.) ; *The Crown* v. *Ram Rakha*, I.L.R. 20 Lah. 373 ; B. B. Mitra's Code of Criminal Procedure, 10th Edn. p. 1273, followed.

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BUDDHIST LAW—*Adoption—Proof—Document admittedly signed by natural parents of the child—Its admissibility—Cancellation of adoption. Held :* That where *kittima* adoption is established, adoptive parents cannot disown the *kittima* adopted child for eloping with and marrying a person whom the adoptive parents do not approve, In any case one of the adoptive parents alone cannot cancel the adoption *Ma Kyin Sein* v. *Maung Kyin Htain*, (1940) R.L.R. 783, followed. *Held per* BA U, J.—Where an unregistered deed of adoption is proved to have been signed by the natural parents of the adopted child but the alleged signatures of adoptive parents are not proved to have been made, at that time, the document is still admissible for a collateral purpose, *viz.* for proving the reliability and trustworthiness of witnesses to prove a course of conduct and notoriety of the relationship of the adopted child with the adoptive parents. *Parhati Charan Mukherjee* v. *A. N. Bhattacharjee*, I.L.R. 53 Cal. 418, followed. *Per* E MAUNG, J.—The document of adoption having been proved to have been executed in presence of several persons would be sufficient to establish *kittima* status of the girl adopted. *Ma Mu* v. *U Nyun*, I.L.R. 12 Ran. 634, followed.

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BUDDHIST LAW—*Divorce by mutual consent—One of the parties previously married—The other not previously married—Ahtetpa property of the former—If divisible. Held by the Full Bench :* That on divorce by mutual consent between a Burmese Buddhist couple, one of whom was previously married and the other had not been so married, the *ahtetpa* property of the party previously married, should be divided on the principle of *nissaya* and *nissita* provided that no property had been acquired by the couple after their marriage. *Ma E Nyun* v. *Maung Tok Pyu*, 2 U.B.R. (1897—1901) (Civ.) 39 ; *Ma Ngwe Hnit* v. *Maung Po Hmu*, 11 L.B.R. 52, followed. *C.T.P.V. Chetty Firm* v. *Ma Cha Hlaing*, I.L.R. 3 Ran. 322 ; *Maung Hme* v. *Ma Sein*, 9 L.B.R. 191 ; *N.A.V.R. Chettyar Firm* v. *Maung Than Daing*, I.L.R. 9 Ran. 524 at p. 539 ; *West Ham Union* v. *Edmonton Union*, L.R. (1908) A.C. 6 ; *Stourbridge Union* v. *Droitwich Union*, L.R. 6 Q.B. 769, 774 ; *Ma Dun Mai* v. *Maung San Tun*, (1938) R.L.R. 229 ; *U Sin* v. *Ma Ma Lay*, (1941) R.L.R. 14, referred to. *Per* E MAUNG, J.—The rule should not be extended to a divorce which is not in fact by mutual consent but which for the purposes for partition on divorce is by a legal fiction deemed to have been as if by mutual consent.

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BUDDHIST LAW—*Grandchild of parents when divorced—Does not maintain filial relationship with one of its parents—Whether loses its right of inheritance of that parent's parent. Held by the Full Bench :* That a child who after the divorce of its parents who are Burmese Buddhists, neither lives with nor maintains filial relationship with one of its parents does not lose its right of inheritance to the property of that parent's parent and it is not necessary that filial relationship between itself and its parent should be resumed before it can inherit from the grandparent. *Mi Thaik* v. *Mi Tu*, (1872—92) S.J.L.B. 184 ; *Ma Shwe Ge* v. *Nga Lan and one*, (1872—92) S.J.L.B. 296 ; *Ma Pon and others* v. *Maung Po Chan and others*, (1897—1901) 2 U.B.R. 116 ; *Ma Sein Nyo* v. *Ma Kywe*, (1892—96) 2 U.B.R. 159 ; *Maung Pan* v. *Ma Hnyi*, (1897—1901) 2 U.B.R. 104 ; *Ma Yi* v. *Ma Gale*, 5 L.B.R. 133 ; *Ma E Me* v *Maung Po Mya*, 11 B.L.R. 316 ; *Ma Hla Kin* v. *Maung Chit Po and others*, (1910) 3 B.L.T 109 ; *Mi Nyo* v. *Mi Nyein Tha*, (1904—06) 2 U.B.R., Buddhist Law of inheritance, p. 15 ; *Le Maung* v. *Ma Kwe*, (1919) 10 L.L.R. 107 ; *Maung Dwe and others* v. *Khoo Haung Shein and others*, (1920) I.L.R. 3 Ran. 29 ; *Maung Hmat and others* v. *Ma Po Zon*, (1893—1900) P.J.L.B 469 at p. 470 ; *Maung Po Thu Daw* v. *Maung Po Than*, (1923) I.L.R. 1 Ran. 316 (F.B.) ; *U Sein* v. *Mu Bok and others*, (1933) I.L.R. 11 Ran. 158 ; *Maung Paik* v. *Maung Tha Shun and another*, (1940) R.L.R. 28, referred to.

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BUDDHIST LAW—Keittima *adoption*—Apatitha—*Difference. Held :* That distinction between *keittima* and *apatitha* adoption is a fine one and lies solely in the intention of the adoptive parent. If the child was taken with intent that it shall inherit from the adoptive parent then the adoption is *keittima* and it is this intention that must be given publicity. *Apatitha* child is one adopted casually without the intention expressed that the child shall inherit. *Ma Than Nyun* v. *Daw Shwe Thit*, I.L.R. 14 Ran. 557, followed. *Ma Gyi and one* v. *Maung Aung Pyu*, I.L.R. 2 Ran. 661, referred to.

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BUDDHIST LAW—*Marriage—Essentials of marriage—Essentials of keittima adoptions. Held:* That under Burmese Buddhist Law no ceremonyis required in order to constitute a valid marriage. All that is necessary is the consent of both parties. In the case of persons who have been previously married it is not however usual to have any entertainment; but in the case of a Burmese Buddhist couple neither of whom has been previously married, marriage is ordinarily accompanied by ceremony attended by neighbours of the couple. There is, however, no recognized ceremony. *Ma E* v. *Maung San Da*, 3 B.L.R. 8; *Mi Ne* v. *Mi Shwe Ma*, (1910—13) 1 U.B.R. 111 (P.C.); *Ma Hla Me* v. *Maung Hla Baw*, I.L.R. 8 Ran. 425. *Held:* That courts are bound to insist upon strict proof of adoption. The intention to adopt as an heir is the essential criterion of *keittima* adoption. While no special formalities are required, there must be proof of intention to adopt an heir by making such intention public. The fact that an orphan niece lived with his childless uncle and for seven or eight years uncle and aunt treated her with affection and that in an inscription on a "kyi-si" donated by the uncle she was described as the daughter and on the death of the aunt in the obituary notice her name appeared as daughter are not sufficient to prove *keittima* adoption. It is common knowledge that the words "father" and "mother," "son" and "daughter." are loosely used by the Burmese. *Ma Pwa* v. *Ma The The and seven others*, 1 L.B.R. 273; *Maung Po Kan* v. *Daw At and others*, 1 Ran. 102; *Ma Than Nyun* v. *Daw Shwe Thit*, 14 Ran. 557; *Maung Sin* v. *Po Ko*, 12 B.L.T. 236; *Ma Nyun Yin* v. *Ma Kyin and others*, (1941) Ran. 445; *Ma Ywet*'s case, 5 L.B.R. 118; *Ma Gun*'s case, (1897—1901) 2 U.B.R. Civil 66 at p. 68; *Maung Seik* v. *Ma Thet Pu*, 9 B.L.T. 154; *Tet Tun* v. *Ma Chein*, 5 L.B.R. 216 at p. 218; *Maung Ba Thein* v. *Ma Than Myint and others*, I.L.R. 3 Ran. 483, referred to and followed.

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BUDDHIST LAW—*New question of Law—When can be raised—Gift—Immoveable property. Held:* A Burman Buddhist cannot claim immoveable property by way of gift except by a registered instrument. *Lim Charlie and another* v. *The Official Receiver* I.L.R. 12 Ran. 238, referred to and followed. In 2nd Appeal a new point of law which would affect the plaintiff's right to institute the suit can be raised for first time. *Maung San Ya and one* v. *Maung San Pe*, I.L.R. 4 Ran. 500, followed.

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BUDDHIST LAW, *Naissya* AND *Nissita* 402

BUDDHIST LAW—Sanghika *property—Burma Laws Act, s. 13 clause* (1) *—Rules of* Vinaya *and Transfer of Property Act—Succession to* kyaungdike—*Right of possession, control and management. Held:* Buddhist Priesthood is a religious institution and devolution of a *pongyi kyaung* is a question of religious usage within the meaning of s. 13 (1) of Burma Laws Act. In this matter the rules of the *Dhammathats* are applicable to the laity and the rules of the *Vinaya* govern the clergy. The rules of the *Vinaya* in respect of a gift have however been altered by s. 123, Transfer of Property Act. The Civil Courts under s. 226 of the Constitution are bound to administer justice according to law, canon as well as lay. *Shwe Ton* v. *Tun Lin*, 9 L.B.R. 220 at p. 242; *A.R.L.P. Firm* v. *U Po Kyaing and one*, (1939) Ran. L.R. 311, *U Zayanta* v. *U Naga*, 9 L.B.R. 258; *U Pandawun* v. *U Sandima and one*, I.L.R. 2 Ran. at

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p. 142, followed. *U Pyinnya* v. *Maung Law*, I.L.R. 7 Ran. 677, not followed. Where the gift of a *kyaungdike* is invalid for want of a registered deed it must be considered to be *Sanghika* property. On the death of the presiding monk it is the duty and the privilege of the *Sangha* to elect a successor to the deceased—presiding monk and a monk does not automatically become the successor of the presiding monk by reason of age and seniority. But where the senior monk is tacitly acknowledged by the monks of a *Sanghika Kyaungdike* he becomes the presiding monk with powers of control and management. But where the authority of senior most monk is not acknowledged either expressly or tacitly the presiding monk must be elected by the monks of *kyaungdike* or the majority of them. *U Thuseitta* v. *U Eindawuntha*, (1940) Ran. L.R. 97 at p. 102, followed. Apart from the presiding monk none of the *Sangha* living in a *Sanghika kyungdike* is entitled to possession, control and management. *U Zawtipala* v. *U Thatdama*, A.I.R. (1939), Ran. 21, followed.

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BURMA MUNICIPAL ACT, s. 141—*Lairage fees—When can be collected—Taxing statute—Benefit of doubt. Held* : Under s. 141, Municipal Act, "Municipal Committee may charge fees for * * * * lairage" only where there is "use or occupation" of the lair. Where there was no use or occupation of the lair as in the present case no fees can be levied. S. 141 of the Municipal Act must be construed strictly and no taxes can be imposed except by words which are clear and the benefit of the doubt is the right of the subject. *The Executive Engineer, Mandalay* v. *The Maymyo Municipality*, I.L.R. 13 Ran. 758, followed and applied. The mere fact that the Municipal Committee had issued a licence to collect such fees cannot create any liability to pay the same.

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CODE OF CIVIL PROCEDURE, S. 115—*Revision of Interlocutory Orders—When lies—Order 18, Rule 17—Recalling of witnesses—Production of certified copy under s. 74, Evidence Act—If proof. Held:* The High Court has jurisdiction under s. 115 of Code of Civil Procedure to revise an Interlocutory Order passed by a Subordinate Court from which no appeal lies to the High Court, only when an irremediable injury will be done. Under Order 18, Rule 17 of the Code of Civil Procedure the Court may, at any stage of a suit, recall any witnesses who had been examined and may put such questions as the Court thinks fit. This jurisdiction of the Trial Court is of a discretionary character and the High Court will not exercise its revisional powers unless the Order is not supported by considerations of justice or by any provision of law or unless there will be a failure of justice if the matter is not put right. *Mohamed Chootoo and others* v. *Abdul Hamid Khan and others*, I.L.R. 11 Ran. 36; *Anindra* v. *Pramatha Nath*, 55 Cal. 748; *Syed Sadeq Reza* v. *Nawab Bahadur of Murshidabad*, 34 C.W.N. 578; *Indubala Dassi* v. *Lakshmi Narayan Ganguly and others*, 38 C.W.N. 1146. The deposition of a witness taken in Court of law forms part of the record of "acts of an official tribunal" under s. 74 of the Evidence Act, and may be proved by production of certified copy. But mere production of a certified copy, without the proof of the identity of the person making the deposition, is not sufficient proof. *Chandreshwar Prasad Narain Singh* v. *Bisheshwar Pratap Narain Singh*, I.L.R. 5 Pat. 777 at p. 793; *Brajaballay Ghose* v. *Akhoy Bagid and others*, 30 C.W.N. 254.

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CODE OF CIVIL PROCEDURE, S. 115—*Direction in the judgment regarding burden of proof—Successor giving direction to the contrary—Interference in Revision. Held:* That where the judgment and decree of the Court gave directions regarding procedure and burden of proof, and there was no appeal against the decree, the successor of the Judge had no jurisdiction to alter the direction regarding the burden of proof. Where a lower Court has failed to take into consideration some material proposition of law or some material fact in evidence, it has acted illegally in the exercise of its jurisdiction and its decision may be revised by the High Court. *Fut Chong* v *Maung Po Cho*, (1929) I.L.R. 7 Ran. 339, followed. The High Court will not interfere in revision against an Interlocutory Order unless some grave injustice or hardship would result from a failure to do so. *L. P. R. Chettyar Firm* v. *R. K. Bannerji*, (1931) I.L.R. 9 Ran. 71, followed.

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CODE OF CIVIL PROCEDURE, S. 148 799

CODE OF CIVIL PROCEDURE, ORDER 2, RULE 2—SUITS FOR MESNE PROFITS—*Subsequent suit for possession—Whether barred by Order 2, Rule 2, Code of Civil Procedure—Cause of action for possession and for mesne profits considered—Urban Rent Control Act, order under—Whether Controller can review or cancel.* Plaintiff-appellant sued for mesne profits and obtained decrees against the 1st defendant-respondent. After the passing of the decree the 1st defendant-respondent applied to the Controller of Rents and made the house owner a party only but did not make the plaintiff a party and obtained an order from the Controller of Rents for occupation under s. 12 of the Urban Rent Control Act. When the plaintiff-appellant became aware of the order he applied to the Controller of Rents and asked for vacating of the order and the order was vacated. Plaintiff-appellant then filed

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a suit for possession. The defendants-respondents contended that—(1) the suit was barred under Order 2, Rule 2 of the Code of Civil Procedure as the rights to mesne profits rested on the same cause of action as for possession and (2) that the first order of the Controller of Rents was final and he had no jurisdiction to review his earlier order. *Held*: That suit for possession and suit for mesne profits do not arise out of the same cause of action. Causes of action of two suits are different and therefore the suit was not barred under Order 2, Rule 2 of the Code of Civil Procedure. In a suit for possession the plaintiff-appellant need only to prove possession within 12 years and defendants occupation without right. For mesne profits he has in addition to prove the duration of the dispossession, its termination and the amount he is entitled to as damages. So far as Burma is concerned this question has been settled in *D. K. Dubash Kader and two others* v. *T. K. Fakeer Meera*, (1910) 3 B.L.T. 56 at p. 59, and the same cannot be deemed to have been overruled by the Privy Council case, A.I.R. (1931) P.C. 221. The case law on the point reviewed and considered. Moreover the case of *D. K. Dubash Kader and two others* v. *T. K. Fakeer Meera* was decided in 1910 and has been followed for about 40 years—therefore in any case the principle *stare decisis* should apply. *Ma Myaing and one* v. *Maung Po Chit and three others*, (1926) I.L.R. 4 Ran. 103; *Lalessor Babui* v. *Janki Bibi*, (1892) I.L.R. 19 Cal. 615; *Ponnammal* v. *Ramamirda Iyer*, (1915) I.L.R. 38 Mad. 829; *R. A. Agarwale* v. *L. G. Bhadbhunji*, 26 Bom. L.R. 288; *R. K. Pujari* v. *S. S. Pujari*, (1935) I.L.R. 59 Bom. 454 at p. 456; *C. L. Singh* v. *C. D. Singh*, (1931) I.L.R. 10 Pat. 329 at p. 331; *R. K. Singh and others* v. *N. C. Ahir*, (1931) I.L.R. 53 All. 951 at pp. 956-7; *Saghir Hasan* v. *Tayab Hasan*, (1940) All. 781 at p. 782; *Channappa Girimallappa* v *Bagalkot Bank*, (1943) Bom. 43 at p. 53; *Naba Kumar* v. *Radhashyam*, (1931) A.I.R. (P.C.) 229; *Nagendrabala Dasi and another* v. *Dinanath Mahish and another*, (1924) I.L.R 51 Cal. 279; *T. Ramiah* v. *M. Thathiah and another*, A.I.R. (1937) Mad. 849; *V. Pillai and others* v. *T. Ammal*, (1940) 2 M.L.J 42 referred to. *Held further*: That the first order of the Controller of Rents was final and could not be questioned except under proviso to s. 12 (2) and s. 13 (1) of the Act. He had no power to cancel his order in the present case and his subsequent order was a nullity.

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CIVIL PROCEDURE CODE, ORDER 2, RULE 2 AND S. 2—Res judicata—*Conditions to be satisfied—First suit for rent—Second for title against tenant and other persons—Whether suit barred.* Appellant-plaintiff claimed to be adoptive daughter of Daw Thon in Civil Regular No. 9 of 1944 of the Additional Court, Mandalay. Her claim as adopted daughter was upheld and she was declared one of the heirs. In Civil Regular No. 4 of 1945 of the Assistant Judge, Mandalay, she sued for rent alleging that respondents 1 and 2 were her tenants. This was dismissed. She later filed Civil Regular No. 27 of 1946 of the 2nd Assistant Judge, Mandalay, for possession of those lands, and she impleaded the alleged tenants and two others. Respondents 1 and 2 contended that the suit was barred as *res judicata* but the suit was decreed; the District Court reversed the decision of trial Court on appeal. On second appeal held that the only question that need have been gone into in the first suit was whether respondents 1 and 2 were tenants. The first suit was only for rent and the second for title. The parties were also different. To constitute *res judicata* five

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conditions must be satisfied : (1) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was *directly and substantially in issue* either actually or constructively in the former suit. (2) The former suit must have been a suit between *the same parties or between parties under whom they or any of them claim.* (3) The parties as aforesaid must have *litigated under the same title* in the former suit. (4) The Court which decided the former suit must have been a court *competent to try the subsequent suit* or the suit in which such issue is subsequently raised. (5) The matter directly and substantially in issue in the subsequent suit must have been *heard and finally* decided by the Court in the first suit. Mulla's Civil Procedure Code, 10th Edn., p. 40, followed. *Held :* That in a suit for rent, the question of title was not directly and substantially in issue either actually or constructively. In the subsequent suit based on title the question of title could not be held to be *res judicata.* Further as the parties were different there cannot be any *res judicata. Dwarkanath Roy* v. *Ram Chand Aich and others*, 26 Cal. 428, followed and applied.

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CODE OF CIVIL PROCEDURE, ORDER 6, RULE 17 855

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CODE OF CIVIL PROCEDURE, ORDERS 44 AND 33, RULE (2)—*Conditions for entertaining pauper appeal. Held :* That there is a difference between an application for leave to sue as a pauper and an application for leave to appeal as a pauper. When the appellate stage is reached a more severe test has to be applied and it is incumbent on the appellant to satisfy the court that the judgment is erroneous and this after a perusal of the judgment and decree. This is a necessary safeguard introduced by the Legislature for the benefit of the litigants. *Ma Tha Din* v. *Daw Paw*, 4 B.L.J. 55 A.I.R. (1925) Ran. 249 ; *Thirupuraneni Narayina Rao* v. *Soorapaneni Veerayyi and three others*, (1933) I.L.R 56 Mad. 323 at pp. 326 and 327 ; *Chennamma, In re* (1929) I.L.R. 53 Mad. 245 ; *Sakubai widow of Vinayak Ramkrishna* v. *Ganpat Ramkrishna*, (1904) I.L.R. 28 Bom. 451 at p. 452, followed and applied.

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CODE OF CRIMINAL PROCEDURE, S. 35 362

CODE OF CRIMINAL PROCEDURE, S. 144—*No mention of material facts in order—Invalidity—Succession of temporary orders—If can be imposed—Object of s. 144—Principles for exercise of discretion by Magistrates.* On the 24th January 1948 the District Magistrate passed an *ex-parte* order prohibiting applicants from opening "B" Block of the Sooratee Bara Bazaar. The order was silent as to the material facts of the case on which it was based, namely, the dispute between the Bazaar Company and the Bazaar Unity Council. *Held :* That an order under s. 144 of the Code of Criminal Procedure where no mention has been made of the material facts of the case is invalid. The mere fact that the order

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is drawn up in the form provided in the Schedule to the Criminal Procedure Code does not amount to a sufficient excuse for non-compliance with this requirement of law and such defect is fatal to its validity. *Aung Bala* v. *District Magistrate*, (1939) Ran. 294, followed and applied. *Held further:* That the conditions set out in s. 144 (2), Criminal Procedure Code, for the making of an order *ex-parte* are (1) in case of emergency and (2) when the circumstances do not admit of getting respondents served with notice. Neither of these conditions existed in the present case. *Held further:* That it was not in consonance with the spirit of the section to impose a restriction of indefinite duration by successive temporary orders. *Govinda Chetti and eight others* v. *Perumal Chetti and another*, 38 Mad. 489; *F. E. Christian* v. *Carter*, (1939) A.I.R. Pat. 512, referred to. The order under s. 144 is a necessary encroachment on personal liberty for preventive purposes. The duty of the Magistrate is not to deprive a man of his lawful rights but to restrain illegal interference with the same. The action should be taken against potential law breakers and not against peaceful citizens. *R.E. Blong* v. *King-Emperor*, A.I.R. (1924) Pat. 767; *Khazen Chand* v. *The Crown*, A.I.R (1927) Lah. 430, applied.

THE DIRECTORS OF THE SOORATEE BARA BAZAAR COMPANY, LIMITED *v.* THE UNION OF BURMA 365

CODE OF CRIMINAL PROCEDURE, ss. 164, 364—*Admissibility of confession. Held:* Where a confession has been recorded by a 2nd Class Magistrate who has not been empowered by the Government to record confessions, such confession is not admissible in evidence. The Magistrate cannot give oral evidence of the confession *Nazir Ahmad* v. *The King-Emperor*, (1936) L.R. 63 I.A. 372; *The King* v. *Saw Min*, A.I.R. (1939) Ran. 219, followed. *Po Dwe and others* v. *The Emperor*, A.I.R. (1934) Ran. 78, deemed to be overruled by the Privy Council.

TUN KHA AND OTHERS *v.* THE KING 49

CODE OF CRIMINAL PROCEDURE, ss. 190 (1) (*a*) (*c*), 235 (1)—*Cognizance of offence under joinder of charges—Ss. 302 and 323 of Penal Code. Held:* That when case is sent for trial under s. 302 of Penal Code and the Special Judge after hearing the evidence frames charges under ss. 302 and 323 of the Penal Code, he takes cognizance of the offence punishable under s. 323 and under s. 190 (1) (*a*) and not 190 (1) (*c*) of the Code of Criminal Procedure and therefore s. 191 of the Code does not come into operation. *Abdul Rahman* v. *King-Emperor*, I.L.R. 5 Ran. 53 (P.C.); *Baldeo Prasad* v. *King-Emperor*, I.L.R. 12 Pat. 758, followed. Under s. 235 (1) of the Code of Criminal Procedure joinder of two charges under ss. 302 and 323 of the Penal Code is justified because both the offences arose out of series of acts so connected together as to form part of the same transaction.

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CODE OF CRIMINAL PROCEDURE, s. 190 (1) (*b*) 91

CODE OF CRIMINAL PROCEDURE, ss. 197 AND 439—*Prosecution under s. 409, Penal Code—Power of revision of the High Court. Held:* It is undesirable and impossible to lay down a rigid rule as to when the High Court in its Revisional Jurisdiction will interfere with a pending case; but the High Court will do so only in exceptional cases where there is no legal evidence to establish a *prima facie* case against the accused. Where the Superintendent of Government Printing Works sold condemned machinery at a price mentioned in the Dead Stock Ledger and

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the value of the machinery were credited to the Government, and it was not suggested that the sale was made dishonestly the mere fact that the sale was at an under-value does not make the Superintendent of the Printing Works liable for criminal breach of trust. When the Court finds that there is no legal evidence of criminal breach of trust against the accused a *de novo* trial of the accused owing to the transfer of the Magistrate should not be allowed, and under these circumstances, the Court would quash the proceedings. Khan Bahadur *Hajee Gulam Sherazee* v. *The King*, (1941) R.L.R. 599 at p. 601. *Maung Ba Yon* v. *Ma Hla Kin*, A.I.R. (1933) Ran. 297 at p. 298; *Hari Charan* v. *Girish Chandra Sadhukan*, (1911) I.L.R. 38 Cal. 68; *Abdul Wali* v. *Emperor*, A.I.R. (1933) Oudh 387 at p. 391, referred and followed.

U WA GYI *v.* THE UNION OF BURMA 652

CODE OF CRIMINAL PROCEDURE, S. 256 (1) AND (2)—*Non-compliance—Effect of. Held:* The right to recall prosecution witnesses is given by s. 256 (1), Criminal Procedure Code and the right to give evidence on his own behalf is provided for in the second part of the section. The terms of these sub-sections are in their nature and wording mandatory in character. Any failure on the part of the trying Magistrate to comply with these provisions must be regarded as vitiating the trial irrespective of whether any failure of justice is occasioned thereby. *Madura Muth Vannian and six others*, I.L.R. 45 Mad. 820 applied.

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CODE OF CRIMINAL PROCEDURE, S. 261—*Trial by bench invested with second class powers—Appeal lies to District Magistrate—Whether revision competent—S. 439 (5), Criminal Procedure Code. Held:* Every bench of Magistrates invested with the powers of a Magistrate of the second class can try summarily under s. 261, Criminal Procedure Code but the decision is subject to appeal to the District Magistrate under s. 407 (1), Criminal Procedure Code *Queen-Empress* v. *Narayanasami*, I.L.R. 9 Mad. 36, referred to. As the applicant filed revision before the learned Sessions Judge it could not been entertained at the instance of a party who could have appealed. In the present case s. 439 (5), Criminal Procedure Code is clearly in the way of the applicant as the reference is not on a report by the Sessions Judge or a District Magistrate. *King-Emperor* v. *Appulsamy*, 1 L.B.R. 209, distinguished.

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CODE OF CRIMINAL PROCEDURE, S. 434 743

———————————, ss. 423 and 439 848

———————————, s. 439 (5) 861

———————————, s. 476 40

CODE OF CRIMINAL PROCEDURE, ss 488, 489. *Held:* An order for payment of maintenance remains valid and enforceable until it is cancelled or modified according to law. Mere subsequent cohabitation does not necessarily revoke the order though it would be automatically suspended for the period of cohabitation. If the marriage between the parties is dissolved by virtue of desertion, on the dissolution of marriage, the wife is not entitled to maintenance. *Pearey Lal* v. *Naraini*, 58 All. 379; *Kanagamma!* v. *Pandara Nadar*, I.L.R. 50 Mad. 663; *Shah Abu Iiyas* v. *Ulfat Bibi*, I.L.R. 19 All. 50, followed.

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CODE OF CRIMINAL PROCEDURE, s. 490—*Effect of re-union of husband and wife upon an order for maintenance.* A wife had an order for maintenance: subsequently there was a re-union of the husband and wife. The wife asked for execution of the order for maintenance up to re-union. *Held:* That she was entitled to the same. The order for maintenance may remain in suspension for the period during which they live together and during such period the husband may apply to have the order cancelled under s. 488 (5) or 489, Criminal Procedure Code. Judgment of Doyle, J. in 8 Ran. 460 is doubted. *Kanagammal* v. *Pandara Nadar*, I.L.R. 50 Mad. 663; *Pearey Lal* v. *Naraini*, 58 All. 379; *Coelho* v. *Coelho*, (1937) Nag. 230, followed.

MAUNG HLA BAW (PHAW) *v.* MA OH ZA 71

CODE OF CRIMINAL PROCEDURE, SS. 366, 367 AND 537—*Judgment written after sentence passed—Whether such defect cured by s. 537. Held:* That though ss. 366 and 367 require that judgments in every criminal trial of original jurisdiction should be pronounced in open Court and signed and dated at the time of pronouncing it yet the omission to write a judgment before sentence is pronounced does not vitiate the conviction and is an irregularity covered by s. 537 and is curable unless it has occasioned a failure of justice. *Queen-Empress* v. *Hargobind Singh and others*, 14 All. 242, not followed. *Tilak Chandra Sarkar and others* v. *Basagomoff*, 23 Cal. 502; *Ata Muhammad* v. *Emperor*, 25 Cr.L.J. 705, followed. Judges and magistrates should comply with the express provision of ss. 266 and 367 of the Code. Failure to obey such provisions is deprecated.

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CODE OF CRIMINAL PROCEDURE, S. 523 (1)—*Amending Act adding a proviso—Power of Police Officer to delivery to any person. Held:* That addition of proviso to s. 523 (1) has altered the law. In respect of a light or portable article the police have no power to make any disposition, but when cattle, paddy or rice, boat or other bulky articles are concerned, subject to the review by the Magistrate, the police may at any time before the termination of the trial, dispose of the property in the way provided in the proviso. The Court and the police should in each case consider who was in apparent lawful possession of the goods at one particular moment. It may vary according to the circumstances of the case. This does not mean that the goods should be delivered to a thief or a dacoit because he was last in possession. *P.R.V.N. Valiappa Chetty* v. *S. Joseph*, 2 B.L.J. 85; *Laxmichand Rajmal* v. *Gopikisan Balmukund*, 60 Bom. 183, referred to.

CHANNA SAMMA *v.* SANKARAYA 87

CODE OF CRIMINAL PROCEDURE, S. 537 519

COGNIZANCE OF AN OFFENCE—*S. 190 (1) (b) of Code of Criminal Procedure—Report of a non-cognizable offence by a Police Officer—Ss. 11 (a) and 11 (b) and 15 of Suppression of Brothels Act. Held:* That after the amendment of the Code of Criminal Procedure in 1923, a magistrate under s. 190 (*b*) of the Code can take cognizance of an offence upon a report in writing of such facts made by any Police Officer whether the facts constitute a cognizable or non-cognizable offence. *Bhairab Chandra Barua* v. *Emperor*, 46 Cal. 807; *The Public Prosecutor* v. *Ratnavelu Chetty*, I.L.R. 49 Mad. 525, followed. Under s. 15 of the Suppression of Brothels Act only a Police Station Officer or officer higher than a Sub-Inspector was entitled to enter a brothel for ascertaining whether an offence under s. 11 has been

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committed. In the present case the entry was by a Sub-Inspector but such illegal entry does not vitiate the proceedings if the Magistrate takes cognizance under the report of the Police. *Emperor* v. *Chandri Bawoo*, 26 Bom. L.R. 1225, dissented from. *Maung San Myin* v. *King-Emperor*, I.L.R. 7 Ran. 771; *Chwa Hum Htive* v. *King-Emperor*, I.L.R. 11 Ran. 107; *Aung Kim Sein* v. *The King*, (1941) Ran. 552, followed. S. 11 (*a*) of the Suppression of Brothels Act penalizes a person who keeps or manages or assists in the management of a brothel—as the report does not make any such allegations and the report simply suggests prostitution by some women, no offence under the Act is disclosed.

MA MYA SEIN *v.* THE KING 91

COMMON INTENTION 334

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COMPLAINT FOR ACTION UNDER S. 476, CRIMINAL PROCEDURE CODE ... 40

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CONFESSION. ADMISSIBILITY OF 49

CONFESSION BEFORE AN EXCISE OFFICER *is no longer admissible in view of the Burma Act 28 of 1940. The decision in* Maung San Myin *v.* King-Emperor, *I.L.R. 7 Ran. 771, is no longer law.*

DAW SAN YI AND ONE *v.* THE UNION OF BURMA ... 195

CONFESSION OF A CO-ACCUSED 310

CONFESSION—*Evidence Act, s. 30—S. 32* (3), *Admissibility of—Murder committed in effecting safe retreat if in the course of dacoity—Sentences. Held:* That the confession of an accused person who is dead implicating himself and an accomplice in a crime is admissible under s. 32 (*3*) of the Evidence Act and is not excluded by illustration (*b*) to s. 30. But where the alleged confession does not expose the confessor to a criminal prosecution though it may contain "admission of a gravity incriminating fact or even a conclusively incriminating fact", it is not a confession. *Nga Po Yin* v. *King-Emperor*, (1904—06) 1 U.B.R. 3 (Ev.), referred to and *Pakala Narayana Swami* v. *Emperor*, A.I.R. (1939) P.C. 47 at p. 52, followed. *Held:* That where murder is committed in the course of effecting a safe retreat it is committed in the course of the dacoity. *Tha NgeGyi and Nga Mya* v. *The King*, (1946) R.L.R. 229, referred to and followed. Sentence of appellant Maung Pay who was only 17 years old at the time of the commission of the offence and played a very minor part by keeping watch, was reduced from death to ten years rigorous imprisonment. *Hla San* v. *The King*, (1941) R.L.R. 595, followed.

MAUNG SHIN AND TWO OTHERS *v.* THE UNION OF BURMA ... 425

CONSTITUTION OF BURMA, s. 13 249

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CONSTITUTION OF BURMA, s. 225 (3)—*Claim against Government for value of plaintiff's properties—Licence gives the option to purchase by Government—Charge taken to properties since 1st January 1946—Frustration of contract by war—Contract Act, s. 56—Sale of Goods Act, ss. 7 and 8—Principles embodied in*

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Contract Act, s. 70—Applicable—Analogy from conversion—Arbitration clause in contract, if applicable. The Rangoon Telephone Company, Limited, was operating telephone and telegraph undertakings in Rangoon and Moulmein before war under a licence. Under clause 8 of the licence Government could buy the Company out, if the right was exercised at the end of 40th year, and by a letter dated 4th March 1940 Government exercised the option to purchase as on 31st March 1943. War broke out and part of the property was demolished under the denial scheme. The remaining properties were taken over on 1st January 1946. The Company claimed Rs. 24,93,490-^-6 as the value under the contract or as damages. Government contended that they were liable only for what was taken over. *Held:* That frustration is the premature determination of an agreement lawfully entered into between parties owing to circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement and as entirely beyond what was contemplated by the parties when they entered into the agreement. This principle is embodied in s. 56 of Contract Act. The contract of purchase in this case was frustrated on account of the war. *Cricklewood Property and Investment Trust, Limited* v. *Leighton's Investment Trust, Limited*, (1945) A.C. 221 at p. 228; *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Limited*, (1943) A.C. 32 at p. 40; *Hirji Mulji and others* v. *Cheong Yue Steamship Company, Limited*, (1926) A.C. 497; *Metropolitan Water Board* v. *Dick, Kerr & Co.*, (1918) A C. 119; *The Pelepah* case, (1944) 170 L.T. 338; *Baily* v. *de Crespigny*, L.R. 4 Q.B. 180; *Mohamed Ismail and others* v. *The King*, (1946) R.L.R. 468, applied and followed. *Held further:* Under the Sale of Goods Act, ss. 7 and 8, if the goods after agreement become damaged, the agreement is avoided. *Barrow, Lane, and Ballard, Limited* v. *Phillip Phillips & Co.*, L.R. (1929) 1 K.B. 574, applied. The contract is indivisible and when the properties were damaged through the fault of neither party, the contract could not be enforced. There was no absolute implied promise to pay full value as on 31st March 1943. *Held further:* The principles of *quantum meruit* embodied in s. 70 of the Contract Act come into play. *Secretary of State* v. *G. T. Sarin & Co.*, 11 Lah. 375; *Zulaing* v. *Yamethin District Council*, I.L.R. 10 Ran. 522. If the suit were in tort the measure of damages would ordinarily be the value of the undertakings at the date of conversion. The Company is entitled to be paid the value of the assets in fact taken on 1st January 1946. The principle of such valuation had been mentioned in the Third Schedule to the licence which was almost precisely the same as paragraph 1152, sub-paragraph 2, of Halsbury's Laws of England, 2nd Edn. Vol. XII. *Held further:* As the contract was brought to an end by frustration, the clause relating to arbitration also came to an end. *Hirji Mulji's* case, (1926) A.C. 497, referred to.

RANGOON TELEPHONE COMPANY, LIMITED *v.* THE UNION OF BURMA 527

CONSTITUTION OF BURMA, SS. 25, 133, 150 AND 222 (1)—*Writs of certiorari and prohibition—Nature of such writs—Both deal with questions of jurisdiction—The principles of which and circumstances under which directions in the nature of these writs will be granted in Burma—City of Rangoon Municipal Act, ss. 25, 79, and 80—Municipal Corporation of the City of Rangoon (Suspension) Act, 1943, scope of—The principles on which the provisions of written constitution will be laid down. Held:* That the writ of prohibition is a judicial process issued out of a Court of superior

jurisdiction and directed to an inferior Court from usurping a jurisdiction with which it is not legally invested or to compel Courts entrusted with judicial duties to keep within the limits of their jurisdiction. The writ of *certiorari* is a writ issued by superior Court in the exercise of its superintending power over inferior jurisdiction and it requires judges or officers of such jurisdiction to certify or send proceedings before them to the superior Court for the purpose of examination as to their legality or given more satisfactory effect to them. [Short and Mellor's (2nd Edn.) 'Order and Practice of the Crown Office," p. 252, followed.] The word "Court" for the purpose of these writs will not only include civil and criminal Courts and ecclesiastical maritime or militrary Courts but also includes person or tribunal which are not Courts of Justice in the strict sense of the term, whenever such person or the tribunal has legal authority to determine questions affecting rights of the subjects and the duty to act judicially. *Rex* v. *Electricity Commissioners*, L.R. (1924) 1 K.B. 171 at p. 205; *The King* v. *Legislative Committee of the Church Assembly*, (1927) 1 K.B. 411 at p. 415; *The King* v. *North Worecestershire Assessment Committee*, (1929) 2 K.B. 397 at p. 406; *Errington and others* v. *Minister of Health*, (1934) 1 K.B. 249 at p. 266; *Rex* v. *Boycott and others*, (1939) 2 K.B. 651 at p. 659, followed. *The King* v. *The London County Council*, (1931) 2 K.B. 215 at p. 243, the view of Lord Justice Scrutton, distinguished. S. 150 of the Constitution should be read as a proviso to s. 133 and therefore in Burma a person or a body of persons may exercise limited powers of judicial nature even though such person or body of persons is not a judge or a Court. When a person or a body of persons (first) having legal authority (secondly) to determine questions affecting the rights of subjects (thirdly) having the duty to act according to law and (fourthly) act in excess of his or their legal authority, those writs will be issued. This is the principle on which Supreme Court will issue directions in the nature of writs of prohibition and *certiorari*. Sections of the Constitution should not be interpreted in a narrow and technical manner but should on all occasions be interpreted in a large, liberal and comprehensive spirit. Constructions most beneficial to the widest possible amplitude of its powers should be adopted. The Constitution though written should be interpreted in such a way as will be subject to development through usage and convention. *Grey* v. *Pearson*, (1857) 6 H.L.C. 106; *Henrietta Muir Edwards and others* v. *Attorney-General for Canada and others*, L.R. (1929) A.C. 124 at pp. 136 and 137; *St. Catherine's Milling and Lumber Company* v. *The Queen*, L.R. (1881) 14 A.C. 46 at p. 50; *Brophy* v. *Attorney-General of Manitoba*, L.R. (1895) A.C. 202 at p. 216; *British Coal Corporation* v. *The King*, L.R. (1935) A.C. 500 at p. 518; *James* v. *Commonwealth of Australia*, L.R. (1936) A.C. 578 at p. 614, followed. The term "existing law" in s. 222 (*1*) of the Constitution, embraces any law, Ordinance, Order, bye-law, rule or regulation passed or made before the commencement of the Constitution by any Legislature, authority or person having power for what now forms the Union of Burma to make such law, Ordinance, Order, bye-law, rule or regulation and not inconsistent with the Constitution. Preamble of Municipal Corporation of the City of Rangoon (Suspension) Act, 1943, cannot, according to well-settled rule of interpretation, restrict or extend the enacting part of the Act when the language and the object and scope of the Act are not open to doubt, and therefore the Act is still operative and the appointment of the 1st respondent according to the provisions of the Act continues. When the Corporation produces

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a budget it will be presumed under s. 114 (*e*) of the Evidence Act that official acts have been properly done and that copy of the budget has been submitted to the Government under s. 73 (*1*) (*3*). Under ss. 79 and 83 of the City of Rangoon Municipal Act the Administrator who now represents the Corporation has legal authority to determine any question affecting the rights of the subjects and he has power to impose taxes on all the citizens of Rangoon. The Administrator has to act judicially, *i.e.* according to law. According to s. 80 he can fix general, lighting and conservancy taxes at his own discretion and as regards water-tax he can fix it at such reasonable rate as would cover the expenses incurred in connection with the supply of water to the City of Rangoon. The exercise of power by the Administrator is not administrative or mechanical but of a judicial nature. But if he exercises his discretion in a *bona fide* manner not influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally the Supreme Court will not interfere. As the Administrator in fixing these rates of taxation has not acted illegally or arbitrarily his decision cannot be questioned. *The King* v. *Board of Education*, L.R. (1910) 2 K.B. 165 at p. 178, referred to.

U HTWE (*a*) A. E. MADARI *v.* U TUN OHN AND ONE ... 541

CONTRACTS OF AGENCY 278

CONTRACT—*Whether completed—Formal contract in writing contemplated—Whether a condition precedent—Rules guiding determination—Deposit—Whether benefit given or received under contract—Contract Act, s. 64—Forfeiture of deposit—Terms and conditions for—S. 28 of Union Judiciary Act—S. 98 of the Code of Civil Procedure.* Appellant deposited on 25th November 1941 a sum of Rs. 3,750 being half the value of 750 tons of molasses at Rs. 10 a ton to be supplied during 1941-42 season and got a receipt. In the previous season, a similar receipt was followed by a written contract fixing *inter alia*, terms and conditions of delivery. The appellant sued for recovery of the deposit, claiming (1) that there was no completed contract, (*a*) as the terms regarding delivery had not been fixed and (*b*) that the parties contemplated a written contract as a condition precedent and (2) the amount of deposit, 50 per cent of the total, could not be forfeited without proof of actual damage as it amounted to a penalty. As regards the second point U Tun Byu and U Aung Tha Gyaw, JJ., agreed and *Held :* A deposit is not a benefit given or received under the contract and a stipulation for forfeiture in case of default is not by way of penalty. *Natesa Aiyar* v. *Appavu Padayachi*, 38 Mad. 178, referred to. For the buyer to recover deposit, it must be shown that seller was in default. *Mohamed Habibbula* v. *Mohamed Shafi*, 41 All. 324 ; *Gowal Das Sidany* v. *Luchmi Chand Jhawar*, 57 Cal. 107 ; *Piari Lal and others* v. *Mina Mal Bal Kishen Das*, 50 All. 82, relied on and applied. *Muralidhar Chatterji* v. *International Film Company, Limited*, I.L.R (1943) 2 Cal. 213 (P C.), distinguished. *Per Chief Justice :* Terms of the proviso to s. 28 of the Union Judiciary Act are wider than that of s. 98 of the Code of Civil Procedure under which only difference on a point of law can be referred to a 3rd Judge but under the Union Judiciary Act not only points of law but also other points can be referred. As regards the first point two learned Judges differed and the matter was referred to the Chief Justice who, agreeing with U Aung Tha Gyaw, J., *Held :* That the terms as to time and mode of delivery could hardly be of importance when the parties had the whole season before them and delivery could be made according to their convenience and

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the parties did not consider it so important. It is a question of construction whether execution of a contract is a condition or term of the bargain or a mere expression of the desire of the parties as to the manner in which the transaction already agreed will go through. *Shankarlal Narayandas Mundade* v. *New Mofussil Company, Limited (In Liquidation)*, 73 I.A. 98 at p. 107; *Harichand Mancharam* v. *Govind Luxman Gokhale*, 50 I.A. 25, relied on.

D. K. PAREKH *v.* THE BURMA SUGAR COMPANY, LIMITED ... 257

CONTRACT ACT, SS. 56, 70 527

CONTRACT ACT, S. 64 257

CONTRACT ACT, SS. 70, 168—*C.A.S. (B) Officer instructing a rice miller to repair boats belonging to unknown owners—Whether rice miller entitled to under s. 70, to compensation from the owner. Held:* That there are three essential ingredients for application of s. 70 of Contract Act: (i) the person claiming compensation must have lawfully done something for another person; (ii) he did not intend to do so gratuitously; and (iii) such other person enjoys the benefit thereof. In ascertaining whether anything has been lawfully done, it should be found out whether the person so acting held such a position to the other as either directly to create or by implication reasonably to justify the inference that by the act done for the other person he was entitled to look for compensation for it to the person for whom it is done. *Punjabhai* v. *Bhagwandas Kisandas*, I.L.R. 53 Bom. 309, followed. S. 168 of the Contract Act applies to a finder of lost goods. The section has no application to a person who was handed over a boat by a Government officer who had found the boat.

SEI SHENG COMPANY *v.* U THEIN 159

CONTRACT ACT, SS. 70 AND 198—*Ratification—Mere inaction not ratification—Whether compensation can be claimed for officious interference.* There could be no valid ratification when the knowledge of facts is defective. Acquiescence in an act while in progress may amount to consent but not mere inaction after the act has been completed. Ratification is an act more active than acquiescence. Mere inaction on the part of the defendant where he is under no duty to act cannot amount to ratification. *Shyamlal* v. *Rameswari Basu*, 33 I.C. 273, followed. Unauthorized assumption of powers of the true owner amounts to conversion. Pollock on Tort, 14th Edn., p. 134 and p. 286, followed. S. 70 ought not to be so read as to justify the officious interference of one man with the affairs or property of another or impose obligations in respect of services which the person sought to be charged did not wish to have rendered. *Nathu* v. *Balwantrao*, (1903) 27 Bom. 390; *Suraj Bahu* v. *Hashmi Begam*, (1918) 40 All. 555, followed.

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DEFENCE OF BURMA ACT—*Defence of Burma Rules—Rules 89A and 96—Requisition under—Defence of Burma (Repealing) Act (Act V of 1947)—Requisitioning (Claims and Compensation) Order, 1947—Paragraphs 6, 7 and 13—Meaning of compensation in clause* (d), *paragraph 2—Arbitrator—Functions of—Requisition—Order in writing—Whether essential.* The applicant claimed compensation for his motor-car seized on 22nd January 1942 by a Police Sergeant without granting a receipt. Applicant claimed before the Collector, Rangoon, that this was a requisition under 89A, Defence of Burma Rules. The Collector of Rangoon forwarded it to the Registrar, City Civil Court, Rangoon, for submission to the Arbitrator in accordance with the Requisitioning (Claims and Compensation) Order, 1947, who referred two questions to the High Court: (1) Whether the application was maintainable before the "arbitrator" under paragraph 6 of the Claims and Compensation Order, 1947, as the car was not requisitioned by the Governor by order in writing as required by sub-s. (*1*) of s. 2 of the Requisitioning (Emergency Provisions) Act, 1947 (Burma Act No. XXXVIII of 1947). (2) Whether the application was maintainable before the "arbitrator" under paragraph 6 of the Claims and Compensation Order, 1947, in view of the fact that Rule 89A of the Defence of Burma Rules does not appear in paragraph 7 of the said Order. *Held:* With reference to the second question the answer was in the affirmative. The Requisitioning (Claims and Compensation) Order, 1947, was made by the Governor under the powers conferred by Rule 96 of Defence of Burma Rules read with s. 5, Defence of Burma (Repealing) Act, 1947. Compensation in clause (*d*) of paragraph 2 of that Order is compensation payable under Rule 96 which authorizes payment of compensation under Rule 89A. Therefore though Rule 89A is mentioned either in paragraph 4 or 7 of the Order yet claim for compensation under Rule 89A of the Defence of Burma Rules is not excluded from the operation of paragraph 6 of the Order. *Held:* With reference to the first question, that Requisitioning (Emergency Provisions) Act (Burma Act XXXVIII of 1947), is not applicable at all. The case is governed by Rule 89A and Rule 96 of the Defence of Burma Rules. As the alleged requisition was not by an order in writing as required by Rule 89A the claim for compensation before "arbitrator" under paragraph 6 of the Order, is not maintainable.

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——————— (REPEALING) ACT 441

DENIAL SCHEME—*Suit for value of goods destroyed against His Britannic Majesty's jurisdiction—Ss. 9 and 86, Code of Civil Procedure—International Law.* The plaintiff filed a suit for Rs. 15,000 value of goods said to have been destroyed under the denial scheme. The 1st defendant was His Britannic Majesty.

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Written intimation was sent to the British Ambassador, who declined to accept it on the ground that no suit lies in Burma court against His Britannic Majesty. The plaintiff contended that a suit lay under ss. 9 and 86 of the Code of Civil Procedure. *Held :* That there is no provision in the Code which permits institution of a suit against a Foreign State. S. 86 provides that in certain circumstances and subject to the consent of the authorities concerned suits may be instituted against a Sovereign. As a rule Foreign States cannot be sued here unless they voluntarily submit to the jurisdiction. This flows from the fact that all States are equal before International Law and no State can consequently claim jurisdiction over another. Such a State need not come forward and assert its right. The Court itself should take notice of the fact that it has no jurisdiction. Oppenheim's International Law, 6th Edn., Vol. I, p. 239, cited. *Mighell* v. *Sultan of Johore*, L.R. (1894) 1 Q.B. 149 at p. 162, applied. Case against the 1st defendant dismissed.

U KYAW DIN *v.* HIS BRITANNIC MAJESTY'S GOVERNMENT OF THE UNITED KINGDOM AND ANOTHER 524

DEFENCE OF BURMA RULES, RULE 96 (1) 804

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DIRECTION. CONTRARY TO JUDGMENT 172

DIRECTION IN THE NATURE OF WRIT OF *certiorari—Disposal of Tenancy Act, 1948, as amended by Act XII of 1948—Village Agricultural Committee constituted under the Act—Quasi-judicial body—Amenable to the jurisdiction of the Supreme Court if the acts of the Committee are in excess of its jurisdiction or against natural justice. Held :* Village Agricultural Committee constituted under the Tenancy Disposal Act, 1948, as amended by Act XII of 1948 are quasi-judicial bodies amenable to the jurisdiction of the Supreme Court in the exercise of its powers to issue directions in the nature of *certiorari*. *U Hlwe* v *U Tun Ohn and one*, (1948) Bur. L.R. 54, followed. As statutory bodies exercising quasi-judicial functions, the Village Agricultural Committees cannot act in excess of their powers or contrary to the provisions of the Act and rules. These Committees must also act according to rules of natural justice which require *inter alia* that—

(1) a person cannot be judge of his own act or cannot judge a matter in which he is interested,

(2) the judges must act in good faith and give an opportunity to parties of being heard and stating their own case and view point.

If any of these rules and principles are violated by the Committees the Supreme Court will quash the proceedings by issue of directions in the nature of *certiorari*.

U PIT *v.* THEGON VILLAGE AGRICULTURAL COMMITTEE AND TWO OTHERS 759

DIRECTION IN THE NATURE OF *certiorari*—ORDER UNDER PUBLIC ORDER PRESERVATION ACT 737

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DIRECTION IN THE NATURE OF *certiorari*—DOES NOT LIE AGAINST AN ORDER OF DISMISSAL OF A MUNICIPAL ENGINEER ... 733

DIRECTION IN THE NATURE OF *habeas corpus—Detention under s. 5A (1) (b) of the Public Order (Preservation) Act, 1947. Held :* If a man is suspected of habitually committing or abetting the commission of dacoity or protecting or harbouring dacoits he cannot be detained under Public Order Preservation Act, 1947, Chapter VIII of the Criminal Procedure Code provided ample machinery for dealing with such a person. It is an abuse of the Public Order (Preservation) Act, 1947, to employ its summary provisions where action under Chapter VIII of the Criminal Procedure Code should be taken.

MA KYIN HNIN *v.* THE COMMISSIONER OF POLICE AND ONE 777

DIRECTION IN THE NATURE OF *habeas corpus—Detention under Public Order (Preservation) Act—Arrest in Insein and subsequent order by the Commissioner of Police, Rangoon, for detention whether illegal. Held :* Under Notification No. 519 the power of the Commissioner of Police, Rangoon, to order detention under s. 5A of the Act is limited to residents of Rangoon or the activities must be within the Town of Rangoon. When a person was not a resident in the Town of Rangoon or his activities do not constitute a menace to public safety or public order in the Town of Rangoon, the Commissioner of Police, Rangoon, has no jurisdiction to order detention. If such a person is arrested in Insein District and later brought to Rangoon, the Commissioner of Police cannot order his detention. A verbal order of detention cannot later be confirmed by a written order of detention. Such orders are illegal. *Bo San Lin* v. *Commissioner of Police,* 1948) Bur. L.R. 372, followed. When a person has been tried for an offence in a Court of Justice and is acquitted he cannot be arrested on suspicion of committing the same offence under Public Order (Preservation) Act. It would be an abuse of the provisions of the Act.

MA AYE KYI *v.* THE COMMISSIONER OF POLICE, RANGOON AND ONE 772

DIRECTIONS IN THE NATURE OF *habeas corpus—Nature and scope—Powers of Supreme Court—Public Property Protection Act, 1947—S. 7 (2), (3), (5)—"Officer" authorized to arrest without warrant—Whether Public Property Protection Committee is an officer—Nature of arrest—If power to arrest can be delegated—Arguments as to absurd consequences—How far applicable—Report by officer under s. 7 (2) condition precedent to action by President under s. 7 (3).* The writ of *habeas corpus* is an ancient Common Law writ used as the normal procedure for protecting the liberty of the subject against unlawful arrests and detainments. It enables the immediate determination of the right to the applicant's freedom. It is not a proceeding in a suit but a summary application by the person detained. The efforts of the Court are invariably directed to prevent evasion and delay. The exercise of this check, whole and unimpaired but shorn of antiquated technicalities, has been entrusted to the Supreme Court by the Constitution of the Union. *Greene* v. *Secretary of State for Home Affairs,* (1942) A.C. 284 at pp. 301—3 ; *Secretary of State for Home Affairs* v. *O'Brien,* (1923) A.C. 603 at p. 609, referred to. Under s. 7 (2). Public Property Protection Act, 1947, by Notification 131, dated 31st December 1947, the Governor purported to authorize the Public Property Protection Committee to arrest without warrant, persons coming under s. 7 (2) of the Act suspected of having committed prejudicial acts. An order signed by the Chairman of

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the Committee was delivered to an Inspector of Police, who arrested applicant on 18th February 1948. On 1st March 1948 an order purporting to be under s. 7 (3) authenticated by a Deputy Secretary to Government, directed detention of applicant for six months from 18th February 1948. On an application for a writ of *habeas corpus*. *Held*. Authority under s. 7 (2) cannot be invested in a Committee and the Committee is not an officer who can arrest. The act of arrest is a physical act and a Committee of several persons cannot touch or arrest. The officer has to entertain a suspicion and a Committee cannot do so. General Clauses Act, s. 2 (44), referred to. *Cecil Gray* v. *The Cantonment Committee of Poona*, 34 Bom. 583 ; *Vishnomal* v. *Court of Wards*, (1928) Sind 76 ; *Tewari* v. *Deputy Commissioner, Lucknow*, 14 Luck. 351 ; *Ismail Mohamed Hajee* v. *The King*, (1941) Ran. 536, distinguished. *Held futher :* The exercise of the power of arrest cannot be delegated. There is no provision in s. 7 (2) to have the arrest effected through another, as in ss. 56 and 65 of Criminal Procedure Code. Further this deprives the person affected of an opportunity to satisfy the officer concerned. The question of administrative inconvenience involved in requiring high officers to arrest personally cannot outweight the liberty of the subject. *Barnard* v. *Gorman*, (1941) A.C. 37 at pp. 383-4, relied on. The duty of Judges is only to take the words as they stand, give its natural meaning and appropriate construction, but not cure loopholes in a statute. *Held also :* The receipt of a report from the officer arresting is a condition to the exercise of the powers of the Governor under s. 7 (5). As there was no report in this case, the further order is invalid and not in accordance with law. *King Emperor* v. *Deshpande*, 73 I.A. 144, applied. From the order it appears that U Thet Tin was satisfied and not the President. The Law contemplates that the President should be satisfied. Greater precision of language should be exercised in drafting documents of great importance involving interference with fundamental rights.

G. N. BANERJI *v.* THE SUPERINTENDENT, INSEIN JAIL ANNEXE, INSEIN 199

DIRECTION IN THE NATURE OF *Mandamus—When granted—Another effective remedy available—Right of a party to War Risk Insurance under the War Risk Insurance Rule made under Defence of Burma Act—Whether right under contract or statutory right—Effective remedy of the applicant by suit. Held :* It is settled law that if a specific remedy exists at law and remedy is not less convenient, beneficial or effective, the writ of *mandamus* or direction in the nature of the writ of *mandamus*, which cannot be claimed by applicant *ex debito justice*, will not be granted. *The Queen* v. *Commissioner of Inland Revenue*, L.R., (1884) 12 Q.B.D. 461 ; *The Queen* v. *Charity Commissioners of England and Wales*, L.R. (1897) 1 Q.B.D. 407 ; *Rex.* v. *Dymock*, L.R. (1915) 1 K.B. 147, followed ; *Manik Chand Mahata* v. *The Corporation of Calcutta*, I.L.R. 48 Cal. 916 at p. 924, dissented from. The nature of the writ of *mandamus* is explained in *Murray* v. *Wellington*, (1938) R.L.R. 83. Whether the right of the applicant for compensation under War Risk Insurance Rules made under the Defence of Burma Act, arises *ex-contractu* or by operation of the Statutory Rules, the principle to be applied is the same that a person shall not take advantage of his own failure or own wrong. *Raine* v. *The Burma Fire and Marine Insurance Co., Ltd.*, I.L.R. 3 Ran. 383, referred to. *Raymond* v *Minton*, L.R. (1866) 1 Exch. 244, followed. As the applicant claims that the Board of War Risk Insurance is still in existence he has

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an effective remedy by way of a suit for compensation and therefore issue of direction in the nature of *mandamus* cannot be ordered.

CHAS. R. COWIE AND CO. *v.* THE GOVERNMENT OF THE UNION OF BURMA 710

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DISMISSAL OF AN ENGINEER BY THE CORPORATION OF RANGOON ... 733

DIVORCE—*Communication of venereal disease—Whether proof of both legal cruelty and adultery—Whether should be done knowingly, wilfully or recklessly—Condonation of offence—Subsequent adultery—Revival of offence. Held :* That mere communication of venereal disease by husband to wife is *prima facie* sufficient evidence both of adultery and legal cruelty. Burden shifts to the husband to rebut the inference. It is not necessary that such communication should be done knowingly, wilfully or recklessly. *Edna Hardless* v. *Harold Richard Hardless*, I.L.R. 55 All. 134 ; *Browning* v. *Browning*, L.R. (1911) (P.D.) 161, followed. Communication of venereal disease may be condoned by wife ; but subsequent adultery has the effect of reviving the former cruelty which has been condoned. *Ma On* v. *Maung Aung Bwa*, 14 B.L.R. 173, followed.

MRS. R. JOUBERT BWA *v.* MR. JOUBERT BWA 132

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EVIDENCE ACT, s. 27 665

EVIDENCE ACT, ss. 30, 32 (3) 425

EVIDENCE ACT, ss. 30, 133—*Confession of a co-accused—Meaning of the words "may be taken into consideration." Held :* That confession of a co-accused is not specific evidence in the sense that conviction on that confession alone cannot stand. If there is other relevant evidence tending to prove the guilt of the accused the confession of a co-accused may be taken into consideration along with the said evidence as lending assurance to it. If there is no other evidence or if the other evidence is insufficient to establish a *prima facie* case against the accused the confession of the co-accused must be excluded altogether and cannot be taken into consideration. The confession of a co-accused cannot be added to supplement evidence otherwise insufficient and in no case can it be used to fill gaps in the prosecution evidence. The confession of a co-accused is therefore not on the same footing as the testimony of an approver which is substantial evidence and on which alone conviction can be made under s. 133 of the Evidence Act. *Emperor* v. *Lalit Mohan Chuckerbutty and others*, I.L.R. 38

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Cal. 599 at p. 587 ; *Maung Mya and another* v. *The King*, (1938) R.L.R. 30, followed. Under Special Judge (Third Amendment) Act (Burma Act LXVII of 1947) s. 3 (3) a Special Judge can act on the evidence recorded by his predecessor or predecessors.

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EVIDENCE ACT, s. 32 (2) 676

————, s. 32 (3) 58

EVIDENCE ACT. s. 63 (5)—*Secondary evidence—Stamp Act*, s. 2 (11). *duly stamped—New point in appeal—When permissible.* A suit upon two promissory notes said to have been lost by fire after Japanese invasion was first dismissed by the trial Court but the High Court remanded the case for evidence, and for decision and a decree was passed. Upon appeal it was contended—

(1) that the evidence of the plaintiff and one U Ba Pe was not admissible as secondary evidence,

(2) that the promissory notes were not legally executed as the originals were payable to bearer.

(3) that the promissary notes were not duly stamped since postage stamp of Re. 1 was affixed on each of the promissory notes and therefore secondary evidence was inadmissible and that leave should be granted to raise this point on appeal.

Held : The learned Judges who remanded the case had decided that the evidence of the plaintiff and his witnesses amounted to an admission and that it was not necessary for the promisee and the witnesses to read the whole of the promissory notes themselves. *Ma Mi and one* v. *Kallander Ammal*, 5 Ran. 18 ; *Kalcuther Ammal* v. *Ma Mi and one*, I.L.R. (1924) 2 Ran. 400, distinguished. *Held further :* That secondary evidence having been admitted that admission cannot be called in question under s. 36 of the Stamp Act. *Maung Po Htoo and three others* v. *Ma Ma Gyi and one*, I.L.R. (1926) 4 Ran. 363, referred to and followed. The Court of appeal should not allow a new line attack of which the party affected had no notice during the hearing of the suit. *Nathu Piraji Marwadi* v. *Umedmal Gadumal*, I.L.R. (1909) 33 Bom. 35 ; *Sreemutty Dossee* v. *Ranee Lalunmonee*, 12 Moores Indian appeals 470 ; *Gajapati Radhika Vasudeva Santa Singaro*, (1891-92) L.R. 19 I.A. 179 at p. 183. No plaintiff should lose his money because of a technical error in the execution of a promissory note and if necessary leave should be granted to amend, basing the claim on the original cause of action. *Krishna Prasad Singh and one* v. *Ma Aye and others*, (1936-37) I.L.R. 14 Ran. 383 ; *Maung Chit and one* v. *Roshan N.M.A. Kareem Coomer & Co.*, (1934) I.L.R. 12 Ran 500, referred to. A plaintiff can recover on the original consideration if the claim is set out in the plaint as a cause of action. *Ram Raghubir Lal and others* v. *The United Refineries (Burma), Ltd.*, (1931) I.L.R. 9 Ran. 56 at p. 63 ; *Maung Po Chein* v. *C.R.V.V.V. Chettyar Firm*, A.I.R. (1935) Ran. 282, referred to and followed. The object of the Stamp Act and the Stamp Rules is to get revenue and to prevent evasion of liability therefrom and not to create pitfalls and in this case the basic requirement that the promissory notes must bear adhesive stamps of not less than the proper amount, has been fulfilled. *Radha Bai* v. *Nathu Ram*, (1891) I.L.R. 13 All. 66 at p. 73 ; *Bank of Madras* v. *Subbarayalu and one*, (1891) I.L.R. 14 Mad. 32 at p. 35 applied. The award of interest from the date of decree is discretionary and the High Court will not as a rule interfere with such orders but in this

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case the District Judge had not considered the question of subsequent interest at all. *Sourendra Mohan* v. *Hari Prasad*, 52 I.A. 418, applied.

EU HPE YAR AND ONE *v.* TEH LU PE 810

EVIDENCE ACT, s. 63 (5), s. 63 (c)—*Lost document—Necessity for proof of execution and attestation. Held :* When execution was denied it is incumbent to have satisfactory proof of execution including attestation and registration of the document even though the document was lost as a result of robbery at the time of evacuation. S. 68 of the Evidence Act is clear on the point and the loss or destruction of the document does not dispense with the mode of proof. *R.M.A.R.M. Chettyar Firm* v. *U Htaw*, 11 Ran. 26 ; *Karimullah* v. *Gudar*, 82 I.C. 396 ; *Jadunath Mitra* v. *Isar Jha and others*, 178 I.C. 198, referred to. A decree could not be passed on the basis of entries in the account books alone, and they do not establish that the transaction did take place as alleged. There must be evidence to corroborate the entries such as the evidence of the document or person present at the transaction. *Ramgobind Prasad v. Gulab Chand Sahu*, I.L.R. 20 Pat. 273, followed. Even if the entries in the account books are relevant under s. 32 (2) of the Evidence Act the Court is not bound to believe the same without corroboration. *Rampyarabai* v. *Balaji Shridhar*, I.L.R. 28 Bom. 294, referred to.

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EVIDENCE ACT, s. 74 672

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FAILURE OF THE RESPONDENT TO TAKE CROSS-OBJECTION UNDER ORDER XLI, RULES 22 OF THE CODE OF CIVIL PROCEDURE AGAINST THE ORDER UNDER APPEAL—*Its legal effect—S. 148 of the Code—Whether time granted by a decree or an order having the force of a decree could be enlarged.* The Rangoon City Civil Court passed an ejectment order ; but thereafter under the provisions of s. 14 (3) of the Urban Rent Control Act, as substituted by Act XXVI of 1947 passed an order that if the present appellant deposited a sum of money by a particular date the decree will be unexecutable so long as the appellant paid the monthly rent by a particular date. The appellant appealed against the order, but the respondent did not like any cross-objection against the order appealed against and the appeal was dismissed. *Held :* That the appellant could not question the propriety or validity of the order either in the trial court or in an appeal against an order for non-compliance of the order modifying the order of ejectment. Provision under s. 148 of the Code of Civil Procedure giving power to the court to extend the time does not apply where time is allowed for doing an act by a decree or an order having the force of a decree. *Hukam Chand and others v. Havat and others*, (1912) ; Punjab Record, Vol. 47, 343 (Civil Judgment 99) ; *Dharmaraja Ayyar and one* v. *K. G. Srinivasa Mudaliar and four others*, I.L.R. 39 Mad. 876 ; *Maslahuddin* v. *Ram Krishen and one*, A.I.R. (1928) Oudh 32 ; *Kshetra Mohan Ghosh and one* v. *Gour Mohan Kupali*, 147 Indian Cases 1025, followed

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FINAL DECREE FOR REDEMPTION NOT DRAWN UP BY COURT—*Order 21, Rule 1—Order 34, Rule 4 (2) and (3) of Code of Civil Procedure—Deposit of Japanese Currency Notes—Its effect—Whether discharges decree—Appeal filed—Leave to file Written Statement on appeal—Considerations governing.* A mortgage by deposit of title deeds was effected in favour of the appellants by the respondent's predecessor in 1941. After the death of the mortgagor the respondents as executors sent a crossed cheque on the Burma State Bank on 20th August 1944 which was not accepted. A suit was filed on 31st January 1945 in the City Court and the sum of Rs. 35,250 in Japanese currency was paid into Court. On 23rd April 1945 the Court passed a judgment for final decree for redemption but no decree was drawn up. The defendant filed an appeal for permission to amend the written statement stating that the appellant could not then raise the issue that he was entitled to receive in British currency only. *Held on appeal per* U THEIN MAUNG, C.J.—The fact that the final decree was not drawn up does not make any difference. Under Order XX, Rule 7, of the Code of Civil Procedure, the decree shall bear the date on which the judgment was pronounced and " an act of the Court shall prejudice no man " is a well-known legal maxim. Broom's Legal Maxims, 10th Edn., p. 73 ; *Turner* v. *London and South-Western Railway Company*, L R. (1873-4), Vol. XVII, Equity cases, 561 at pp. 566—9, referred to. Order XXXIV, Rule 4 (2) and (3), Code of Civil Procedure, shows that preliminary decree shall merely declare that on payment plaintiff can obtain a final decree. The Court could take judicial notice of the necessary amount having already been paid and pass a final decree. *Tata Iron and Steel Company, Limited* v. *Baidyanath Laik*, (1923), I.L.R. 2 Pat. 754 ; *Laxminarayan Ganesdas* v. *Ghasiram Dulchand Palliwal*, A.I.R. (1939) Nag. 191 ; *Mohamed Rahimtulla* v. *Ismil Allarakhia*, 51 I.A. 236, considered. Order XXI, Rule (1), is not applicable to cases of mortgage decrees. *Ambi (a) Subramaniam Pattar* v. *P. A. V. Sridevi*, A.I.R. (1924) Mad. 102, referred to. The Japanese so-called currency was never lawful currency in Burma. *Maung Sein Kho* v. *Maung Hla Din*, Civil 2nd Appeal No. 3 of 1947 ; *Ko Maung Tin and eight others* v. *U Gon Man*, Civil Reference No. 5 of 1947 (1947) R L.R. 149 ; *J. K. Behara*, v. *Lee Shein Yu*, Special Civil 1st Appeal No. 18 of 1946 ; *U Sein Wa* v *U Ba Thin*, Civil 1st Appeal No. 23 of 1947 ; *U Ba San and one* v. *U Hoke Wan and one*, Civil 2nd Appeal No. 37 of 1947 ; *U Pe Shein* v. *S.R.M.A.R. Ramanathan Chettyar*, Civil 1st Appeal No. 3 of 1948, referred to and considered. Acceptance of a payment by Court and the discharge resulting therefrom are subject to the right of appeal by the opposite party and till the right of appeal has become barred or the decree confirmed on appeal the payment cannot be said to have been finally accepted. The real defence in the case that the defendant was entitled to payment in British currency could not be raised during the Japanese occupation and amendment of the written statement is necessary to enable the real question in issue between the parties to be decided. Final decree set aside. *Held per* U SAN MAUNG, J.—The question whether Japanese Military notes were lawful currency in Burma is not *res integra*. The contrary has been decided in *Maung Sein Kho* v. *Maung Hla Din*, Civil 2nd Appeal No. 3 of 1947 ; *Ko Maung Tin and eight others* v. *U Gon Man*, Civil Reference No. 5 of 1947 ; McNair's Legal Effect of War, 2nd Edn., p. 337 ;

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Jack Thorrington v. *William B. Smith and H. John Hartley*, S.C.S. 8 Wall 1—14, referred to. If the question was *res integra* it was entirely beyond the competence of the Japanese Military Authorities under Article 43 of Hague Regulations to issue Burma Monetary Arrangements Ordinance, 1942, equating their currency to the lawful currency of the country. The right of the appellant was a right to be repaid in lawful money and the order of the City Court purporting to direct satisfaction or that liability in currency which was not lawful cannot be upheld in appeal. *U Ba San's* case, Civil Reference No. 5 of 1907, relied on. The Hague Regulations must be treated by the Courts in Burma as part of the Municipal Law. *King* v. *Maung Hmin and three others*, (1946) R.L.R. 1, referred to. The payment had not been accepted in the terms of the Japanese Currency (Evaluation) Act, 1947, s. 4. What is contemplated by s. 4 is the voluntary acceptance of a payment by the creditor, not appropriation by an order of the Judge. No question of acceptance of payment by anybody would arise in the case of a payment into Court under Order 34, Rule 4, sub-rule 3, of the Code of Civil Procedure. The Legislature has not extended the application of s. 4 of the Japanese Currency (Evaluation) Act, 1947, to decrees. *U Pe Shein* v. *S.R.M.A.R. Ramanathan Chettyar*, Civil 1st Appeal No. 3 of 1948, distinguished.

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HINDU LAW—Mitakshara *School—Adoption—Proof of—Principles applicable—Self acquired properties—Will—Validity of—Alienation—Legal necessity—Immorality—Burden of proof.* Evidence in support of adoption must be sufficient to satisfy the very grave and serious onus that rests upon any person who seeks to displace the natural succession by alleging adoption. The physical act of giving and receiving is absolutely necessary to the validity of adoption. It is the essence of adoption under the Hindu Law, and the Law does not accept any substitute. Mere expression of consent or the execution of a deed of adoption, though registered but not accompanied by an actual delivery of the boy does not operate as a valid adoption. When there is a lapse of period of years between the adoption and its being questioned an allowance must be made for absence of evidence. The fact that the alleged adopted son's brother never heard of it during the adoptive father's lifetime, that the adoptive father treated both his brother's son and the alleged adopted son exactly alike as they helped him in the management of his business and that during the adoptive father's lifetime the son never claimed that right and the adopted son's name was not mentioned as such in the deceased's Will is consistent only with the view that there was no adoption. Mulla's Hindu Law, ss. 512 and 489, followed. Property inherited by a Hindu for other relatives is his separate property. Mulla's

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Hindu Law, s. 223, referred to. As against a son an alienation by a father can be sustained if it is for antecedent debt that is antecedent in fact as well as in time. But that debt must be truly independent and not part of the transaction. A transfer outright in satisfaction of a mortgage debt is a transfer for antecedent debt. The burden of proof is upon the sons to prove the immorality of the debt. It is not discharged by showing that the father lived an extravagant and immoral life. There must be a direct connection between the debt and the immorality set up by the sons. *Brij Narain* v. *Mangla Prasad*, L.R .51 I.A. 129, applied and followed.

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INTERMEDDLER—*Renting property to third party—Payment of rent—Whether a defence against rightful owner.* The appellants, 2nd respondent and 3rd respondent and one Tanner were sued for compensation for use and occupation of a house. The 3rd respondent had taken possession of the same and let it out to appellants and 2nd respondent. The trial Court had decreed the claim against all. On appeal it was contended that the appellants were not liable for the period that rent was paid to the 3rd respondent. *Held :* Rejecting such claim that such a plea cannot be set up against the rightful owner. Upon the admission that the property was taken from an unauthorized person the occupants are liable to pay standard rent.

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JAPANESE CURRENCY NOTES. DEPOSIT OF 454

JAPANESE CURRENCY (EVALUATION) ACT, S. 3, SUB-S. 2—*Applicability of—Execution of decree—Right of executing.* The decree-holder had obtained a decree for work done by him payable in Indian rupees and the decree provided that it must be satisfied by payment "in whatever may be legal tender in Burma when the payment is made"; upon a contention that the decree was in respect of money due under a contractual obligation of the description in s. 3 (*1*) of the Japanese Currency (Evaluation) Act. *Held :* That for the purpose of execution and appeal arising out of such execution, the court was bound by the previous judgment of the High Court and cannot go beyond the same or reasons therefor. The Full Bench decision of *Ko Maung Tin* v. *L. Gon Man* [R.L.R. (1947)-149 at p. 152], cannot affect actual decree passed in another case prior to the decision of the Full Bench. Such decree will remain binding between parties to such suit. Consequently s. 3 of the Japanese Currency (Evaluation) Act, 1947, had no application to the case.

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JAPANESE CURRENCY (EVALUATION) ACT, 1947, s. 3—*House rent incurred during Japanese occupation—Pre-war contract to pay monthly rent—Whether s. 3 applicable.* An unregistered document was executed prior to the Japanese occupation providing for occupation for five years but on payment of monthly rent as it fell due. The document being unregistered could not determine the right of parties. The claim for rent due between July 1944 and February 1945 did not amount to a contractual obligation entered prior to Japanese occupation. The parties must be deemed to have agreed that each month's rent would become payable at the end of the month. It is a separate debt which for the period in suit, *viz.* July 1944 to February 1945 could have been satisfied by payment in Japanese Currency Notes. Accordingly the party is liable to pay only in terms of s. 3 of the Japanese Currency (Evaluation) Act, 1947.

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JUDICIAL OR QUASI-JUDICIAL ACT 733

JUDGMENT OF APPELLATE COURT—*Contents of—Order XLI, Rule 31; Code of Civil Procedure—Requisites.* The District Judge on appeal stated that he had gone through the judgment and the evidence of the witnesses and agreed that there was real substance in the claim of the plaintiff and confirmed the decree of the trial Court. *Held :* That the judgment did not give any reasons for coming to the conclusion. Under Order XLI, Rule 31, the judgment of the appellate Court should state (1) the points for determination, (2) the decision thereon and (3) the reasons for the decision. The judgment did not comply with these conditions and was not judgment as contemplated by the Code of Civil Procedure. *Ma Saw and others* v. *Ma Bwin Byu*, I.L.R. 6 Ran. 66 ; *Dharam Das* v. *Shankar Ahir*, I.L.R. 53 All. 528 ; *Sitarama Sastrulu and others* v. *Suryanarayana Sastrulu*, I.L.R. 22 Mad. 12 ; *Sohawan and another* v. *Babu Nand*, I.L.R. 9 All. 29, followed.

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LEGAL PRACTIONERS ACT, s. 13—*Pleader struck off the Rolls for appearing in drunken condition in Court—Application for reinstatemen in the roll—Principles applicable. Held :* That the High Court has inherent power to reinstate a legal practitioner if it is satisfied that the delinquent has reformed his character and has for sufficiently long period acted in such a way that he can be entrusted notwithstanding his previous delinquency, with affairs of clients and admitted to an honourable profession without the profession suffering degradation. But where there is no repentance or regret for his past conduct and the evidence of his good conduct after his dismissal from practice, is meagre, he should not be reinstated. *In re Abiruddin Ahmed*, 38 Cal. 309 ; *In the matter of Mathura Prasad*, 1 Pat. 684 ; *Mohammad Yusuf Husain Khan* v. *Emperor*, A.I.R. (1934) Oudh. 140 ; *In re Pyke*, 34 L.J. Q.B. 220.

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LIMITATION. EXPIRED PERIOD OF 855

LIMITATION ACT, S. 5—*Sufficient cause—Ignorance of law—Money-lenders' Act, s. 12—Retrospective effect—Mortgage suit—Parties claiming adverse title—Attestation.* In a suit on a mortgage bond for a claim of Rs. 7,000 the Trial Court granted a decree. An appeal filed in the District Court of Myingyan was successful, but on 2nd appeal the High Court reversed the decision of the District Court on the ground that the District Court had no jurisdiction to entertain the appeal of the value of over Rs. 5,000. The present appeal was then filed in the High Court, and even though allowance was made for the time spent in the District Court the appellants were still out of time by about ten days due to inability to raise necessary funds. *Held :* That the mistake of the appellants' Pleader amounted to sufficient cause within the meaning of s. 5, Limitation Act. *Held further :* That though ignorance of law is no excuse the degree of skill and efficiency displayed by the moffusil bar is a special circumstance for adoption of a liberal construction when copies of legal Acts and enactments were not readily available for easy reference. The District Court and the Officers of the Court shared the same notion as to forum of appeal and the pleader had honestly given the advice under which the appellants acted. Case law on the point referred to and discussed. *Ma Hmon and others* v. *Ma Shwe Me*, (1892—96) Civil, Vol. 2, U.B.R. 452 ; *Gopal Chandra Lahiri* v. *Solomon*, 13 Cal. 62 ; *Krishna* v. *Chathappan*, 13 Mad. 269 ; *Nga Po An* v. *Nga Nyun Bu and two others*, (1907—09) Civil, Vol. 2, U.B.R., Limitation 2 ; *Ma Mai Gale* v. *Tun Win*, (1915-16), Vol. 8, L.B.R. 566 ; *Tin Tin Nyo and others* v. *M. Aung Ba Saing and one*, 1 Ran. 584 ; *J. N. Surty* v. *T. S. Chettyar Firm*, 4 Ran. 265 ; *Rakhal Chandra Ghosh and others* v. *Ashutosh Gosh and others*, 17 C.W.N. 807 ; *Kura Mal* v. *Ram Nath and another*, 28 All. 414 ; *Nagindas Motilal and others* v. *Nilaji Moroba Naik and others*, 48 Bom. 442 ; *Ambika Ranjan Majumdar* v. *Manikgunge Loan Office, Limited*, 55 Cal. 798 ; *Ghulam Mohammad* v. *Usman and others*, 14 Lah. 206 ; *Mithoo Lal* v. *Jamna Prasad and another*, A.I.R. (1933) Oudh. 523 ; *Kishan Chand* v. *Mohammad Husain*, A.I.R. (1942) Lah. 94 ; *Kayambu Pillai and another* v. *Court of Wards by Collector, Trichinopoly District and others*, A.I.R. (1942) Mad. 170, referred to. *Held :* Where the execution of a mortgage bond is admitted it is not necessary to produce the specific proof of attestation and this fact could be proved by the other evidence, *M.P.A.K. Firm* v. *Ma Mya Thein and others*, A.I.R. (1940) Ran. 184, referred to. *Held also :* That the Money-lenders' Act came into force on 1st January 1947 and it has retrospective effect. No decree can be passed for an amount which, together with interest paid is more than double the original sum borrowed. Parties who claim under a title adversely to both mortgagor and mortgagee are not proper parties to the mortgage suit. *M.V.A.L. Viswanathan Chettyar* v. *Ma Aye and three others*, 4 Ran. 214, followed.

U SHWE KYU AND FOUR OTHERS *v.* MA TIN U' ... 606

LIMITATION ACT, S. 28—*Whether extinguishes rights or bars remedies to regain possession after Court sale and delivery—Specific Relief Act, s. 42—Whether co-owner should sue for possession—Execution sale—Whether third parties' rights affected—Burmese Buddhist Law*—Nissaya *and* Nissita. In execution of a money decree

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obtained by the appellant against the husband of the 1st respondent, property in dispute which belonged to the couple was sold by court on the 30th July 1930 and purchased by appellant and he obtained possession through court. At the time of the sale the Full Bench decision of *Ma Paing* v. *Maung Shwe Hpa.. and others*, I.L.R. 5 Ran. 478, determined the rights of Burmese Buddhist husband and wife. According to that decision an execution sale against husband conveyed wife's interest as well. This decision was later overruled by the Special Bench decision of *N.A.V.R. Chettyar Firm* v. *Maung Than Daing*, I.L.R. 9 Ran. 524, and the effect of that decision was to restore the old law under which execution sale in a decree against the husband did not convey wife's interest. The appellant remained in possession of the disputed properties till evacuation. After evacuation the respondents got into possession. After the British re-occupation, when the appellant tried to regain possession, the respondents filed a suit for declaration of title over the whole property and obtained a decree for 11/12th share. This decision was set aside by the District Court but in second appeal trial Court's decision was restored. In further appeal under s. 31 of the Union Judiciary Act it was contended—(*a*) that no suit for declaration having been filed within six years of the court sale, a suit under s. 42, Specific Relief Act, was barred, (*b*) as the plaintiff could have claimed further relief, the suit for bare declaration was not maintainable, (*c*) that the entire property had passed by reason of the ruling in *Ma Paing*'s case, (*d*) that in any case, the share granted by the trial Court was not correct and that the claim could be only for one-half as the property brought to the marriage by the wife had changed character and been sold and the price had been employed in money-lending. *Held*: That though plaintiff-respondent's right to sue for a declaratory decree before the war had been time barred yet title in the property was not extinguished and when the plaintiff-respondent regained possession within 12 years there was a fresh cause of action for a declaratory decree when the defendant disputed her title. *Rajah of Venkatagiri* v. *Isakapali Subbiah and others*, (1903) I.L.R. 26 Mad. 410, referred to. The relief by way of partition is not a consequential relief. A suit for declaration of title alone lies without a claim for partition. *Joy Narayan Sen Ukil* v. *Srikantha Roy*, 26 C.W.N. 206, followed. *Held further*: That as the wife was not a party to the auction sale her rights cannot be affected and the ruling in *Abdul Aziz Khan Sahib* v. *Appayasami Naiker and others*, (1904) L.R. 31 I.A. 1, has not the effect of affecting the rights of third parties. *Held further*: That though the wife's *payin* had changed character, it will not make any difference in the application of the principle of *N'ssaya* and *Nissita*. May Oung's Buddhist Law, p. 60, referred to. The children of the marriage had no interest during the parent's lifetime and the decree-holder's share was accordingly held to be one-third and not one-twelfth.

A.L.M. CHETTYAR FIRM *v.* MA SINT AND THREE OTHERS ... 402

Lis pendens 138

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MAINTENANCE ORDER. EFFECT OF RE-UNION ON NON-COGNIZABLE OFFENCE. REPORT BY POLICE OFFICER 108

MATERIAL ALTERATION OF RECEIPT—*Effect of—Test whether the document is the foundation of the claim or merely evidence. Held*: Where a document which is the foundation of the

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obligation of the defendant is materially altered by the plaintiff, his suit should be dismissed. But where the document materially altered is merely a piece of evidence and plaintiff can prove his claim without reference to the altered document, the claim may be decreed. *Nathu Lal and others* v. *Mt. Gomti Kuar and thers*, (1940) A.I.R. 160; *Gour Chandra Das* v. *Prasanna Kumar Chandra*, 33 Cal. 812; *Tapiram* v. *Jugalkishore and another*, (1926) A.I.R. Nag. 29, referred to and discussed. The test is whether the original consideration has merged in the document.

MAUNG THIT MAUNG *v.* MAUNG TIN AND THREE OTHERS ... 722

"MAY BE TAKEN INTO CONSIDERATION." MEANING OF 310

MONEY-LENDERS' ACT, 1945, s. 2 (6)—*Carrying on the business of money-lender—Plea not raised in written statement or at the time of framing of issues—But raised in argument—Consideration of in appeal. Held:* That if there are facts either admitted or proved beyond controversy, a new plea could be entertained on appeal. *Connecticut Fire Insurance Company* v. *Kavanagh*, (1892) A.C. 473 at p. 480, followed. *M. E Moola Sons, Limited (In Liquidation)* v. *Burjorjee*, (1932) I.L.R. 10 Ran. 242 (P.C.) at p. 255; *Papa Ammal* v. *Panchavarnam Ammal and others*, (1936-37) I.L.R. 14 Ran. 738 at p. 742, referred to. *Held further:* That under s. 2, clause 6, of the Money-lenders' Act, money-lender means a person who carries on the business of advancing loans as defined in the Act. A person who lends money on two or three occasions a year to his friends while doing some other business cannot be regarded as a money-lender.

BISWAS NATH RAI *v.* KASHI NATH RAI 449

MONEY-LENDERS' ACT, 1945—*S. 13, clause* (a)—*Whether final mortgage decree for sale could be re-opened under—Interest after 8th December 1941*—Whether s. 3, Accrual of Interest (War-Time Adjustment) Act, 1947, applies to decrees. *Held:* That British subjects in India did not become alien enemies of the people in Burma when Burma was occupied by the Japanese. *V.E.R.M. Krishnan Chettyar* v. *M.M.K. Subbiya Chettyar*, (1948) Bur. L.R. 278, followed. S. 13 (*a*) of the Money-lenders' Act, 1945, provides that in an appeal arising out of a final decree in a mortgage suit whether filed before or after the commencement of the Act the court may re-open the transaction; in so doing the court can re-open the preliminary decree also. *Renula Bose, Srimati* v. *Rai Manmatha Nath Bose and others*, L.R. 72 I.A. 156, followed and applied. *Held further:* That in respect of the two transactions, dated 30th October 1929 and 12th December 1930, which had been settled on 14th June 1936 and the appellant agreed to pay in annual instalments, it would not be fair to re-open the same as appellant cannot be allowed to benefit by his own wrong. In re-opening the transaction, the Accrual of Interest (War-Time Adjustment) Act, 1947, could not be considered as disallowing interest after 8th December 1941, as the said Act does apply to a decree. *Bank of Chettinad, Limited* v. *Chuah Bun Hock*, Civil Misc. No. 69 of 1947, followed.

KO SAN MYA AND ONE *v.* A.P.S.A. FIRM 390

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MORTGAGE SUIT. PARTIES CLAIM ADVERSE TITLE TO 606

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Nissaya AND *Nissita* 402

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OCCUPATION OF BURMA BY JAPANESE—*Effect on contracts of agency—Decision of Supreme Court during occupation—Defence of Burma Act and Rule—Rule 97—English Common Law if applicable—Doctrine of* stare decisis—*Declaration of war by Burma on Great Britain—Its legal effect. Held:* Agency of an agent in Burma of a principal residing in India did not terminate when Burma was occupied by the Japanese and the agent remained in occupied Burma though the communication between the principal and the agent became impossible. *Held:* That such question is to be decided in accordance with the Municipal Law of Burma and not by International Law. Condition of Burma under Japanese occupation was peculiar and there is no Common Law authority on the point. The Municipal Law of Burma is in consonance with the American decisions in *Kershaw* v. *Kelsey*, (100 Mass 561) and *Williams* v. *Paine*, (169 U.S. 55). *Held:* That the courts were always reluctant to upset decisions which have been accepted by the public as the basis of their transactions for a length of time and the ruling of the Supreme Court in Civil Reference No. 2 of 1943 should not be disturbed and should be followed. *Held:* That during the Japanese occupation Burma did not attain the necessary status to declare war on Great Britain. Therefore the alleged declaration of war by the then Burmese Government could have no legal effect. *A.S.N.S. Firm by their duly constituted agency Karappaya Pillay* v. *Maung Po Khin and Ma Thaung Kywai*, Civil Reference No. 2 of 1943 of the Supreme Court of occupied Burma, followed. *U San Wa* v. *U Ba Thin*, Civil Reference No. 2 of 1947, referred to. *R.M.M.R.M. Perichiappa Chettiar* v. *Ko Kyaw Than*, Civil 1st Appeal No. 34 of 1947, followed. *Sovfracht*'s case, (1943) A.C. 203; *Fretz* v. *Stover*, 22 S.C. Wall, 98; *Chem Abbheong* v *Mapacarai Mohamed Rowther and eight others*, (1946) Mad. 768; *Daimler Company, Limited* v. *Continental Tyre and Rubber Company (Great Britain) Limited*, (1916), 2 A.C. 307; *Waghela Rajsanji* v. *Shekh Masludin*, 14 I.A. 89; *Thomas Bear & Sons (India), Ltd.* v. *Prayag Narain*, 67 I.A. 212; *Tingley* v. *Muller*, (1917) L.R. 2 Ch. 144; *Ma Mya* v. *Ma Thein*, I.L.R. (1926) Ran. 313 (F.B.); *Lodewyk Johannis De Jager* v. *The Attorney-General of Natal*, (1907) A.C. 326; *The King* v. *Maung Hmin and three others*, (1946) Ran. 1, referred to. *Per* U SAN MAUNG, J.—Sir Frederick Pollock's observations "Laws of every nation are determined by their historical condition not only as to details but as to structure" should be applied to the special conditions in Burma during occupation. The agent in Burma could very well look after the interest of his principal in India without supplying the Japanese with sinews of war. The growth of English Common Law on the subject is not based on experience of enemy occupation of English territory. Payment to the agent would rather tend to increase the sinews of war to the British and the Courts in Burma

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during occupation have followed the decision of the Supreme Court of Massachusetts. The question is not *res integra* and the principle of *stare decisis* must apply.

V.E.R.M. KRISHNA CHETTIAR *v.* M.M.K. SUBBIYA CHETTIAR 278

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ORDERS, SUCCESSION OF TEMPORARY 365

ORDER FOR EJECTMENT UNDER S. 17 OF THE RANGOON CITY CIVIL COURT ACT—*Execution of the order—Obstruction by a third person—Whether Order 21, Rule 97, applies. Held by the Full Bench :* That when a landlord has obtained an order of ejectment against his tenant under s. 17 of the Rangoon City Civil Court Act and in course of the execution of the said order is obstructed by a third person who is not a party to the proceedings under s. 17, the landlord can avail himself of the provision of Order XXI, Rule 97, of the Code of Civil Procedure and obtain an order under Rule 98 if the facts would justify such a course. In view of ss. 36 and 141 of the Code and s. 23 of the Rangoon City Civil Court Act and Rule 3 of the Rangoon City Civil Court (Recovery of Possession and Distress) Rules, the word "decree" in Rules 97 and 98 of the Order XXI of the Code includes an "order". *D. H. Atchia & Co.* v. *M. E. Jeewa*, (1924) 3 B.L.J. 263 ; *Baggiammal* v. *Appadurai Gramany*, 6 I.C. 722 ; *Mahomed Ghouse Sahib* v. *Shaik Mohideen Sahib*, A.I.R. (1924) Mad. 74 ; *Narayana Iyengar* v. *Desika Chariar*, (1933) I.L.R. 57 Mad. 35 ; *Meredith* v. *Sanjibari Dasi*, (1915) I.L.R. 42 Cal. 313 ; *Kilachand Devchand & Co., Ltd.* v. *Ajudhia Prasad Sukhanand & Co. and others*, 59 Bom. 10, referred to.

BABU SAGARMAL TIBREWALA *v.* G. M. LATIMOUR ... 113

OWNER OF LAND—*Structure on the land—Onus of proof regarding ownership of—Difference between English Law and law in India and Burma—Burden of proof in ejectment suit—Stamp Act, s. 36—Unstamped documents admitted by trial Court—Effect.* The respondent was the owner of Holding No. 2. On the land was a building occupied by appellants. The respondent sued for possession of the house and land. The appellants asserted that the house belonged to them but that they were tenants of the land. The Subordinate Judge held under s. 110 of the Evidence Act, as the appellants were in possession, the burden of proving title lay on the plaintiff. Trial Judge admitted in evidence, Exhibits 2 and 4, two unstamped documents referring to an agreement to pay rent and a receipt for rent. On appeal the District Judge placed the burden of proving ownership of the house on the defendant and he rejected Exhibits 2 and 4 as inadmissible in evidence and held that the defendants had not discharged the burden which lay on them. When the defendant in possession of a house on a land belonging to the plaintiff which the defendant claims he has taken on rent and built the house, the District Judge erred in placing burden of proving the title of the house on the defendant. In England no doubt the owner of the land would be the owner of whatever is affixed to the soil on the principle of "*Quicquid plantatur solo solo credit*" but in India and Burma this principle does not apply. *Thakoor Chunder Poramanick and others* v. *Ramdhone Buttacharjee*, 6 W.R. 228 (F.B.) ; *Narayan Das Khettry* v. *Jatindra Nath Roy Chowdhury and others*, I.L.R. 54 Cal. 669 (P.C.) and *Vallabhdas Narainji* v. *Development Officer, Bandra*, 53 Bom. 589 (P.C.), followed. *Held further :* That under s. 36 of the Stamp Act if documents insufficiently stamped are admitted in evidence in trial Court such

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admission could not be challenged in appeal. *Pedda Venkatta Reddi and another* v. *Vitta Hussain Setti*, I.L.R. 57 Mad. 779 ; *Venkatakrishna Reddi* v. *Batcha Reddi*, I.L.R. 57 Mad. 783, referred to. A sale deed though unregistered was admissible in evidence to prove the nature of the possession of the house though it may confer no title.

NAZIR KHAN AND ONE *v.* MA MA LAY 353

Parabaik, MORTGAGE BY 619

"*Parabaik*" UPPER BURMA REGISTRATION REGULATION, 1897, s. 4—*Mortgage for Rs. 200 and Rs. 500 recorded in* "Parabaik." The concensus of judicial opinion has been to treat mortgage transactions recorded in "*Parabaiks*" as completed mortgage instruments and where the validity of such transactions depended upon registration the unregistered instrument has been held to be inadmissible in evidence to prove its terms. The case law on the point discussed. *Queen-Empress* v. *Mi Nan Tha*, 1 U.B.R. (1892—96) 303 ; *Mi Ta* v. *Nga Sein*, 2 U.B.R. (Civil) (1907—09) Execution-Signing 5 ; *In re Chet Po*, 7 L.B.R. 77 ; *Ma Sat Pu* v. *Ma Sin*, 3 U.B.R. (1917—20) 258 ; *Maung Po Din* v. *Maung Po Nyein*, 4 U.B.R. 80 ; *Ma Saw* v. *Maung Ba*, 5 Ran. 650 ; *Maung Ba* v. *Maung Tha Kyu*, (1930) Ran. 39, referred to and discussed.

MAUNG BA KYAW AND FIVE OTHERS *v.* MAUNG BA SHEIN 619

PENAL CODE S. 64—*Imprisonment in default of fine—S. 35, Criminal Procedure Code—Power of court to direct sentences to run concurrently*. The accused was found guilty of three separate offences under s. 409, Penal Code. He was sentenced in respect of each offence to undergo one and a half years' rigorous imprisonment and to pay a fine of Rs. 150 or six months' imprisonment in default. The Magistrate directed the sentences of imprisonment including one in lieu of fine to run concurrently. *Held* : That this is clearly opposed to s. 64, Penal Code. The additional sentence must be in excess of any other imprisonment. Under s. 35, Criminal Procedure Code, the Criminal Court is not competent to direct that such sentences should run concurrently. *Kanda Moopan* (a) *Gopal Naicker*, I.L.R. (1937) Mad. 362 ; *King-Emperor* v. *Subrao Seshrao*, A.I.R. (1926) Bom. 62, followed ; *Ebrahim* v. *King-Emperor*, Cr.L.J. Vol. XXXII (1931) 637 ; *The Crown* v. *Chanan Singh*, I.L.R., Vol. XXI, Lah. (1940) 143, referred to.

THE UNION OF BURMA *v.* AYE MAUNG 362

PENAL CODE, S. 193—*S. 476 of Criminal Procedure Code—Principles on which complaint should be filed. Held* : Where there has been inordinate delay in making application for action under s. 476 of the Criminal Procedure Code the Court should not entertain such an application. Complaint should not be filed unless there is a reasonable probability of conviction. *Maung Shwe Phe and five others* v. *Ma Me Hmoke*, I.L.R. 3 Ran. 48 ; *Rahimadulla Sahib* v. *Emperor*, I.L.R. 31 Mad. 140 ; *Begu Singh* v. *Emperor*, I.L.R. 34 Cal. 551 ; *Bahadur* v. *Eradatullah Mallick*, I.L.R. 37 Cal. 642, followed. *Jadu Nandan Singh* v. *Emperor*, I.L.R. 37 Cal. 250, referred to.

HWE EYE HAIN AND ONE *v.* THE KING 40

PENAL CODE, SS. 299 AND 300 AS AMENDED BY THE PENAL CODE AMENDING ACT, 1947—*Causing injury which is likely to cause death—If murder. Held* : Where a person caused the death of

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another person, by causing an injury which was likely to cause death—

(*a*) the offence, in the absence of any circumstance which makes the act one of culpable homicide not amounting to murder, is murder if it can be deduced from a consideration of the whole facts of the case that the offender caused the death by doing an act with the intention of causing death or with the intention of causing bodily injury as in fact is sufficient in the ordinary course or nature to cause death ;

(*b*) the offence is one of voluntarily causing grievous hurt under s. 325 or 326 of the Penal Code according to the nature of the weapon used if it can be deduced from a consideration of the whole facts of the case that the offender intended only to cause bodily injury which was likely to cause death, as ss. 299 and 300 of the Penal Code as amended do not refer to such intention like the old section ;

(*c*) the offence is not one under s. 304A of the Penal Code if the bodily injury was caused with criminal intention to cause it, as an act done with such intention cannot be a rash or negligent act ;

(*d*) the offence is one under s. 304A of the Penal Code if the bodily injury was caused by a rash or negligent act, *i.e.* without any criminal intent but with the knowledge that it was likely to cause death ; and

(*e*) the offence is one under s. 299 or s. 300 of the Penal Code even though the bodily injury was caused by a rash or negligent act if the offender knew that the act was so imminently dangerous that it must in all probability cause such bodily injury as is likely to cause death and the court finds under s. 300 (*c*) of the Code that his intention was to cause death or bodily injury as in fact is sufficient to cause death.

Sein Kho v. *The King*, Criminal Appeal No. 1312 of 1947, overruled ; *Shwe Ein* v. *King-Emperor*, (1905-06) 3 L.B.R. 122 at p. 123 ; *Nga Na Ban* v. *King-Emperor*, (1904—06) 1 U.B.R. Penal Code 33 ; *Empress of India* v. *Idu Beg*, (1881) I.L.R. 3 All. 776 at pp. 779 and 780 ; *W. H. Smith* v. *Emperor*, (1926) I.L.R. 53 Cal. 333 at p. 338 ; *Sukaroo* v. *Emperor*, (1887) I.L.R. 14 Cal. 566 ; *Kywe We* v. *King-Emperor*, 4 L.B.R. 311 at pp. 313 and 314 ; *Po Tun* v. *King-Emperor*, 4 L.B.R. 306 ; *The King* v. *Aung Nyun*, (1940) Ran. 441 (F.B.) ; *Abor Ahmed* v. *The King*, (1937) Ran. 393 ; *Shwe Hla U* v. *King-Emperor*, 3 L.B.R. 122 ; *Po Sin* v. *King-Emperor*, 5 L.B.R. 80 ; *Apalu* v. *King-Emperor*, 1 Ran. 285 ; *Munilal's* case A.I.R. (1943), All. 853 ; *Jennings and one* v. *Kelly*, (1940) A.C. 206, referred to.

THE UNION OF BURMA *v.* MAUNG NYUN 780

PENAL CODE, s. 302 (2) 848

PENAL CODE, ss. 300, 302—*Difference between the first three clauses of s. 300 and 4th clause—Intention whether essential ingredient under clause 4. Held :* That intention is mentioned as an essential ingredient in the first three clauses of s. 300, Penal Code, but not under clause 4. If a person does a rash or reckless act without any excuse and he knows that the act is so imminenty dangerous to human life that in all probability it would cause death then the act comes within this clause. The view is made quite plain by illustration (*d*) to s. 300, Penal Code. *Held further :* That conviction should have been under clause 3 of s. 300

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and not clause 4. *Shwe Ein* v. *King-Emperor*, 3 L.B.R. 122 ; *Nga Na Ban* v. *King-Emperor*, Vol. I (Cr.) (1904—06) U.B.R. 33 ; *Manindra Lal Das* v. *The Emperor*, 41 Cal. 1187, followed.

MAUNG PE *v.* THE KING 36

PENAL CODE, s. 302 READ WITH s. 34—*Common intention necessary inference—Alteration of sentence on appeal. Held by the Bench :* Essence of joint liability under s. 34 of the Penal Code is the existence of a common intention leading to doing of a criminal act in furtherance of such intention. Such inference of common intention should not be reached unless it is a necessary inference. " Necessary inference " must mean the only reasonable inference possible, not merely the probable inference ; from the mere fact that the accused were all armed it cannot be said that the only necessary inference was that they intended to kill as well as rob passengers. *Mahbub Shah* v. *King-Emperor*, 72 I.A. 148, applied. *King-Emperor* v. *Nga Aung Thein and another*, 13 Ran. 210 (F.B.), referred to. *Baredra Kumar Ghosh* v. *Emperor*, 52 Cal. 197 (P.C.) referred to. *Held further :* Though conviction under s. 302 read with s. 34 could not stand the accused could be convicted under s. 394, Penal Code, as jointly concerned in committing robbery in which hurt was caused by fellow robbers. The accused could have been separately charged under ss. 323, 392 and 394. It would be permissible to alter the offence to one under s. 394 of the Penal Code and the appellate Court may after the charge or finding. *Lala Ojha* v. *Queen-Empress*, 20 Cal. 863, followed. Conviction altered into one under s. 394 of the Penal Code and accused sentenced for transportation for life. *Held per Chief Justice :* The true test for alteration of conviction is whether the facts are such as to give the accused notice of offence for which he is going to be convicted though not charged and that the accused is not prejudiced by the mere absence of a specific charge. *Meher Sheikh and others* v. *Emperor*, A.I.R. (1931) Cal. 414, applied. *Wallu* v *The Crown*, (1923) I.L.R. 4 Lah. 373, distinguished. *Begu* v. *King-Emperor*, (1925) I.L.R. 6 Lah. 226 (P.C.), referred to.

MAUNG MYINT *v.* THE UNION OF BURMA 379

PENAL CODE, s. 304, RIGHT OF PRIVATE DEFENCE 661

———— , ss. 302, 323 179

ရာဇသတ်ပုဒ်မ ၃၁၄—ခုခံကာကွယ်ပိုင်ခွင့်— ၎င်းအခွင့်ကို ပိုန်ပြုလုပ်ခြင်း။ လူဘဦးတယောက်ကမိမိအားရန်မူရန်လာလျှင် ရန်မူခြင်းခံရသူသည်ထွက်ပြေးရန်မလို၊ ရပ်တန့်၍ ခုခံနိုင်သည်၊ မိမိကိုရန်မူသူသည် ထင်မံ၍ ရန်မူနိုင်သည်တိုင်အောင်ခုခံနိုင်သည်၊ ဘုရင်ကောရှင်မင်းမြတ်နှင့် မောင်လှမောင်တို့၏အမှု၊ ၁၉၄၆ ခုနှစ်၊ ရန်ကုန်၊ စာမျက်နှာ ၅၀၊ လိုက်နာသည်။ မောင်အောင်သွင်နှင့် ဘုရင်ကောရှင် မင်းမြတ်တို့၏အမှု။ ၁၉၄၇ ခုနှစ်၊ ရန်ကုန်၊ စာမျက်နှာ၁၅၅။ သွန်ပြသည်။

မောင်ကတိုး (ဂဒုံး) နှင့် မြည်ထောင်စု မြန်မာနိုင်ငံတော် ... 661

PENAL CODE, s. 304A (2)—*Joint attack with sticks—Mutual fight—Right of private defence—No common intention—Cause and injury likely to cause death—Real offence committed.* The appellants had jointly assaulted with sticks one R who died as a result of the injuries received. Only one of such injuries was a fatal wound and there was no evidence as to who struck the fatal blow. There had been a fight between the deceased and the appellants.

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They were convicted under s. 304A (2) of the Penal Code for doing a rash act with knowledge that it was likely to cause death. The lower Court found that there was no common intention to cause the death of R. *Held:* That the conviction under s. 304A (2) was not sustainable as it could not be said that those who did not strike the fatal blow contemplated such a blow by others and they were not guilty under s. 302. *Gouridas Namasudra* v. *Emperor*, 36 Cal. 659, applied. *Sulaiman* v. *The King*, (1941) Ran. 258, followed. The common intention was to cause grievous hurt and the accused was guilty under s. 324, Penal Code.

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PENAL CODE, ss. 366, 366A—*"Seduce to illicit intercourse", meaning of—Whether conviction under s. 366 of Penal Code can be altered into one under s. 7 of Suppression of Brothels Act. Held:* Where a girl below the age of 18 years was living a life of prostitution in a brothel and she was induced, without any force or deceit, by the appellant to leave the brothel and live with him as his concubine he could not be convicted under ss. 366 and 366A of the Penal Code. *Held further:* "Seduced to illicit intercourse" is something different from "seduction" in its popular sense. It means induced to surrender or abandon a condition of purity from unlawful sexual intercourse. Where the girl was already living a life of prostitution, she could not be said to have been seduced to illicit intercourse. *Shaheb Ali* v. *Emperor*, I.L.R. 60 Cal. 1457; *Emperor* v *Baijnath*, 54 All. 756; *Nura* v. *Emperor*, 35 Cr.L.J. 1386, followed. *King-Emperor* v. *Nga Ni Ta*, (1902-03) 1 U.B.R. (Penal Code) 15; *King-Emperor* v. *Nga Nge*, (1904—06) 1 U.B.R. (Cr.) 17; *Crown* v. *Chan Mya*, 1 L.B.R. 297, dissented from. *Bahadur* v. *The Empress*, (1881) P.R. (Cr.) 7, referred to. *Held further:* S. 7 of Brothels Act was the proper section but the conviction could not be altered into one under that section as this is a special law and s. 237, Criminal Procedure Code, is not applicable.

TUN KYAING *v.* THE KING 74

PENAL CODE, s. 395—*S. 32 (3) of the Evidence Act—Admissibility of statements made as against other accused—Necessity of corroboration of material particulars of such statement. Held:* That the said incriminating statement made by a person who was one of the dacoits was not admissible under s. 32 (*1*) of the Evidence Act against another inasmuch as it did not relate to the cause of his death or to any of the circumstances of the transaction which resulted in his death. Under s. 32 (*3*) of the Evidence Act it could not be admitted in this case on the ground that he must have known that he was dying and exposure to a criminal prosecution for the dacoity cannot under the circumstances be taken seriously. At any rate, he must be treated to be an accomplice and his statement required corroboration on some material particulars so as to satisfy the Court of its truth in so far as it implicates the appellant. *Nga Te and others* v. *King-Emperor*, 7 L.B.R. 33, followed. *Hari Ram* v. *The Crown*, (1934) I.L.R. 15 Lah. 693, applied.

KHWE DI AUNG *v.* THE KING 58

PENAL CODE, s. 408—*Distinction between a Civil wrong and Criminal offence.* Appellant, a tindal of a boat in the employment of Port Lighterage Department, was entrusted with a 1,000 bags of rice on 27th November 1946 to be loaded on S.S. "Stagen". On 29th November 1946 the appellant loaded the rice bags and when loading was over 12 bags were found short.

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He was convicted of criminal breach of trust in respect of the 12 bags and sentenced to six months' rigorous imprisonment. *Held*: That there was nothing to show that the shortage was due to dishonest misappropriation or conversion by the appellant. Every breach of trust case gives rise to a suit for damage but it is only when there is evidence of a mental act of fradulent misappropriation that an offence under ss. 408 and 409 can arise. *Kanhaiya Lall* v. *Emperor*, 38 Cr.L.J. 491, followed. *Held further*: Mere failure to deliver the full quantity of goods is insufficient to prove dishonest misappropriation or conversion. *Ramaya and others* v. *The Crown*, 1 Cr.L.J. 908, applied, *Sona Meah* v. *King-Emperor*, (1924) I.L.R., 11 Ran. 476, distinguished.

B. RAJANA *v.* THE KING 61

PENAL CODE, S. 414—*Application of the doctrine of* ejusdem generis *rule. Held*: That ingredients of an offence under s. 414 of Penal Code are "concealing" or "disposing of" or "making away with" properties which the offender knows or has reason to believe to be stolen. It is not one of the ingredients of the offence that the person who deals with stolen property should deal in such a way that it becomes impossible to identify it or use it as evidence. *Amar Nath* v. *Emperor*, 36 Cr.L.J. 1459; *Nga Yan* v. *Emperor*, (1910—13) 1 U.B.R. 8, dissented from. The rule of *ejusdem generis* has no application in the interpretation of s. 414 of Penal Code. That rule applies when the words of general meaning are followed by words of more particular meaning. Here concealing, disposing of or making away with cannot constitute a genus. Disposing may be a genus of which "concealing" forms a species, but "concealing" is not a species of "making away with".

F. M. JONES AND ONE *v.* THE KING 103

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PLEDGE OF JEWELLERY FOR LOAN—*Ss. 176 and 177, Contract Act—Whether stipulation that pledge would become irredeemable, valid—Sale by pledgee without notice to the pledgor, conversion—Measure of damages—Value at the date of the conversion—Accrual of Interest (War-Time Adjustment) Act—Whether applies to settled transactions. Held*: The rights of pledgor and pledgee are governed by ss. 176 and 177 of the Contract Act. Pledgee has no right to foreclose, and his remedy is either to sell the pledged article or to file a suit and return pledged article as collateral security. The stipulation in the contract of pledge that if the pledgor does not redeem by a particular date the pledge will be irredeemable is void, and the right of pledgee to redeem the pledged article subsists. If the plegee sells the pledged articles without notice as provided under ss. 176 and 177 of the Act it amounts to conversion even though there was a contract that after a particular date the pledge will become irredeemable. *The Co-operative Hindustan Bank, Limited* v. *Surendranath De*, 59 Cal. 667, followed. *Dwarika* v. *Bagawati*, A.I.R. (1939) Ran. 413, dissented from. The general

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measure of damages in case of conversion is in general the value of the goods at the time of conversion. Ratanlal's Law of Torts (10th Edn.), p. 305; Iyer's Law of Torts, (1932 Edn.), p. 140; *Cooverji Umersey* v. *Mawji Vaghji and another*, A.I.R. (1937) Bom. 26, followed. *Ma Me Shin* v. *R.M.R.M.N. Chettyar Firm*, A.I.R. (1933) Ran. 76 at p 79, distinguished. The Accrual of Interest (War-time Adjustment) Act, 1947 (Burma Act XI of 1947), applies only to outstanding debts and not to settled transactions that are settled before the Act came into force.

U PAW TUN AUNG & Co. *v.* ABDUL RAZAK 182

POLICE ACT—*Ss. 43* (a) *and 43* (d)—*Protest against an order of reversion—Whether offence under s. 43* (d)—*Absence from duty for strike—Offence under s. 43* (a)—*Sentence. Held:* Protest for an order of reversion to the Headquarters Assistant is not an offence under s. 43 (*d*) of the Police Act. That section penalizes violation of duty or wilful breach of any rule or order. That rule or order should relate to the duties of a police officer in discharge of his functions, not a private protest against an order of reversion. If a police officer absents himself from duty without leave, by joining a strike, he is guilty of offence under s. 43 (*a*) of the Police Act. But where out of 72 strikers only four were selected and sent up for trial and others equally guilty were not prosecuted at all, nominial punishment should meet the end of justice.

MAUNG KAN NYUNT *v.* THE KING 98

POSSESSION. WHETHER CO-OWNER COULD SUE FOR 402

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PUBLIC ORDER (PRESERVATION) ACT, 1947—*S. 5* (a) *and* (b)—*S. 9* (1)—*Power of Court—Whether invalid, telephone message by Commissioner of Police to Police Station Officer to arrest if an order—Subsequent order in writing whether can validate previous illegal arrest—Order enumerating 71 persons—Necessity for individual consideration. Held:* (1) That if the orders made by the Commissioner of Police under s. 5 (*a*) and (*b*) of Public Order (Preservation) Act, 1947, were invalid and not in accordance with the requirements of the Act they were not made in exercise of a power conferred by the Act. *King-Emperor* v. *Vimlabai Deshpande*, 73 I.A. 144 at p. 155, referred to. By Article 25 of the Constitution the right conferred on a citizen is indefeasible and none of the contingencies contemplated by sub-s. 3 of Article 25 arose and the provisions of s. 9 of Public Order (Preservation) Act, 1947, if it purports to exclude the jurisdiction of the Supreme Court, is void as being repugnant to the Article 25 of the Constitution. In a proceeding under Article 25 of the Constitution in spite of s. 9 (*1*) of Public Order (Preservation) Act, 1947, it is competent for the Supreme Court to consider whether the action taken by the Commissioner of Police is legal or not; (2) That though the Commissioner of Police might have had good and sufficient grounds for what he did, law requires that he should proceed in a certain manner. Unless the procedure adopted was in accordance with law the detention would be illegal. The order contemplated by s. 5 (*a*) and (*b*) must be one in writing and in this case, at the outset there was no such order and consequently the arrest and detention were illegal. *Held further:* The jurisdiction of the Commissioner of Police under s. 5 (*a*) of the Act arose only on his being satisfied of certain circumstances and the order in

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the case dated 30th June 1948 mentions "I hereby direct . . . . . detention with effect from" previous dates. *Ex-post-facto* detention under s. 5 (*a*) of the Act is clearly illegal. A single order in respect of 71 persons arrested at different places on different dates deprecated.

BO SAN LIN *v.* THE COMMISSIONER OF POLICE AND ONE ... 372

PUBLIC ORDER (PRESERVATION) ACT, 1947 (ACT XVI OF 1947), AS AMENDED BY ACT XXVIII OF 1947—*S. 5A* (1) (b)—*Power of Court to examine the return. Held:* The Court has power to examine the truth of the facts set forth in a return for *habeas corpus* but such an examination shall be done in a summary way by affidavit or affirmation. *Yin Ma Ma* v. *The Chairmain, Public Property Protection Board and one* (Criminal Misc. Application No. 12 of 1948), followed. Where the activities of the person detained as set forth in the writ amounts to evidence under the Penal law the Supreme Court has no power to order the officer to prosecute him under the Penal law and not to detain him under the Public Order (Preservation) Act. Bare assertion by applicant suggesting that the Commissioner of Police is not acting in good faith is insufficient to prove that fact especially when he has arrived at a certain finding of fact on the materials before him.

TINSA MAW NAING *v.* THE COMMISSIONER OF POLICE, RANGOON 571

PUBLIC ORDER (PRESERVATION) ACT, 1947, S. 5A—*Preventive justice—Nature of—Rights and duties of the courts and extent of inquiry they would hold in an application for direction in the nature of* habeas corpus. *Held:* Preventive justice which consists in restraining a man from committing a crime which he may commit but has not yet committed or from doing some act injurious to the members of the community which he may do but has not yet done, is common to all systems of jurisprudence; and as preventive justice proceeds upon the principle that a person should be restrained from doing something which, if free and unfettered, it is reasonably probable that he would do, it must in all cases necessarily proceed to some extent on anticipation at distinct from proof. Commissioner of Police acting under s. 5A of the Public Order (Preservation) Act, 1947, cannot be required to act on such materials only as would be sufficient for conviction at a criminal trial but his power to detain under the Act is not absolute. Supreme Court can enquire into the legality or sufficiency of any decision of a judicial or quasi-judicial body dealing with the liberty of subjects. In proceedings in the nature of *habeas corpus* the Supreme Court does not exercise appellate jurisdiction. Its function is simply to see whether the authority detaining a person has or has not acted within the limits of its power. For this purpose it must examine the competency of the authority and also consider whether it had before it such materials as would justify in law to arrive at the conclusion it did, and court may for the purpose of satisfying itself require to be informed of the nature of the materials on which the authority purported to act. The Court can enquire even into the *bona fides* of the authority and genuineness of the order itself. *Rex* v. *Secretary of State for Home Affairs*, (1942) 2 K.B. 14 at p. 22, followed. Though the original order of detention is legal in its inception the court can consider whether because of events subsequently supervening the continuance of the detention is legal or justifiable. The authorities entrusted with the power to direct detention under the Act for an indefinite

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—it may be for a prolonged—period, of a citizen, the duty of the authorities is to shift such materials as are before them with care and to form a definite opinion before they take action.

MAUNG HLA GYAW *v.* THE COMMISSIONER OF POLICE AND ONE 764

PUBLIC PROPERTY PROTECTION ACT, 1947, s. 7 (2), (3), (5) 199

PUBLIC PROPERTY PROTECTION ACT, ss. 2 (i), (ii), (*b*).—*Direction in the nature of* habeas corpus—*Nature of return—Power of Court to examine its truth—Held:* Under the English common law the return in a writ of *habeas corpus* could not originally be questioned but later by *Habeas Corpus* Act of 1816 (56 Geo. 3 C. 100) the rigour was mitigated. It gave power to the Judges to examine the truth of the facts set forth in such return by affidavit or affirmation. The same principle should be applied in Burma. But the Supreme Court in issuing direction in the nature of *habeas corpus* does not sit as a Court of Appeal against the order or detention. In order to enable the Court to see, whether the officer concerned had sufficient grounds of suspicion, *i.e.*, whether he acted honestly, he must place all the facts and materials on which he acted before the Court. This must be done by an affidavit as provided by the rules of Supreme Court. Definition of Public Property in s. 2 (i) of the Act is very wide. It does not however include all private properties. It means and includes one's own private property if it is intended, either under contract or any law for the time being in force, for use by the army, navy and air force in Burma and property purchased under such a contract from NAFFI is public property. *Rex* v. *Secretary of State for Home Affairs*, (1942) 2 K.B. 14, followed.

KIN MA MA *v.* THE CHAIRMAN, PUBLIC PROPERTY PROTECTION BOARD AND ANOTHER 574

PUBLIC PROPERTY PROTECTION ACT, ss. 2 (ii) (*b*) AND 7—*Prejudicial Act—When complete—Whether issue or procuring the issue of import licence by illegal means whether is—Suspicion—Nature of. Held:* That the words "prejudical act" in s. 2 ii) (*b*) of the Act includes issue and procuring of licence by illegal means because it would be clearly an act directly or indirectly connected with or relating to, any unlawful activity having for its object the smuggling of any property in Burma in contravention of import or export orders and rules duly made under the Imports and Exports (Temporary) Act, 1947. Under s. 7 (3) it is not necessary that the order of commitment should set out the nature of suspicion entertained by the officer making the arrest and therefore redundant reference to the nature of the suspicion in the order of commitment cannot be fatal to its validity. The dividing line between a completed prejudical act and a prejudical act in the course of commission is thin, and in some cases it is difficult to dissociate them. Even though the officer making the arrest has not been able to make up his mind as to whether the person to be arrested has actually committed a prejudical act or still in the course of committing that act, he would still have the right to make the arrest. The right of appeal is not inherent in the nature of things, it is a right which has to be given by express enactment. The Supreme Court in issuing directions in the nature of *habeas corpus* does not exercise an appellate jurisdiction. If in arresting or directing the detention of a citizen the authority concerned was acting within its lawful powers, the Supreme Court cannot interfere and the Supreme Court cannot go into the question of fact when the Legislature has made that authority the judge of facts. The

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Supreme Court in proceedings for directions in the nature of *habeas corpus* will accept its findings of facts unless they are vitiated in law. Suspicion is something much weaker than proof and all that is required of the officer in entertaining a suspicion is that it must be in good faith and a thing shall be deemed to have been done in good faith where it is in fact done honestly, whether it is done negligently or not. If he has acted honestly then the Court will not interfere unless the suspicion was entertained irrationally which would in itself not be conclusive of absence of honesty of motive. *King-Emperor* v. *Deshpande and one*, (1946) 73 I.A. 144; *King* v. *Bethel*, 84 E.R. 494 at p. 495, referred to.

DAW THIN TEE *v.* U CHAN THA AND ONE 562

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REQUISITIONING (CLAIMS AND COMPENSATION) ORDER, 1947 ... 441

REQUISITIONING (CLAIMS AND COMPENSATION) ORDER, 1947, CLAUSE 13—*Whether defective or* ultra vires—*Loss of profits—Whether a part of loss under Rule* 96 (1), *Defence of Burma Rules*. A Restaurant business and the premises were requisitioned. Tha owner claimed that conditions or facts beyond those referred to in Rules 7, 8 and 9 made under the Requisitioning (Claims and Compensation) Order, 1947, should be taken into consideration and in the alternative that the said Rules are *ultra vires* as they restricted the right to compensation. *Held*: That the maxim *expressio unuisiest exclusio alterius* is applicable to the interpretation of the said clauses and regard shall be had only to the conditions prescribed. *Held further*: That the Claimants are entitled only to such compensation as may be fixed under the Rules and Orders and it must be regarded as fair. Loss of profits is only national loss and the Claimants were not entitled to it. *In re An Arbitration between the London, Tilbury and Southern Railway Company and The Trustees of the Gower's Walk Schools*, (1890) L.R. 24 Q.B.D. 326; *Newcastle Breweries, Limited* v. *The King*, (1920) L.R. 1 K.B. 854, distinguished. *In re An Arbitration between The Mersey Docks and Harbour Board and The Lords Commissioners of the Admiralty*, (1920) L.R. 3 K.B. 223; *The Marpessa*, (1906) Pro. 14, 33, affirmed in *ibid* 95, applied.

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RIGHT OF PRIVATE DEFENCE—*How long exists—Existing right—Error of judgment*. When the deceased struck the appellant with a wooden yoke pin and the latter wrenched it from his hand and both were struggling and the appellant gave a blow on the head

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of the deceased with it as a result of which the other man died. *Held :* That as parties were struggling—right of private defence was not gone and he must have inflicted the blow not only on grave and sudden provocation but also in exercise of the right of private defence. It is not possible for a person under such circumstances to weigh what maximum amount of force is necessary to keep within that right. The sentence was therefore reduced to one of one year's rigorous imprisonment. *The King* v. *Hla Maung*, (1946) R.L.R. 50 at p. 55 ; *Bhut Nath Dave* v. *King-Emperor*, 13 C.W.N. 1180 ; *Radhey and others* v. *Emperor*, 24 Cr.L.J. 735 ; *Queen* v. *Fuzza Meeah*, (1866) 6 W.R. (Cr.) 89 ; *Queen* v. *Shunker Sing*, (1864) 1 W.R. (Cr.) 34, followed.

TUN KYAING *v.* THE KING 66

RIGHT TO DRAIN OFF RAIN WATER—*Whether immovable property within the meaning of Rules 97 and 98 of Order 21 of the Code of Civil Procedure—The definition of immovable property in General Clauses Act, s. 2, sub-s. (29). Held :* That there is no definition of immovable property in the Civil Procedure Code. S. 2, sub-s. (29), of the General Clauses Act defines immovable property as including "lands, benefits to arise out of lands and things attached to the earth or permanently fastened to anything attached to the earth." The right to drain off rain water in an easement and is not immovable property within the meaning of Order 21, Rules 97 and 98, of the Code of Civil Procedure. *Mangaladas* v. *Jewanram and others*, I.L.R. 23 Bom. 673.

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SPECIAL CRIMES (TRIBUNAL) ACT, 1947 (BURMA ACT LIII OF 1947), WHETHER *ultra vires—Government of Burma (Temporary) Provisions Act, 1945, Notification No. 94—Proclamations of House of Commons and House of Lords—Opportunity of accused be defended by "pleader"—S. 340 Criminal Procedure Code—Confessions of accused—Admissibility of—S. 24, Evidence Act—Delay in recording confession—Recording of confessions not in open court or court hours—Effect of contravention of rules—Value of confessions as evidence—Corroboration and admissibility against co-accused —S. 114* (b)*—Evidence Act—Examinations of accused under s. 342* (2)*—Criminal Procedure Code as amended by Burma Act XIII of 1945—Whether can be taken into consideration under s. 30, Evidence Act—Burma Act XXXIII of 1947, crimes committed before the Act came into force.* The accused were tried by a

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Special Tribunal under Burma Act LIII of 1947 and convicted under s. 302 (*1*) (*b*) of the Penal Code as amended by Burma Act XXXIII of 1947 and sentenced to death in connection with the shooting in the Council Room of the Secretariat of the Governor's Executive Council presided over by its Deputy Chairman resulting in the instantaneous death of five Ministers, a Deputy Secretary, the death of two other Councillors later and of the Personal Body Guard of one Minister. *Held :* Under s. 1 of the Government of Burma (Temporary) Provisions Act, 1945, published in the Government of Burma, Home Department Notification No. 94, dated 24th July 1945, any proclamation made after the passing of that Act varying the previous proclamation of the 10th of December 1942 under s. 139 (*3*) of the Government of Burma Act, 1935, shall continue in force, unless revoked, till 9th December 1948 if resolutions in that behalf are from time to time passed by both the Houses of Parliament. The House of Commons on the 2nd of April 1947 approved the proclamation of the Governor of Burma and the House of Lords also on the 15th of April 1947 approved the continuance of the same. Therefore the proclamation issued by the Governor must be deemed to be still in force and the Governor must be deemed to have all the powers vested in the Legislature of Burma. *Held :* By the establishment of a new court, the Governor did not assume to himself the powers vested in the High Court and he was entitled to appoint a Special Tribunal as the Legislative Assembly in Burma could establish a new or collateral court and the fact that the High Court was at that time holding its criminal sessions was irrelevant. *Chithambaram* v. *The King-Emperor*, (1947) R.L.R. 66 (P.C.), applied and followed. S. 340 of the Criminal Procedure Code provides that an accused before a criminal Court may of right be defended by a pleader. Where accused was defended by a pleader since the beginning of the Trial and later a King's Counsel appeared who was given the opportunity to recall prosecution witnesses and he recalled some of the witnesses for the prosecution for further cross-examination and did not recall others, the accused can have no grievance and the section has been complied with. The words " appears to the Court " in s. 24 of Evidence Act is something less than positive proof that the confession is not voluntary. *The King* v. *Hla Maung*, (1946) Ran. 102 ; *The King* v. *San Myint*, (1939) Ran. 97, referred to. The fact that to avoid publicity and ensure the safety of the life of the confessing accused, the Magistrate recorded the confession and had each accused brought before him at 6 a.m. in the Senate Hall of the Law Courts Building and not in open Court after giving sufficient time for reflection does not amount to any infringement of the rules framed by the High Court in Notification No. 6, General, dated 19th September 1946. The rule refers that a confession should *ordinarily* be recorded in court and during court hours. In exceptional circumstances the rule may be relaxed and there was no deliberate infringement. A contravention of the rules though to be deprecated did not render the confession inadmissible. *Emperor* v. *Panchkowri Dutt*, I.L.R. 52 Cal 67, referred to and followed. The confessions are sufficient evidence against the confessing accused if the court is satisfied of their truth ; as against the other co-accused corroboration is required in material particulars acting or tending to connect each of the accused with the offence. *The King* v. *Nga Myo*, (1938) Ran. 190 (F B.), followed. If by extraneous evidence or matters appearing on the record it is established that the confessing accused are not in collusion, the cumulative effect may be sufficient to remove

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the *prima facie* presumption of the individual unworthiness of credit. S. 114, Evidence Act, illustration (*b*), referred to. Statements made by the accused on examination under s. 342 (2), Criminal Procedure Code, as amended by Burma Act XIII of 1945 after the accused had been called upon to enter the defence, cannot be taken into consideration even if it confesses partly or wholly his guilt, under s. 30 of the Evidence Act against the other accused persons. *Mt. Sumitra* v. *King-Emperor*, A.I.R. (1940) Nag. 287, and the cases mentioned therein, relied upon. As regards evidence given on oath by an accused person under s. 342 (1), Criminal Procedure Code, as amended, it may be used against the co-accused. The weight to be given to such evidence will depend on the circumstances of each case. The admissions under s. 342 (2), Criminal Procedure Code, as amended, are however valuable as showing consistency. As the act was committed before 1st August 1947 on which date the Burma Act XXXIII of 1947 came into force, the conviction should be under s. 302 and s. 34 or 109 of the Penal Code as the case may be. *Shwe Hla U* v. *The King*, (1941) Ran. 58, referred to and compared. There was no circumstance under which the accused could get a lesser sentence and in any case the question whether mercy should be extended to any one of the appellants is a matter with which this Court is not concerned. *Aung Hla* v. *King-Emperor*, 9 Ran. 433, referred to.

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SPECIFIC RELIEF ACT, S. 42—*Suit for damages for wrongful use and occupation. Held :* There is no rule that as soon as plaintiff's title to property is challenged the plaintiff must also pray for declaration of title. It is sufficient that he proves that he is the owner of the property and entitled to possession. *M. P. Sayed Mohamed* v. *K. S. Ebrahim Das and one*, (1947) R.L.R. 98, referred to.

MA CHO AND ONE *v.* THAKIN ANT GYI 726

SPECIFIC RELIEF ACT, S. 42.—When a plaintiff lost possession of a property under a decree against her husband and her right of suit for declaration had become time-barred, yet, when she regained possession before the expiry of 12 years she acquired a fresh right to sue for declaration.

A.L.M. CHETTYAR FIRM *v.* MA SINT AND THREE OTHERS ... 402

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STIPULATION IN PLEDGE FORFEITING RIGHT OF REDEMPTION AFTER A SPECIFIED TIME—WHETHER VALID 182, 830

STRIKE. ABSENCE FROM DUTY DUE TO 98

SUCCESSION ACT, S. 23—*Application for letters—Probate and Administration Act, s. 218—Findings in Administration suit—Binding nature. Held :* Where as between rival claimants for letters of administration title of none of the applicants is admitted, the court must determine the status of the applicant before letters are granted. *Maung Ba Han and one* v. *Maung Tun Yin*, (1934) 12 Ran. 629, referred to. Where a widow of a Burman Buddhist made an announcement in a newspaper concerning

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divorce, it will be for her to prove that there is no divorce and her son will have to prove that he has maintained filial relations with his father till his death and therefore entitled to inherit. The findings of fact in an application for letters of administration will constitute a bar to subsequent declaratory suit. *Maung Hmat* v. *Ma Htay*, (1923) I.L.R. 1 Ran. 258, referred to. *Ma Tok* v. *Ma Thi*, 5 L.B.R. 78, distinguished.

MA MYA SEIN *v.* MAUNG SO MYINT (TAN) AND TWO OTHERS 591

SUCCESSION ACT, ss. 229, 230—*Grant of letters of administration without issuing special citation to the executor—Whether valid—Effect of grant of letters—Order XLI, Rule 27, of the Code of Civil Procedure. Held:* Renunciation by an executor can be made prior to the institution of proceedings for letters. Under s. 229 of the Succession Act a duty is cast on an applicant for letters of administration to prove satisfactorily that the executor has already renounced. When the fact of renunciation by executor has not been proved the court has no power to grant letters of administration unless special citation calling upon the executor to accept or renounce his executorship has been issued to him. Service of general citation is not sufficient. Renunciation of executorship may be made orally before a Judge or by a writing signed by the executor. It is not necessary or expedient in an application for a probate or letters of administration to consider any issue relating to the title of the testator to, or his power to dispose of, any property. Grant of probate or letters of administration does not confer on the grantee any title to the property over which the testatrix had no right to dispose of. It only perfects the representative title of the executor or administrator to the property which belonged to the testator and over which he had the disposing power. *Behary Lal Sandyar* v. *Juggo Mohan Gossam*, I.L.R. 4 Cal. 1, followed. *Held further:* The scope of Order 41, Rule 27 (1) (c), of the Code of Civil Procedure is limited and it is for the court to decide whether such evidence as is applied to be admitted is necessary to enable the court to pronounce its judgment and whether there is substantial cause for admitting it at that stage.

I. J. DUCKWORTH *v.* MISS D. I. DUCKWORTH (*a*) MA KHIN THI 165

SUCCESSION ACT, s. 298—*Burmese Buddhist—Representation of—Discretion of Court to refuse.* Ma Ohn Nu applied for Letters to the estate of her aunt, a Burmese Buddhist, who died on 5th August 1926. She claimed as *kittima* adopted daughter. The application was refused on the ground of delay and as she would still have to sue for possession. *Held on appeal:* That representation for Burmese Buddhist is not compulsory under the Succession Act. Observations of E Maung, J., in *Maung Sein* v. *U Po Toke and others* (Civil 1st Appeal No. 28 of 1946 of the High Court, Rangoon), referred to. *Held further:* That under s. 298 of the Succession Act where the deceased was a Buddhist the Court has a discretion to refuse letters. The application in this case was made twenty years after the death of Daw Kyin and ten years after the applicant's marriage and the applicant had not explained the delay.

MA OHN NU *v.* MA NYUN 329

SUCCESSION TO *Kyaungdike* 866

SUIT FOR POSSESSION ALLEGING INVALID MORTGAGE IN FAVOUR OF DEFENDANTS—*S. 91, Evidence Act—How far a bar to oral evidence—Plea of adverse possession by the defendant—Whether sustainable.* The plaintiff-respondent alleged that defendant-appellant was in possession of a land under a mortgage from plaintiff's

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grandparent Daw Yu. The said mortgage was not registered. The properties were admittedly in defendant's possession for fifteen years before the suit. Consequently the burden rested on the plaintiff to show how the said property passed into defendant's possession. In proof of the mortgage oral evidence was led and objection was raised that such evidence was inadmissible. *Held:* That the factum of possession under an invalid mortgage could be proved orally. S. 91 of the Evidence Act did not stand in the way of such evidence. The plea of adverse possession, therefore, which rested on this was not sustainable. *Maung Sin and another v. Maung So Min*, 8 Ran. 556; *U Thet Pan and another* v. *Ma Phu Saing*, (1937) Ran. 442, referred to. *Ma Kyi* v. *Ma Thon*, 13 Ran. 274, followed.

MAUNG TUN MIN *v.* MA TIN NYUN AND THREE OTHERS ... 509

SUIT FOR REDEMPTION—*Whether competent without mortgage deed—S. 59 of Transfer of Property Act—Abortive mortgage—Suit on title—When lies.* Plaintiff-respondent sued for recovery and possession of a piece of land on the strength of title on payment of Rs. 800 and defendant-appellants contended that the original owners mortgaged the land usufructorily to plaintiff and her husband and that after the death of her husband the plaintiff-respondent sold it to the appellants-defendants. Plaintiff-respondent's suit was decreed in both the lower Courts. On second appeal it was contended that the suit was really one for redemption and as such was not maintainable. *Held:* Though a suit for redemption cannot lie in the absence of a valid deed of mortgage, as a mortgage for Rs. 100 or upwards can be effected only by a registered instrument under s. 59 of the Transfer of Property Act, this did not prevent a person who made an abortive mortgage from suing for possession relying on title. *U Thet Pan and another* v. *Ma Phu Saing*, (1937) R.L.R. 442; *Maung Lu Pe and others* v. *Maung San Mya*, (1939) R.L.R. 645; *Maung Daw Na and another* v. *Maung Wa Maung and others*, (1941) R.L.R. 706. The prayer in the plaint for recovery on payment of Rs. 800 should be read in the light of other circumstances of the case; as the defendant claimed title as vendee, the plaintiff must be allowed to state how the land went into defendent's possession. This claim of adverse title distinguished the case from the case of *Maung Daw Na and another* v. *Maung Wa Maung and others*, (1941) R.L.R. 708; *Ma Kyi* v. *Ma Thon and another*, 13 Ran. 274, referred to.

MAUNG HLA GYAW AND ONE *v.* DAW CHIT 499

SUIT ON TITLE 499

SUIT FOR TITLE 343

SUPREME COURT. JURISDICTION OF 733

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———. DURING OCCUPATION 278

SUPPRESSION OF BROTHELS ACT, SS. 11 (*a*), 11 (*b*), 15 91

TEMPORARY INJUNCTION. PRINCIPLES 134

TEMPORARY INJUNCTION—*Order 39, Rules 1 and 2 of the Code of Civil Procedure—Principle on which temporary injunction is granted—Proof of title if necessary. Held:* That if a party makes out a *prima facie* case, *i.e.* a case of a clear colour of title as distinguished from proof of real title, he is entitled to a temporary injunction if other conditions are satisfied. *Universities of*

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Oxford and Cambridge v. *Richardson*, 31 E.R., Chancery, 1260, followed. *Spottiswoode* v. *Clarke*, 41 E.R., Chancery, 901, referred to. *Held*: That in order to obtain temporary injunction restraining the use of a trade mark or lable, the plaintiff must show that the case is of some urgency, that he has a clear colour of title and the granting of injunction will not cause irrepairable damage to the defendant if it be later proved that the defendant has a right. Copinger on Copyright, 7th Edn., p. 156, followed.

SAYA U NYO ZEINT *v.* SAYA SHEIN 134

THIRD PARTY TO RENTING 321

TIME GRANTED BY A DECREE OR ORDER 799

TITLE. PROOF OF—IF NECESSARY 134

TRANSFER OF PROPERTY ACT, S. 52 138

———————————, S. 59 499

TRANSFER OF PROPERTY ACT, S. 69—*Power of Sale—Deeds giving power to mortgagee "to buy in, or rescind or vary the Contract of Sale and to resell without being responsible for any loss"—Meanings of words "buy in" and "resell"—Power of mortgagee to buy on his own account—If valid—Mortgagee when selling mortgaged property under a power of sale if an agent—S. 215, Contract Act—Rules interpretation of legal documents. Held*: That s. 69 (3) (4) of Transfer of Property Act does not authorize the mortgagee exercising power of sale to purchase the property for himself. The expression "buy in" has acquired a definite meaning and means "to buy back for the owner at an auction." This expression in effect empowers the mortgagee at whose instance the auction is held to take the property out of auction, if adequate price is not obtained. The word "resell" does not imply a previous "effective sale." It is consistent with sale in outward appearance by which a mortgagee apparently purchases to save the property from being sold at a low price. These expressions do not authorize the mortgagee to buy the property either directly or indirectly on his own account. *Mulraj Virji* v. *Nainmal Pratapchand*, I.L.R. (1942) Bom. 83 at pp. 92-3; *Downes* v. *Grazebrook*, (1817) 36 E.R. 77 at p. 80; *National Bank of Australia* v. *The United Hand-in-Hand and Bank of Hope Company*, (1878-79) 4 A.C. 391; *Martinson* v. *Cloves*, (1882) 21 Ch.D. 857; *Hodson* v. *Deans*, (1903) 2 Ch.D. 647, followed. *Held further*: That the mortgagee in exercising the power of sale acts in his own right and not as the agent of the mortgagor and s. 215 of Contract Act has no application in a purchase by mortgagee in the exercise of his power of sale. *Achutha Naidu* v. *Oakley Bowden & Co.*, I.L.R. 45 Mad. 1005, referred to. *Held further*: That one who reads a legal document, whether public or private, should not be prompted to ascribe, should not, without necessity or some sound reason, impute to its language tautology or superfluity, and should be rather at the outset inclined to suppose each word intended to have some effect, or be of some use. *Ditcher* v. *Denison*, (1856) 11 Moore (P.C.) 325 at p. 337, followed.

TAN BYAN SENG *v.* ELLERMANS ARRACAN RICE AND TRADING COMPANY, LIMITED AND ONE 148

TRANSFER OF PROPERTY ACT, S. 106 499

TRANSFER OF PROPERTY ACT, S. 108, CLAUSES (*o*) AND (*p*), CONTRAVENTION OF—*Urban Rent Control Act, 1946, s. 11* (c)—*Notice to quit under s. 106, Transfer of Property Act*. The plaintiff-1st

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respondent granted lease of a piece of land and a dry dock to remain in force till repair of a motor launch is completed. The defendants-appellants gave back possession of the dry dock but not of the piece of land on which they put up a permanent building, pulling down the hut which was there. In a suit for ejectment the defendants-appellants claimed there were separate leases for the land and the dock and that the defendants-appellants put up the building with plaintiff-1st respondent's permission. The trial Court held that the plaintiff-1st respondent was not entitled to eject the defendant-appellant but only to get the permanent structure demolished. *Held on appeal:* That under s. 11 (*a*) of the Urban Rent Control Act the obligations of the tenancy implied therein under s. 108, clauses (*o*) and (*p*), of the Transfer of Property Act had been broken by the tenants and the lease had been terminated in accordance with law under s. 111 (*h*) of the Transfer of Property Act and the plaintiff-1st respondent was entitled to eject the appellant and 2nd respondent. Decree made for ejectment and for removal of the permanent structure. *K. Singh* v. *Holasi and others*, A.I.R. (1914) All. 285, referred to.

MAUNG KHIN MAUNG *v.* DAW HLA YIN AND ONE ... 481

TRIAL BY BENCH INVESTED WITH SECOND CLASS POWERS ... 861

UNION JUDICIARY ACT, ss. 5 (*a*), 6—*Principles involved in granting—S. 13 of the Constitution Act—Setting up Special Crimes Tribunal if amounts to discrimination—Findings of fact interfered with.* Applicants were tried by a Special Crimes Tribunal, Rangoon, constituted under the Special Crimes Tribunal Act, 1947. The convictions were confirmed by the High Court. In the application for special leave it was contended (1) That great prejudice had been suffered because the applicant No. 2 was deprived of his right to be defended by a pleader of his choice; (2) That by the Special Crimes Tribunal Act, 1947, the Governor could not take away the inherent right of trial by jury; (3) That confessions by certain accused which were admitted were not voluntary and relevant; (4) That the effect of s. 13 of the Constitution was to deprive the Tribunal of its powers. *Held:* That many of the rules laid down by the Privy Council on applications for special leave to appeal in criminal matters are rules of wisdom and should ordinarily act as guidance to the Supreme Court in applications under s. 6 of the Union Judiciary Act. An exhaustive definition of such limits would be futile but if the application raises questions of great and general importance which are likely to occur often or to prevent wrong precedents for the future, the Supreme Court could interfere by way of appeal by special leave in matters as defined in *Reg* v. *Bertraud*, L.R. 1 P.C. 520; *Mohindar Singh* v. *King-Emperor*, L.R. 59 I.A. 233; *Sheo Swarup* v. *King-Emperor*, L.R. 61 I.A. 398; *Nazir Ahmad* v. *King-Emperor*, L.R. 63 I.A. 373 and *Pakala Narayana Swamy* v. *King-Emperor*, I.L.R. 18 Pat. 238 (P.C.), referred to. *Held further:* That a pleader is defined in s. 4 (*r*) of the Code of Criminal Procedure and a King's Counsel from England when granted permission to appear comes within the definition of the word, "pleader". Prior to granting of such permission he was not a pleader and the accused was not deprived of any right he had in law. *Held also:* That trial by jury allowed by the Criminal Procedure Code is a right that can be taken away by an Act of the Burma Legislature. *Held also:* Whether confessions are voluntary and relevant depend on determinations of facts, and these are questions on which the trial Court, as also the High Court on appeal are fully competent to decide and it was not for the Supreme Court to

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consider such questions. The decision of the Privy Council in *Sutton* v. *The King*, L.R. (1933) A.C. 348 at p. 360, followed. *Held also :* That the trial concluded on 30th December 1947 and the operation of the Constitution was from 4th January 1948 a completed trial cannot be invalidated *ex-post facto* on the alleged ground that the setting up of such a tribunal amounted to any discrimination and therefore prohibited by the Constitution.

U SAW AND FOUR OTHERS *v.* THE UNION OF BURMA ... 249

UNION JUDICIARY ACT, 1948, s. 5—*Conditions*. When the judgment of the Trial Judge is confirmed by the High Court, in order that an appeal may lie to the Supreme Court there must be two certificates granted—one to the effect that the amount or the value of the subject-matter in dispute in the Court of first instance and still in dispute on appeal was and is not less than Rs. 10,000 and the other, that the appeal involves some substantial question of law. As the value was admitted less than Rs. 10,000 an appeal does not lie to the Supreme Court.

SEI SHENG *v.* U THEIN 600

UNION JUDICIARY ACT, s. 6—*Residuary provisions—When can be used—Constitution Act, s. 25*. Applicant applied under s. 6 of the Union Judiciary Act for special leave to appeal from an order of the High Court under s. 491 of the Criminal Procedure Code. *Held* ; That there is an effective remedy in s. 25 of the Constitution whereby the Supreme Court could issue directions in the nature of *habeas corpus*. S. 6, Union Judiciary Act, provides for cases which do not come within the purview of s. 5. It is a residuary provision enacted with the sole intention that no subject of the Union shall go without redress from the Supreme Court if he has a genuine grievance; but where there is an effective remedy provided in s. 25 of the Constitution for issue of directions in the nature of *habeas corpus*, the application for special leave will be refused. The provision in s. 25 of the Constitution is only an adaptation of the English Common Law practice in *Eshugbayi Eleko* v. *Officer administering the Government of Nigeria and another*, (1928) A.C. 459.

MA MAR MAR *v.* P.S.O., AHLONE AND OTHERS 214

UNION JUDICIARY ACT, s. 22—*S. 434, Code of Criminal Procedure—Reservation of point of law—Whether can be made after conviction and sentence. Held :* That under s. 434, Code of Criminal Procedure, read with s. 22, Union Judiciary Act, the point or points arising in the course of trial may be noticed in course of trial or almost immediately after the trial is over or even sometimes after the trial is over. The Presiding Judge, either of his own motion or at the instance of a party after the trial is over, may make a reference under s. 434 of the Code of Criminal Procedure, even though he did not reserve any point or points of law for reference at the time of passing the sentence. *Rex* v. *Brown*, L.R. (1890) 24 Q.B.D. 357, followed. *Queen-Empress* v. *Durga Charan*, I.L.R. 7 All. 672 ; *Queen-Empress*, v. *C. P. Fox*, I.L.R. 10 Bom. 176 ; *In re Kunhammed Haji*, I.L.R. 46 Mad. 382 ; *King-Emperor* v. *Nga Tin Gyi*, I.L.R. 4 Ran. 488, referred to.

MAUNG OHN KYAING *v.* THE UNION OF THE GOVERNMENT OF BURMA 743

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URBAN RENT CONTROL ACT, s. 14 (3)—*S. 11 (a), Urban Rent Control Act —Restrospective nature of—Conditions to be satisfied—Substantial compliance if sufficient.* On 20th December 1946 the Chief Judge of the Rangoon City Civil Court passed a decree for ejectment of respondent. On 8th August 1947 the order was altered. On appeal it was contended that an order for execution had been passed on 14th February 1947, that it must be deemed to have been executed and therefore it could not be altered or rescinded after an order for execution and that substantial compliance with the requirements of s. 11 of the Urban Rent Control Act was sufficient as decided in *J. L. Chowdhury Bros.* v. *Sit Taik Tong Society* where mere order for execution of decree for ejectment has been passed but the tenant had not been actually ejected and the rooms had not yet been delivered, relief could be given to the tenant under s. 14 (3) of the Urban Rent Control Act. Further, that it is not permissible for the landlord under s. 14 (3) to introduce new matters to supplement those already on record, as it will amount to allowing the landlord to substitute a fresh cause of action. As no notice of demand by registered post had been sent, an order for ejectment under s. 11 could not have been passed. S. 11 of the Act as amended must be deemed to be in force at the time of the decree or order for ejectment.

M. H. ISMAIL *v.* M. E. O. KHAN 314

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WHETHER FINAL MORTGAGE DECREE FOR SALE COULD BE RE-OPENED 454

WRITS OF *Certiorari* AND PROHIBITION. NATURE OF SUCH WRITS 541

WRIT OF *certiorari—Detention under s. 5A (1) (b) of the Public Order (Preservation) Act—Order of detention should be in writing—Confirmation of a verbal order if sufficient—Return of Respondent. Held :* The order of detention under the Public Order Preservation Act should be in writing—Detention in pursuance of a verbal order is invalid. The mere passing of an order in writing confirming the verbal order as to detention is ineffective. *Bo San Lin* v. *The Commissioner of Police and one*, (1948) B.L.R. 372, followed. The return of the officer in support of detention should state the nature of the unlawful activities or the nature of acts prejudicial to public safety and maintenance of public order on which the office had reason to believe that the applicant was guilty. The Supreme Court will not substitute its own discretion for the discretion invested on an officer under the Statute.

ALI NYWE *v.* COMMISSIONER OF POLICE, RANGOON AND ANOTHER 737

WRIT OF *certiorari—Dismissal of an Engineer by the Corporation of Rangoon under s. 34 of the City of Rangoon Municipal Act whether judicial or quasi-judicial—Whether writ of* certiorari *the proper*

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remedy. Held : That the dismissal of an Engineer by the Administrator of the Corporation was not a judicial act for which the writ of *certiorari* could be issued. If the dismissal be wrongful the remedy of the party is by a suit for damages. *A. E. Madari* v. *U Tun Ohn and one*, (1948) B.L.R., p. 541, followed.

U MYA *v.* U TUN OHN AND ONE 735

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သက်သေများ အပြိုင်အဆိုင် ဖြစ်နေခြင်း—အမှုကို မှန်ရာရောက်ရအောင် ဆုံးဖြတ်နည်း—စာချုပ်ချုပ်ဆိုရန်အတွက်ဂတိနှင့် ညီညွတ်ချက်ရှိမရှိနှစ်ဦးနှစ်ဘက်မှ ပြသော သက်သေများသည် အပြိုင်အဆိုင် ဖြစ်နေကြရာ၊ အမှုကိုမှန်ရာရောက်အောင် မည်သည့်နည်းနှင့်ဆုံးဖြတ်ရမည်နည်း။ ဤအချက်နှင့်စပ်လျဉ်း၍ ပရိဗ္ဗိုကောင်စီ၏ လွှတ်တော်က ဂျီ၊ ဒမလျှူ၊ ဒေဝိစန့် မောင်ရွှေကိုတို့အမှု (အတွဲနံပါတ် ၃၈၊ အိုင်၊အေ၊ စာမျက်နှာ ၁၅၅)တွင် ဆုံးဖြတ် ထားသော အချက်မှာ များစွာဆီလျော်ပေသည်။ ယင်းသို့ အမှုများတွင် ဝန်ခံထားသော အချက်များနှင့် ဖြစ်ဟန် လက္ခဏာရှိသော အချက်များတို့ကို ထောက်ရှုပြီး မည်သည့်ဘက်ကမှန်ကန်လိမ့်မည်ဟု ဆုံးဖြတ်သင့်ကြောင်း။ အတွဲနံပါတ် ၈၊ ရန်ကုန်၊ စာမျက်နှာ ၄၂၅။

မတင်တင်နှင့်ဒေါ်ကံရှိ ... ...