# BURMA LAW REPORTS

# (1950) B.L.R

Containing cases determined by the

Supreme Court of the Union of Burma

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## SUPREME COURT

## 1950

Containing cases determined by the Supreme Court of the Union of Burma

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ဗုန်းကုန်းမြို့ - တရားလွှတ်တော
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## NAMES OF THE JUDGES AND LAW OFFICERS OF THE UNION

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Hon'ble *Thado Thiri Thudhamma* U E MAUNG, M.A., LL.M. (Cantab.), *Barrister-at-Law*, Acting Chief Justice from 1st January 1950 to 31st July 1950.

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Hon'ble JUSTICE U KYAW MYINT, *Barrister-at-Law*, up to 17th February 1950.

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ဝိုင်းကတ်ကို၊

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APPLICATION FOR WRIT OF *habeas corpus—Public Order (Preservation) Act, s. 5-A—Direction to detain outside the jurisdiction of a district—Jurisdiction of Supreme Court not like that of an appellate court.* Where the applicant was first detained by the order of the Deputy Commissioner, Amherst, and the order was withdrawn and the Deputy Commissioner, Insein, made an order under s. 5-A of the Public Order (Preservation) Act directing applicant's detention in the Rangoon Central Jail and later the President under s. 5-A (*4*) directed his detention in Insein Central Jail. *Held:* That an order under s. 5-A (*1*) (*b*) can specify the place or places where the detenue is to be confined and a Deputy Commissioner empowered under the Act may direct confinement at a place outside his district. As the detenue had his permanent residence and carried on business in Insein District, the Deputy Commissioner, Insein, had jurisdiction to order his detention, though the detenue was at that time in Rangoon. The fact that an order of detention is passed during the pendency of *habeas corpus* proceedings before the Supreme Court does not necessarily make it illegal. Where the Deputy Commissioner came to conclusions of fact *bonâ fide* and reasonably the order will not be interfered with. The Supreme Court does not exercise the powers of an appellate court in *habeas corpus* proceedings and will not embark on detailed examination of the evidence.

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BURMESE BUDDHIST LAW—Keittima *adoption*—Apatittha—*Competition between* apatittha *and step-child—Letters of administration to whom granted——Ranking in succession. Held:* Under Buddhist Law the facts that a person was put to school and a person's name is shown as guardian or mother in the school register and that marriage invitations were issued by the said guardian described as mother, that after marriage the couple used to live with the guardian and lived with her do not suffice to make out

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a *keittima* adoption. The statement in a letter by the alleged adopting mother that after her death her nephews and nieces will enjoy the properties also show that there was no *keittima* adoption. Though the joinder of the child's name in monetary transactions might lead to such an inference the absence of the same is also a fact tending against *keittima* adoption. An *apatittha* child is not without rights and is one of the six classes of children entitled to inherit the estate of parents. In granting letters of administration of a Buddhist it is left to the Court to grant Letters to any person who would be entitled to a share in the estate however small it may be. In the majority of *Dhammathats* a pubbaka child comes fourth or fifth in the list and after him the *apatittha* child. They may both be equally entitled to inherit but it will be idle to say that *apatittha* child would exclude the step-child.

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BUSINESS PREMISES ACT, s. 1—*Construction of Taxing Statute—Whether retrospective—Taxable year—S. 2* (d)—*Burma General Clauses Act, s. 2* (23) *s. 16—Rule-making power of the President.* The Business Premises Tax Act came into force in the City of Rangoon on 15th July 1949. The applicants were directed to pay the tax for the financial year commencing 1st October. The applicants sought direction by a writ of prohibition for restraining the Business Premises Tax Officer from collecting such tax for any period prior to the commencement of the Act. On behalf of the respondents it was contended that the Act was retrospective and was intended to be operative from the beginning of the financial year, and that financial year under the Burma General Clause Act, s. 2 (23) commenced from 1st October 1948 and that the claim had been made reasonably in as much as the President could give relief in respect of Business Premises not in existence for the larger part of the year. *Held negativing* the *contention:* Under s. 16 of the Union Constitution, no person could be deprived of his property unless there was clear authority in law for such encroachment, and any doubt must be resolved in favour of the person sought to be made liable. Though the word "Taxable year" under s. 4 of the Act is defined as equivalent to the financial year, the language of the Statute did not have the effect of imposing liability for any period prior to the enactment of the Statute. The financial year under the Burma General Clauses Act, s. 2 (23) means any twelve calendar months beginning with the 1st day of October and it could not be contended that the Assessee was liable also for any period prior to the 1st October 1948. The contention on behalf of the respondent was one of doubtful validity and in a taxing Statute any doubt must be resolved in favour of the party affected.

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CITY OF RANGOON MUNICIPAL ACT, s. 18 (3) READ WITH RULE 9, CHAPTER 9, SCHEDULE I—*Meeting meaning of—Adjournment—Power of Mayor.* Where a meeting of Councillors of the Corporation of Rangoon was convened for the 7th March 1950 at 3 p.m. for election of the Mayor and at about 1 p.m. the Commissioner of the Rangoon Corporation received a note from the Mayor instructing him to inform the Councillors that the meeting could not be held and had been postponed till the 13th of March 1950 but nevertheless at the time mentioned another Chairman was appointed and a Mayor is elected. *Held:* Under

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s. 18 (3) of the City of Rangoon Municipal Act read with Rule 9, Chapter 9 of Schedule I the Mayor can adjourn a meeting when he is present, but by keeping away he cannot do so. Every meeting has to be presided over either by the Mayor if he is present or by one of the Councillors chosen by the meeting to be Chairman if the Mayor is absent. Rule 9 provides that any meeting may be adjourned by the Mayor or the Chairman. Though there is authority for the view that in certain circumstances the word "adjournment" need not be given the technical meaning usually associated with it, yet having reference to the context, the use of the word "meeting" in s. 18 (3) and reference in Rule 9 to meeting already in session, the word adjournment has to be given its technical meaning. The meeting held on the 7th March 1950 was a competent meeting and the election held therein was legal.

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CONSTITUTION OF THE UNION OF BURMA, s. 150—*Warrant issued but not executed—Whether certiorari lies. Held:* Any person administering either the Public Order (Preservation) Act or the Public Property Protection Act exercises limited functions and powers of a judicial nature; therefore, when he issued the warrant for arrest application for directions in the nature of certiorari would be the proper remedy. Where the alleged prejudicial acts were committed before the Public Property

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Protection Act was enacted, he could not be arrested and detained for such acts and his detention would not be in accordance with law.

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CONVERSION—*Military Proclamation 11 of 1945—CAS(B) taking possession of cargo boats and delivering to Respondent—Burma Indemnity and Validating Act, 1945, ss. 3 and 5—Inconsistent pleas*—Res judicata—*S. 11, Exception 4 of the Code of Civil Procedure.* In 1942 appellant left behind in Rangoon three cargo boats belonging to him owing to circumstances arising out of the war. After British reoccupation in 1945 of the Rangoon Area the CAS(B) and its officers collected cargo boats including the boats of the appellant and these three boats were handed over to the respondent. The respondent repaired these boats and returned them to the appellant on the 12th February 1946. The respondent filed Civil Regular No. 14 of 1947 against the respondent claiming compensation under s. 70 of the Contract Act for repairs done by him to two of the three cargo boats. The appellant filed Civil Regular No. 31 of 1947 for compensation for the use of his boats from the 1st of May 1945 till they were returned. Suit No. 14 of 1947 was decreed by the Trial Court and the decree was confirmed in appeal and there was no further appeal. In Civil Regular No. 31 of 1947 the Trial Court gave a decree but the decree was reversed on appeal. *Held :* Conversion is wrong done by an unauthorized act which deprives another of his right permanently or for an indefinite time. *Pollock on Torts*, 14th Edn. 285, followed. When CAS(B) obtained possession of the cargo boats belonging to the appellant they were finder of goods belonging to another within the meaning of s. 71 of the Contract Act and were subject to the responsibility of a bailee. The bailee as such would not commit any wrong by holding the goods but when he delivers them to a third party a civil wrong of conversion is committed. The question how far s. 3 of Burma Indemnity and Validating Act, 1945, would give protection to a person in the position of an officer of CAS(B) did not arise in this case as here there was no order within the meaning of s. 5 because the orders referred in that section clearly relate to statutory orders. Good faith would not absolve a person guilty of conversion of another's

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property. Where the boats were not duly requisitioned and they belonged to some one else, no question of good faith could be invoked. A person suffering injury by wrongful conversion may in a special case sue for special damages and if after conversion the goods are re-delivered an action will still lie for the original conversion and the re-delivery will only go in mitigation of damages. *Held further :* That the contention of the respondent that one of the boats did not belong to the appellant was untenable even though the evidence was meagre. There is implied in the decree in Civil Regular No. 14 of 1947 finding that all the cargo boats belonged to the appellant and that repairs to the cargo boats were done for the appellant and that the appellant had enjoyed the benefit thereof. The respondent cannot be allowed to blow hot and cold in one breath even where the provisions of s. 11 of the Code of Civil Procedure may not in term apply. In view of the decree in favour of the respondent in Civil Regular No. 14 of 1947 exception of s. 11 of the Code of Civil Procedure would operate to make the question of ownership of the cargo boats involved in the claim in that suit *res judicata* as between the parties. *Bodley* v. *Reynolds*, (1846) 8 Q.B.D. 779 ; *Salloway* v. *Mc Laughlin*, (1938) A.C. 247 at 258 ; *Owners of Dredger Leisbosch* v. *Owners of Steamship Edison*, (1933) A.C. 449 ; *Re. The Mediana Case*, (1900) A.C. 113, referred to.

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CRIMINAL APPEAL TO THE SUPREME COURT—*Principles to be followed —Question of fact—Whether can be gone into—Confession— Meaning of. Held :* That the principles applicable to the exercise by the Supreme Court of its Appellate Jurisdiction in Criminal matters has been explained in *U Saw and four others* v. *The Union of Burma*, (1948) B.L.R. 249. Article 157, Limitation Act prescribes the period of limitation for an appeal by the Government against an order of acquittal. No departmental instruction can over-rule the statutory provision. *Held further :* That an appeal on facts against an order of acquittal is allowed. But in exercising such powers the High Court should and will always give proper weight and consideration to such matters as (i) the views of the Trial Judge as to the credibility of the witnesses, (ii) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (iii) the right of the accused to the benefit of any doubt, and (iv) the slowness of an Appellate Court in disturbing findings of fact arrived at by a Judge who had the advantage of seeing the witnesses. These rules and principles are well known and recognized in the administration of justice. *Sheo Swarup* v. *King-Emperor*, 56 All. 645 at 651, followed. 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. Thus 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, is not a confession. Where there were materials other than the alleged confession on which the appellant could be found guilty the Supreme Court will not interfere with the decision of the High Court.

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DEFENCE OF BURMA RULES 81 (2) (*a*), 81 (4) AND 83—*Custodian of Moveable Property Act, ss. 7 and 8. Held :* Under Rule 81 of the Defence of Burma Rules, calling for information can only be for the purpose of Rule 83, namely for requisitioning the property on behalf of the Government and the information as to stocks held. If Government decided to requisition the property compensation is payable under Sub-Rule (3) of Rule 83. The applicants asked for the price of stock of ores delivered in pursuance of requisition, and the Deputy Commissioner, Tavoy, in his capacity as Assistant Custodian of Immoveable Property, passed an order to forfeit to the Government the stock of ores previously requisitioned and delivered. *Held :* That the ores in question were not delivered to the Assistant Custodian of Moveable Property under s. 7 (*1*) of the Custodian of Moveable Property Act nor were they seized and taken possession of under s. 7 (**2**). Consequently the order purporting to forfeit to Government would be quashed by way of directions in the nature of certiorari. Law Officers of the Government should always advise in such manner that justice should be done to persons concerned.

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DEFENCE OF BURMA RULES—*Rules 89-A and 96—Lorries requisitioned under by Government—S. 151, Contract Act—Duty of Government—Conditions for liability.* Appellant's lorries were requisitioned by the Commissioner of Police, Rangoon, on behalf of the Government of Burma on the 9th December 1941 at Rs. 15 per diem under s. 89-A of Defence of Burma Rules and the lorries were left behind by the government on evacuation and the owner received payment for hire up to the date of abandonment, *i.e.*, 20th February 1942 and now claimed the value of lorries. *Held :* That the provisions of s. 151 of the Contract Act would not in terms apply to the facts of the case. The lorries having been lawfully requisitioned, their taking was not an act of trespass and the use by Government was lawful. The duty of Government in such circumstances is not higher than that of a person in lawful possession of another's goods. The government was only bound to take reasonable care. Except where the negligence or wrongful act of the person in lawful possession of another's goods had been a proximate cause of the loss or destruction thereof, the damage must lie where it falls. As the government had taken as much care of the appellant's properties as of their own property, there was no question of negligence or wrongful act on their part—the government cannot be held liable for the price of the lorries. *Goldman* v. *Hill*, (1919) 1 K.B. 443 ; *Broadwater* v. *Blot*, Holt, N.P., 547 ; *Searle* v. *Laverick*, (1874) 9 Q.B.D. 122 at 130, referred to and applied.

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DEFENCE OF BURMA RULES—*Rules 90 (2) (a), 90 (2) (b)– Object of—Occupation of Burma by enemy—If rules suspended—Exchange of Japanese Currency with Burmese—Contract for—If legal—Pleadings in High Court should be precise.* Where appellant alleged that respondent offered to act for him and obtain Rs. 35,000 in British Burma notes in exchange for Japanese military papers of the nominal value of Rs. 35,000 and the Japanese notes were accordingly delivered and appellant claimed payment of the amount in British currency. *Held that:* Viewed as a contract of agency, the object of the contract was the acceptance of Rs. 35,000 in British Burma notes in payment for the true and not the notional value of Japanese Military Notes of the nominal value of Rs. 35,000. Viewed as a contract between principals, the appellant agreed to accept Rs. 35,000 in British Burma notes in payment of a like sum in Japanese Currency and in either case the object or consideration of the contract would fall within Rule 90 (2) (*b*), Defence of Burma Rules and be illegal. Viewed as an exchange of goods (Japanese currency) for cash, it may not fall within Rule 90 (2) (*a*) but it offends Rule 90 (2) (*b*). The contract is illegal and void. The object of Rule 90 is to prevent depreciation of lawful currency and loss of confidence in it, which would mean loss of confidence in the Government to prosecute the war successfully. On Burma being occupied by the enemy, the necessity to prevent such mischief, would be more pressing. It is desirable that in the High Court, original side, pleadings should be precise.

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DIRECTIONS IN THE NATURE OF CERTIORARI AND PROHIBITION—*Licence for sale of liquor—Ss. 18, 28 and 29 (1), Burma Excise Act—Powers of Collector—Analogy with English licensing system—Difference between English Licensing Acts and Burma Excise Act—Whether Collector exercises quasi-judicial or administrative power—Remedy by way of suit—Licence for consideration if irrevocable.* Where the Collector of Insein held an enquiry under the orders of the Excise Commissioner acting under the instructions of the Government of the Union of Burma cancelling the licence of the applicants and accepted a third party's offer during the currency of the licence and the same was challenged by applications for direction in the nature of certiorari to have the proceedings of the Collector quashed and direction in the nature of prohibition prohibiting the Commissioner from granting the licence to the rival. *Held:* That the Collector in deciding to cancel the unexpired licence under s. 29 (*1*) of the Burma Excise Act is performing a purely administrative function and therefore his proceedings could not be quashed by the Court. There is a radical difference between Licensing Acts in England and the Burma Excise Act. In England Justices had absolute discretion to refuse to renew prior to 1904 when this was taken away and the power to refuse renewal of an old licence was confined to certain cases specified in the Act. As jurisdiction was exercised by two justices of the peace in petty sessions after hearing evidence it was held to be a judicial order and that consequently certiorari would lie. In Burma if

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the licence has been improperly revoked a right to sue would exist against the Government in the absence of an indemnity in the Act. The mere fact that the Collector is an officer of the Government would not make him amenable to the jurisdiction of the Court. Under s. 28 of the Burma Excise Act the officer who granted the licence could revoke it on certain grounds and when the grounds exist no compensation can be claimed. Under s. 29 where a licence is recalled for any other reason except those provided for by s. 28, grant of some compensation and notice is provided. An excise licence gives nothing more than a right *ex contractu* which is a right *in personam* and not one coupled with an interest. Therefore no fundamental rights assured by the Constitution had been encroached upon. *Sharp* v. *Wakefield*, (1891) A.C. 173 ; *Rex* v. *Johnson*, (1905) 2 K.B. 59 ; *The King* v. *Woodhouse*, (1906) 2 K.B 501 ; *Rex* v. *Sunderland Justices*, (1901) 2 K.B. 357 at 370 ; *U Htwe* v. *U Tun Ohn*, (1948) B.L.R. 541 ; *The King* v. *Electricity Commissioners*, (1924) 1 K.B. 171 ; *Hurst* v. *Picture Theatres Ltd.*, (1915) 1 K.B. 1, referred to and distinguished.

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DIRECTIONS IN THE NATURE OF MANDAMUS—*Agreement of license—Providing for no right under Urban Rent Control Act—Controller of Rents directing parties to Civil Court and not fixing standard rent—Licence—Definition of—True test in construing a document.* The tenant of certain properties entered into an agreement with the applicant which provided that the agreement was not one of sub-tenancy but that the applicant was only a licensee and that he should have no right to outwit the agreement and bring the matter within the Urban Rent Control Act. The applicant applied for the standard rent to be fixed. Upon objection the Assistant Controller of Rents, Rangoon considered that it was a matter for the Civil Court and left the parties to seek relief there. *Held :* That in granting a mandamus the Court is directing the Assistant Controller to proceed with the case and decide the question, which it was his duty to decide and is not in any way interfering with his discretion. *Halsbury's Law of England*, Vol. IX, paras. 1296 and 1300, referred to. Licence is "that consent which, without passing any interest in the property to which it relates, merely prevents the acts for which consent is given from being wrongful." *Pollock on Torts*, referred to. It is the duty of the court to look not so much at the words as the substance of the agreement. Even where the parties call a document as agreement of licence such recitals can never be conclusive and the court will have to look to the substance of the terms of the agreement and not to the name given by the parties. *Smith* v. *The Overseers of St. Mitcheal, Cambridge*, 3 EL. and EL. 383 ; *Kent* v. *Fittall*, (1906) 1 K.B. 60 at 69 ; *Young & Co.* v. *Liverpool Assessment Committees*, (1911) 2 K.B. 195 ; *Burmah Shell Oil Storage and Distributing Co. of India* 55 All. 874, referred to. *Held :* That the Assistant Controller of Rents was not justified in his view that the Urban Rent Control Act was not applicable in the case. The mandamus should issue directing him to dispose of the application under s. 19 of the Urban Rent Control Act.

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DIRECTIONS FOR MANDAMUS—*Requisition by Collector—No duty of Collector to de-requisition—If application lies.* Where the Collector of Rangoon requisitioned certain premises under the Requisitioning (Emergency Provisions) Act, 1947 and directed it to be made available to a Chinese School. *Held:* That there is no duty cast on the Collector to de-requisition under the Act and as there was no duty, there could be no application for directions in the nature of a mandamus. By allotting the premises to the School, the Collector may have committed a wrong but there may be remedy elsewhere but not by a writ to the Supreme Court. Facts on which the decision was made were as follows :—The Applicant Ephraim Solomon is the owner of the house known as No. 297, Godwin Road, Rangoon. Some people trespassed on this house during the Japanese occupation and ran a school there known as the Hwa Sha Chinese School. These trespassers never paid any rent to the applicant. The applicant then filed a suit being Civil Regular Suit No. 302 of 1947 for recovery of possession of the premises and obtained a decree. He applied for execution of the decree in Civil Execution No. 19 of 1950. The judgment-debtors took time on several occasions for vacating, and it appears that they then approached the Government for the requisition of the said building and allot it to them for running the said school. The Collector then requisitioned the building in question and allotted to them for running the Hwa Sha Chinese School. The applicant then applied under s. 25 of the Constitution of Burma for a direction in the nature of mandamus.

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DIRECTIONS IN THE NATURE OF PROHIBITION—*Previous application for certiorari withdrawn—Effect of such withdrawal*—Res judicata—*Principle of—Whether applicable—Analogy of Order 23, Rule 1 of Code of Civil Procedure—Whether can be extended—Collector of Customs when imposing fines if a representative of Government—Additional powers of President under Sea Customs Act—Scope of Supreme Court in application under s. 25, Constitution of the Union of Burma.* Where the Collector of Customs had applied to the Supreme Court for a writ of certiorari to quash an order of the Financial Commissioner and restore the penalty levied by him and the application was subsequently dismissed as withdrawn, and after the enactment of Sea Customs (Amendment) Act of 1949 a notice was issued calling on applicants to show cause why the President should not revise the order of the Financial Commissioner. *Held:* That the matter is not governed by the principles of *res judicata* because there was no adjudication or final adjudication and the Court did not apply its mind to the merits of the application. *Parsotam Gir* v. *Narbada Dir*, 26 I.A. 175, applied. The withdrawal of a previous application without leave might bar a fresh application upon the same set of circumstances. *Hingu Singh* v. *Jhuri Singh*, 40 All. 590; *Kartick Chandra Pal* v. *Sridhar Mandal*, 12 Cal. 563, distinguished.

RANCHHODDAS JETHABHAI & CO. *v.* THE SECRETARY OF THE UNION GOVERNMENT, MINISTRY OF JUDICIAL AFFAIRS AND TWO OTHERS ... ... ... ... 68

DIRECTIONS IN THE NATURE OF PROHIBITION—*Trade Disputes Act—Decision by the Industrial Court on a reference by the President under s. 9 of the Act—Power of the court to modify or to interpret or to review the award—Demands by employees—Discharge of certain employees thereafter—Whether discharge can be subject to reference. Held:* The Industrial Court acted in excess of its

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jurisdiction under s. 9 in granting to employees in the maintenance section who did not attend work of their own accord. *Held:* The Industrial Court is not competent to interpret, modify or review its own award except in circumstances specified in s. 11 (3) of the Act. If employees are discharged after a trade dispute has arisen between the employer and employees, the Industrial Court has right to give its decision on the point of dispute. During the currency of employment, a demand made by employees would constitute a trade dispute sufficient to give jurisdiction to the President to make a reference under s. 9 of the Act and the Industrial Court can hold an enquiry under s. 10. To hold otherwise would mean that any employer or any workmen could nullify the whole provisions of the Act by terminating the contract of service before a reference was ordered. *Steel Bros. Co.* v. *The Court of Industrial Arbitration and others*, B.L.R. (1950) S.C. 47; *Rex* v. *The National Arbitration Tribunal*, (1948) 1 K.B. 424, followed. The continuance of a strike after reference under s. 9 of the Act is illegal. If some employees voluntarily kept away they could not be said to have been locked out by the employers and no compensation can be given to them by the Industrial Court.

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DIVORCE ACT, SS. 7, 36 AND 55—*Refusal of Application for costs for wife's defence in an application for divorce on the ground of adultery—Order whether appealable—Application for alimony pendente lite—Whether appeal lies against such order—Granting of alimony—The discretion of court. Held:* That though s. 55 of the Burma Divorce Act provides that all decrees and orders are appealable, yet the said provisos are subject to the two provisos limiting the right. The second proviso provides that there shall be no appeal as to costs only. Hence no appeal lay against the order of the District Judge refusing an application of wife for costs for her defence. But an appeal against the refusal of alimony *pendente lite* was competent. The granting or withholding of alimony *pendente lite* is a matter of judicial discretion of the court and the appellate court having exercised its discretion fairly the decision in respect of that portion should not be interfered with. *Garlinge* v. *Garlinge*, 44 All. 745; *Ste. Croix* v *Ste. Croix*, 44 Cal. 35; *Masih* v. *Masih*, (1949) All. 802; *Dwyer* v. *Dwyer*, 66 I.C. 494; *A. v. B*, 22 Bom, 612; *Savuriammal* v. *Santiago*, 7 L.B.R. 347; *Wilkinson* v. *Wilkinson*, 30 Cal. 48; *Iswarayya* v. *Iswarayya*, A.I.R. (1930) Mad. 154; *Stuart* v. *Stuart*, 57 All. 884; *Steedman* v. *Wheeler*, (1944) 1 Cal. 258; *Williams* v. *Williams*, (1929) Pat. 315; *Russell* v. *Russell*, (1892) p. 152; *Robertson* v. *Robertson*, (1881) 6 P.D. 119; *Thompson* v. *Thompson*, (1939) p. 1, referred to. *T.* v. *B and B*, 44 P.R. 486; *Chamarette* v. *Chamarette*, A.I.R. (1947) Lah. 176, dissented from. The historical back ground of the Divorce Act considered.

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GOODS LEFT AFTER LOOTING—*Respondent locking premises and obtaining permit from Commission—Conversion or trespass—Test—Control—Powers of Appellate Court—Order 41, Rule 33, Code of Civil Procedure—Interference where permissible—Damages—Presumption against spectator—Burden in appeal.* Goods in appellant's shop were looted in part after British evacuation and a portion was still in the premises. The Respondent locked the premises and handed the keys to one I. G. Mohamed with instructions to hand over the keys to any one he liked or to a person who had obtained a permit from the Hiraoka Commission. The 3rd defendant obtained such permit and the keys were handed over to him by I. G. Mohamed and the 3rd defendant sold the goods. A decree was passed against all defendants by the trial Court as joint tort-feasors. Respondent alone appealed without making other two joint tort-feasors as parties and the trial Court's judgment was set aside. On further appeal to the Supreme Court. *Held:* There was effective exclusion of others when the premises were locked and respondent had full control and exclusive occupation. *Kirk* v. *Gregory*, (1876) L.R. 1 Ex 55, distinguished. A finder of goods is bound to answer to the true owner and cannot deliver them to any except the true owner. *Issack* v. *Clark*, 80 E.R. 1143 at 1148 K.B., followed. The delivery of keys gives the transferee power over goods which he had not before and amounts to a symbolic declaration that the transferor no longer intends to meddle with the goods. *Wrightson* v. *Mc Arthur and Hutchinsons Ltd.*, (1921) 2 K.B. 807, referred to. The Respondent was guilty of conversion when he transferred possession of the goods to I. G. Mohamed by handing him the keys with instructions to transfer possession to any one who brought a permit from the Japanese Hiraoka Commission. *Hiort* v. *Bott*, (1874) I.L.R. 9 Ex. 86, followed. *Stephens* v. *Elwall*, (1815) 4 M.& S. 257; *Fowler* v. *Hollins*, (1872) 7 Q.B. 616; *Hollins* v. *Fowler*, (1874) 7 H.L 757; *Barker* v. *Furlong*, (1891) 2 Ch. 172; *Clayton* v. *Le Roy*, (1911)

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2 K.B. 1031 ; *Caxton Publishing Co.* v. *Sutherland Publishing Co.*, (1939) A.C. 178 at 201-202 ; *Lancashire and Yorkshire Railway Co.* v. *MacNicoll*, 88 L.J. K.B. 501 ; *Towne* v. *Lewis*, 137 E.R. 241 ; *England* v. *Cowley*, (1873) L.E. 8 Ex. 126 ; *Consolidated Co.* v. *Curtis and Son*, (1892) 1 K.B. 495 at 497, discussed. A person is liable in respect of a wrongful act for all consequences which he ought reasonably to have foreseen. *Muhammad Issa El Sheik Ahmed* v. *Ali*, (1947) A.C. 414 ; *Monarch Steamship Co. Ltd.* v. *A/B Karlshamns Olje Fabriker*, (1949) 1 A.E.R. 1, referred to. The question whether a decree against joint tort-feasors will be *res judicata* against a co-defendant, reserved. The right of appellate court to interfere with the decree of the trial court where some of the parties have not appealed against decrees against them arises under Order 24, Rule 33, Code of Civil Procedure. There is a fair consensus of authority in the courts in India in favour of wide power, if as a result of the appellate court's interference with the decree, it is necessary in the end of justice to adjust the rights of the parties. *Babaj Dhohsdet* v. *The Collector of Salt Revenue*, (1887) 11 Bom. 596 ; *Subramania Chettiar* v. *Sinnammal*, (1930) 53 Mad. 881 ; *Somar Singh* v. *Mussamat Premedi*, 3 Pat. 327 at 334 ; *Bhutnath Deb* v. *Sashimukkhi*, A.I.R. (1926) Cal. 1042 at 1043-1044 ; *Rukia* v. *Mewa Lal*, 51 All. 63 ; *Madan Lal* v. *Gajendrapal*, 51 All. 575 at 578 ; *Kamalakanta Dabnath* v. *Tamjadden*, 61 Cal. 919, referred to. As in this case, the extent of appellant's liability is co-extensive with other defendants and arises in the same suit on the same evidence, if the appellate court comes to the conclusion that the award is excessive, the ends of justice require variation in favour of the non-appealing parties also. A right of appeal, under s. 20, Union Judiciary Act or s. 96, of the Code of Civil Procedure is a substantive right. *National Trustees Co. of Australia* v. *General Finance Co. of Australia*, (1905) A.C. 373 ; *Delhi Cloth and General Mills Co.* v. *Income-Tax Commissioner, Delhi*, 54 I.A. 421 ; *Sadar Ali* v. *Dalimuddin*, 56 Cal. 512, referred to. The right of appeal is a right to have the decision of an inferior court put to judicial examination by a higher court and to have it rectified, if wrong. The remedy may not be available to some by lapse of time and it remains untouched but the appellate court can exercise the power, unless it is otherwise curtailed. The decision in 2 Ran. 541 and 6 Ran. 29 only decide that section 3, Limitation Act should not be circumvented by adding a respondent against whom the appeal is barred. *Badri Naraya* v. *East Indian Railway Co.*, 5 Pat. 755, distinguished. The burden is on the party challenging the decision of the trial Judge to establish that it is incorrect. Unless the appellate court is of the opinion that no other conclusion is possible and that the decision of the trial Judge is wrong, the finding on damages should not be interfered with. The largest amount of injury which can be sustained would probably be considered to be the amount to be awarded by the Tribunal which has to award compensation if the party guilty of a wrong did not produce the best evidence available of the true value of goods converted. *Armory* v. *Delarmirie*, 93 E.R. 664 ; *Hammersmith Railway Co.* v. *Brand*, (1869) L.E. 4 H.L. 171 at 224 ; *Wardour* v. *Berisford*, 23 E.R. 579 ; *Wall* v. *Thomas*, (1947) A.C. 484 at 493, referred to.

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GOVERNMENT OF BURMA ACT, 1935, SS. 41 AND 42—*Governor's declaration, dated 10th December 1942—Constitution Act, ss. 23* (4), *222, and 226* (1)*—Existing laws—General Clauses Act, s. 4* (1), *particular date—meaning of—Adaptation Order 226* (2)*—Urban Rent Control Act, 1948, whether* ultra vires *of the Constitution—Validity of agreements generally. Held:* The Urban Rent Control Act, 1948, was enacted by the Governor of Burma on the 2nd January 1948 when the Government of Burma Act, 1935, was in force. It was made in pursuance of the proclamation of 10th December 1942 by the Governor assuming to himself under s. 139 of the Government of Burma Act, all the powers vested by that Act in the Legislature of Burma. Unlike ordinances under ss. 41 and 42 of the Government of Burma Act, an act of the legislature did not require any public notification. In this respect the Act followed the English Rule that proclamation or any other form of publication of an Act of Parliament was never necessary to make an Act complete. S. 222 of the Constitution defines "existing law" as a law passed before the commencement of the Constitution by any legislature, authority or person, etc. The Urban Rent Control Act, 1948, complies with this definition. It provides in s. 1 (3) that it shall come into force at once except the provisions of ss. 16-A and 16-B. Though the Act was not published in the *Gazette* till the 17th January 1948 it cannot be said that the Act could not have come into force before that date. The fact that the Act is not specifically mentioned in the Adaptation of Laws Order made by the President of the Union of Burma under s. 226 (2) of the Constitution does not affect its validity because the Act shall come into force "at once" are sufficiently specific taking into consideration the fact that the authenticated copy of the Act before the date the 2nd January 1948. *Held also:* That the Act is consistent with s. 23 (4) of the Constitution. The right of private property is, with certain reservations, guaranteed by the Constitution but the right to contract is not a fundamental right assured thereby. The central idea of the Urban Rent Control Act is the restriction of rents of premises in urban areas, and the Act extends no further than placing restraint on the untrammelled exercise of consensual letting of premises in the urban areas. An agreement has no inherent vitality. Rights and obligations attaching to one voluntarily made are creatures of the statute. The Contract Act which regulates the subject principally postulates equality of status between the contracting parties. Where the parties do not enjoy equality recognition is withheld from agreements. Again certain rights and liabilities are attached by law to contracts and they are not allowed to be varied by agreement. Parliament has a right to take measures to prevent owners of premises in residential areas from taking advantage of abnormal conditions, to the detriment of the general public and exacting excessive or unreasonably high rent and a duty is imposed on Parliament under s. 29 of the Constitution to make laws to give effect to the limits permitted for the use of private property to the detriment of the general public.

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*Keittima* ADOPTION—*Apatittha* ADOPTION ... ... ... 78

*Keittima* ADOPTION ACT, 1932, s. 5—*Registration—If necessary before institution—Registration Act, ss.* 32(a) *32* (b) *and* 2 (10) *representative—Registration out of time—Document returned for want of proper stamp to advocate—Effect of advocate presenting—Admission of execution by minor's father as representative—Defect in procedure—S. 87 of the Registration Act—Publicity of adoption.* A minor child six years old was adopted and a deed was executed signed by the father and the adopting parent with a ten rupee currency note attached with undertaking to present the deed for registration and register it when the Registration office opened, but before registration the adopting parent died leaving the child only as his legal representative. A suit was filed with the unregistered document and it was then taken back and registered before the actual hearing. *Held:* That under s. 5 of the registration of *Keittima* Adoption Act, 1932 no dispute shall be entertained by any court to inherit as a *Keittima* son or daughter if it was effected after 1st April 1941 unless the same is evidenced by an instrument as mentioned therein. The words in s. 5 are "no disputes" and not "no suits." The suit was competent when the deed of adoption was returned for registration before the actual trial and actually registered, then there is sufficient compliance of the section for a registered instrument under s. 47 of the Registration Act operates from the date of its execution. *Held also:* That the father of the minor could present it under s. 32 (*a*) of the Registration Act as a person who had executed it and also under s. 32 (*b*) read with s. 2 (*10*) as the representative of the minor. *Subba Reddy* v. *Suruva Reddy*, A.I.R. (1930) Mad. 425, referred to. Questions as to when and by whom a document was presented are questions of fact and any party challenging registration on the grounds that the document was not presented in proper time or by proper person must raise such questions in time in the court of the first instance. If a document when presented is insufficiently stamped there is no provision that the presentation is not proper. The Registrar should not have returned the document but impounded it and send it to the Collector himself. *Shama Charan Das* v. *Joyenoolah*, (1885) I.L.R. 11 Cal. 750 at 754, referred to and applied. There is nothing in the Registration Act to prevent a person from showing that the endorsement was inaccurate and proving the real facts. *Official Receiver* v. *P.L.K.M.R.M. Chettyar Firm*, (1931) I.L.R. 9 Ran. 170, followed. It is immaterial by whom the physical act of presentation of the document was performed.

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This question is a mixed question of law and fact and a court of appeal cannot expose a party after he has obtained a decree to the brunt of a new attack of which he had not notice at the hearing. *Barkhudar Shah* v. *Mst. Sat Bharai*, (1934) I.L.R. 16 Lah. 563 ; *Bharat Indu* v. *Hamid Ali Khan*, 47 I.A 177 at 184 ; *Nathu Piraja Marwadi and others* v. *Umedmal Gadumal*, (1909) I.L.R. 33 Bom. 35 ; *Mathradas Girdharidas and others* v. *Khemchand Ramdas*, A.I.R. (1948) Sind 96, referred to. Where a Registrar did not summon the parties referred to in the minor's application as entitled to notice for opposing the registration it is only an irregularity. Presumption of proper registration arises under s. 87 of the Registration Act as " nothing done in good faith pursuant to the Act by any registration officer shall be deemed invalid merely by reason of any defect in procedure." *Kanhaya Lal* v. *National Bank of India, Ltd.*, (1923) I.L.R. 4 Lah. 284 at 294 ; *Rafat-un nissa Begum* v. *Husaini Begum*, (1925) I.L.R. 47 All. 292 at 294 ; *Dattatraya Keshav Naik* v. *Gangabai Narayan Naik*, A.I.R. (1926) Bom. 137 ; *Mani Lal and one* v. *Shulam Hussain Nur Ahmad and others*, (1935) I.L.R. 16 Lah. 1049 ; *S.M.A.R. Chettyar Firm* v. *Ko Teik Ka*, (1923) I.L.R. 1 Ran. 22, referred to. *Held further :* That when a document of adoption is executed in presence of several respectable witnesses there was sufficient publicity of the adoption as required by law. *Ma Nu* v. *U Nyun*, (1934) I.L.R. 12 Ran. 634, referred to.

U BA THAN AND SIX OTHERS *v.* MA AMA ... ... 113

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LIMITATION ACT, s. 5.—*Discretion—Discretion when in accordance with law.* The Court of the Assistant Judge was first created by the Act of 1945 and in 1946 an appeal was by mistake filed in the District Court, when it should have been filed in the High Court as the relevant enactments were not available to the members of the Bar and the litigating public and the appeal was entertained, heard and allowed by the District Judge. On appeal to the High Court the judgment of the District Court was set aside by the High Court on the ground that no appeal lay to the District Court. The Respondent then filed an appeal to the High Court and prayed under s. 5 of the Limitation Act to excuse the delay in presenting the appeal and the High Court excused the delay and entertained the appeal and afterwards allowed the appeal. *Held :* That s. 5 of the Limitation Act vests the exercise of discretion in this case in the High Court and as the High Court gave due consideration to all the relevant facts and exercised its discretion in accordance with law, such exercise could not therefore be interfered with.

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NEGOTIABLE INSTRUMENT. CONSIDERATION FOR LOAN OR LOAN FOLLOWED BY ... ... ... ... ... 239

NEGOTIABLE INSTRUMENTS ACT, s. 4—*Promissory note—Certain sum—Japanese Currency (Evaluation) Act, 1947.* By a promissory note executed on the 22nd December 1944 during Japanese occupation, the appellant promised to pay Rs. 5,000 to the Respondent or his agent on Demand. *Held :* That *primâ facie* the promise is one for payment of a certain sum as required by s. 4 of the Negotiable Instruments Act. The promise in the promissory note is to pay Rs. 5,000 and the amount is not stated to be payable 'ostensibly' in Japanese Military currency notes' and it is a promise to pay in legal currency and therefore to pay a sum certain. If consideration had been received in Japanese currency it does not necessarily follow that the promissory note is to be discharged by payment in the same currency and not by payment in legal currency in accordance with the well-known principle that a document shall, if possible, be interpreted so as to give it maximum validity. After enactment of the Japanese Currency (Evaluation) Act, 1947 there is no necessity to depart from the general proposition that when parties to a contract say nothing about the nature of currency in which the agreed price is to be paid, the parties must have intended the price to be paid in legal currency. *Ko Maung Tin* v. *U Gon Man.* (1947) R.L.R. 149 (F.B.) ; *Maung Po Lun and eight others* v. *Ma E Mai and three others*, 1 B.L.J. 111 at 116, referred to.

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PLEDGE OF JEWELS—*Document vesting property on non-redemption by date fixed—Validity—Sale without notice—Contract Act, s. 196—Claim for redemption in 1944—Conversion or wrongful detention—Specific Relief Act, ss. 10 and 11—Contract Act, ss. 39 and 73. Held:* A clause in a document evidencing a contract or pledge, purporting to vest the pledged articles absolutely in the pledgee on failure to redeem by end of April 1942 curtails the statutory right of redemption and is invalid. The pledgor, coming to know of the sale held without notice to him could not sue for return of the specific articles against the pledgee alone. There is a distinction between the cause of action for conversion and the cause of action in wrongful detention. The former is based on an unequivocal act of ownership by the defendant over plaintiff's goods without any right or authority while the latter is based on a wrongful withholding of the plaintiff's goods by defendant, being in possession

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of the same. *Beaman* v. *A.R.T.S. Ltd.*, 64 Times L.R. 285 at 287, referred to, *Rosenthal* v. *Alderton*, (1946) 1 K.B. 374, distinguished. A bailee cannot be heard to plead his own wrong in discharge of his duty under the contract of bailment. *Reeve* v. *Palmer*, 5 C.B. (N.S.) 84; *Wilkinson* v. *Verity*, L.R. (1871) 6 C.P., 206; *Donald* v. *Suckling*, (1866) L.R. 1 Q.B.D., 585; *Coldman* v. *Hill*, (1919) 1 K.B. 443 at 449, referred to. The Courts cannot be invited to a mere *brutum fulmen* and no decree can be passed for return of moveables not in defendant's possession. Ss. 10 and 11 of the Specific Relief Act apply only to cases when defendant is in possession of specific moveables and Order 20, Rule 10 of the Code of Civil Procedure applies only where a decree for possession can properly be made. Any excess by the possessor of rights under a contract will be a breach of contract and it may also be a wrong. A mere irregular exercise of power, by way of sub-pledge or a premature sale, is not a conversion. It is at most a wrong done to the reversionary interest of an owner out of possession and the owner must show he is really damnified. *Halliday* v. *Holgate*, (1863) 3 Ex. 299; *Mulliner* v. *Florence*, (1878) 2 Q.B.D. 484; *Bristol and West of England Bank* v. *Midland Railway Co.*, (1891) 2 Q.B.D. 653; *Button* v. *Haviside*, (1907) 2 K.B. 180 at 188; *Solloway* v. *Mclaughlin*, (1938) A.C. 247; *Johnson* v. *Stear*, (1863) 15 C.B. (N.S.) 329, referred to. *Alliance Bank of Simla* v. *G. Lal and one*, I.L.R. 8 Lah. 373, not followed. *Motilal* v. *Lakhmichand*, A.I.R. (1943) Nag. 162, distinguished. A comparison of Article 48-A and 48 of the Limitation Act, 1st Schedule, indicates that the Legislature does not contemplate a sale of the pledged article by the pledgee otherwise than in accordance with s. 176, Contract Act. If a party undertakes to do an act on a future date and earlier disables himself from performing the act, it is open to the injured party to treat that conduct as a violation or wait till the day fixed. The option is that of the aggrieved party not that of the party committing the wrong. The wrong in this case is failure to return the goods as contracted upon tender of money due and s. 73, Contract Act would regulate the rights of the parties and the damages.

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PROHIBITION—*Writ of—Federated Shan States—Income-tax Act if extends to—Letter from Chief Secretary relied on—Unauthenticated copy—Effect—Letter if Notification under s. 40, Government of Burma Act—Coffee grown in Shan States—Company incorporated in British Burma—S. 4, Income-tax Act—Agricultural income—S. 2 (1) (b), Income-tax Act—General Clauses Act—S. 2 (26)—Agricultural income and income from agriculture.* On the Applicant's petition for a writ of prohibition to restrain assessment to income-tax for 1947-48 and 1948-49 income from business of growing coffee and other produce on lands in Hsipaw State, for which money was paid to the Ruler. *Held:* That a copy of the letter from the Chief Secretary to the Commissioner, Federated Shan States relied on by Government cannot be acted upon and even the original, if produced could not have the effect of a Notification required under s. 40 of the Government of Burma Act. Even if the Income-tax Act did not extend to the Shan States such income might become taxable under the Act when received in British Burma unless it was income from agriculture arising in a state in Burma from land for which any payment in kind or in money is made to the State. The terms "agricultural income" and "income from agriculture" are different. The first is a term of art while the second is not. Under Burma General Clauses Act, s. 2 (*26*) as it was before 4th January 1948, Government includes a person authorized by the Government of Burma Act, 1935, to exercise the executive authority of Burma. The Federated Shan States fall within Part I of the Second Schedule of the Government of Burma Act, 1935, where the Governor exercises power in his discretion and it was therefore under the authority of the Governor that the *Sawbwa* exercises executive authorty and collected revenue on land. The income from such land is therefore protected both under s. 4 (2) and 4 (3) provisos. The income after 4th January 1948 have the same protection as also that of s. 4 (3) (viii) as adapted under Union of Burma (Adaptation of Laws) Order, 1948, and is not taxable.

SHAN MOUNTAIN ESTATES, LIMITED *v.* THE INCOME TAX OFFICER, COMPANIES CIRCLE, RANGOON ... ... 58

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PROMISSORY NOTE—*Suit on—Suit for money lent—Necessary averments in such case—Negotiable instrument consideration for loan or loan followed by negotiable instrument—Loan by Buddhist couple—Contract with one alone—Suit by such party—Non-joinder of others—Order 1, Rule 13, Code of Civil Procedure.* Appellants borrowed two sums and in consideration thereof executed two promissory notes in favour of one only of a Chinese Buddhist couple, and the claim was decreed in two courts. *Held:* That the suit in the case was not solely on the promissory notes but on the original consideration also. A suit on a promissory note need not aver the loan which formed the consideration. All that is necessary is to plead execution of the instrument and prove it, while the defendant could prove absence of consideration. It is one thing for a negotiable instrument to be given and accepted as consideration for the loan and an entirely different thing for a loan to be made and in consideration thereof, the borrower making a negotiable instrument. In the first case, the loan is merged in the instrument and in the latter case it is only a collateral security. *Maung Chit* v *Kareem Oomer*, 12 Ran. 153, referred to. The respondent alone was the party with whom the contract was

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made ; as he was not acting as agent or trustee of his wife, he could sue for enforcing the contract, even though the money belonged to the Buddhist couple. The plea was not taken in the first instance and would not be available in appeal.

EU HPE YAR AND ONE *v.* TEH LU PE ... ... 239

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PUBLIC ORDER (PRESERVATION) ACT, s. 5-A (*1*) (*b*)—*Possession of a seditious leaflet, if sufficient. Held :* That if a detenue had been found in possession of 50 or 100 copies of a seditious leaflet it might be reasonable to assume that he was in some way responsible for dissemination of seditious literature but possession of just one copy does not prove anything. *Held further :* The allegation that the applicant was a deserter from the Army could not be sufficient ground for detention in the absence of proof of such desertion.

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PUBLIC ORDER (PRESERVATION) ACT, 1947, s. 5-A (*1*) (*b*) AND s. 7.—*Whether within Parliament's competence—Existing law—Constitution of Burma, s. 16 "save in accordance with law," ss. 22 and 26 (1)—Article 14 (1) of the Constitution of the United States of America—Burma Laws Act, 1898, s. 13—Dismissal of previous application for* habeas corpus *how far bars subsequent action. Held :* The decision in *Won Shwe Bee* v. *The Commissioner of Police and one* cannot be extended to exclude successive applications for directions in the nature of *habeas corpus*. Where the subsequent application was based on facts in existence prior to the previous application even though such facts were not then within the knowledge of the applicant, the second application would be in the nature of review, which does not exist in the ordinary nature of things. Where there is an order for a term " certain "it cannot be questioned more than once by writs of *habeas corpus* because the first dismissal would be tantamount to a declaration that the detention for that term is a legal detention ; but preventive detention for an indefinite period is under an order for detention from day to day. In such a case the dismissal of a previous application does not amount to more than a declaration that the detention up to that date of dismissal was lawful. By a change in the relevant circumstances such detention may therefore become illegal. What is subsequently challenged is the legality of the detention at the date of the application. *Maung Hla Gyaw* v. *The Commissioners of Police*, (1948) B.L.R. 764 at 769, referred to and followed. In such subsequent application the court cannot allow the previous decisions to be challenged and the legality of the detention up to the date of the dismissal of the previous application cannot be canvassed. *Held also :* In construing the provision in s. 16 of the Constitution " that no citizen shall be deprived of his personal liberty save in accordance with *law* " it is pertinent to examine the sense in which this term has been understood in this country for many years before the constitution was framed. The term " LAW " in s. 13 (*1*) of the Burma Laws Act, 1898, again repeats the provisions of the Act VII of 1872. It is by people who had lived or who had been trained under this system that the Constitution of the Union of Burma was drawn up and enacted and it is therefore reasonable to conclude that " LAW " refers to the will of the legislature enacted in due form, provided that it is within the

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competence of the legislature. To accept natural law as a higher law which invalidates any inconsistent positive law would lead to chaos and each Judge would be a law unto himself. "LAW" therefore under s. 16 of the Constitution is an enactment by Parliament or by other competent legislative body. Their powers are defined and circumscribed and within such limits the "LAW" are binding on all in the Union of Burma. *Held further*: That s. 5-A (*1*) (*b*) of the Public Order (Preservation) Act, 1947 is within the competence of the Parliament to enact but the provisions do not grant the President or his delegate arbitrary powers to order detention of a citizen for an indefinite period. Parliament can by positive enactment define the circumstances and conditions under which any authority, it has empowered, may interfere with the personal liberty of the citizen. There is no distinction in principle between the provisions of the Public Order (Preservation) Act and the preventive provisions of the Criminal Procedure Code. *The Federal Commissioner of Taxation* v. *Manro*, 38 C.L.R. 153 at 180; *Macleod* v. *Attorney-General for New South Wales*, (1891) A.C. 455; *Adkins* v. *Children's Hospital*, (1923) 261 U.S. 525 at 544; *Osborne* v. *Commonwealth*, (1911) 12 C.L.R. 337; *Rex* v. *Halliday*, (1917) A.C. 260; *Liversidge* v. *Sir John Anderson*, (1942) A.C. 206; *King-Emperor* v. *Vimalbai Despande*, 73 I.A. 144; *In the Matter of the Offences Against the State Amending Bill*, 1940, 74 Irish Law Times 61, referred to and distinguished.

TINSA MAW NAING *v.* THE COMMISSIONER OF POLICE, RANGOON AND ANOTHER ... ... ... 17

PUBLIC ORDER (PRESERVATION) ACT—*Suspicions that detenue concerned in dacoity, murder, robbery—Proper remedy.* Where the applicant was detained under the Public Order (Preservation) Act, as he was suspected in series of robbery, dacoities and murders. *Held*: That the Public Order (Preservation) Act cannot be applied to such cases. The proper action to take was under the preventive sections of the Criminal Procedure Code.

MAUNG THA SHWE *v.* THE DEPUTY COMMISSIONER, AMHERST AND ONE ... ... ... ... ... 255

PUBLIC PROPERTY (PROTECTION) ACT, s. 7 (*3*)— *Aim, scope and object. Held*: To arrive at real meaning of the provisions of an act it is always necessary to get an exact conception of the aim, scope and object of the whole Act. Construction is to be made of all the parts together and not of one part only by itself, even when the words are plainest, as the true meaning of any passage is that which (being permissible) best harmonises with the subject and with every other passage of the Statute. *The Union of Burma* v. *Maung Maung and two others*, B.L.R. (1949) (H.C.) 1 p. 20 (F.B.); *Soe Khin* v. *The Union of Burma*, B.L.R. (1949) (H.C.) 111, followed. S. 5 (*1*) of the Public Property (Protection) Act creates a new offence and under s. 5 (*2*) of the Code of Criminal Procedure in the absence of enactment to the contrary that offence will have to be enquired into under the Code and in view of the provisions of ss. 61 and 167 of the Code no Police Officer would be able to detain in custody a person arrested for an offence under s. 6 (*1*) of the Public Property (Protection) Act for a longer period than 24 hours and no Magistrate would be able to authorize his detention for a term exceeding 15 days on the whole unless he takes action under s. 344. The Provisions of s. 7 (*3*) of the Public Property (Protection) Act have been enacted to render ss. 61 and 167 of the Code inapplicable to an

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offence under s. 6 (*1*) of the Act. This section allowed the Police Officer longer time (up to six months) for investigation when applying to any Magistrate for remand. The detention in custody is not by way of punishment in violation of the fundamental principle that a man cannot be detained on mere suspicion but can only be for the purpose of investigation ; even though all prejudicial acts are not offences yet most of them are offences and investigation into the rest may also disclose that offences have been committed. *Ma Lone* v. *The Commissioner of Police, Rangoon and one*, (1949) B.L.R. (S.C.) 8 at 11, referred to. *Vimalbai Despande* v. *Emperor*, A.I.R. (1945) Nag. 8, followed.

U BA YI AND EIGHT OTHERS *v.* THE OFFICER-IN-CHARGE OF JAIL, YAMETHIN ... ... ... ... 130

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SEA CUSTOMS ACT, s. 167 (*8*)—*Appellate order of Financial Commissioner—S. 191* (1) *amended—Revision by Minister of Finance and Revenue—Hearing before Secretary—Proceedings judicial—President acting under s. 191 exercises judicial function—Criminal Procedure Code, s. 5* (2), *s. 439—Rules of Natural Justice in judicial proceedings—Constitution of Burma, s. 152—Supreme Court whether bound by earlier ruling.* 1. The Collector of Customs when he imposes fines and penalties under the Sea Customs Act, and Appellate authority acting under s. 18 of the said Act exercise judicial functions. Similarly the President of the Union, when exercising his powers or revision under s. 191 of the Act exercises under s. 150 of the Constitution limited functions of a judicial nature. They are all, therefore, bound to act on judicial principles. Exercise of a judicial function is individual. Therefore, prior to the amendment of the General Clauses Act which came into operation on the 1st March 1950 the President was bound to exercise his judicial functions personally. But after the amendment all the functions of the President including judicial functions, can be exercised by the Minister-in-charge of the Ministry concerned. Custom Officer exercising power under s. 182, Appellate Authority acting under s. 188 and

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the President acting under s. 191 of the Sea Customs Act administer criminal justice. A Court of criminal jurisdiction has ordinarily no power to review its own decision. A review of a decision is not provided for by the Criminal Procedure Code but if the power of revision is exercised in a criminal case under a Special Law, s. 439 (2) of the Code Criminal Procedure would become applicable by reason of s. 5 (2) of the Code Rules of natural justice require that no man shall be condemned unheard and therefore, before an order to the prejudice of any person is made he must be given an opportunity of making his defence even though there be no provision in the code for such hearing. That after the 1st March 1950 the Minister of Finance and Revenue was the proper authority to hear and decide the dispute in the revision proceedings. The officer who heard the Applicant and recommended decision in his favour had no jurisdiction to hear the case. Hence the proceedings must be quashed. *Held also:* That there is no bar either under s. 152 of the Constitution or elsewhere to the Supreme Court reconsidering its earlier ruling of law laid down in a previous decision by itself. S. 121 of the Constitution does not apply to judicial proceedings. Reference to an inappropriate section in an order due to clerical mistake when such mistake does not prejudice any one may be ignored. The effect of decisions in *Gwan Kee* v. *The Government of the Union of Burma and Ranchhoddas Jethabhai & Co.* v. *The Secretary to the Union Government, Ministry of Judicial Affairs and two others*, explained.

ABDUL GAFFAR *v.* U KYAW NYUN AND ONE ... ... 218

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SUIT AGAINST A FIRM, ORDER 30, RULE 1, CODE OF CIVIL PROCEDURE—*How to be framed—Whether initials of firm prefixed to agent's name indicates a firm in a plaint—Contract for sale of immoveable property—Time when of essence—Construction—Ss. 55 and 74 of the Contract Act—Reliefs for forfeiture if applies to deposit—Agent of necessity, s. 189, Contract Act.* Where in a suit directed against the chettyar firm of A.K.R.M.M.K. the defendant was described in the plaint as A.K.R.M.M.K. Chidambaram Chettyar. It was contended that the firm had not been properly impleaded. *Held:* That under Order 30, Rule 1 of the Code of Civil Procedure, any two or more persons claiming or being liable as partners may sue or be sued in the name of the firm. The name of the firm was A.K.R.M.M.K. firm and as the firm has not been made a party the suit was not correctly framed and the customary usage of the Chettyars referred to in 13 Ran. 87 is not relevant for this purpose. Provisions of Order 30 of the Code of Civil Procedure cannot be over-ridden by this usage. The omission is not merely a technical mistake because the amendment if allowed would necessitate the addition or substitution of new parties who could claim the benefit of the Limitation Act. *K.S.A.V. Chettyar Firm* v. *Mahmoo.* 13 Ran. 87 ; *Krishna Prasad Singh* v. *Ma Aye*, 14 Ran. 383, referred to and distinguished. *Held also:* The principle applied by the Courts of Equity in England introducing the presumption in cases of sales of land between Vendors and Purchasers, that time is not of the essence of the contract is only a presumption which will give way to proof of a contrary intention by express words or by the nature of the transaction. As in the present case in the written contract there

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are penal clauses binding on both the parties forfeiting the deposit in the case of non-completion within a fixed date and providing for refund of the deposit and a further compensation in case of breach by the vendor it is clear that a contrary intention appears in its wordings within s. 55 of the Contract Act. The language plainly excludes the notion that time limits were of mere secondary importance. *Jamshed Khodarani* v. *Burjorji Dhunjibhai*, 40 Bom. 289 at 298 applied. *Held also:* That the alleged extension of time by the vendors' representative was ineffectual as on the alleged date of extension the time limit had already expired. The agent cannot be held to be an agent of necessity within the meaning of s. 189 of the Contract Act empowered to act during the war time as this is a mixed question of law and facts and no averments had been made in the pleadings nor in the evidence led, upon which to base such a contention. The purchaser could not also get relief under s. 74 of the Contract Act as this section has no application for the purpose of scaling down the amount of compensation agreed upon. *Burjorjee Shapurji* v. *Madhavlal Jesingthai*, 58 Bom. 610 at 618, referred to.

A.K.R.M.M.K. CHIDAMBARAM CHETTYAR *v.* KHOO HWA LEM 9

SUIT FOR MONEY LENT ... ... ... ... 39

SUIT FOR REDEMPTION OF MORTGAGE—*Form of decree—Code of Civil Procedure, Order 34, Rule 4 (2) (3)—Deposit of lawful currency—Japanese Military Notes of such deposit—"Money" in Order 21, Rule (1) (a), Civil Procedure Code meaning of—Acceptance—S. 63, Contract Act and s. 4, Japanese Currency Evaluation Act.* Where, in satisfaction of a mortgage by deposit of title deeds, created before the War, the mortgagee deposited Rs. 35,250 into Court and a final decree for redemption was passed by the City Civil Court on 23rd April 1948, and the decree was set aside on appeal, after reoccupation by the High Court. *Held:* That if procedure fixed by the Code of Civil Procedure had been strictly followed, a preliminary decree under Order 34, Rule 4 (3) should have been passed and it could be only in terms of the lawful currency of the land. The only question then would be whether such a decree could have been discharged by payment into Court of Japanese Military Notes. The trial Judge did not examine this question. Japanese Military Notes were not lawful money and were no better than tokens with an exchange value. *Ko Maung Tin* v. *U Gou Man*, (1947) Ran. 149 (F.B.), referred to and applied. Such deposit cannot discharge the decree under Order 21, Rule 1, Code of Civil Procedure. *Held also:* That if the deposit had been accepted by the defendant, both under s. 63, Contract and s. 4 of the Japanese Currency (Evaluation) Act, such acceptance might release the mortgagees. The rule, however cannot ordinarily be extended to cover a deposit into Court. Payment into Court under Order 21, Rule 1 (1) (a), Code of Civil Procedure can only be by payment into Court of money payable under the decree.

ARIFF MOOSAJEE DOOPLY AND ONE *v.* DR. T. CHAN TAIK ... 227

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TORT—*Goods taken after door broken—Whether takr, finder of goods—Joint tort-feasors—Release of one—Finding by courts below as only a covenant not to sue—Mixed question of law and fact. Held :* That persons, who take possession of goods, after breaking doors of the rooms whether such goods are kept (the rooms being leased by the owner of goods from the landlords) and who knew fully that they were the property of others, are not innocent finder of goods *Tan Soon Li* v. *The Burma Oil Co. Ltd.*, (1941) R.L.R. 153. The question whether a release deed where by one of the several tort-feasors is released from liability reserving the right of action against others amounts to release of all or only a covenant not to sue the party released, is a mixed question of law and fact. Concurrent findings of both the Courts cannot therefore be challenged.

HAJEE SAHIB HAJEE MOHAMED BROS. *v.* PUDUVEETTU ABDUL MOHAMED SHERIFF AND ONE ... ... ... 244

TRADE DISPUTES ACT ... ... ... ... ... 47

——————— s. 2 (*f*) ... ... ... ... 176

——————— s. 9 ... ... ... ... 163

TRADE DISPUTES ACT, s. 2 (*g*)—*Writ of Prohibition and Certiorari*—Where the President in exercise of the powers conferred under s. 9 of the Trade Disputes Act referred 11 matters for decision to the Industrial Court and it was contended that four matters out of eleven referred to did not come within the definition of a Trade Dispute and the Industrial Court had no jurisdiction to entertain them. *Held :* That the application for prohibition and certiorari was premature. The Industrial Court had not yet opportunity to consider whether all or any of these matters fell within its jurisdiction. Where having reference to several distinct things one or more of which is within the cognizance or competence of the inferior court and the others are not, the Supreme Court will not presume that the inferior court will go beyond its jurisdiction. *Hallack and one* v. *The Chancellor, Masters and Scholars of the University of Cambridge*, 1 Q.B. 593 ; *The Queen* v. *Twiss*, 4 Q.B. 407 at 413, applied.

THE BURMAH OIL CO. (BURMA CONCESSION), LTD. *v.* THE COURT OF INDUSTRIAL ARBITRATION, BURMA AND FIVE OTHERS ... ... ... ... ... 125

TRADE DISPUTE—*Meaning of—Trade Disputes Act, s. 2, Clause* (J)—*Reference by President to Industrial Court Whether conclusive of the existence of Trade dispute.* When the President of the Union made a reference to the Industrial Court regarding a claim of three months pay as Evacuation Compensatory allowance made by the Members of the Union owing to the evacuation and the consequent closure of the Burma Corporation Ltd. in 1942 on account of the war, and the Industrial Court by its Award held that the claim, made after the war, could not be regarded as connected with non-employment or as the subject-matter of a trade dispute, and the Union applied for a writ of mandamus against the decision of the Industrial Court. *Held :* That a writ

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of mandamus can only issue to direct the performance of a public duty where a public authority has failed in its legal obligation to perform such duty. Where the President of the Union in exercise of his powers under s. 9 of the Trade Disputes Act makes a reference to the Industrial Court such reference is not conclusive of the matter being a trade dispute. "Trade dispute" is defined in the Act elaborately. Where the Industrial Court properly held that there was no trade dispute it had not evaded any statutory duty imposed upon it. It is open to the Industrial Court as well as the Supreme Court to decide whether there is a trade dispute or not.

THE NAMTU WORKERS' UNION *v.* THE COURT OF INDUSTRIAL ARBITRATION AND TWO OTHERS ... ... ... 176

TRUST ACT—*Ss. 1, 44, 75—Rules of Mohamedan Law—Silent—Effect—Provision in deed for five trustees—Whether four alone can file suit.* Where a deed of waqf created by a Mohamedan provided that there should always be five trustees and in case of vacancy, the survivors could appoint to the vacancy, but a vacancy was not filled up and the remaining four trustees alone filed a suit for recovery of monies, on behalf of the Trust. *Held :* That s. 1 of the Trusts Act, provides that nothing contained in the Act affects the rules of Mohamedan Law as to waqf, but there was nothing in the rules of Mohamedan Law which conflict with ss. 44 and 75 of the Trusts Act. The provision in the document of Trust that there should always be five trustees does not exclude the operation of ss. 44 and 75 expressly or by implication and on the death of one of several co-trustees, the trust survives and the trust property passes to the others. *Rajendronath Dutt* v. *Shaik Mohamed Lal*, 8 I.A. 135, distinguished. *Bechu Lal* v. *Olullah*, 40 Cal. 338 ; *Krishna Bhatta* v. *Udayavar Srinivasa Shambagu*, A.I.R. (1917) Mad. 730, refer ed to. By continuing to act the surviving trustees may have committed a breach of trust ; but a stranger to the trust cannot say that in spite of the trust surviving and the surviving trustees having the same rights, as the original trustees, the survivors cannot sue.

HASHIM AZAM BHAKHRA *v* EBRAHIM ARIFF ASHRAFF AND THREE OTHERS ... ... ... ... 251

*Ultra Vires* ... ... ... ... ... ... 185

UNION CITIZENSHIP (ELECTION) ACT, 1948, s. 8—*Powers of Judge to review issue of certificate—Jurisdiction—Assumption of—Writ of prohibition—When can issue.* Where the applicant applied for a Citizenship Certificate and stated that he was born at Mergui but was residing at Rangoon, and notice was accordingly issued to the Deputy Commissioner, Rangoon and after enquiry a Certificate of Citizenship was issued ; and thereafter application was made to Court to revoke the Certificate. *Held :* That by virtue of s. 8, Clause 5 of the Union Citizenship (Election) Act, 1948, the Certificate of Citizenship became fully effective. The learned Judge who issued the certificate, had no authority to review his order and cancel the certificate or to hold a *de novo* enquiry. The right of review just like the right of appeal is a creature of Statute. *Won Shwe Bee* v. *The Commissioner of Police and one*, B.L.R. (1949) (S.C.) 157, followed. A Court has jurisdiction to decide in any particular case whether it possesses jurisdiction to entertain the suit or not and when a duly constituted Court assumes jurisdiction it must be taken that it has decided the

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question that it possesses the jurisdiction it has exercised, *S. A. Nathan* v. *S. R. Samson*, 9 Ran. 480 at 494, followed. S. 5 of the Act does not require that notice must be issued to the Deputy Commissioner of the place where the applicant was born and to the Deputy Commissioner of the place where he is for the time being residing. *Held further :* That where a definite remedy is provided, *e.g.*, appeal to the High Court under s. 476 (*b*) of the Code of Criminal Procedure an application for direction in the nature of prohibition cannot be entertained.

AH FAT (*a*) U AUNG THEIN *v.* U THA WIN AND ANOTHER 53

URBAN RENT CONTROL ACT, SS 11 (*1*) (*a*), 13 (*1*) AND 14 (*b*)—*Code of Civil Procedure*, s. 2 (ii)—*Constitution Act*, s. 25 (2)—*Directions in the nature of mandamus.* K. V. S. Iyer, a tenant of Room No. 5 of House No. 231-237, Mogul Street, Rangoon, died in November 1949, but the rent continued to be received later by the landlords. They however did not accept it from the applicant, a son of the deceased tenant and he sought to deposit the rent with the Controller of Rents. The Controller held that the claimant must first obtain a declaration of status as a legal representative from a Civil Court. *Held :* On an application for a mandamus, that at the stage of deposit of rent with the Controller, it is not necessary that the status of the person who seeks to deposit should be established. S. 2 (ii) of the Code of Civil Procedure defines legal representative as including even a intermeddler. Deposit of rent can operate as a shield only to a person who is in occupation of the premises and a tenant's legal representative is included in the definition of tenant. The deposit ensures for the benefit of the legal tenant and does not give the depositor any right adverse either to the landlord or to the tenant. Therefore no enquiry was called for as to the status of a person making deposit under s. 14 (*b*) of the Act and the Controller is bound to accept the deposit.

S. THUKARAM *v.* THE CONTROLLER OF RENTS, RANGOON AND ONE ... ... ... ... ... 193

URBAN RENT CONTROL ACT—*Monthly Leases Termination Act, 1946, s. 4—Monthly leases when terminate—Urban Rent Control Act, s. 12—Conditions to be satisfied—Passing of the decree of the Court. Held :* Where a monthly tenant left Rangoon after December 1941 and there was nobody looking after or was in possession of the premises from June 1943. S. 4 of the monthly Leases Termination Act applies and a tenant loses his right under the Act. In spite of the fact that a decree has been passed against a person in possession of a house on the ground that he is a trespasser he has still the right to make an application under s. 12 of the Urban Rent Control Act to the Rent Controller. Requirements of s. 12 to justify the Controller of Rents are—(1) person making the application must not be a tenant of the premises ; (2) that he must be in occupation of the premises *bona fide* for residential or business purpose ; (3) that he must have made a written application of his willingness to pay the standard rent of such premises. On written declaration being made by the occupant of his willingness to pay the standard rent the Controller of Rents is entitled to give him permit.

SAW CHAIN POON AND ONE *v.* ASSISTANT CONTROLLER OF RENTS, RANGOON AND EIGHT OTHERS ... ... 109

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URBAN RENT CONTROL ACT, s. 16-AA (4) (a) AS AMENDED BY ACT LIII OF 1948—*Jurisdiction of Controller of Rents. Held :* The Controller of Rents has jurisdiction to act under s. 16-AA (4) (a) of the Urban Rent Control Act only when residential premises are either vacant or about to be vacant. He cannot take action at a time when the premises had already been occupied and his action therefore was without jurisdiction.

U SEIN LIN *v.* THE CONTROLLER OF RENTS, RANGOON AND TWO OTHERS ... ... ... ... 156

URBAN RENT CONTROL ACT, s. 19-A (1)—*Decision of Board without notice of landlord—Allotting rooms to strangers—S. 16-AA* (1)—*Call for fresh intimation under—Jurisdiction after time-limit to make allotment.* Where a landlord sent an intimation under s. 16-AA (1) of the Urban Rent Control Act that the building would be ready at a particular time but the Rent Controller asked the landlord to submit a fresh intimation after completion certificate from the Corporation of Rangoon, but nevertheless the Rent Controller without notice of the landlord arrived at a decision to allot certain rooms to strangers. *Held :* That there is no provision in the Urban Rent Control Act entitling the Controller of Rents to ignore the first intimation by the landlord and call for a fresh intimation. It is incumbent upon the Rent Controller to make the allotment under s. 16-AA (4) (a) within ten days from the receipt of the intimation from the landlord. The purpose of this enactment is that the landlord cannot be left waiting indefinitely with vacant rooms awaiting a decision from the Controller and his Board. After the statutory period of ten days after the receipt of the intimation has expired the Controller of Rents has no jurisdiction to make an allotment under s. 16-AA of the Urban Rent Control Act.

CASSIM AHMED SOOKMA AND HAWA BIBI *v.* THE CONTROLLER OF RENTS, RANGOON ... ... ... 94

URBAN RENT CONTROL ACT—*Licence and lease—Officers exercising judicial function or quasi-judicial function whether can seek legal advice at the back of the Advocate of the other side and whether Attorney-General or Government Advocate can give such advice Held:* A licence may come within definition of "letting" under the Urban Rent Control Act. The distinction between a licence and a lease is that there must be exclusive possession in the case of lease and that element of exclusive possession is absent in the case of a licence. Officers exercising judicial or quasi-judicial function should not seek for legal advice especially at the back of the Advocate of the other side ; in proper cases he may ask the Attorney-General to appear as an *amicus curiæ* and the Attorney-General also should not give legal advice if sought for by persons exercisng judicial or quasi-judicial function. *S. R. Raju* v. *The Assistant Controller of Rents and two*, B.L.R. (1950), (S.C.) 10, followed.

THE INDIAN STARCH PRODUCTS, LIMITED AND ANOTHER *v.* THE CONTROLLER OF RENTS, RANGOON AND ANOTHER 64

URBAN RENT CONTROL ACT, s. 21-A—*Permit subsequently withdrawn —Tenant—Application under s. 16-A only by tenant.* Where the wife of a tenant of some premises applied to the Controller for permission to assign tenancy, and the Controller first issued a permit to that effect but subsequently, on the application of the real tenant, withdrew the permit and the party affected applied

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for a writ of certiorari. *Held:* That the term "tenant" in the Urban Rent Control Act means one by whom, or on whose account rent for the premises is paid, or the legal representative of a tenant, or a person deriving title from a tenant, or a tenant, holding over; and the wife of the tenant is not a tenant according to this definition. An application for permission to assign a tenancy lies only at the instance of a tenant. Consequently the original application for assigning tenancy at the instance of the wife was incompetent. Even if there had been irregularities in the Review proceedings before the Controller of rents setting aside the original permit, it would be wrong for the court to uphold the original order, for the original application on which orders were passed is incompetent.

B. R. KAMDAR *v.* THE ASSISTANT CONTROLLER OF RENTS AND OTHERS ... ... ... ... 50

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WARRANT ISSUED BUT NOT EXECUTED—WHETHER CERTIORARI LIES! ... 6

WITHDRAWAL OF APPLICATION WHETHER BARS FEESH APPLICATION ... 68

WRIT OF CERTIORARI ... ... ... ... 6, 125

WRIT OF CERTIORARI AND PROHIBITION—*Trade Disputes Act*—Where the employers published a warning notice on 7th March 1949 that they would close their business as Saw Millers early in April 1949 and gave notice to all their workers that with the exception of some, other workers would cease to be employed with effect from 12th April 1949, but before that date the Workers' Union formulated their demands and presented them to the employers and the demands were referred to the Industrial Court for determination. *Held*: That on the 6th April 1949 the demands made on behalf of the Workers and rejected by the applicant would constitute a trade dispute. And the reference of the trade dispute to the Industrial Court was correct.

STEEL BROS. & CO. LTD. *v.* THE COURT OF INDUSTRIAL ARBITRATION AND OTHERS ... ... ... 47

WRIT OF *Habeas Corpus—Public Order (Preservation) Act, s. 5-A (4)—Arrest of person outside territorial jurisdiction—Later order in substitution—Whether jurisdiction of Supreme Court affected.* The detenue was arrested at Hmawbi on the 26th of May 1949 and was detained in the Rangoon Central Jail under the order dated the 30th May 1949 of the Deputy Commissioner of Police, Rangoon under s. 5-A (*1*) (*b*) of the Public Order (Preservation) Act. On 20th March 1950 the detenue applied to the Supreme Court for a writ of *habeas corpus* and while the proceedings were in the Supreme Court the Deputy Commissioner of Police, Rangoon, cancelled his order and the Deputy Commissioner, Insein, passed an order directing the detention of the applicant in the Rangoon Central Jail until further orders and then passed another order under sub-s. 4 of s. 5-A of the said Act transferring the applicant to Insein Jail for further detention. *Held:* That the present confinement of the applicant on the date of the hearing in an area under military administration is an attempt to evade the jurisdiction of the court in an

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application already within its seizin and such an attempt by the executive authorities interfering with the rights assured by the Constitution could not be encouraged. The mere fact that the applicant is a White Pyithu Yebaw Leader would not bring the applicant within the purview of s. 5-A (*1*) (*b*) of the Public Order (Preservation) Act.

BO AYE KO *v.* THE COMMISSIONER OF POLICE, RANGOON AND TWO OTHERS ... ... ... ... 181

WRIT OF MANDAMUS ... ... ... ... 10

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## SUPREME COURT.

# STEEL BROTHERS & Co. LTD. (APPLICANTS)

*v.*

# THE BUSINESS PREMISES TAX OFFICER, RANGOON (RESPONDENT).*

†S.C. 1950

*Jan. 2*

*Business Premises Act, s. 1—Construction of Taxing Statute—Whether retrospective—Taxable year—S. 2 (d)—Burma General Clauses Act, s. 2 (23), s. 16—Rule-making power of the President.*

The Business Premises Tax Act came into force in the City of Rangoon on 15th July 1949. The applicants were directed to pay the tax for the financial year commencing 1st October. The applicants sought direction by a writ of prohibition for restraining the Business Premises Tax Officer from collecting such tax for any period prior to the commencement of the Act.

On behalf of the respondents it was contended that the Act was retrospective and was intended to be operative from the beginning of the financial year, and that financial year under the Burma General Clauses Act, s. 2 (23) commenced from 1st October 1948 and that the claim had been made reasonably in as much as the President could give relief in respect of Business Premises not in existence for the larger part of the year.

*Held negativing the contention :* Under s. 16 of the Union Constitution, no person could be deprived of his property unless there was clear authority in law for such encroachment, and any doubt must be resolved in favour of the person sought to be made liable.

Though the word "Taxable year" under s. 4 of the Act is defined as equivalent to the financial year, the language of the Statute did not have the effect of imposing liability for any period prior to the enactment of the Statute.

The financial year under the Burma General Clauses Act, s. 2 (23) means any twelve calendar months beginning with the 1st day of October and it could not be contended that the Assessee was liable also for any period prior to the 1st October 1948.

The contention on behalf of the respondent was one of doubtful validity and in a taxing Statute any doubt must be resolved in favour of the party affected.

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* Civil Misc. Application No. 75 of 1949.

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

S.C. 1950

STEEL BROS. & CO., LTD. v. THE BUSINESS PREMISES TAX OFFICER, RANGOON.

*Horrocks and Kyaw Min* for the applicants.

*Chan Tun Aung* (Assistant Attorney-General) for the respondent.

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

U E MAUNG.—The applicants seek a direction in the nature of a writ of prohibition calling upon the respondent to refrain from levying, in respect of the premises held by the applicants for business purposes, a tax under the Business Premises Tax Act of 1949 for any period prior to the 15th July 1949.

The Business Premises Tax Act, in section 1, provides that it shall come into force in such area or areas and on such date or dates as the President may in respect of such area or areas specify and it is common ground that the Act was directed to come into force in the City of Rangoon on the 15th July 1949. The applicant's case shortly put is that their business premises situated in the City of Rangoon would not attract the tax under the Act till the Act was put into effect in the City of Rangoon and that for the period prior to that they could not be held liable to pay any tax under the Act.

At the hearing before us the learned counsel for the applicants offered to support by authority the proposition that taxation statutes require to be construed strictly ; but as it is an obvious proposition flowing directly from the provisions of section 16 of the Constitution we have not troubled him on this aspect of the case. Before any person can be deprived of his property there must be clear authority in law for such an encroachment : any doubt must be resolved in favour of the person who is sought to be made liable in property.

It is sought, however, on behalf of the Union to persuade us that the Act read as a whole, and especially the provisions of section 4 thereof, make it clear that it was intended to be retrospective and to operate from the beginning of the financial year 1948-49. The learned Assistant Attorney-General, who appears for the Union, claims that under section 4 of the Act the assessment and the levy of the tax is to be for the " taxable year " and that the term " taxable year " is under section 2 (*d*) of the Act defined as equivalent to the " financial year." Applying next the provisions of section 2 (23) of the Burma General Clauses Act, the learned Assistant Attorney-General sought to deduce that the Business Premises Tax Act clearly authorizes the assessment and levy of the tax under the Act from a date prior to the 15th July 1949, *viz.*, as from the 1st of October 1948.

We do not deny the possibility that this result was in the mind of the law officers of the Union who were responsible for the drafting of the Act when they prepared the Bill for presentation in Parliament. But it is not what was in the mind of the legal draftsmen that is material when we have to decide what the Act has really achieved. The test is whether the Act, taken by itself and given its plain meaning—subject to such rules of legal interpretations as are applicable—would beyond reasonable doubt operate to attach a liability on a citizen to pay the tax or not. The arguments of the learned Assistant Attorney-General at first sight appeared attractive but we are constrained to say that they would not bear a close examination. It must be remembered that section 2 (23) of the Burma General Clauses Act does not say that the " financial year " shall mean the year beginning with the 1st October 1948. It merely says in general terms that it shall mean any twelve calendar

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STEEL BROS. & CO. LTD. v. THE BUSINESS PREMISES TAX OFFICER, RANGOON.

months beginning with the 1st day of October. Bearing that in mind and bearing also in mind the provisions of section 12 (2) of the Burma General Clauses Act the Assistant Attorney-General, if he is to be consistent in his contention before us, must go further than he has done and claim that the applicants are liable to be taxed under the Business Premises Tax Act, not only from the 1st of October 1948, but from the 1st of October of such previous " financial year " in which the applicants first began operating the business which would attract the Act if it had then been in force. That clearly would be a demonstration *reductio ad absurdum* of the Union's case as presented before us.

We have been told on behalf of the Union that the President has in the Rules made under section 16 of the Act enabled relief to be given in respect of business premises which had not been in existence as such for the larger part of the assessable year and it is said by the learned Assistant Attorney-General that such provisions are clear indications of the reasonableness of the claim now made on behalf of the Union in this case. It is not necessary for us to say in the present case—and therefore we refrain from considering—whether it is within the power of the President, under section 16 of the Act, to make such provisions for relief and condonations. In any case, we do not consider this consideration at all relevant in the present proceedings. It is clear to us that the most that can be said, in support of the contention made on behalf of the Union, is that there can be some doubt in favour of that contention. But that is not enough. As we have already said, a doubt, if any, must be resolved not in favour of the Union but in favour of the party sought to be made liable to taxation.

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STEEL BROS. & Co. LTD. v. THE BUSINESS PREMISES TAX OFFICER, RANGOON.

We accordingly direct that an order be issued to the respondent calling upon him to refrain from levying on the applicants any tax under the Business Premises Tax Act of 1949 for any period prior to the 15th of July 1949.

There will be no order as to costs.

## SUPREME COURT.

†S.C. 1950

*Jan. 6.*

DAW TIN NU (APPLICANT)

*v.*

THE CHAIRMAN, PUBLIC PROPERTY PROTECTION COMMITTEE, RANGOON AND ONE (RESPONDENTS).*

*Warrant issued but not executed—Whether certiorari lies—S. 150, Constitution of the Union of Burma.*

*Held :* Any person administering either the Public Order (Preservation) Act or the Public Property Protection Act exercises limited functions and powers of a judicial nature ; therefore, when he issued the warrant for arrest application for directions in the nature of certiorari would be the proper remedy.

Where the alleged prejudicial acts were committed before the Public Property Protection Act was enacted, he could not be arrested and detained for such acts and his detention would not be in accordance with law.

*Thein Maung* for the applicant.

*Ba Sein* (Government Advocate) for the respondents.

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

U E MAUNG.—The only point in this case that gave us any trouble was the question whether an application for directions in the nature of certiorari would be the proper remedy. The applicant's husband has not yet been arrested but a warrant for his arrest has been issued by the Chairman of the Public Property Protection Committee. On this point it seems to us that section 150 of the Constitution would supply the required answer. We have held in several cases that any person administering either the Public

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* Civil Misc. Application No. 48 of 1949.

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

Order (Preservation) Act or the Public Property Protection Act would be a person coming within the meaning of persons authorized to exercise limited functions and powers of a judicial nature. That being so, directions in the nature of certiorari can issue to the Chairman of the Public Property Protection Committee.

That point being settled, the case is really covered by our decision in Criminal Miscellaneous Application No. 175 of 1948. The prejudicial acts ascribed to the applicant's husband are supposed to have been committed before the Act was enacted. We accordingly quash the order issuing a warrant for the arrest of the applicant's husband.

## SUPREME COURT.

† S.C. 1950

*Jan. 6.*

MA MYA KHIN (APPLICANT)

*v.*

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

*Public Order (Preservation) Act, s. 5A (1) (b)—Possession of a seditious leaflet, if sufficient.*

*Held :* That if a detenu had been found in possession of 50 or 100 copies of a seditious leaflet it might be reasonable to assume that he was in some way responsible for dissemination of seditious literature but possession of just one copy does not prove anything.

*Held further :* The allegation that the applicant was a deserter from the Army could not be sufficient ground for detention in the absence of proof of such desertion.

Applicant in person.

*Ba Sein* (Government Advocate) for the respondents.

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

U E MAUNG.—In this case Mya Maung who has been detained under section 5A (*1*) (*b*) of the Public Order (Preservation) Act, is alleged by the Sub-Inspector of Police Maung Tin Nyunt to have been found in possession of one copy of a seditious leaflet, a letter to his wife into which the Police Inspector had read something sinister and a diary in which are two entries evidencing the vist of Mya Maung to Okkan when that town was occupied by the insurgents. It is also stated that Mya Maung is a contact of one Tin Myint, alleged in the affidavit of U Tin Nyunt to be a deserter from the 3rd Burma Rifles.

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* Criminal Misc. Application No. 385 of 1949.

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

If it can be said that Mya Maung was found in possession of 50 or 100 copies of the seditious leaflet it might be reasonable to assume that he was in some way responsible for the dissemination of seditious literature ; but to be in possession of just one copy does not prove anything. The letter to his wife, which has been produced before us and found in his possession when he was arrested, also does not suggest that Mya Maung is a person who requires to be kept in custody under the Public Order (Preservation) Act. Nothing also turns on the diary entries evidencing his visits to Okkan. But what has been of great influence on us in coming to the decision which we have arrived at is that Tin Myint who is stated in the affidavit of the Sub-Inspector of Police to be a deserter of the Army, is a nephew of Mya Maung and even if Tin Myint had been a deserter nothing sinister can be inferred merely from Mya Maung remaining friendly with him. But this is not the end of the matter. Mya Maung's wife has sworn an affidavit in which she definitely stated that Tin Myint, far from being a deserter from the Army, is still a member of the Army and in operation in some part of Burma. We have given the learned Government Advocate an opportunity to verify the truth of this allegation and all that, after four days adjournment, he has been able to tell us is that the Army authorities find it very difficult to trace Tin Myint and that they would not be able to tell us today whether he is a deserter or whether he is still in the Army. In this state of affairs we must come to the conclusion that Mya Maung's continued detention is in no way justified.

We accordingly order that the detenu Mya Maung be forthwith released.

## SUPREME COURT.

†S.C. 1950

*Jan. 6.*

S. R. RAJU (APPLICANT)

*v.*

THE ASSISTANT CONTROLLER OF RENTS, RANGOON AND TWO OTHERS (RESPONDENTS).*

*Mandamus—Agreement of license—Providing for no right under Urban Rent Control Act—Controller of Rents directing parties to Civil Court and not fixing standard rent—Licence—Definition of—True test in construing a document.*

The Tenant of certain properties entered into an agreement with the Applicant which provided that the agreement was not one of sub-tenancy but that the Applicant was only a licensee and that he should have no right to outwit the agreement and bring the matter within the Urban Rent Control Act. The Applicant applied for the standard rent to be fixed. Upon objection the Assistant Controller of Rents, Rangoon considered that it was a matter for the Civil Court and left the parties to seek relief there.

*Held :* That in granting a mandamus the Court is directing the Assistant Controller to proceed with the case and decide the question, which it is his duty to decide and is not in any way interfering with his discretion.

*Halsbury's* Law of England, Vol. IX, paras. 1296 and 1300, referred to.

Licence is "that consent which, without passing any interest in the property to which it relates, merely prevents the acts for which consent is given from being wrongful."

Pollock on Torts, referred to.

It is the duty of the court to look not so much at the words as the substance of the agreement. Even where the parties call a document as agreement of licence such recitals can never be conclusive and the court will have to look to the substance of the terms of the agreement and not to the name given by the parties.

*Smith* v. *The Overseers of St. Mitcheal, Cambridge*, 3 EL. and EL. 383 ; *Kent* v. *Fittall*, (1906) 1 K.B. 60 at 69 ; *Young and Co.* v. *Liverpool Assessment Committees*, (1911) 2 K.B. 195 ; *Burma Shell Oil Storage and Distributing Co. of India*, 55 All. 874, referred to.

*Held :* That the Assistant Controller of Rents was not justified in his view that the Urban Rent Control Act was not applicable in the case. The mandamus should issue directing him to dispose of the application under s. 19 of the Urban Rent Control Act.

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* Civil Misc Application No. 58 of 1949.

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

*C. C. Khoo* for the applicant.

*Ba Shein* (Government Advocate) for the 1st respondent.

*M. E. Dawoodjee* for the 2nd respondent.

*J. N. Dutt* for the 3rd respondent.

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

U E MAUNG.—In this application for directions in the nature of mandamus two questions arise for our consideration.

The first is a preliminary question, *viz.*, whether in the circumstances obtaining in this case directions in the nature of mandamus would be an appropriate remedy. Mr. Dutt, the learned counsel for the third respondent, claims that an application of this nature would not be competent in this case. To decide this point and also for the purpose of determining the issue on the merits, if on this preliminary objection we hold against the respondents, it is necessary to set out the essential facts of the case.

The second respondents are the owners of premises in No. 99—101, Fraser Street, Rangoon, and the third respondent is the tenant thereof from the owners. On 20th October 1948 the third respondent and the applicant executed what was described as an "Agreement of License." That document contains 21 paragraphs or clauses and it is not necessary to reproduce it in extenso. What is clear is that the third respondent did not want the transaction to amount to one of lease and that the learned counsel advising him in that transaction has employed his ingenuity and

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learning to avoid that happening. In clause 17 of the agreement appears the following :

"That both parties have expressly agreed and understood that this agreement is not one of sub-tenancy and that the licensee is not the sub-tenant of the licensor."

This is followed by another provision is clause 18 :

"That the Licensee shall have no right to outwit this agreement and to bring the matter within the operation of the Urban Rent Control Act."

That the third respondent desired to keep this transaction outside the meaning of a lease can be clearly understood, for he was paying to the second respondent Rs. 144 per mensem for the whole ground floor of house No. 99—101, Fraser Street, Rangoon, and was by this transaction obtaining a fee or rental of Rs. 500 per mensem for a part only of the same tenancy.

The applicant in Proceedings No. 319-E of 1948-49 made an application to the Controller of Rents, Rangoon, to have the standard rent fixed for what he claimed to his sub-tenancy under section 19(1) of the Urban Rent Control Act. This application was strongly contested by the third respondent and on the 17th June 1949 the Assistant Controller rejected the application. The material portion of the order of the Assistant Controller of Rents reads as follows :

" . . . . I am clearly of the opinion that it is outside the sphere of my duties as Controller of Rents to do anything which would have the effect of reckoning the agreement between the parties as null and void. This is obviously a matter for the Civil Court, and I shall leave the petitioner to seek relief there."

It is at this stage that the applicant has come to this Court to seek directions in the nature of mandamus calling upon the Controller of Rents to fix the standard

rent for what the petitioner claims to his sub-tenancy. The second respondents, the owners of the premises, support the application.

Mr. Dutt, who appears for the third respondent, developes his case on the preliminary objection on the authority of *Halsbury*'s Laws of England, Volume 9. He relies on paragraphs 1296 and 1300. We are definitely of the opinion that these two paragraphs in no way support the preliminary objection taken on behalf of the third respondent. In paragraph 1296 it is said :

> " In cases where application is made for the issue of a writ of mandamus to tribunals of a judicial character, the writ will only be allowed to go commanding such tribunals to hear and decide a particular matter. No writ will be issued dictating to them in what manner they are to decide."

Here we have not been asked, and we do not propose, to tell the Controller of Rents how he is to decide this particular application when it goes back to him. All that we are asked to do is to direct him that it is his duty to decide the question, which he thought could not be decided by him till the parties had first received an adjudication in the Civil Court, *viz.*, whether to fix the standard rent or not.

Paragraph 1300 relates to matters where a tribunal has a discretion and has already exercised that discretion in an honest manner. In such cases, of cource, it is elementary that this Court will not substitute its discretion for that of the authority who is entrusted with the exercise thereof. The present is not a case belonging to that class.

Accordingly, the preliminary objections fail and are rejected.

Pollock in his treatise on the Law of Torts has defined " license " as " that consent which, without

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passing any interest in the property to which it relates, merely prevents the acts for which consent is given from being wrongful." As early as the case of *Smith against The Overseers of St. Mitcheal, Cambridge* (1) Hill J. said : "We think that we must look not so much at the words as the substance of the agreement." In that case the owners of a house contracted to give to the Board of Inland Revenue the use of five rooms and a closet in the house in return for an annual consideration of £90. The contract provided that this sum of £90 was to include all expenses, namely, rent, rates, taxes, gas, wood, coals, also providing a trustworthy person to reside on the premises, to keep clean, light fires and attend to the same. This transaction was held to be only one of license. A distinction was drawn between possession and control in the owner of the house and mere use of five rooms and the closet in the licensee.

In the case of *Kent* v. *Fittall* (2) Collins, M.R. said :

"It has been pressed upon us in argument that a person who resides in part of a house cannot claim as an inhabitant occupier if his landlord lives in the same house, because the residence of the landlord is incompatible with the claim. It seems to me on principle that it cannot be affirmed as a matter of law that the co-existence of the landlord as an occupier of another and a distinct subject-matter is a bar to the claim of the tenant to a separate tenancy, any more than if the landlord lived next door or in the next street. The law has created a thing which is capable of being the subject-matter of a separate tenancy, and the only bar to a claim in respect of it is that it has not been occupied in such a way as to show that the occupation has been free and uncontrolled. The occupation may be subject to stipulations, such for instance as would give the landlord a right to enter the tenement for the purposes of repair ; but that is compatible with an independent occupation, such as would give the francise to the tenant, and that is the occupation that the revising barrister has found to exist in this case."

(1) 3 EL. & EL. 383. (2) (1906) 1KB 60 at 69.

The case of *Young & Co.* v. *Liverpool Assessment Committees* (1) is of some assistance in the decision of the application before us. In that case it was held that there may be exclusive occupation in the tenant even if the clauses contained in the deed are consistent with the privilege being given to the landlord for use of certain parts of the demised premises. Lord Alverstone C.J. says at page 209 :

"The position seems to me very analogous to that where a house is let in ordinary circumstances, containing a passage through to some private room or safe of the landlord which he does not desire to demise. He does not want to go to it regularly, and accordingly he reserves a right to go through the passage in the house and open the safe at reasonable times in order that he may avail himself of the use of that safe. That is the class of privilege here given to the landlord, which is in no way inconsistent with the exclusive occupation by the tenant."

The judgment of Sulaiman C.J. in the matter of *Burmah Shell Oil Storage and Distributing Company of India* (2) is pertinent in this connection. At page 879 the learned Chief Justice says :

"No doubt the parties call this document an agreement by way of license, and throughout that document the same phraseology has been used and the parties are called licensor and licensee. There is also a clear statement that this deed should not be construed to create a tenancy in favour of the Oil Company. It is, however, clear that such recitals in a document can never be conclusive, and we have to look to the substance of the terms agreed upon and not to the nomenclature given to the deed by the parties."

Applying these principles to the present case it is clear to us that what purported to be a transaction creating a license only in the agreement between the applicant and the third respondent did in fact create a tenancy. Clause 9 of the agreement recites that as between the "licensee" and the "licensor" there shall

(1) (1911) 2KB 195. (2) 55 All. 874.

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be no interference and interruption of each other's business. There is also in clause 6 a provision that out of the 14 almirahs in the said premises the "licensee" shall be entitled to have the exclusive use of 12 almirahs. There is also another provision that the "licensee" shall be entitled to keep his employee or employees or men to reside in the premises to enable him to run his own business. There is, further, another provision that the "licensee's" representative will be jointly responsible with the "licensor's" representative for theft or loss of goods at night time on the premises. All these provisions are inconsistent with the applicant being a mere licensee.

Mr. Dutt for the third respondent relying on the definition of the term "premises" in section 2 (*d*) of the Urban Rent Control Act claims that there can be no lease except where a building or part of a building had been let separately. The learned counsel appears to have overlooked the amendments made by Act LIII of 1948 which now includes in the definition of "premises," a building or part of a building let or occupied or intended to be let or occupied separately for any purpose whatsoever. In so far as that part of the ground floor which is occupied by the 12 almirahs exclusively allotted to the use of the applicant this definition clearly would fit.

In the result we hold that the learned Controller of Rents was not justified in taking the view that the Urban Rent Control Act is not applicable to the relation that subsists between the applicant and the third respondent and consequently we direct that he do proceed to dispose of the application made by the applicant to him under section 19 of the Urban Rent Control Act in accordance with law.

The third respondent will pay the costs of the Applicant. Advocate's fees ten gold mohurs.

## SUPREME COURT.

## TINSA MAW NAING (APPLICANT)

*v.*

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

†S.C. 1950

*Feb. 18.*

*Public Order (Preservation) Act, 1947, s. 5A* (1) (b) *and s. 7—Whether within Parliament's competence—Existing law—Constitution of Burma, s. 16* "*save in accordance with law,*" *ss. 22 and 26* (1)*—Article 14*(1) *of the Constitution of the United States of America—Burma Laws Act, 1898, s. 13—Dismissal of previous application for* habeas corpus *how far bars subsequent action.*

*Held :* The decision in *Won Shwe Bee* v. *The Commissioner of Police and one* cannot be extended to exclude successive applications for directions in the nature of *habeas corpus*. Where the subsequent application was based on facts in existence prior to the previous application even though such facts were not then within the knowledge of the applicant, the second application would be in the nature of review, which does not exist in the ordinary nature of things. Where there is an order for a term "certain" it cannot be questioned more than once by writs of *habeas corpus* because the first dismissal would be tantamount to a declaration that the detention for that term is a legal detention ; but preventive detention for an indefinite period is under an order for detention from day to day, authority for each day's detention operating separately from that from any other day. In such a case the dismissal of a previous application does not amount to more than a declaration that the detention up to that date of dismissal was lawful. By a change in the relevant circumstances such detention may therefore become illegal. What is subsequently challenged is the legality of the detention at the date of the application.

*Maung Hla Gyaw* v. *The Commissioner of Police*, (1948) B.L.R. 764 at 769, referred to and followed.

In such subsequent application the court cannot allow the previous decisions to be challenged and the legality of the detention up to the date of the dismissal of the previous application cannot be canvassed.

*Held also :* In construing the provision in s. 16 of the Constitution "that no citizen shall be deprived of his personal liberty save in accordance with *law*" it is pertinent to examine the sense in which this term has been understood in this country for many years before the constitution was framed. The term "LAW" in s. 13(*1*) of the Burma Laws Act, 1898 again repeats the provisions of the Act VII of 1872. It is by people who had lived or who had been trained under this system that the Constitution of the Union of Burma was drawn up and enacted and it is therefore reasonable to conclude that "LAW" refers to

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* Criminal Misc. Application No. 426 of 1949.

† *Present* : U E MAUNG, Chief Justice of the Union of Burma, Mr. JUSTICE KYAW MYINT and U ON PE, J.

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the will of the legislature enacted in due form, provided that it is within the competence of the legislature. To accept natural law as a higher law which invalidates any inconsistent positive law would lead to chaos and each Judge would be a law unto himself. "LAW" therefore under s. 16 of the Constitution is an enactment by Parliament or by other competent legislative body. Their powers are defined and circumscribed and within such limits the "LAW" are binding on all in the Union of Burma.

*Held further*: That s. 5A (*1*) (*b*) of the Public Order (Preservation) Act, 1947 is within the competence of the Parliament to enact but the provisions do not grant the President or his delegate arbitrary powers to order detention of a citizen for an indefinite period. Parliament can by positive enactment define the circumstances and conditions under which any authority, it has empowered, may interfere with the personal liberty of the citizen. There is no distinction in principle between the provisions of the Public Order (Preservation) Act and the preventive provisions of the Criminal Procedure Code.

*The Federal Commissioner of Taxation* v. *Munro*, 38 C.L.R. 153 at 180, *Macleod* v. *Attorney General for New South Wales*, (1891) A.C. 455; *Adkins* v. *Children's Hospital*, (1923) 261 U.S. 525 at 544; *Osborne* v. *Commonwealth*, (1911) 12 C.L.R. 337; *Rex* v. *Halliday*, (1917) A.C. 260; *Liversidge* v. *Sir John Anderson*, (1942) A.C. 206; *King-Emperor* v. *Vimlabai Despande*, 73 I.A. 144; In the matter of the Offences Against the State (Amending) Bill, 1940, 74 Irish Law Times 61, referred to and distinguished.

*Dr. Ba Maw*, *P. K. Basu*, *K. R. Venkatram* *N. C. Sen*, *Kyaw Din* and *Chaung Po* for the applicant.

*Chan Htoon* (Attorney-General), *Chan Tun Aung* (Assistant Attorney-General), *Tin Maung* and *Ba Sein* (Government Advocates) for the respondents.

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

U E MAUNG,—Bo Yan Naing, on whose behalf his wife has applied to this Court for directions in the nature of ***habeas corpus***, has been in detention in the Central Jail at Rangoon since the 14th July 1948 in pursuance of an order of detention made by the Commissioner of Police, Rangoon, under section 5A (*1*) (*b*) of the Public Order (Preservation) Act, 1947, in exercise of the powers delegated to him under section 7 of the Act,

On the 21st July 1948 an application for directions in the nature of *habeas corpus* was made by the present applicant in Criminal Miscellaneous Application No. 15 of 1948 of this Court. That application, after a hearing, was dismissed on the 11th August 1948. The present application was instituted on the 7th December 1949.

The first objection raised on behalf of the respondents by the learned Attorney-General is that the dismissal of the previous application operates to bar the present application. Reliance has been placed by him on the decision of this Court in *Won Shwe Bee* v. *The Commissioner of Police and one* (1) where on a second application for directions in the nature of *habeas corpus* in respect of the same detenu, this Court said :

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

It was also said in the course of the judgment in that case that this Court, in respect of the same subject-matter, become *functus officio* after it had passed an order or judgment therein and, that this is one of the reasons why a second application on the same subject-matter, whether it be for directions in the nature of *habeas corpus* or in any other criminal proceeding, cannot be entertained by the Court which had passed final judgment on a previous occasion. The learned Attorney-General relies also on section 138 of the Constitution wherein it has been laid down that "the decisions of the Supreme Court shall in all cases be final."

(1) Cr. M.A. 186 of 1949.

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This objection on behalf of the respondents is countered on behalf of the applicant by the claim that the subject-matter for decision in the present application is not the same as that arising for examination in the previous case. Reference was made to these words in Won Shwe Bee's case (1):

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

It seems to us that the ruling in Won Shwe Bee's case cannot be extended to exclude successive applications for directions in the nature of *habeas corpus* in all cases. Where, as in Won Shwe Bee's case, the subsequent application was based on facts in existence prior to the previous application which had been rejected, even though these facts were at the time of that application not within the knowledge of the applicant, clearly the second application would partake of the nature of review which, as has been rightly pointed out, does not exist in the ordinary nature of things. Again, an order for a term certain cannot be questioned more than once by way of directions in the nature of *habeas corpus*. This must be so because the first dismissal of the application in such cases would be tantamount, in any event, to a declaration by this Court that the detention for that term is a legal detention. That decision, in view of section 138 of the Constitution, is final and cannot be questioned in a further application. That detention is under a single inseparable order and the validity of the order having once been upheld is final. But, preventive detention for an indefinite period is under an order for detention from day to day, authority for each days's detention

(1) Cr. M.A. 186 of 1949.

operating separately from that for any other day ; and the dismissal of an earlier application for an order of release does not amount to more than a declaration that the detention continued to the date of the dismissal was a lawful one. That dismissal cannot be interpreted as justifying further detention for an indefinite period however lengthy it may be. Detention which is legal to a certain date may thereafter, by a change in the relevant circumstances, become illegal, and, when an application for directions in the nature of *habeas corpus* is filed, what is being challenged by that application is the legality of the detention at the date of the application. As has been said in English cases, what the Courts require in similar proceedings would be ***causam captionis et detentionis.*** As we have said in *Maung Hla Gyaw* v. *The Commissioner of Police* (1):

"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 directions 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

(1) (1948) B.L.R. 764 at 708 and 769.

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arrest and detention in its inception, the Court has the power and is under a duty to direct the release of the prisoner."

It must be remembered, however, that in such subsequent application the Court cannot allow the previous decision in respect of the same detention, so far as is relevant to that previous application, to be challenged. The legality of the detention to the date of dismissal of the previous application cannot be further canvassed. Within these limits we are satisfied that we have jurisdiction to entertain successive applications in repect of a continuous preventive detention.

The learned counsel for the applicant proceeding with his arguments claim that the Public Order (Preservation) Act, 1947, under which the applicant's husband has been detained, is unconstitutional and that it is therefore invalid. On the other hand, the learned Attorney-General claims that not only is the Act within the legislative powers of the Union of Burma but also that this Court cannot go behind the order of detention if made in due form under the Act. The learned Attorney-General claims that this Court, in seeking to examine the nature of the materials on which an authority empowered to direct the detention of a person has acted, has in many previous applications for directions in the nature of *habeas corpus* exceeded its jurisdiction and powers.

These contentions, which the learned counsel on both sides tried to support with a wealth of authorities, are of the greatest moment and we have followed the arguments of the learned counsel with the greatest care. In view of the importance of the problems we have taken time to consider our decision in this case.

We shall first consider the claim of the applicant's learned counsel that the Public Order (Preservation) Act, 1947, is not within the competence of Parliament

to enact and that therefore it does not form part of the body of existing laws continuing to be in force in the Union of Burma by reason of section 226 (1) of the Constitution. The basis of this claim is said to be section 16 of the Constitution. Leaving out the parts not relevant, section 16 reads :

" No citizen shall be deprived of his personal liberty . . . save in accordance with law."

It is said that the qualifying words "save in accordance with Law" require an Act which authorizes interference with the personal liberty of a citizen to provide that such deprivation of personal liberty shall be made only after an enquiry at which the person proposed to be detained is given the right to attend, to be informed of the charge against him as also of the evidence against him and to be given an opportunity of adducing evidence in his own defence. It is claimed that anything short of these requirements would offend the principles of natural justice and the rules of natural law and that when the Constitution in section 16 speaks of "law" it is not merely positive law that is being contemplated but that term would extend to embrace in its meaning principles of social and political justice. Many decisions of the Supreme Court of the United States of America have been cited before us in support of this claim but these decisions turn on the interpretation of Article 14 (1) of the Constitution of the United States of America. The relevant part of the Article for our purpose reads :

" Nor shall any state deprive any person of life, liberty, or property without due process of law."

The learned Attorney-General contends that the difference between section 16 of our Constitution and Article 14 of the American Constitution is so great that

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no assistance can be had from the American decisions in seeking to interpret section 16 of our Constitution. He says that in our Constitution the term "law" can only mean positive law evidencing the will of Parliament, the legislative organ of the Union, and enacted in due form, provided that such enactment does not contravene any prohibition in the Constitution itself. We would go further and say that for any Act of Parliament to be invalid it must run counter to an express, and not merely an implied, prohibition in the Constitution. Section 222 of the Constitution has been relied upon the learned Attorney-General. "Existing law" is there defined and from this definition he seeks to deduce that the Constitution wherever the term "law" appears must be read to have contemplated a positive enactment of a legislative authority in the Union having power to enact it.

In seeking the true meaning of the term "law" as used in the Constitution, it appears to us to be pertinent to examine the sense in which that term has been understood in this country for many years before the Constitution was framed. The Burma Laws Act of 1898 has in section 13 the following provisions :

"13. (1) where in any suit or other proceeding in Burma it is necessary for the Court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution,—

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

(*b*) the Muhammadan law in cases where the parties are Muhammadans, and

(*c*) the Hindu law in cases where the parties are Hindus,

shall form the rule of decision, except in so far as such law has by enactment been altered or abolished, or is opposed to any custom having the force of law.

(2) Subject to the provisions of sub-section (*1*) and of any other enactment for the time being in force, all questions arising

in civil cases instituted in the Courts of Rangoon shall be dealt with and determined according to the law for the time being administered by the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction.

(3) In cases not provided for by sub-section (*1*), or by any other enactment for the time being in force, the decision shall be according to justice, equity and good conscience."

It must be remembered that this Act of 1898, so far as section 13 is concerned, repeats the provisions of Act VII of 1872. Customary laws, the Common Law of England and the principles of justice, equity and good conscience were not applied by their inherent force but were made applicable by enactment. It is by people who had lived or who had been trained under this system that the Constitution of the Union of Burma was drawn up and enacted and it is therefore reasonable to conclude that when the Constitution speaks of "law" it speaks of the will of the legislature enacted in due form, provided that such enactment is within the competence of the legislature.

On principle also it seems to us difficult to accept the suggested contrary concept of "law" equating it with principles of absolute justice or the rules of natural justice as they have sometimes been called. With changing social and political conditions notions regarding natural law change ; all that remains constant is the appeal to something higher than positive law. Rules of natural law are as the mirage which ever recedes from the traveller seeking to reach it. They are no doubt ideals to which positive law should strive to conform. But to accept natural law as a higher law which invalidates any inconsistent positive law would lead to chaos. There is no certain standard and no measuring rod by which the so-called principles of natural justice can be ascertained or defined. Each judge administering, natural justice would be a law

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unto himself. In seeking to escape from the arbitrary exercise of power by the State the exponents of this principle would but place themselves under the exercise of arbitrary powers by the judges. The burden on judges also would be intolerable. No judge worthy of his office relishes the exercise of arbitrary powers whether by himself or by any other person.

In our opinion, therefore, when section 16 of the Constitution speaks of "law" it is an enactment by Parliament or other competent legislative body that is contemplated. The Parliament and legislative bodies have their powers defined and circumscribed and within the limits so defined and circumscribed they make laws, binding on all in the Union.

In this view it would serve no useful purpose for us to discuss in detail the several decisions of the Supreme Court of the United States of America which have been cited by the learned counsel for the applicant. This does not mean, however, that we have not examined these decisions; we have examined them, but, as we think that the problem which faced the learned Judges of the Supreme Court of the United States of America is radically different from the problem which faces us in this case, we refrain from discussing these decisions here. In our view section 16 of the Constitution of the Union of Burma, so far as is relevant to the present case, should be paraphrased in the following sense: No citizen shall be deprived of his personal liberty except in such circumstances and under such conditions as Parliament or other competent legislature by an enactment made in due form specifies, provided that in so specifying the circumstances and conditions Parliament or other legislature has not acted beyond the limitations which the Constitution has set.

This brings us to the consideration of the learned Attorney-General's point that only express prohibitions, and not a prohibition by implication in the Constitution would invalidate an Act of Parliament or other competent legislature in the Union of Burma. He relies on the dictum of Isaacs J. in *The Federal Commissioner of Taxation* v. *Munro* (1). The learned Judge says :

It is always a serious and responsible duty to declare invalid, regardless of consequences, what the national Parliament, representing the whole people of Australia, has considered necessary or desirable for the public welfare. The Court charged with the guardianship of the fundamental law of the Constitution may find that duty inescapable. Approaching the challenged legislation with a mind judicially clear of any doubt as to its propriety or expediency—as we must, in order that we may not ourselves trangress the Constitution or obscure the issue before us—the question is : Has Parliament, on the true construction of the enactment, misunderestood and gone beyond its constitutional powers ? It is a received canon of judicial construction to apply in cases of this kind with more than ordinary anxiety the maxim *Ut res magis valeat quam pereat.* Nullification of enactments and confusion of public business are not lightly to be introduced.

" Unless, therefore, it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will. Construction of an enactment is acertaining the intention of the legislature from the words it has used in the circumstances, on the occasion and in the collocation it has used them. There is always an initial presumption that Parliament did not intend to pass beyond constitutional bounds. If the language of a statute is not so intractable as to be incapable of being consistent with this presumption, the presumption should prevail. That is the principle upon which the Privy Council acted in *Macleod* v. *Attorney-General for New South Wales* (2). It is the principle which the Supreme Court of the United States has applied, in an unbroken line of decisions, from Marshall C.J. to the present day

(1) 38 C.L.R. 153 at 180. (2) (1891) A.C. 455.

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[see *Adkins* v. *Children's Hospital* (1).] It is the rule of this Court [*see*, for instance, per Griffith C.J. in *Osborne* v. *Commonwealth* (2)."]

We see nothing, however, in this dictum—even though we feel that certain passages in it has gone beyond what we would have been able to subscribe to completely—in support of the learned Attorney-General's claim. We are of the opinion that no distinction can be drawn between a prohibition in so many words and a prohibition clearly implied.

The relevant provisions of the Public Order (Preservation) Act, 1947, reads as follows :

"5h. (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—

(*a*) . . . . . .

(*b*) directing that he be detained ; "

As we have noticed earlier these provisions have been attacked on behalf of the applicant as being beyond the powers of Parliament under the Constitution of the Union of Burma to enact. On the other hand the learned Attorney-General has claimed for these provisions not merely constitutionality but also as vesting the President—and by virtue of section 7 of the Act any such officer to whom the President may delegate his powers under section 5A—with the right without any question by the Supreme Court or any other authority to detain a citizen for an indefinite term.

Both claims, in our opinion, are misconceived. On the one hand we are satisfied that section 5A (1) (*b*) of the Public Order (Preservation) Act is within the competence of Parliament to enact. On the other hand

(1) (1923) 261 U.S. 525 at 544. (2) (1911) 12 C.L.R. at p. 337.

we are satisfied that these provisions do not grant to the President or his delegate arbitary powers to order the detention of a citizen for an indefinite period. In the view we take of the effect of section 5A of the Public Order (Preservation) Act it is not necessary for us to consider the larger question which has been propounded at length before us, namely, whether Parliament under the Constitution of the Union of Burma can grant to any authority, however highly placed, the exercise of arbitrary power of arrest and detention.

The learned Attorney-General relying on *Rex* v. *Halliday* (1) *and Liversidge* v. *Sir John Anderson* (2) contends that the President or his delegate is the sole judge of the necessity to act under section 5A of the Public Order (Preservation) Act and that once the President or his delegate has stated in the order of detention that he is so satisfied the matter is at an end and that neither this Court nor any other authority in the Union can challenge that statement. We notice that the Privy Council in *King-Emperor* v. *Vimlabai Despande* (3) appears to be willing to follow Liversidge's case in the interpretation of Rule 26 of the Defence of India Rules, the terms of which are substantially the same as those of Rule 26 of the Defence of Burma Rules. Section 5A of the Public Order (Preservation) Act, enacted on the 31st May 1947 reproduces substantially Rule 26 of the Defence of Burma Rules, which had been repealed only a few months earlier.

It would appear, therefore, as if the learned Attorney-General has strong Judicial support for his contention. But Lord Shaw, in the earlier case, and Lord Atkin, in the later one, have thrown their great weight, though without avail, against the subjective interpretation of phrases such as "is satisfied or has

(1) (1917) A.C. 260. (2) (1942) A.C. 206.
(3) 73 I.A. 144.

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reasonable grounds to believe" in whatever collocation they may appear ; and we cannot brush aside the very close reasoning of such eminent Judges in their speeches before the House of Lords. Moreover, in spite of the superficial similarity between the wording of the English Regulation 18B or Rule 26 of the Defence of India Rules or Rule 26 of the Defence of Burma Rules and section 5A of the Public Order (Preservation) Act, 1947, a careful examination of these enactments in the light of the sentiments of the learned Law Lords in the English cases makes it clear that section 5A of the Public Order (Preservation) Act is not *ad idem* with the English Regulation 18B or Rule 26 of the Defence of India Rules or Rule 26 of the Defence of Burma Rules.

In Liversidge's case the key note to the majority view was struck by Lord Macmillan at page 252 :

"It is, therefore, proper to consider with what object the regulation was made. This appears clearly from the terms of the empowering statute, the Emergency Powers (Defence) Act, 1939. By section 1, sub-section 1, of that Act 'His Majesty may by order in council make such regulations . . . . as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community.' The second sub-section in particular authorizes the making of Defence Regulations (*inter alia*) 'for the detention of persons whose detention appears to the Secretary of State to be expedient in the interests of the public safety or the defence of the realm.' There could be no clearer evidence of the intention of Parliament to authorize the abrogation in the public interest and at the absolute discretion of the Secretary of State of the ordinary law affecting the liberty of the subject."

Viscount Maugham at page 219 of the report says :

"The language of the Act of 1939 (above cited) shows beyond a doubt that Defence Regulations may be made which must

deprive the subject 'whose detention apppears to the Secretary of State to be expedient in the interests of the public safety ' of all his liberty of movement while the regulations remain in force. There can plainly be no presumption applicable to a regulation made under this extraordinary power that the liberty of the person in question will not be interfered with, and equally no presumption that the detention must not be made to depend (as the terms of the Act indeed suggest) on the unchallengeable opinion of the Secretary of State. The legislature obviously proceeds on the footing that there may be certain persons against whom no offence is proved nor any charge formulated, but as regards whom it may be expedient to authorize the Secretary of State to make an order for detention. The only safeguards, if they be safeguards, is that detention ' appears to the Secretary of State to be expedient in the interests of the public safety or the defence of the realm, ' and that he himself is subject to the control of the Parliament. "

Lord Wright at page 260 puts the *ratio decidendi* very clearly thus :

" Parliament is supreme. It can enact extraordinary powers of interfering with personal liberty. If an Act of Parliament, or a statutory Regulation, like Regulation 18B, which has admittedly the force of a statute, because there is no suggestion that it is *ultra vires* or outside the Emergency Powers (Defence) Act, under which it was made, is alleged to limit or curtail the liberty of the subject or vest in the executive extraordinary powers of detaining a subject, the only question is what is the precise extent of the powers given. The answer to that question is only to be found by scrutinizing the language of the enactment in the light of the circumstances and the general policy and object of the measure. I have ventured on these elementary and obvious observations because it seems to have been suggested on behalf of the appellant that this House was being asked to countenance arbitrary, despotic or tyrannous conduct. But in the constitution of this country there are no guaranteed or absolute rights."

It is clear from these extracts that it is not so much the actual wording of Regulation 18B as the wording of the Act which authorises the making of the regulation

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which swayed the House of Lords into giving a subjective operation to the words in question.

The Defence of Burma Act under which Rule 26 of the Defence of Burma Rules was made has in section 2 the following provisions :

"The Governor may, by notification, make such rules as appear to him to be necessary or expedient for securing the defence of British Burma, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community."

We find nowhere in the Public Order (Preservation) Act any provision such as formed the deciding factor in the deliberations of the House of Lords or the Privy Council in the three cases noted above. It is clear that but for these provisions in the English Act the ordinary rule that the objective test is applicable would have been accepted in all cases. Moreover, the right of personal liberty is a fundamental right assured to every citizen by the Constitution of this country. The learned Attorney-General relies also on a decision of the Supreme Court of Eire *In the Matter of the Offences Against the State (Amendment) Bill, 1940* (1). The question propounded by the President of Ireland was whether the Bill was repugnant to the Irish Constitution or any provision thereof. By a majority of three to two, the Supreme Court of Ireland answered that question in the negative. The decision itself, namely, that an Act—similar in many respects to our Public Order (Preservation) Act but providing greater safeguards in the interests of the person ordered to be detained and providing machinery for an independent examination of the materials on which the order of detention is made—did not offend the Constitution of Eire, we have no reason to challenge. But in the course

(1) 74 Irish Law Times, p. 61.

of the judgment delivered by Chief Justice Sullivant was foreshadowed—unnecessarily it seems to us—the doctrine of subjective interpretation of words such as "is satisfied" or "has reasonable cause to believe" appearing in enactments providing for the administration of what is often called "preventive justice."

We think that to seek to apply the subjective test to the "satisfaction" or the "belief" of the Minister in cases following under the Irish Bill then under consideration before the Supreme Court would clearly be against the provisions of that Bill taken as a whole. If the subjective test is the proper test and rightly applicable the detention must be made to depend on the unchallenged opinion of the Minister empowered. But under the Irish Bill (1) there is an immediate appeal from the order of detention made by the Minister to an Appeal Commission ; (2) the personnel of the Commission is such that there is ample safeguard of its independence of the Government ; (3) it is the duty of the Commission to investigate and to make a report ; (4) the Commission has the right to call on the Minister for such information and documents as they require ; and (5) if the Commission reports that there is no reasonable ground for the continued detention of the prisoner he must be released with all speed. To no "satisfaction" or "belief" which can thus be enquired into and overruled by an extraneous authority can the subjective interpretation be applicable.

If, as we hold, section 5A of the Public Order (Preservation) Act does not grant arbitrary and uncontrolled powers to the President or his delegate, the contention of the learned counsel for the applicant that this Act is unconstitutional falls to the ground. We have said that Parliament can by positive enactment define the circumstances and conditions under which any authority which it, in due exercise of its legislative

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powers, has empowered may interfere with the personal liberty of the citizen. We can see no distinction in principle between the provisions of the Public Order (Preservation) Act and the preventive provisions of the Code of Criminal Procedure.

In the view we take of the Public Order (Preservation) Act the question whether the administration of "preventive justice" falls within the purview of section 153 or of section 150 of the Constitution is not necessary to be decided. All that we need note here in this connection is that the provisions of section 150 of the Constitution are radically different from the corresponding provisions in the Irish Constitution. Neither is it necessary to scrutinise the definition which the High Court of Australia in *The Federal Commissioner of Taxation* v. *Munro* (1) has given of the term "judicial power" appearing in the Australian Constitution. Here again it may be noted that the Irish Constitution of 1922 used the term "judicial power" but that this term was abandoned in the Constitution of 1937 and it is in the Constitution of 1937 that we find the closest resemblance so far as the judiciary of the Union of Burma is concerned. Why the term "judicial power" was abandoned and what effect in law the change in the wording from the Constitution of 1922 to the Constitution has are questions which we may have to consider on a suitable occasion but they do not arise now.

It now remains to examine if the facts disclosed in the affidavits are such as to justify the continued detention of the applicant's husband. The test appears to us to be whether it can be said that the Commissioner of Police, on the materials which he had placed before the Court, can be reasonably satisfied of the necessity to keep the applicant's husband further detained.

(1) 38 C.L.R. 153 at 180.

A few words in explanation of the test we have just propounded. The notion of reasonableness must be presumed in the exercise of such grave powers as interference with the fundamental right of personal liberty which the Constitution has assured to each citizen. If authority for what appears to be an obvious proposition is needed, we have the authority of Lord Wright in Liversidge's case (1), strongly leaned upon by the learned Attorney-General.

Again, if as we hold, the objective test is applicable to determine whether the Commissioner of Police "is satisfied" or not, of the necessity to act, we must examine the materials to see if they are such as could have satisfied the Commissioner of Police. We fully realize that we are not sitting here in appeal from the Commissioner of Police and that we are not entitled to substitute our conclusions on facts for his. But a distinction must be drawn and must be kept ever present before our minds between reasonable satisfaction and apprehension born of vague anticipation. Reasonable satisfaction of the necessity to direct detention is the basis of the exercise of power under section 5A of the Public Order (Preservation) Act. It is an abuse of that power to exercise it on an apprehension born of vague anticipation.

The Commissioner of Police has stated in his affidavit 11 grounds altogether in support of the continued detention of the applicant's husband. The first ground we consider entirely irrelevant. In paragraph 6 (1) (*a*) is mentioned the incident which was alleged to have occurred sometime in 1947. It must be remembered that the applicant's husband was arrested and detained under section 5A of the Public Order (Preservation) Act on the 20th July 1947 and that he was released later on the 8th May 1948. What

(1) (1942) A.C. 206.

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happened before his first arrest and detention cannot be of any weight in this case. These allegations can hardly be relevant for consideration in July 1948 when the applicant's husband was re-arrested or at this present date when the application for release is made.

Coming to the second ground placed before us in support of the detention, it is said that in June 1948, after his release from the first detention he rallied round him *ex*-yebaws who had grievances against the Government and who would obey him blindly for the purpose of overthrowing the Government by violent means. That may be true ; but that was in June 1948. We are not told what has happened to these *ex*-yebaws after the expiry of one year and eight months. We are not told that they are still banded together and that they are as such a menace to public safety or public peace to this day.

The third ground is that on the 7th July 1948 there was a meeting at the residence of the applicant's husband when *ex*-yebaws, who were said to be notorious criminals, and others were present. But the affidavit of Thakin Ba Sein is before us to show that it was merely an ordinary political meeting. Every citizen in this country has a right to convene or to be present at a political meeting. The fact that some of those who attended were criminals would not make every one who attended liable to be detained under the Public Order (Preservation) Act. It is said that Ba Kyi and Kyaw Than, who were present at the meeting, were wanted by the police and that Ba Kyi was arrested after the meeting. We are not told, however, what has since happened to Ba Kyi. The arrest was made one year and eight months ago. Has Ba Kyi been convicted ? We do not know.

In clause (*d*) is made an allegation for the first time in the present proceedings. When the first application

for the release of the applicant's husband was made, after his detention on the 14th July 1948, the Commissioner of Police who directed the detention did not in his affidavit seek to justify the arrest or detention on the ground set out in that clause by his successor. Besides we see no reasonable connection between these facts and the detention of the applicant's husband. What was said is that on the 10th July 1948 a party of five men were arrested with an unlicensed pistol and cartridges in a jeep. We do not know definitely what has happened to these people ; whether they have been convicted or not. It was said from the Bar that Tun Kyaing, one of the five men, has been discharged and that the other four persons were never sent up for trial. But since it has not been shown that they have been convicted for any offence an allegation like this cannot be taken into serious consideration. The necessity ever to bear in mind the distinction between reasonable satisfaction and mere apprehension on vague anticipation is made apparent by such allegations often relied upon before us in support of detentions under section 5A of the Public Order (Preservation) Act. The personal liberty of a citizen, guaranteed to him by the Constitution, is not lightly to be interfered with and the conditions and circumstances under which the legislature allows such interference must be clearly satisfied and be present.

In clause (*e*) it is said that Bo Yan Naing is also connected with the "Yebawhaung" Association of Pegu District of which Bo Tun Shein is the local leader. That may be so. The Commissioner of Police goes on to say that in July 1948 Bo Tun Shein was arrested with three hand-grenades and as he went into the Police lock-up he shouted out that he was a real Communist rebel. Even granting this, we see no connection between this incident and Bo Yan Naing.

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This incident was referred to for the first time by the present Commissioner of Police. His predecessor either forgot or did not think it important enough to receive mention.

In clause (*f*) we find an extreme case of an apprehension on vague anticipation. It reads :

"Regarding this 'Yebawhaung' or '*Ex*-Yebaws' Association led by Bo Yan Naing, there was information that Bo Yan Naing, for the present, will not show his hand but will remain behind the scene until the opportune moment comes. All the disgruntled *ex*-BDA, *ex*-PBF and persons who thought they had been let down by the present Government were recruited and since they have no other vocation or profession they live on crime."

Being imperfect, it can be presaged of every man that he is a potential criminal but that would not justify each one of us being detained in custody on that bare possibility.

In clause (*g*) it is said that there were ample grounds to show that Bo Yan Naing had been rallying around him criminals and desperadoes. If that was so the proper course would have been to take action against him under section 110 of the Criminal Procedure Code. We have in many previous cases said that the Public Order (Preservation) Act is not intended to be used in place of the preventive sections of the Criminal Procedure Code.

In clause (*h*) it is said that Bo Yan Naing had a contact in Siam in the person of one Thein Hlaing through whom *ex*-BIA personnel in Siam were being rounded up to join Dr. Ba Maw's party and that they were waiting for an opportune moment and a signal from Bo Yan Naing to march into Burma in order to overthrow the present Government. When, on the 14th July 1948 or shortly before, the Commissioner of Police had received this information, it may have

justified the action he took then to direct the detention of Bo Yan Naing. But a year and eight months have gone by and the Commissioner of Police has not been able to tell us in his affidavit or through the learned Attorney-General of any materialisation in pursuance of this alleged contact between Bo Yan Naing and Thein Hlaing in Siam. Nothing in the least tangible has come out of this information so far as the record shows.

The present Commissioner of Police has added four further grounds in support of his claim to keep the applicant's husband further detained. In clause (*a*) of the additional grounds it is said that Bo Yan Naing had collected and concealed a large quantity of arms and ammunition for the purpose of overthrowing by force of arms the Government. It is said that these arms and ammunition are hidden somewhere in Rangoon and are still intact. The Commissioner of Police does not tell us whether he claims that this collection of arms and ammunition in large quantities was made prior to the first detention or after the first detention of the applicant's husband. Remembering that the applicant's husband was at liberty only for two months and six days after his first detention, and in the absence of any definite statement to the contrary in the affidavit of the Commissioner of Police, we must presume that what he intended to say was that this was prior to the first arrest in 1947.

In clause (*c*) of the additional grounds it is said that Bo Yan Naing's followers, who were detained and subsequently released, headed by Bo Moke Sein, are trying their best to secure Bo Yan Naing's release by all means, including a jail-break, with a view to re-organizing subversive activities which Bo Yan Naing had in view before his arrest and detention. These "followers" were detained under section 5A of the

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Public Order (Preservation) Act presumably because the Commissioner of Police was satisfied that they would be a menace to public order and safety. But they were subsequently released, not by us but by the Commissioner of Police himself, presumably because he was satisfied that they were no longer such a menace. It is very difficult to understand why, if these persons had been released by the Commissioner of Police because he did not think them to be a menace to the public safety and order, he should still regard them as constituting a menace if Bo Yan Naing should be released. The fact that no action against them has been taken or alleged to be taken in respect of the allegation that they are trying their best to secure Bo Yan Naing's release by all means, including a jail-break, is the best evidence that this allegation is not worthy of serious consideration for the purpose of justifying the detention of the applicant's husband.

Lastly, the Commissioner of Police said that Bo Yan Naing's release will serve as a signal for all his followers to rally around him and carry out their plan to rise in arms against the Government and that there is every reason to apprehend that there will be a widespread uprising by his men under his leadership. This is another instance of apprehension based on mere possibilities and we are satisfied that on such apprehension the Commissioner of Police had no right or authority to act under section 5A of the Public Order (Preservation) Act.

In the result we direct that Bo Yan Naing be released forthwith.

## SUPREME COURT.

KEAN GWAN AND CO. (APPLICANTS)

*v.*

THE CUSTODIAN OF MOVEABLE PROPERTIES, BURMA AND ONE (RESPONDENTS).*

†S.C. 1950

*Feb. 21.*

*Defence of Burma Rules 81 (2) (a), 81 (4) and 83—Custodian of Moveable Property Act, ss. 7 and 8—Duty of Law Officers.*

Under Rule 81 of the Defence of Burma Rules calling for information can only be for the purpose of Rule 83, namely for requisitioning the property on behalf of the Government and the information as to stocks held. If Government decided to requisition the property, compensation is payable under Sub-Rule (3) of Rule 83.

When the Applicants asked for the price of stock of Ores delivered in pursuance of and the Deputy Commissioner, Tavoy, in his capacity as Assistant Custodian of Moveable Property, passed an order to forfeit to the Government the stock of Ores previously requisitioned and delivered.

*Held:* That the Ores in question were not delivered to the Assistant Custodian of Moveable Property under s. 7 (*1*) of the Custodian of Moveable Property Act nor were they seized and taken possession of under s. 7 (2). Consequently the order purporting to forfeit to Government would be quashed by way of directions in the nature of certiorari.

Law Officers of the Government should always advise in such manner that justice should be done to persons concerned.

*P. K. Basu* for the applicants.

*Choon Foung* (Government Advocate) for the respondents.

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

U E MAUNG.—This judgment will apply to Civil Miscellaneous Applications Nos. 18, 19, 20, 21 and 42 of 1949.

These proceedings disclose the most sorry state of affairs and, if we are to accept in its entirety the

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* Civil Misc. Application No. 18 of 1949.

† *Present:* U E MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE THEIN MAUNG and U THAUNG SEIN, J.

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explanation offered on behalf of the Government by the learned Government Advocate, there appears to have been a series of attempted frauds on behalf of the Government. There was issued on the 23rd December 1945 a notice under Rule 81 (2) of the Defence of Burma Rules by the then Senior Civil Affairs Officer, Tavoy, calling upon all persons who had in their possession tin ores or tin concentrates or wolfram to declare their stocks to him within 15 days. It was said in that notice that persons failing to declare would be prosecuted under section 81 (4) and severely punished. This was followed by a subsequent notice issued on the 2nd April 1946 by the Deputy Commissioner, Tavoy. This notice was also under Rule 81 (2) (a) of the Defence of Burma Rules and called upon the person holding stocks of " looted Japanese ores " to sell them before the 21st April 1946 to His Majesty's Government. It threatened the seizure or confiscation of such stocks as remain unsold to Mr. A. P. Ruddy, Tin Purchasing Agent of His Majesty's Government by that date. The notice also stated that those persons who could not make immediate delivery to Mr. Ruddy should register their stocks with him and he would arrange to collect them.

A reference to Rule 81 of the Defence of Burma Rules makes it clear that the notice calling for the information could have only been for the purpose of Rule 83. Information would have to be supplied when called upon by the Government and once it is declared Government can, under Rule 83, requisition stocks so declared. But it is clear that if Government decided to requisition the property, compensation is payable under sub-rule (3) of Rule 83. In respect of requisitioning of the stocks in exercise of the powers under Rule 83, Mr. Ruddy entered into a

transaction on behalf of his Majesty's Government which can only be described as one of purchase. This is clear from the letters written by Mr. Ruddy, which are filed in the proceedings. For instance, in the letter of the 20th April 1946 addressed to the applicants in this case, Annexure "D" to the affidavit of the applicants, it is stated :

"I informed you verbally on the 17th instant that your ore would be taken over by the Ministry of Supply at the scheduled rate for official ore buying, laid down by the Government, in Tavoy at the present time."

It is clear therefore—whatever the concealed intention of the officers then concerned might have been—the transaction that was entered into between the applicants and Mr. Ruddy was one of sale and purchase.

Later, when the applicants asked for the price of the ores delivered to Mr. Ruddy, the Deputy Commissioner, Tavoy, opened what purported to be proceedings under the Defence of Burma Rules. The relevant provision would be Rule 83. On the 6th October 1947 there is a diary entry under the hand of the Akunwun of Tavoy as follows :

"As verbally ordered by the Deputy Commissioner proceeding is transferred to Custodian Department for necessary action."

Then on the 13th October 1947 the Deputy Commissioner, Tavoy, in his capacity as the Assistant Custodian of Moveable Property for Tavoy District passed an order purporting to forfeit to the Government the bulk of the ores which had been delivered to Mr. Ruddy in 1946 and accordingly rejecting the claims of the applicants for payment in respect of such ores. It is this order which we are asked to quash by way of directions in certiorari.

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The learned Government Advocate has not been able to point to any provision in the Custodian of Moveable Property Act which authorizes the Assistant Custodian of Tavoy to act in the manner he did. Half-heartedly he sought to rely on sections 7 and 8 of the Act. But section 7 is clearly inapplicable. The power of disposal which section 8 gives cannot also be said to be applicable. The ores in question were not delivered to the Assistant Custodian of Moveable Property under section 7 (1) of the Act. Neither were they seized and taken possession of under section 7 (2).

It follows therefore that the order now questioned must be, and we hereby direct that it be, quashed.

We must say we are very much surprised at the Government of the Union being advised by its law officers to contest the persent applications. It is evident that gross injustice had been done to the applicants and we would have expected the law officers to advise that justice should be done to them. In the circumstances we allow Advocate's fees twenty gold mohurs.

## SUPREME COURT.

MAUNG HAN THEIN (APPLICANT)

*v.*

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

† S.C. 1950

*Feb. 21.*

*Criminal Procedure Code, s. 523 (1)—Mandatory.*

***Held :*** S. 523 (1) of the Criminal Procedure Code makes it mandatory for any Police Officer seizing property under circumstances which created suspicions of the commission of an offence should forthwith report to a Magistrate. The Magistrate to whom such report is made is the only person competent to make such order as he thinks fit regarding the disposal of such property or the delivery thereof to the person entitled to the possession thereof.

*B. W. Ba Tun* for the applicant.

*Ba Sein* (Government Advocate) for the respondents.

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

U E MAUNG.—On the 9th September 1948 U Ba Thein, an Inspector of Police of the Criminal Investigation Deparment, seized 53 one hundred-rupee notes from the possession of the applicant as it appeared to the police officer that there were circumstances which created suspicions of the commission of a theft by the applicant. The police officer then asked for the orders of U Han, Superintendent of Police, Western Division, Rangoon, and on the 15th June 1949, over six months later, U Han sent a telegraphic message to the District Superintendent of Police, Pyapôn, asking him, according to his affidavit, " whether these 53 currency notes were wanted in any criminal case, " in

* Civil Misc. Application No. 53 of 1949.

† *Present :* U E MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE THEIN MAUNG and U THAUNG SEIN, J.

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Pyapôn District. Apparently no reply has been received to date from Pyapôn. U Han also states that he and the Rangoon Town Police are awaiting a reply from the District Superintendent of Police, Pyapôn, as to the disposal of these currency notes.

It appears to us that the police officers in Rangoon have overlooked the provisions of section 523 of the Code of Criminal Procedure. Sub-section (1) of this section makes it mandatory for any police officer seizing property under circumstances which create suspicion of the commission of any offence to forthwith report to a magistrate. It is for the magistrate to whom such report is made to make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof. It is admitted by the learned Government Advocate, who appears for the Commissioner of Police, Rangoon, the Superintendent of Police, West Rangoon and the Police Station Officer, Lanmadaw, Rangoon, that no report whatsoever has yet been made.

In these circumstances we direct that the respondents do make forthwith a report in the terms of the provisions of section 523 (1) of the Code of Criminal Procedure.

## SUPREME COURT.

STEEL BROS. & CO. LTD. (APPLICANTS)

*v.*

THE COURT OF INDUSTRIAL ARBITRATION AND OTHERS (RESPONDENTS).*

† S.C. 1950

*Feb. 22.*

*Writs of Certiorari and Prohibition.—Trade Disputes Act.*

Where the employers published a warning notice on 7th March 1949 that they would close their business as Saw Millers early in April 1949 and gave notice to all their workers that with the exception of some, other workers would cease to be employed with effect from 12th April 1949, but before that date the Workers' Union formulated their demands and presented them to the employers and the demands were referred to the Industrial Court for determination.

*Held :* That on the 6th April 1949 the demands made on behalf of the Workers and rejected by the Applicant would constitute a trade dispute. And the reference of the trade dispute to the Industrial Court was correct.

*E. C. V. Foucar* for the applicants.

*Ba Sein* (Government Advocate) for the respondents Nos. 1 and 3.

*Yan Aung* for the respondent No. 2.

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

U E MAUNG.—This application for directions in the nature of certiorari and prohibition must be dismissed.

On the 7th March 1949 the applicants published a warning notice that their business as saw millers would have to be closed down early in April 1949. It is admitted that this is not a notice of termination of the services of the workers employed by the applicants. On the 4th April 1949 the Workers' Union met and

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* Civil Misc. Application No. 72 1949.

† *Present :* U E MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE THEIN MAUNG and U THAUNG SEIN, J.

S.C. 1950

STEEL BROS. & CO. LTD. v. THE COURT OF INDUSTRIAL ARBITRATION AND OTHERS.

decided to formulate certain demands in anticipation of the threatened closing down of the saw mill. Before these demands could be presented to the applicants, the applicants apparently in pursuance of their warning given on the 7th March 1949, gave notice to all their workers that, with the exception of such persons as they would specify within a day or two, the workers would cease to be employed with effect from the 12th April 1949. On the 6th April 1949 the demands which were formulated on the 4th April 1949 by the Workers Union were presented to the applicants.

These demands were not accepted by the applicants in their entirety and on the 9th May 1949 the President, in exercise of the powers under section 9 of the Trade Disputes Act, referred the demands of the workers which were rejected by the applicants to the Industrial Court for determination.

At the hearing Mr. Foucar for the applicants frankly, and in our opinion rightly, conceded that on the 6th April 1949 where the workers demands were presented to the applicants, all the workers could not be said to have had their employment terminated. According to him there were still 180 workers in the saw mills and in the office still in employment at that date. U Yan Aung, who appears for the Saw Mill Workers' Union, claims that there were more than 180 workers who could rightly claim that on the 6th April 1949 they were still in employment. This, however, is not a matter which is relevant in the present proceedings but will have to be adjudicated upon later when the effect of the award made by the Industrial Court under section 13 (*a*) of the Trade Disputes Act comes to be considered. For our purpose, all that is necessary to say is that on the 6th April 1949 there were still some workers employed by the applicants

and that the demands made on behalf of these workers and rejected by the applicants would constitute a trade dispute.

Mr. Foucar does not contend that the claims made on behalf of such workers would not amount to a trade dispute merely because the payments contingent on later termination of their services are described as "bonuses" or "gratuities." He agrees that they can be terms of employment in respect of those workers who were, when the demands were made, in employment and continued in employment.

The respondents, when the case was first called for hearing, were not prepared with the necessary affidavits to meet the applicants' case. Time had to be granted to them to enable them to file the affidavits. Accordingly we do not consider that they are entitled to costs in these proceedings.

## SUPREME COURT.

† S.C. 1950

*Feb. 22.*

B. R. KAMDAR (APPLICANT)

*v.*

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

*Urban Rent Control Act, s. 21A—Permit subsequently withdrawn—Tenant—Application under s. 16A only by tenant.*

Where the wife of a tenant of some premises applied to the Controller for permission to assign tenancy, and the Controller first issued a permit to that effect but subsequently, on the application of the real tenant, withdrew the permit and the party affected applied for a writ of certiorari.

*Held* : That the term "tenant" in the Urban Rent Control Act means one by whom, or on whose account rent for the premises is paid, or the legal representative of a tenant, or a person deriving title from a tenant, or a tenant, holding over; and the wife of the tenant is not a tenant according to this definition.

An application for permission to assign a tenancy lies only at the instance of a tenant. Consequently the original application for assigning tenancy at the instance of the wife was incompetent.

Even if there had been irregularities in the Review proceedings before the Controller of rents setting aside the original permit, it would be wrong for the court to uphold the original order, for the original application on which orders were passed is incompetent.

*Aung Min* (2) for the Applicant.

*Ba Sein* (Govemnent Advocate) for the respondent No. 1.

*M. M. Rafi* for the respondent No. 2.

*Ahmed* for the respondent No. 3.

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

U E MAUNG.—This application must be dismissed.

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* Civil Misc. Application No. 73 of 1949.

† *Present* : U E MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE THEIN MAUNG and MR. JUSTICE THAUNG SEIN, J.

One Daw Mi Mi Gyi, otherwise calling herself Mrs. S. E. Bhaiyat, applied to the Controller of Rents of the City of Rangoon on the 19th November 1948 for permission to sublet in favour of the present applicant Room No. 5 in House No. 192—194, Barr Street, Rangoon. She made the application describing herself as the tenant of the premises and attached to the application a letter she had written to the owners of the premises and the reply she received which stated that the rent for the said room had been paid up till the 31st October 1948. On this application the Controller of Rents passed the following order: "Issue permit. Assign tenancy." The applicant in consequence of this order came into occupation of the premises.

Daw Mi Mi Gyi thereafter apparently disappeared from Burma and went away to India. On the 18th February 1949 S. E. Bhaiyat made an application to the Controller of Rents stating that he was in fact the tenant of the premises in question and that Daw Mi Mi Gyi, who is his second wife, had no right whatsoever to represent herself as the tenant of the premises and to make the application of the 19th November 1948. The Controller of Rents, acting under section 21A of the Urban Rent Control Act, withdrew the permit which he had previously given on the application of Daw Mi Mi Gyi. It is against this order of the Controller of Rents that the present application is made.

U Aung Min (2), who appears for the applicant, has drawn our attention to the fact that under section 21A of the Urban Rent Control Act review proceedings are required to approximate to review proceedings under Order 47 of the Civil Procedure Code. He claims that only on such grounds as are mentioned under Order 47 (1) of the Civil Procedure Code would an

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B. R. KAMDAR v. THE ASSISTANT CONTROLLER OF RENTS AND OTHERS.

application for review under the Urban Rent Control Act be maintainable. He also claims that a review application under the Act must be made within the period prescribed by Article 173 of the Limitation Act. He has placed many authorities before us which he contends support the claims we have stated above.

It is not necessary, however, to discuss the decisions in detail. It is clear from a reference to the definition given in the Urban Rent Control Act of the term "tenant" that Daw Mi Mi Gyi was not a tenant. She was not a person by whom or on whose account rent for the premises was paid. She was not a legal representative of the tenant nor a person deriving title from the tenant. She was clearly not a tenant holding-over. That being so, the original application under section 16A of the Act filed by her was not a competent application ; an application to the Controller under this section can only be made by a tenant.

Once we hold that the application under 16A of the Act is not competent, it would be thoroughly wrong for us to uphold it even if there had been irregularities in the review proceedings which set it aside. As we have said at the beginning of the judgment, the application must be dismissed. The applicant must pay the costs of the respondents. Advocate's fees five gold mohurs.

## SUPREME COURT.

## AH FAT (*a*) U AUNG THEIN (APPLICANT)

*v.*

## U THA WIN AND ANOTHER (RESPONDENTS).*

†S.C. 1950

*Jan. 25*

*Union Citizenship (Election) Act, 1948, s. 8—Powers of Judge to review issue of certificate—Jurisdiction—Assumption of—Writ of prohibition—When can issue.*

The applicant applied for a Citizenship Certificate and stated that he was born at Mergui but was residing at Rangoon, and notice was accordingly issued to the Deputy Commissioner, Rangoon, and after enquiry a Certificate of Citizenship was issued ; and thereafter application was made to Court to revoke the Certificate.

*Held :* That by virtue of s. 8, clause 5 of the Union Citizenship (Election Act, 1948, the Certificate of Citizenship became fully effective. The learned Judge who issued the certificate, had no authority to review his order and cancel the certificate or to hold a *de novo* enquiry. The right of review just like the right of appeal is a creature of Statute.

*Won Shwe Bee* v. *The Commissioner of Police and one*, B.L.R. 1949, S.C. 157, followed.

A Court has jurisdiction to decide in any particular case whether it possesses jurisdiction to entertain the suit or not and when a duly constituted Court assumes jurisdiction it must be taken that it has decided the question that it possesses the jurisdiction it has exercised.

*S. A. Nathan* v. *S. R. Samson*, 9 Ran. 480 at 494, followed.

S. 5 of the Act does not require that notice must be issued to the Deputy Commissioner of the place where the applicant was born and to the Deputy Commissioner of the place where he is for the time being residing.

*Held further :* That where a definite remedy is provided, *e.g.* appeal to the High Court under s. 476 (*b*) of the Code of Criminal Procedure an application for direction in the nature of prohibition cannot be entertained.

*Thein Moung* for the applicant.

*A. H. Paul* for the respondents.

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

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* Civil Misc. Application No. 66 of 1949.

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

S.C. 1950

AH FAT (a) U AUNG THEIN v. U THA WIN AND ANOTHER.

U E MAUNG.—In this application two reliefs are sought: the first by way of directions in the nature of certiorari and the second by way of directions in the nature of prohibition.

The applicant, claiming to be a person entitled under section 11 of the Union Constitution to elect for citizenship, applied to the 3rd Judge of the Rangoon City Civil Court for a certificate under section 3 of the Union Citizenship (Election) Act, 1948. In his original application the applicant had stated that his place of residence was Mergui and the learned 3rd Judge made the following diary entry :

> " According to the application, the petitioner is a Chinese, born at Mergui. It is stated in paragraph 3 of the application that the permanent residence of the petitioner is at Mergui and therefore this application does not come under section 3 of the Union Citizenship (Election) Act, 1948. The application may be put down for admission."

On the date fixed for hearing as to admission the learned Counsel for the applicant stated to the Court that the applicant is also residing at No. 143, Maung Khine Street, Rangoon, and asked for permission to amend paragraph 3 of the application. This was granted and notice was directed to be issued to the Deputy Commissioner, Rangoon.

Notice was directed to be issued to the Deputy Commissioner, Rangoon, apparently in view of section 5 (*1*) of the Union Citizenship (Election) Act, 1948, where it was laid down that on an application being made for a certificate of citizenship notice of such application shall be issued to the Deputy Commissioner of the district where the applicant resides. No objection was made on behalf of the Deputy Commissioner, Rangoon, to the grant of the certificate sought with the result that on the 15th January 1949 the learned

3rd Judge held that the applicant had established his right to the certificate and had a copy of his findings sent to the Ministry for Judicial Affairs.

The Minister for Judicial Affairs accepted the findings of the learned 3rd Judge and issued a certificate in terms of section 8 (*1*) of the Act. This certificate was received by the learned 3rd Judge and on the 28th January 1949 the applicant appeared before the Court and subscribed to a declaration on oath renouncing any other nationality or status as citizen of any foreign country that he may at that time possess. Consequently, by virtue of section 8 (*5*) of the Act the certificate of citizenship became fully effective.

Some time later and on the 16th March 1949 the learned 3rd Judge received instructions, as he calls them, from the Ministry of Judicial Affairs asking him to hold an enquiry into the allegations of U Tha Win, the 1st respondent before us. The learned 3rd Judge accordingly issued notice to the applicant to show cause why the certificate of citizenship issued to him should not be cancelled. After hearing Counsel the learned 3rd Judge set aside the finding arrived at by him on the 15th January 1949 and stated his intention to hold a *de novo* enquiry into the application after issuing notice to the Deputy Commissioner, Mergui.

Simultaneously with the application of U Tha Win to set aside the grant of the certificate of citizenship there was also filed an application for an enquiry under section 476 of the Criminal Procedure Code with a view to having the applicant prosecuted for perjury in respect of certain statements in his original application for a citizen certificate.

The applicant now desires the order setting aside the finding of the 3rd Judge of the 15th January 1949

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AH FAT (a) U AUNG THEIN v. U THA WIN AND ANOTHER.

quashed and an order by way of directions in the nature of prohibition restraining the further progress in the proceedings under section 476 of the Criminal Procedure Code.

Mr. Paul who appears for the first respondent has not been able to point to any provisions in the Union Citizenship (Election) Act empowering the learned 3rd Judge to review his own order. As has been said by this Court in *Won Shwe Bee* v. *The Commissioner of Police and one* (1) the right of review, just like the right of appeal, is a creature of Statute and it is not inherent in any proceeding before a Court of justice. The learned 3rd Judge appears to have realized that he has no power to review his own previous decisions. For reasons which we have not been able to appreciate stated in his lengthy judgment, he appears to have come to the conclusion that by the action proposed to be taken by him he is not reviewing his previous order.

It cannot be said in this case that the 3rd Judge when he held the first enquiry and came to a definite finding was acting without jurisdiction. A Full Bench of the Rangoon High Court in *S. A. Nathan* v. *S. R. Samson* (2) has held—and rightly in our opinion—that a Court has jurisdiction to decide in any particular case whether it possesses jurisdiction to entertain the suit or not, and when a duly constituted Court assumes jurisdiction to try a suit it must be taken thereby implicitly to assert that it possesses the jurisdiction which it is exercising. All that Mr. Paul has been able to stress before us is that because a notice under section 5 of the Act—as he reads it—has to be issued to the Deputy Commissioner, Mergui, and as this was not done the proceedings in the original application were void. He

(1) B.I.R. (1949) S.C. 157. (2) 9 Ran. 480 at 494.

has, however, not been able to place before us any authority in support of this proposition. Besides it will be found that section 5 does not require that notice must be issued to the Deputy Commissioner of the place where the man was born as well as to the Deputy Commissioner of the place where he for the time being resides.

It is clear therefore that the application for quashing the proceedings in Citizenship Application No. 1 of 1949 must be, and it is hereby, granted.

Different considerations will, however, apply when we come to consider the other application, *viz.*, the application for an enquiry under section 476 of the Criminal Procedure Code. That application is a distinct application and the 3rd Judge is competent to hold the enquiry. Further, a definite remedy is provided to the applicant before the High Court under section 476B of the Criminal Procedure Code if at any time a complaint is made.

The application for direction in the nature of prohibition in respect of Citizenship Application No. 2 of 1949 of the 3rd Judge of the Rangoon City Civil Court must therefore be dismissed.

There will be no order as to costs.

## SUPREME COURT.

† S.C. 1950

*Jan. 30.*

# SHAN MOUNTAIN ESTATES, LTD. (APPLICANT)

*v.*

# THE INCOME-TAX OFFICER, COMPANIES CIRCLE, RANGOON (RESPONDENT).*

*Prohibition—Writ of—Federated Shan States—Income-tax Act if extends to—Letter from Chief Secretary relied on—Unauthenticated copy—Effect—Letter if Notification under s. 40, Government of Burma Act—Coffee grown in Shan States—Company incorporated in British Burma—S. 4, Income-tax Act—Agricultural income—S. 2 (1)(b), Income-tax Act—General Clauses Act—S. 2 (26)—Agricultural income and income from agriculture.*

On the Applicant's petition for a writ of prohibition to restrain assessment to Income-tax for 1947-48 and 1948-49 income from business of growing coffee and other produce on lands in Hsipaw State, for which money was paid to the Ruler.

*Held:* That a copy of the letter from the Chief Secretary to the Commissioner, Federated Shan States relied on by Government cannot be acted upon and even the original, if produced, could not have the effect of a Notification required under s. 40 of the Government of Burma Act.

Even if the Income-tax Act did not extend to the Shan States such income might become taxable under the Act when received in British Burma, unless it was income from agriculture arising in a state in Burma from land for which any payment in kind or in money is made to the State. The terms "agricultural income" and "income from agriculture" are different. The first is a term of art while the second is not. Under Burma General Clauses Act, s. 2 (26) as it stood before 4th January 1948 Government includes a person authorized by the Government of Burma Act, 1935, to exercise the executive authority of Burma. The Federated Shan States fall within Part I of the Second Schedule of the Government of Burma Act, 1935, where the Governor exercises power in his discretion and it was therefore under the authority of the Governor that the *Sawbwa* exercises executive authority and collected revenue on land. The income from such land is therefore protected both under s. 4 (2) and 4 (3) provisos. The income after 4th January 1948 have the same protection as also that of s. 4 (3) (viii) as adapted under Union of Burma (Adaptation of Laws) Order, 1948, and is not taxable.

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* Civil Misc. Application No. 77 of 1949.

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

*G. Horrocks* for the applicant.

*Ba Sein* (Government Advocate) for the respondent.

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

U E MAUNG.—By this application for directions in the nature of prohibition the applicants seek to restrain the Income-Tax Officer, Companies Circle, Rangoon, from proceeding with the assessment of income-tax in respect of the income for the years 1947-48 and 1948-49, which the applicants claim they derived from their business of growing coffee and other produce on certain lands in the Hsipaw State.

The applicants claim that prior to the 4th January 1948 the Income-Tax Act did not extend to the Hsipaw State which was then part of the Federated Shan States and did not form part of British Burma. For this proposition reliance is placed on the provisions of section 1 of the Act as it stood before the 4th January 1948 and to section 40 of the Government of Burma Act, 1935.

The Income-tax Officer in his objections to the application before us relies on a letter from the Chief Secretary to the Government of Burma, Home and Political Department, to the Commissioner, Federated Shan States, dated the 16th September 1929. Unfortunately, neither the original of that letter nor a duly authenticated copy of it appears to be available to him, for, at the hearing the learned Government Advocate produced for our inspection what purports to be an unauthenticated copy of the letter. Apart from the fact that we find it impossible to act on such a document, even the original of it, assuming every thing in favour of the respondent, is not sufficient

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SHAN MOUNTAIN ESTATES, LIMITED v. THE INCOME-TAX OFFICER, COMPANIES CIRCLE. RANGOON.

to effect an extension of the Burma Income-tax Act to the Hsipaw State. It appears to be merely a communication stating the inexpediency of extending the Act as a whole to the Shan States and indicating the Governor's decision to apply the provisions of the Act to certain classes of persons and to certain classes of income only. This communication could not have the effect of a notification required under section 40 of the Government of Burma Act, 1935.

That consideration, however, is not conclusive. The applicants are a company incorporated and having its headquarters in what was then British Burma and even if the Income-tax Act did not extend to the Shan States, on the income accruing in the Shan States being brought into British Burma it would be exigible—other things necessary for the purpose being present—to income-tax in British Burma under section 4 of the Act. It is therefore necessary to examine the provisions of section 4 of the Income-tax Act. Before the 4th January 1948 the second proviso to the section read as follows :

> "Provided further that nothing in this sub-section shall apply to income from agriculture arising or accruing in a State in Burma from land for which any annual payment in money or in kind is made to the State."

From the materials on the record it appears—and in fact this is not challenged on behalf of the respondent—that the applicants were under a duty to make and have been making annual payments in money to the Hsipaw State for the lands on which they had been growing coffee and other agriculture produce. It will appear therefore that this proviso would operate to save the income from agriculture arising or accruing in Hsipaw State prior to the 4th January 1948 from the

operation of section 4 (*1*) of the Act, even if that income was brought into British Burma.

The learned Government Advocate, relying on the definition of "agricultural income" in section 2 (*1*) (*b*) of the Income-tax Act, contends that since the annual local payment was made to the Hsipaw *Sawbwa* or the Hsipaw State that payment cannot be said to be one "assessed and collected by the officers of Government as such" and that the second proviso to section 4 (*2*) of the Act would not apply. There are two fallacies in this argument. In the first place the second proviso to section 4 (*2*) does not speak of "agricultural income"; it speaks of "income from agriculture." The first is a term of art, the second is not. Secondly, section 2 (*26*) of the General Clauses Act, as it stood prior to the 4th January 1948, defined the term "Government" to mean "a person authorized by or under the Government of Burma Act, 1935, to exercise the executive authority of Burma but shall not include the Railway Board." Under section 7 of the Government of Burma Act executive powers in the areas specified in Part I of the Second Schedule to that Act were to be exercised by the Governor in his discretion and the Federated Shan States fell within the said Part I of the Second Schedule. It was therefore under the authority of the Governor that the *Sawbwa* of Hsipaw State exercised the executive authority in that State and the collection of revenue on land by his officer would appear to us to satisfy the requirements of section 2 (*1*) (*a*) of the Income-tax Act.

In respect of the income derived from the same sources by the applicants after the 4th January 1948, they would appear to have the protection of not merely the second proviso to section 4 (*2*) of the Income-tax Act but also that of section 4 (*3*) (viii) as adapted under the Union of Burma (Adaptation of Laws) Order, 1948,

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and promulgated by His Excellency the President of the Union of Burma under section 226 (2) of the Constitution.

The second proviso to section 4 (2) of the Income-tax Act now reads :

"Provided further that nothing in this sub-section shall apply to income from agriculture arising or accruing in a State in the Union of Burma from land for which any annual payment in money or in kind is made to the State."

Under section 96 (1) of the Constitution "All revenues from the sources enumerated in the Fourth Schedule to this Constitution shall form part of the revenues of the State in or by which they are raised or received," and item 1 of the Fourth Schedule refers to "Land Revenue" and article (i) of the same item refers to "Land revenue proper."

The exemption granted to agricultural income by section 4 (3) (viii) of the Income-tax Act also must apply. Section 2 (26) of the Burma General Clauses Act now reads :

"(26) 'Government' or 'the Government' shall mean the person authorized by or under the Constitution of the Union of Burma to exercise the executive authority of Burma."

The executive authority of that part of the Union of Burma which lies in the Hsipaw State, so far as the collection or assessment of land revenue is concerned, would, by reason of section 162 (1) of the Constitution read with section 92 (2) and item 2 (3) of List II of the Third Schedule of the Constitution, vest in the Shan State. The officers of the Shan State would be officers of the Government for such purposes.

Accordingly we order that directions do issue to the Income-tax Officer, Companies Circle, Rangoon, restraining him from assessing to tax under the

Income-tax Act in respect of such income of the applicants for the years 1947-48 and 1948-49 as was derived from lands which the applicants hold under a lease from the *Sawbwa* of Hsipaw State under an instrument of lease executed in 1933.

Advocate's fees ten gold mohurs.

## SUPREME COURT.

† S.C. 1950

*Jan. 30.*

THE INDIAN STARCH PRODUCTS, LIMITED AND ANOTHER (APPLICANTS)

*v.*

THE CONTROLLER OF RENTS, RANGOON AND ANOTHER (RESPONDENTS).*

*Urban Rent Control Act—Licence and lease—Officers exercising judicial function or quasi-judicial function whether can seek legal advice at the back of the Advocate of the other side and whether Attorney-General or Government Advocate can give such advice.*

*Held :* A licence may come within definition of " letting " under the Urban Rent Control Act. The distinction between a licence and a lease is that there must be exclusive possession in the case of lease and that element of exclusive possession is absent in the case of a licence.

Officers exercising judicial or quasi-judicial function should not seek for legal advice especially at the back of the Advocate of the other side ; in proper cases he may ask the Attorney-General to appear as an *amicus curiæ* and the Attorney-General also should not give legal advice if sought for by persons exercising judicial or quasi-judicial functions.

*S. R. Raju* v. *The Assistant Controller of Rents and two*, B.L.R. (1950), S.C. 10, followed.

*Ba Win* for the applicants.

*Ba Sein* for the respondent No. 1.

*Kyaw Myin* for the respondent No. 2.

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

U E MAUNG.—This case is in many respects the converse of the case of *S. R. Raju* v. *The Assistant Controller of Rents and two* (1) which this Court disposed of recently. In that case what purported to be a licence was claimed to be a "letting" within the

* Civil Misc. Application No. 70 of 1949.

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

(1) C.M.A. 58 of 1949.

meaning of the Urban Rent Control Act and we accepted that contention. In the present case the words used in the agreement between the parties are consistent with "letting." The terms used, for instance, in the receipts for the payment of the use of the land reserved under the arrangement were "rent" and "rent for land," so that thereby the parties, or those who were responsible for these documents, intended the transaction to be, or thought the transaction amounted to, a "letting" within the meaning of the Urban Rent Control Act. But, as we have laid down in *Raju*'s case (1) it is the essence of the transaction which we have to look into.

The learned Advocate for the applicants, basing his contention mainly on the definition of "premises" appearing in section 2 (*d*) (ii) of the Urban Rent Control Act, claims that his clients had a right under the Act to have the standard rent for the land in question fixed. But the learned Counsel has overlooked one very important word in that definition. The definition of "premises" for the purposes of this case would read: "any land let or occupied or intended to be let or occupied *separately* for any purpose whatever." The essence is that there must be exclusive occupation, otherwise that occupation cannot be said to be separate occupation in the person to whom the property is let. If the word "separately" did not appear in the definition the learned Counsel's contention may be of substance. As we have carefully discussed the position in *Raju*'s *case* (1), the underlying difference between a "license" and a "lease" is that in one there is exclusive possession in the person who is in occupation and in the other there is not this exclusive right of possession. It is frankly conceded for the applicants that they cannot exclude the owners from using the

(1) B.L.R. (1950) S.C. 10.

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THE INDIAN STARCH PRODUCTS, LTD. AND ANOTHER v. THE CONTROLLER OF RENTS, RANGOON AND ANOTHER.

land in question or from allowing other people using it for the same purpose for which it is claimed to be let to them.

The learned Counsel for the applicants has also relied on several decisions of the Indian High Courts and of the King's Bench in England for his interpretation of the word "let" appearing in the Urban Rent Control Act but it must be remembered that "letting" of property in law amounts to a lease. There is no lease here. At best what was granted to the applicants under the arrangement evidenced by the various receipts, which are wrongly called rent receipts, is a grant of a right of way and this right of way was granted as a mere personal licence.

In these circumstances the application must be dismissed.

Before we part with this case, however, we have to make a few observations on the course the proceedings took before the learned Controller of Rents. His diary entry of the 10th May 1949 reads:

"*U Ba Win* for applicant present. *U Kyaw Min* for respondents present. Arguments heard. I propose to refer this case to Government for legal advise. Case is therefore adjourned *sine die*. Parties informed."

Following this entry the learned Controller of Rents wrote a letter to the Secretary to the Government in the Ministry of Finance and Revenue, in the last paragraph of which he says:

"As this case is of some importance and is of a complicated nature, I should like to seek the legal advice before I proceed further with the case. I would therefore request that the advice of the Attorney-General, Burma, may please be obtained on the point raised in paragraph 3 above."

Now the point raised in paragraph 3 of that letter is exactly the point which the learned Controller of Rents

was called upon to decide and which we are now called upon to decide here. The learned Controller of Rents had apparently forgotten that he was exercising judicial functions and, as we have had occasion to remark only this morning, under section 150 of the Constitution the exercise of a judicial or a quasi-judicial function is individual in its nature. The learned Controller of Rents was therefore wrong in seeking legal advice, especially at the back of the learned Counsel in this case. If he had asked the learned Attorney-General to appear before him, either in person or through one of the officers of his department, as *amicus curiæ* there would be no objection. But to seek legal advice after the learned Counsel in the case had presented their views before him and to act on that legal advice, from however eminent a source it may have come, is thoroughly reprehensible.

We are also surprised to note that at the request made to him, though it may have been through the Secretary to the Government of the Union of Burma, the learned Attorney-General saw fit to give the legal advice. It would have been more proper to have directed the Controller of Rents into the right course he should take and to have informed him that as a judicial officer or an officer exercising quasi-judicial functions he should not seek advice from a strange source.

As we have said, this application must be dismissed. The applicants will pay the 2nd respondents' costs. Advocate's fees ten gold mohurs.

## SUPREME COURT.

† S.C. 1950

*Jan. 30.*

RANCHHODDAS JETHABHAI & Co. (APPLICANT)

*v.*

THE SECRETARY OF THE UNION GOVERNMENT, MINISTRY OF JUDICIAL AFFAIRS AND TWO OTHERS (RESPONDENTS).*

*Direction in the nature of prohibition—Previous application for certiorari withdrawn—Effect of such withdrawal*—res judicata— *Principle of—Whether applicable—analogy of Order 23, Rule 1 of Code of Civil Procedure—Whether can be extended—Collector of Customs when imposing fines if a representative of Government—Additional powers of President under Sea Customs Act—Scope of Supreme Court in application under s. 25, Constitution of the Union of Burma.*

Where the Collector of Customs had applied to the Supreme Court for a writ of certiorari to quash an order of the Financial Commissioner and restore the penalty levied by him and the application was subsequently dismissed as withdrawn, and after the enactment of Sea Customs (Amendment) Act of 1949 a notice was issued calling on Applicants to show cause why the President should not revise the order of the Financial Commissioner.

*Held :* That the matter is not governed by the principles of *res judicata* because there was no adjudication or final adjudication and the Court did not apply its mind to the merits of the application.

*Parsotam Gir* v. *Narbada Dir*, 26 I.A. 175, applied.

The withdrawal of a previous application without leave might bar a fresh application upon the same set of circumstances.

*Hingu Singh* v. *Jhuri Singh*, 40 All. 590 ; *Karlick Chandra Pal* v. *Sridhar Mandal*, 12 Cal. 563, distinguished.

*Foucar and Horrocks* for the applicant.

*Chan Tun Aung* (Assistant Attorney-General) lor the respondents.

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

U E MAUNG.—The applicants seek directions in the nature of a writ of prohibition restraining the respondents from further action by way of revision proceedings contemplated in the notice issued by the Government of the Union of Burma in the Ministry of

* Civil Misc. Application No. 54 of 1949.

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

Judicial Affairs on the 14th July 1949 calling upon the applicants to show cause why the President of the Union should not revise the order of the Chief Customs authority (the Financial Commissioner, Commerce) in Revenue Appeal No. 4C (230) of 1948.

The essential facts necessary for the disposal of this application are simple. The applicants imported into Rangoon on the 8th November 1947, 48 bales of jute gunny bags from India. The Control of Import and Export (Temporary) Act, 1947, and orders made thereunder require such import to be covered by an import licence and under section 3 (*2*) of that Act such goods when not covered by an import licence would be deemed to be prohibited articles within the meaning of section 19 of the Sea Customs Act. On the 23rd December 1947 the applicant produced before the Collector of Customs an import licence dated the 14th November 1947 together with a letter from the Director of Civil Supplies, Commerce and Supply Department of the Government of Burma, purporting to instruct the Collector of Customs in exercising his powers under sections 182 and 183 of the Sea Customs Act to impose a token fine of Rs. 1,000 only and to allow redemption of the gunny bags, which under section 167 (*8*) of the Act were liable to be confiscated, on payment of that token fine. The fine was paid and the goods were released.

Eight months later the Collector of Customs called upon the applicants to show cause why, in addition to to the fine already paid, a further penalty should not be imposed on them for the import of the gunny bags without the cover of the requisite import licence. Cause was shown by the applicants but the Collector of Customs, apparently considering that sufficient cause had not been shown, imposed a penalty of Rs. 44,544 being twice the value of the goods imported.

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The applicants appealed, as they clearly were entitled to do under section 188 of the Sea Customs Act, to the Chief Customs authority, namely, the Financial Commissioner, Commerce, Burma. That appellate authority by an order of the 25th January 1949, in Revenue Appeal No. 4C (230) 1948 set aside the order of the Collector of Customs imposing the penalty of Rs. 44,544. For reasons which will appear later it is not necessary to examine the grounds on which the learned Financial Commissioner came to the conclusion that the order of the Collector of Customs imposing the penalty was erroneous. It is sufficient for the disposal of the present application to note that the order of the Collector of Customs was set aside by the Financial Commissioner, Commerce, Burma.

On the 19th April 1949 the Collector of Customs applied to this Court for directions in the nature of certiorari in Civil Miscellaneous Application No. 29 of 1949 and impleaded as respondents the Financial Commissioner, Commerce, Burma, and the present applicants. It was then claimed on behalf of the Collector of Customs that his order, which was set aside on appeal by the Financial Commissioner, was a correct order and that the Financial Commissioner had allowed himself to be influenced by extraneous and irrelevant matters and had not taken into consideration certain matters alleged to be relevant, and that accordingly the order of the Financial Commissioner was one proper to be quashed by this Court in exercise of the power which the Constitution has granted to this Court under section 25. To this application, objections were taken by the second respondents (the present applicants) challenging *inter alia* the right of the Collector of Customs to move this Court for directions in the nature of certiorari, the jurisdiction of the Court to entertain the application and the competence of the Collector of

Customs, in view of the earlier infliction on the applicants of a token fine, to impose on them an additional penalty.

What happened on the 6th June 1949 when the application came up for hearing before this Court appears from the order which reads :

" U Chan Htoon, Attorney-General asks for permission to withdraw the applications beginning with Civil Miscellaneous Application No. 26 to 37 of 1949 in the list.

The application for withdrawal is opposed by Mr. Foucar on behalf of the 2nd respondent in Civil Miscellaneous Application Nos. 26, 28, 29 and 31 of 1949 and he submits that the applications should be dismissed.

This application is dismissed as being withdrawn. Costs seven gold mohurs in favour of the 2nd respondent."

Soon after the proceedings in this Court terminated, Parliament enacted the Sea Customs (Amendment) Act of 1949 and it was promulgated by the President of the Union on the 24th June 1949. On the 14th July 1949 the Secretary to the Union Government in the Ministry of Judicial Affairs called upon the applicants to show cause why the President should not exercise the powers of revision under section 191 (2) of the Sea Customs Act as amended in respect of the order of the Financial Commissioner of the 25th January 1949 above referred to.

Before us it has been claimed on behalf of the applicants that directions restraining further proceedings in this matter by the President of the Union should issue and that claim is made on two main grounds. It has been urged firstly that the dismissal of the application before this Court in Civil Miscellaneous Application No. 29 of 1949 on that application being withdrawn by the learned Attorney-General, operates by way of *res judicata* to bar further agitation of the points that were taken or could have been taken in

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those proceedings on behalf of the Union of Burma. It has also been urged that the Collector of Customs had no jurisdiction to impose the additional penalty and that the revision proceedings initiated by the President of the Union of Burma to examine the legality or correctness of the appellate order vacating the order of the Collector are incompetent and should be restrained.

What was said to be a preliminary objection has been raised on behalf of the respondents by the learned Assistant Attorney-General. It is claimed by him that since all that has been done to this date on behalf of the President of the Union is to issue a notice calling upon the applicants to appear before the Secretary to the Government of the Union in the Ministry of Judicial Affairs, the application for directions in the nature of prohibition would not be competent. He suggests that the applicants should wait till the proceedings in revision has progressed further but he does not tell us at what stage of the revision proceedings the applicants would become entitled to seek prohibition. We cannot see any substance in this preliminary objection. If the applicants are right in their contentions they would clearly be entitled to seek prohibition the moment the President initiates the revision proceedings. We are not entitled to assume that the President in directing the Secretary to the Government of the Union in the Ministry of Judicial Affairs to call upon the applicants to appear before the latter does not intend to take further steps in the revision proceedings once the applicants have put in their appearance before that officer.

Mr. Foucar, with whom Mr. Horrocks is associated in presenting the applicants' contentions, has taken us through several decisions of the Judicial Committee of the Privy Council and of the various High Courts in

India. It is not necessary for us in this judgment to examine these decisions in detail, for, they enunciate nothing more than accepted principles on the application of the doctrine of *res judicata*. We agree with the learned Counsel that the principles of *res judicata* should not be administered in a technical and narrow spirit and that these principles are principles of justice. The principle of finality of an adjudication by a competent Court is one to which we readily subscribe ; but whether it be for the application of section 11 of the Civil Procedure Code or, of the general principles of *res judicata*, one thing is essential, namely, there must have been a decision either express or implied, on the questions which arise in the later proceedings. If authority for this is at all necessary *Parsotam Gir* v. *Narbada Dir* (1) would clearly be in point. At page 183 Their Lordships said :

"It is enough to say that there is no such thing known to the law as constructive estoppel, and if there were it would not satisfy the requirements of section 13 of the Code of Civil Procedure (XIV of 1882). 'The conditions for the exclusion of jurisdiction on the ground of *res judicata* are,' as Willes J. (2) says, 'that the same identical matter shall have come in question already in a Court of competent jurisdiction, that the matter shall have been controverted, and that it shall have been finally decided.' That is just what section 13 requires : there must be a final decision."

It is clear to us that the principles of *res judicata* can have no application to the facts of the present case. If any analogy is to be drawn at all from the Civil Procedure Code it is to Order XXIII, Rule 1 of that Code that we must go. There was a withdrawal of the application by the Attorney-General and on that withdrawal his application was dismissed. This Court did not apply its mind to the merits of the application.

(1) 26. I.A. 175. (2) (1865) 18 C.B. (N.S.) 270.

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Accordingly, there was not and cannot be deemed to have been a decision by this Court on any matter in controversy. It may well be that, applying the principles of Order XXIII, Rule 1, the withdrawal of a previous application without leave granted by the Court for the institution of a fresh application may operate to bar a fresh application based on the same set of circumstances and in the same right but this is a different thing altogether from the principle of finality of a decision or what is implied in a decision of a competent tribunal. Withdrawal, for instance, of a suit for cancellation of a document without leave being granted for the institution of a fresh suit, clearly does not bar the plaintiff, when he is later sued on the same document, from taking the plea in his defence that the document was void.

The decision in *Hingu Singh* v. *Jhuri Singh* (1) relied upon by the learned Counsel for the applicants does not support the claim for application of the principles of *res judicata* here. In that case the suit was dimissed for want of prosecution ; the plaintiff was present in Court and he had an opportunity of proceeding *ex parte* against the defendant who was absent ; but he did not adduce evidence with the result that the Court had to dismiss the suit under Order XVII, Rule 3. A decision under Order XVII, Rule 3, is a decision on the merits.

*Kartick Chandra Pal* v. *Sridhar Mandal* (2), again is not very apposite. At page 565 it was said :

" It appears that in the former suit between the parties issues had been fixed on the question of title. In that suit the plaintiffs having failed to adduce evidence, which it was incumbent upon them to do, the suit was dismissed ; and must be held to have been dismissed on the merits. "

(1) 40 All. 590. (2) 12 Cal. 563.

The applicability of the principle of *res judicata* where the previous proceedings terminated on a withdrawal did not arise for discussion in these cases.

Another fallacy which we trace running through the contentions of the applicants has been to identify the Collector of Customs with the President of the Union or with the Government of the Union. It has been said on behalf of the applicants that the Collector of Customs in making his application to this Court must be deemed to have been acting on behalf of the Government of the Union and that the Government of the Union must be regarded as bound, to the extent that the Collector of Customs is, by what has happened in these proceedings. The principle *respondeat superior* cannot be applicable here and it is difficult to see on what principle the claim can be justified. It has also to be borne in mind that the Collector of Customs when he imposes fines and penalties under the relevant provisions of the Sea Customs Act is exercising a judicial function and the exercise of a judicial function is individual. In that capacity the Collector of Customs is not a representative of either the President of the Union or the Government of the Union of Burma. He is for the time being a judge bound to act in his individual judgment, subject, of course, to control by other authorities exercising judicial functions to whom he may be subordinate.

The second line of attack on the competence of the revision proceedings is due, in our opinion, to the not unnatural confusion between the President as the executive head of the Union and the President who, when exercising his powers under section 191 of the Sea Customs Act, functions as an authority vested under section 150 of the Constitution to exercise limited functions and powers of a judicial nature and is bound therefore to act on judicial principles. That

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the Customs Officer exercising the powers vested in him by section 182 of the Sea Customs Act, the appellate authority acting under section 188 of the Act and the President exercising powers under section 192 are all judicial functionaries clearly emerge from the fact that they are administering criminal justice. Section 167 refers to the acts falling within the First Schedule as "offences" for which, in the words of the same section, the person "responsible" is "punishable" with the "penalties" set out in the third column of the Schedule. The learned Assistant Attorney-General has frankly conceded that this is a proposition which he is not prepared to controvert.

By the Sea Customs Act, as it stood before the amending Act of 1949, the President of the Union had been made the revising authority in respect of decisions of the Chief Customs authority. Hence, apart from the fact that Parliament has given—and there is no question that it is competent so to do—retrospective operation to the amendments introduced by the amending Act of 1949, it cannot be said that the decision of the Chief Customs authority under consideration in this case was in law a final decision at the time it was made. While it is true that but for the amending Act, the President's revisionary powers were to be exercised only when invoked by "a person aggrieved" it would be incorrect to confine the term "a person aggrieved" to one on whom the penalty or fine or both had been imposed. Circumstances can be easily envisaged of others having a grievance in law with the order of the Customs Officer or of the Chief Customs authority. The amending Act merely extends the exercise of jurisdiction in revision, already vested in the President, to enable him to act *suo motu*.

From this it follows that the contention on behalf of the applicants that the Collector of Customs acted in

excess of his jurisdiction in imposing the additional penalty on the applicants is clearly irrelevant in these proceedings. This is a contention which under the Sea Customs Act is properly and primarily within the competence of the President as the revisional authority to decide ; and we can see no justification at this stage for taking the decision of this issue out of his hands. The essence of revisional jurisdiction consists in examining the competence of the subordinate tribunal and the legality and correctness of the decision of such tribunal. To deny to the revisional authority the exercise of its functions on the ground that the subordinate tribunal had acted beyond its competence would be to nullify the jurisdiction of the revisional authority.

We do not conceive it to be within our functions as the ultimate supervising authority over all judicial and quasi-judicial tribunals in the Union, in the exercise of the powers which the Constitution has reserved to us to issue directions in the nature of certiorari or prohibition, to anticipate the decision of any issue within the competence of a judicial or quasi-judicial tribunal before whom that issue properly arises. If after the decision is made and if good cause appears for quashing the decision of a judicial or quasi-judicial tribunal we shall not hesitate, however eminent that tribunal may be, to do our duty. But we refuse to presage of any judicial or quasi-judicial functionary, however limited its powers and however humble it may be, the least propensity to act other than on judicial principles in matters within its jurisdiction.

The application fails and is dismissed. In the special circumstances of this case we make no orders for costs.

## SUPREME COURT.

† S.C. 1950

*Feb. 1.*

MAUNG TIN AYE (APPELLANT)

*v.*

MAUNG MAUNG HMIN AND SIX OTHERS (RESPONDENTS).*

*Burmese Buddhist Law*—Keittima *adoption*– Apatitha—*Competition between* apatitha *and step child—Letters of administration to whom granted—Ranking in succession.*

*Held* : Under Buddhist Law the facts that a person was put to school and a person's name is shown as guardian or mother in the school register and that marriage invitations were issued by the said guardian described as mother, that after marriage the couple used to live with the guardian and lived with her do not suffice to make out a *keittima* adoption.

The statement in a letter by the alleged adopting mother that after her death her nephews and nieces will enjoy the properties also show that there was no *keittima* adoption. Though the joinder of the child's name in monetary transactions might lead to such an inference the absence of the same is also a fact tending against *keittima* adoption.

An *apatitha* child is not without rights and is one of the six classes of children entitled to inherit the estate of parents.

In granting letters of administration of a deceased Buddhist it is left to the Court to grant Letters to any person who would be entitled to a share in the estate however small it may be.

In the majority of *Dhammathats* a *pubbaka* child comes fourth or fith in the list and after him the *apatitha* child. They may both be equally entiled to inherit but it will be idle to say that *apatitha* child would exclude the step-child.

*P. B. Sen* for the appellant.

*P. K. Basu* for the respondents.

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

U E MAUNG.—This appeal relates to the estate of one Daw Khin Hta who died at Singaing in Kyauksè District in 1944. The first respondent Maung Maung Hmin is a son of one Maung Maung Hla by his first

* Civil Appeal No. 1 of 1948.

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

marriage. Maung Maung Hla, after the death of his first wife, married Daw Khin Hta and he died some time in 1930. There was no issue to the marriage of Maung Maung Hla and Daw Khin Hta, and Daw Khin Hta did not remarry after the death of Maung Maung Hla. Shortly after the death of Maung Maung Hla, Daw Khin Hta effected a partition of the joint estate of herself and her late husband with her step-sons Maung Maung Hmin and Maung Maung Kyin. Maung Maung Kyin has since died. The document of partition is an exhibit in the case, being Exhibit 1 filed by the appellant.

It has been suggested on behalf of the appellant that the terms of this deed of partition are such that Maung Maung Hmin and Maung Maung Kyin would be precluded by complete severance from their step-mother to take any further steps in the step-mother's estate on her subsequent death. We have carefully perused this document and the evidence relating to its execution and these materials do not, in our opinion, support the contention that there was such a complete serverance of all relationships between the step-mother and the step-sons, following on this document, that there can be a semblance of a reasonable claim of complete failure of filial relationship. We do not mean to suggest by this that we take the view that maintenance of filial relationship would be essential for a step-child to inherit from the step-parent.

The appellant, who is a nephew of Daw Khin Hta, lost his parents when he was very young. He tells us that he lost his parents when he was under three years of age and that when he was about three years of age he was taken into the family of Daw Khin Hta and her husband Maung Maung Hla and was brought up by them along with the two sons of Maung Maung Hla. We have no reason to doubt the substantial correctness of the story told by the appellant on this part of the

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case though it may well be that he was taken into Daw Khin Hta's family a few years later than he suggests. We say this because there is conclusive evidence that before the appellant was taken into the family by Daw Khin Hta he had already been *shinpyued* by another couple. The appellant in his statement before the Court suggested that the *shinpyu* ceremony took place when he was younger than three years of age. That, as Buddhists, we are not prepared to accept in the absence of very convincing proof. But nothing turns on this because the appellant admits that till 1932 there was no question whatsoever of his having been taken in adoption by Daw Khin Hta. Daw Khin Hta, according to the appellant, wanted to keep from the knowledge of her husband any intention—that is if she had any such intention—to take him in adoption. The appellant's case is that in 1932 Daw Khin Hta for the first time disclosed her intention of treating him as an adopted child. The appellant, supported by a few witnesses whom he had called, tried to establish that in April 1932 there was a formal announcement made by Daw Khin Hta of her having taken the appellant in *keittima* adoption. If he had been able to establish that, it would conclude the present case. But unfortunately for him both the trial Judge and the Appellate Bench of the late High Court of Judicature at Rangoon came to the conclusion—and rightly in our opinion—that this branch of the appellant's case is not true.

The appellant, in addition, tried to prove his *keittima* status by certain other circumstances and these circumstances amount only to (1) that he was put in Mandalay school where Daw Khin Hta's name was entered in the register of the school either as the mother or the guardian ; (2) that when later he was transferred to Maymyo school Daw Khin Hta's name

continued to appear in the school register as the guardian or the mother ; that when the engagement of the appellant to the daughter of U San Shwe, a witness for the appellant in the case, was announced in the " Sun " newspaper of Mandalay, the appellant was described as son of Daw Khin Khin Hta of Zigôn Quarter, Maymyo, and brother of U Ba Thwin, broker, and his wife Ma Khin Sein of Htendan Quarter, Mandalay. It may be mentioned here that Ma Khin Sein referred to in the announcement is a sister of the appellant. The marriage invitation issued in the joint names of Daw Khin Hta and U San Shwe described the appellant as the son of Daw Khin Khin Hta and brother of Ko Ba Thwin and Ma Khin Sein of Malun, Mandalay. The invitation issued by U San Shwe to the reception following the marriage again described the appellant as the son of Kyaung-ah-ma Daw Khin Khin Hta of Zigôn Quarter, Maymyo, and brother of broker Ko Ba Thwin and Ma Khin Sein of Malun Quarter, Mandalay. (4) That after the marriage the appellant and his wife used to live for the most part with Daw Khin Hta and (5) that the time of Daw Khin Hta's death, she having then evacuated to Singaing during the Japanese occupation, the appellant was living together with her.

The learned Counsel for the appellant contends that these circumstances taken together with the oral testimony proffered by Brother Clementian (D.W.4), Ma Khin Sein (D.W.2), U San Shwe (D.W.5), and certain admissions which he had referred to us made by the witnesses for the 1st respondent Maung Maung Hmin are sufficient to entitle the Court to deduce that the appellant was the *keittima* adopted son of Daw Khin Hta. The evidence of Brother Clementian does not, in our opinion, carry the appellant's case any further than the entries in the school register. This witness,

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who is now the Director of St. Peter's High School at Mandalay, admits that he had no recollection whether or not Daw Khin Hta of her own accord said to him that she was the adoptive mother of Maung Tin Aye. He also admits that his conversations with Daw Khin Hta were made through a Burmese interpreter. What is more important is that this witness admits that the impression he had that Daw Khin Hta was either the parent or guardian of Maung Tin Aye was the result of her settling all the bills of Maung Tin Aye and because he had seen her come and visit Maung Tin Aye on three or four occasions.

Ma Khin Sein's evidence will have to be accepted, if we can do so at all, with a great deal of caution. She was the main witness in support of the story that there was a formal announcement of Maung Tin Aye having been taken in adoption as the *keittima* son of Daw Khin Hta. This part of the case has been rejected as false by the trial Judge and also by the Appellate Court. It follows therefore that Ma Khin Sein on one material point in this case has given false testimony. There is another point that must be remembered. Soon after Daw Khin Hta's death, when the appellant claimed that he was the sole heir to the estate of Daw Khin Hta, Ma Khin Sein protested very strongly. Mr. Sen contends in explanation of this protests, that Ma Khin Sein even though she realized in law that her brother would be the sole heir to Daw Khin Hta's estate, might well feel aggrieved at his exercising his legal rights. But we are not prepared to accept this explanation. Not only that; there is on the record a document, Exhibit A, signed by this witness and also by the appellant amongst others. This document, which was apparently written after due consideration in reply to certain overtures made by the respondent Maung

Maung Hmin as to the ultimate disposition of the estate of Daw Khin Hta, again disproves Ma Khin Sein's case that they had throughout Daw Khin Hta's lifetime and thereafter acted on the basis of the appellant having been taken in *keittima* adoption by Daw Khin Hta. The relevant portion of that document reads :

" From the time of division of properties after the death of Bagyi (uncle), the aunt had been living with nephews and nieces for better and for worse up to the time of her death ; moreover she had always been telling us, ' If I die, you—nephew and nieces—will enjoy the properties.' This was also told to other persons."

The statement in the letter Exhibit A is true or it is false. If it is true, Daw Khin Hta never intended Maung Tin Aye to inherit her estate to the exclusion of everybody else. If it is false it would be impossible to act on Ma Khin Sein's and Maung Tin Aye's testimony now.

There is also one important consideration which has influenced us a great deal in this case. Daw Khin Hta admittedly was engaged in money-lending business, either with or without security. Several documents executed in her favour at these money-lending transactions have been produced before the Court. In not one of these transactions has Maung Tin Aye's name appeared as one of the lenders. It is true that this in itself would not be conclusive but taken with the other considerations which we have mentioned above, we are forced to the conclusion that Maung Tin Aye was never intended to be a *keittima* adopted son of Daw Khin Hta. In our opinion, what has happened here is that Daw Khin Hta, seeing an orphan nephew at a very tender age left without a home, had taken him into her home and had brought him up from infancy practically. She had treated him

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no doubt as a son ; she had educated him and given him in marriage and he had been living with her till she died. It may well be that in these circumstances Maung Tin Aye would be able to claim that he is an *apatittha* son of Daw Khin Hta.

An *apatittha* child is a person not without rights. He is one of the six classes of children entitled to inherit the estate of the parents. But Mr. Sen would not be content with that position. He goes further and says that an *apatittha* child would exclude a step, or to be more technically correct a *dway-poppakara*, child. We do not propose in this case to go deeply into the question of the rights of an *apatittha* child. It must be remembered that the appeal arose out of an application under section 218 of the Succession Act. The estate in question is that of a Buddhist deceased and it is left to the Court to grant letters of administration to any person who would be entitled to a share in the estate, however small that share may be. Once the respondent has shown that he has a share in the estate, however small, his application for letters of administration, in the absence of a counter affidavit, must necessarily be granted. Moreover, if there had been a counter application it would be in the discretion of the Court to grant it to any one of the persons who are entitled to a share in the estate of the deceased.

There are certain decisions of the High Court of Judicature which suggest that an *apatittha* child would be in a position inferior to that of a *kilita* child even. But it is not necessary for us in this case to say whether we agree with these decisions in that respect. But it seems to us that for the purpose of the present case, the *Manugye* and other *Dhammathats*, where they speak of the six classes of children who are entitled to inherit, would conclude the matter. In the majority of the texts a *poppakara* child comes fourth in the

list, in a few others he comes fifth and the *apatittha* child comes sixth. They may both of them be equally entitled to inherit or it may be that the rights of the step-child or *poppakara* child are higher than that of the *apatittha* child. But it would be idle, in our opinion, to say that the *apatittha* child would exclude the step-child.

In this view of the case the appeal must necessarily fail and is dismissed. Advocate's fees ten gold mohurs.

# SUPREME COURT.

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*Feb. 8.*

## HUP FOR (APPLICANT)

*v.*

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

*Directions in the nature of certiorari and prohibition—Licence for sale of liquor—Ss. 18, 28 and 29(1), Burma Excise Act—Powers of Collector—Analogy with English licensing system—Difference between English Licensing Acts and Burma Excise Act—Whether Collector exercises quasi-judicial or administrative power—Remedy by way of suit—Licence for consideration if irrevocable.*

Where the Collector of Insein held an enquiry under the orders of the Excise Commissioner acting under the instructions of the Government of the Union of Burma, cancelled the licence of the applicants and accepted a third party's offer during the currency of the licence and the same was challenged by applications for direction in the nature of certiorari to have the proceedings of the Collector quashed and direction in the nature of prohibition prohibiting the Commissioner from granting the licence to the rival

*Held :* That the Collector in deciding to cancel the unexpired licence under s. 29 (*1*) of the Burma Excise Act is performing a purely administrative function and therefore his proceedings could not be quashed by the Court.

There is a radical difference between Licensing Acts in England and the Burma Excise Act. In England Justices had absolute discretion to refuse to renew prior to 1904 when this was taken away and the power to refuse renewal of an old licence was confined to certain cases specified in the Act. As jurisdiction was exercised by two justices of the peace in petty sessions after hearing evidence it was held to be a judicial order and that consequently certiorari would lie. In Burma if the licence has been improperly revoked a right to sue would exist against the Government in the absence of an indemnity in the Act. The mere fact that the Collector is an officer of the Government would not make him amenable to the jurisdiction of the Court.

Under s. 28 of the Burma Excise Act, the officer who granted the licence could revoke it on certain grounds and when the grounds exist no compensation can be claimed. Under s. 29 where a licence is re-called for any other reason except those provided for by s. 28, grant of some compensation and notice is provided. An excise licence gives nothing more than a right *ex contractu* which is a right *in personam* and not one coupled with an interest. Therefore no fundamental rights assured by the Constitution had been encroached upon.

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* Civil Misc. Application No. 3 of 1950.

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

*Sharp* v. *Wakefield*, (1891) A.C. 173 ; *Rex* v. *Johnson*, (1905) 2 K.B. 59 ; *The King* v. *Woodhouse*, (1906) 2 K.B. 501 ; *Rex* v. *Sunderland Justices*, (1901) 2 K.B. 357 at 370 ; *U Htwe* v. *U Tun Ohn*, (1948) B.L.R. 541; *The King* v. *Electricity Commissioners*, (1924) 1. K.B. 171 ; *Hurst* v. *Picture Theatres Ltd.*, (1915) 1 K.B.1, referred to and distinguished.

*P. K. Basu* for the applicant.

*Chan Tun Aung* (Assistant Attorney-General) for the respondents 1 and 2.

*Kyaw Min* and *C. C. Khoo* for the respondents No. 3.

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

U E MAUNG.—Hup For is the firm name for certain persons who acting in partnership had been granted licences for the sale of alcoholic liquor under CFL2/CS2 for Kamayut, Kanbe and Thingangyun areas in Insein District. The firm obtained these licences at an Excise auction sale held by the Collector of Insein District on the 18th October 1949 and the term under the licences has not yet expired.

On the application of the third respondent the Collector of Insein District held an enquiry in his District Office Miscellaneous Proceedings No. 2 of 1949-50. It appears from the materials on the record that this enquiry was initiated by the Collector under the (orders of the Excise Commissioner who again acted under the) instructions from the Government of the Union in the Ministry of Finance and Revenue. From the certified copies of the diary entries in the enquiry proceedings it appears that nine witnesses were examined and the Collector ultimately decided under the provisions of section 29 (*1*) of the Burma Excise Act to cancel the licences granted to the applicants and still in force with effect from the 31st January 1950 and

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accepted provisionally the third respondent's offer for these licences with effect from the 1st February 1950.

The acceptance of the third respondent's offer was provisional as it was necessary for the Commissioner of Pegu Division, who has been made the second respondent in the case, to confirm the issue of licences to the third respondent.

It was at this stage that the applicants came to this Court to seek relief by way of certiorari and prohibition. They claim that they are entitled to have the proceedings of the Collector of Insein cancelling the licences granted to them quashed and to have the Commissioner of Pegu Division prohibited from granting the licences to their rival the third respondent. Needless to say the second prayer is bound up with the first, for if the decision of the Collector of Insein to cancel the licences in favour of the applicants is quashed the Commissioner of Pegu Division cannot grant the licences to the third respondent. Similarly, if the decision is upheld, the applicants can have no further interest in the proceedings before the Commissioner of Pegu Division.

The Collector of Insein and the Commissioner of Pegu through the learned Assistant Attorney-General have taken a preliminary objection to the application and the third respondent through U Kyaw Min has supported the objection taken by the other respondents. Shortly put, the objection is that the Collector in deciding to cancel the unexpired licences in favour of the applicants under section 29 (*1*) of the Burma Excise Act is performing a purely administrative function and that therefore the proceedings in which the Collector came to the conclusion now attacked before us by the applicants would not be within the cognizance of this Court in certiorari It was also further said that in any event section 29 (*1*) of the Burma Excise Act granted

an unfettered discretion to the Collector to revoke or not to revoke an Excise licence and that accordingly there is no justiciable issue on which this Court can make a pronouncement one way or the other.

Mr. Basu who appears for the applicants, has, with his usual thoroughness, taken us through a series of decisions of the English Courts on the position of licensing justices in England. He has called our attention to *Sharp* v. *Wakefield* (1), *Rex* v. *Johnson* (2) and *The King* v. *Woodhouse* (3). It is true, as the learned Counsel has pointed out, that while for a long time there was in England a considerable body of opinion that licensing justices were exercising an administrative rather than a judicial function it has not been doubted since the decision in *The King* v. *Woodhouse* (3) that licensing jurisdiction under the English system of licensing is essentially judicial and subject to certiorari. But the radical differences between the licensing Acts in England which have been consolidated by the Licensing Consolidation Act of 1910 and the Burma Excise Act must be borne in mind in attempting to apply English precedants in this country. In England, prior to 1904 justices had an absolute discretion to refuse to renew general public house licences though the usual practice was to renew such licences in all cases except where actual misconduct on the part of the holder was shown. But by the Licensing Act of 1904 this absolute discretion was specifically taken away and the power in the licensing justices to refuse the renewal of an old licence was confined to certain cases specified in the Act. Moreover, as has been said by Lord Alverstone C.J. in *Rex* v. *Johnson* (2) :

" Considering that the persons by whom the jurisdiction is to be exercised are two justices of the peace in petty sessions

(1) (1891) A.C. 173. (2) (1905) 2 K.B. 59.
(3) (1906) 2 K.B. 501.

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assembled, and that they are to hear evidence for the purpose, I should certainly be of opinion, apart from authority, that the justices in exercising this jurisdiction are sitting as a Court, and that the order made by them is a judicial order, and consequently that certiorari would lie."

In the same judgment the learned Chief Justice quoted a statement of Vaughan Williams L.J. in *Rex* v. *Sunderland Justices* (1) :

"I can only say, speaking for myself, that, having regard to the general principles of the common law, I should have been disposed to think that wherever a body such as justices have under the provisions of a statute to grant or withhold a certificate, such as a certificate for a licence, and it appears from the statute that they had to exercise a judicial discretion in so doing, a certiorari would lie to bring up proceedings before them, in the case of erroneous exercise or excess of jurisdiction, whether they could or could not be said to have acted as a Court in the strict sense of the term."

We can see no parallel between the licensing justices in England and the Collector exercising functions under the Burma Excise Act so as to justify our holding on the authority of these cases that the Collector in deciding to revoke or suspend an unexpired Excise licence is amenable to the jurisdiction of this Court by way of certiorari or prohibition. Mr. Basu however relies on a decision of this Court in *U Htwe* v. *U Tun Ohn* (2) and on *The King* v. *Electricity Commissioners* (3) in support of his thesis that the Collector under the Burma Excise Act is exercising a quasi-judicial and not a purely administrative function. If we do not do any injustice to Mr. Basu, his case on this aspect appears to be that the Collector being an officer of the Government empowered by an Act of the legislature to decide whether to cancel or not to cancel an existing Excise

(1) (1901) 2 K.B. 357 at 370. (2) (1948) B.L.R. 541.
(3) (1924) 1 K.B. 171.

licence must, within the meaning of *U Htwe*'s case, act according to law and that therefore he would be exercising quasi-judicial powers. It appears to us that the learned Counsel has overlooked one essential concomitant for a judicial or quasi-judicial proceeding. It is this: a judicial or quasi-judicial tribunal has to adjudicate, and adjudicate finally, no doubt subject in proper cases to an appeal or other supervision by higher judicial bodies, upon the rights of parties before it. By a wrong decision so long as it is made in good faith, that authority would not be liable in any action at the instance of the party suffering damages.

Every person before acting has in a sense to decide for himself whether the action which he intends taking is within the law or not but that would not necessarily make him a judge or a quasi-judicial tribunal. Only when the decision would have a binding force on a third party, so that the decision cannot be challenged except by way of an appeal, revision or other modes of supervision by a higher judicial tribunal in proper cases, can that person or that authority be properly described as a judicial or quasi-judicial authority. In the present case if the licences have been improperly revoked a right of suit would clearly have existed against the Government of the Union of the Collector in the absence of any indemnity provision in the Act itself. The fact that the Act has a specific indemnity provision for actions in good faith by officers in discharge of their duties under the Burma Excise Act is also a point against such officers being deemed to be acting in a judicial or quasi-judicial capacity.

We can see no difference in principle between a person who has granted a licence revoking the licence and the Collector revoking an Excise licence. If the licence was one which cannot be lawfully revoked the proper remedy is by way of a suit for damages.

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Mr. Basu frankly conceded that if the person revoking the licence had not been an officer of the Government of the Union no certiorari would lie to this Court. But we see no reason why the mere fact that the Collector is an officer of the Government of the Union should make him amenable to the jurisdiction of this Court.

The terms of section 29 (*1*) of the Burma Excise Act also seem to us to be conclusive against the applicants ; for, if we compare the provisions of section 28 with the provisions of section 29 we get the position very clearly as follows : section 28 makes it lawful for the officer who has granted the Excise licence to revoke the licence on certain grounds and when these grounds for cancellation exist no compensation or remission is due to the licensee who has his licence recalled ; section 29 allows the authority who has granted the Excise licence to recall the licence in all cases not provided for by section 28 but, since the licence is to be revoked or recalled without any fault on the part of the licensee, this section provides for notice and remission of licence fees.

It has been contended also before us by the learned Counsel for the applicants that the licence being one which had been granted for a consideration is not revokable. We are aware that there is a conflict of judicial opinion in England on this point, but even the case of *Hurst* v. *Picture Theatres Ltd.* (1) cannot be read as clear authority for the view that the licensee for consideration thereby obtains an " interest. " Section 18 of the Burma Excise Act seems to us to be sufficient authority for the view that an Excise license gives nothing more than a right *ex-contractu* which is a right *in personam*. There is no room under the Excise Act for a licence coupled with an interest. It is therefore very difficult for the applicants successfully to claim

(1) (1915) 1 K.B. 1.

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that any fundamental rights assured to them by the Constitution have been encroached upon by the Collector when he decided to revoke the licences in their favour.

It follows therefore that the application is not maintainable in this Court and is rejected. The applicants will pay the costs of the respondents. Advocates' fees ten gold mohurs.

The order of stay is discharged.

# SUPREME COURT.

† S.C. 1950.

*Feb. 15.*

## CASSIM AHMED SOORMA AND HAWA BIBI

(APPLICANTS)

*v.*

## THE CONTROLLER OF RENTS, RANGOON (RESPONDENT).*

*Urban Rent Control Act, s. 19 (1) Decision of Board without notice of landlord—Allotting rooms to strangers—S. 16AA (1)—Call for fresh intimation under—Jurisdiction after time limit to make allotment*

Where a landlord sent an intimation under s. 16AA (*1*) of the Urban Rent Control Act that the building would be ready at a particular time but the Rent Controller asked the landlord to submit a fresh intimation after completion certificate from the Corporation of Rangoon, but nevertheless the Rent Controller without notice to the landlord arrived at a decision to allot certain rooms to strangers

*Held :* That there is no provision in the Urban Rent Control Act entitling the Controller of Rents to ignore the first intimation by the landlord and call for a fresh intimation. It is incumbent upon the Rent Controller to make the allotment under s. 16AA (*4*) (*a*) within ten days from the receipt of the intimation from the landlord The purpose of this enactment is that the landlord cannot be left waiting indefinitely with vacant rooms awaiting a decision from the Controller and his Board. After the statutory period of ten days after the receipt of the intimation has expired the Controller of Rents has no jurisdiction to make an allotment under s. 16AA of the Urban Rent Control Act.

*Kyaw Din* for the applicants.

*Ba Sein* (Government Advocate) for the respondent.

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

U E MAUNG.—This is an application to quash the proceedings of the Controller of Rents, City of Rangoon, in Proceedings 5AA and 7AA of 1949-50, in so far as

* Civil Misc. Application No. 88 of 1949.

† *Present*. U E MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE KYAW MYINT and U THAUNG SEIN, J.

they relate to rooms 4 and 6 in the three-storey pucca building known as 78/80, 43rd Street, Rangoon.

There are in that building four rooms vacant and the Controller of Rents has permitted the applicants, who are the landlords thereof, to let rooms 3 and 5 to tenants of their choice. But against the suggestions made by the landlords the Controller of Rents decided to let room 4 to one Maung Kin Maung On and room 6 to one L. F. Beck. The Controller of Rents acted with the Advisory Board the other two members of which were Thakin Pan Myaing and Mr. Modan. It appears from the note made by the Controller of Rents that the decision in so far as rooms 4 and 6 are concerned was a majority decision of the Controller and Thakin Pan Myaing. Before us U Kyaw Din, who appears for the applicants, filed two affidavits alleging that the allottee of room 4 is a brother of Thakin Pan Myaing. Thakin Pan Myaing has, however, filed an affidavit denying that he is related to Maung Kin Maung On. It is not necessary therefore to consider this aspect of the case any further.

U Kyaw Din then drew our attention to section 19A (*1*) of the Urban Rent Control Act and claims that as the mandatory provisions of this section have not been complied with the Controller of Rents and his Board acted irregularly in the exercise of their jurisdiction. From the Rent Controller's proceedings it is clear that no notice was given to the landlord prior to the decision being arrived at by the Rent Controller and his Board. If the case had rested there it would be our duty to quash the proceedings and call upon the Controller of Rents to hold a regular enquiry after issue of notice to the applicants.

But the intimation sent under section 16AA (*1*) of the Urban Rent Control Act is dated the 11th October 1949. In that intimation it was said that the building

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would be ready by the first week of November. The Rent Controller directed the intimation to be put up at the following meeting of the Advisory Board. On the 1st November 1949 he passed the following order :

" The intimation sent is too premature. Ask Mr. Soorma to submit a fresh intimation with a completion certificate from the Rangoon Corporation."

In compliance with this order the applicants on the 21st November 1949 submitted a fresh intimation attaching to it a certificate from the Building Engineer, Corporation of Rangoon. On the 26th November 1949 the Board met and, as we have said before, by a majority decision the rooms were allotted.

We find no provision in the Urban Rent Control Act which would entitle the Controller of Rents to ignore the earlier intimation and call upon the applicants, as he did in this case, to submit a fresh intimation. The proviso to section 16AA (*4*) (*c*) makes it incumbent upon him to make an allotment under section 16AA (*4*) (*a*) within ten days of the receipt of the intimation from the landlord. The purpose of this proviso is clear : the landlord cannot be left waiting indefinitely with vacant rooms on his hands for a decision from the Controller of Rents and his Board. Section 16AA (*2*) (*c*) sets the extreme limit of time within which the intimation by the landlord is to be given to the Controller of Rents. It does not prevent the landlord from giving an intimation at an earlier date.

It is clear that the Controller of Rents and his Board, once the statutory period of ten days after the receipt of intimation has expired, has no jurisdiction to make an allotment under section 16AA of the Urban Rent Control Act. The allotment in this case was made one month and fifteen days after the first—and in

our opinion, effective—intimation was given by the landlords. It follows therefore that the Controller of Rents and his Board when they purported to allot the rooms in the premises on the 26th November 1949 acted without jurisdiction.

We accordingly quash the Proceedings 5AA and 7AA of 1949-50 of the Controller of Rents. There will be no order as to costs.

## SUPREME COURT.

†S.C. 1950

*Mar. 1.*

# A.K.R.M.M.K. CHIDAMBARAM CHETTYAR (APPELLANT)

*v.*

# KHOO HWA LAM (RESPONDENT).*

*Suit against a firm—Order 30, Rule 1, Code of Civil Procedure—How to be framed—Whether initials of firm prefixed to agent's name indicates a firm in a plaint—Contract for sale of immoveable property—Time when of essence—Construction—Ss. 55 and 74 of the Contract Act—Reliefs for forfeiture if applies to deposit—Agent of necessity—S. 189, Contract Act*

Where in a suit directed against the chettyar firm of A.K.R.M.M.K. th defendant was described in the plaint as A.K.R.M.M.K. Chidambaram Chetty: it was contended that the firm had not been properly impleaded.

*Held:* That under Order 30, Rule 1 of the Code of Civil Procedure, any two or more persons claiming or being liable as partners may sue or be sued in the name of the firm. The name of the firm was A.K.R.M.M.K. firm and as the firm has not been made a party the suit was not correctly framed and the customary usage of the Chettyars referred to in 13 Ran. 87 is not relevant for this purpose. Provisions of Order 30 of the Code of Civil Procedure cannot be over-ridden by this usage.

The omission is not merely a technical mistake because the amendment if allowed would necessitate the addition or substitution of new parties who could claim the benefit of the Limitation Act.

*K.S.A.V. Chettyar Firm* v. *Mahmoo*, 13 Ran. 87; *Krishna Prasad Singh* v. *Ma Aye*, 14 Ran. 383, referred to and distinguished.

*Held also:* The principle applied by the Courts of Equity in England introducing the presumption in cases of sales of land between Vendors and Purchasers, that time is not of the essence of the contract is only a presumption which will give way to proof of a contrary intention by express words or by the nature of the transaction.

As in the present case in the written contract there are penal clauses binding on both the parties forfeiting the deposit in the case of non-completion within a fixed date and providing for refund of the deposit and a further compensation in case of breach by the Vendor it is clear that a contrary intention appears in its wordings within s. 55 of the Contract Act. The language plainly excludes the notion that time limits were of mere secondary importance.

*Jamshed Khodaram* v *Burjorji Dhunjibhai*, 40 Bom. 289 at 298, applied.

*Held also:* That the alleged extension of time by the Vendor's representative was ineffectual as on the alleged date of extension the time

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* Civil Appeal No. 14 of 1948.

† *Present:* U E MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE THEIN MAUNG and U THAUNG SEIN, J.

limit had already expired. The agent cannot be held to be an agent of necessity within the meaning of s. 189 of the Contract Act empowered to act during the war time as this is a mixed question of law and facts and no averments had been made in the pleadings nor in the evidence led, upon which to base such a contention.

The purchaser could not also get relief under s. 74 of the Contract Act as this section has no application for the purpose of scaling down the amount of compensation agreed upon.

*Burjorjee Shapurji* v. *Madhavlal Jesingbhai*, 58 Bom. 610 at 618, referred to.

*K. R. Venkatram* for the appellant.

*T. Wan Hock* for the respondent.

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

U E MAUNG.—The facts necessary for the determination of this appeal lie within a very narrow compass. On the 4th December 1941 the respondent entered into an agreement with A.K.R.M.M.K. Chettyar Firm acting through its partner A.K.R.M.M.K. Chidambaram Chettyar (the appellant in this case) for the purchase of a house and site in Rangoon and executed the document Exhibit A before us. In paragraph 5 of this document appears the following provision :

"If the Purchaser shall fail to purchase the said property within the time mentioned herein the earnest money paid to the Vendor by the Purchaser shall be forfeited."

Paragraph 6 reads :

"If the Vendor shall fail to sell the property to the Purchaser within the time mentioned herein or should he sell the same to a third party or fail to give a good, clear and complete title then the Vendor shall return the sum of Rs. 5,000 (Rupees five thousand) herein paid by the Purchaser to the Vendor as earnest money together with a further sum of Rs. 5,000 as compensation damages making in all Rs. 10,000."

The time stipulated within which the sale was to be completed was on or before the 10th January 1942.

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The respondent's case is that some time before the 10th January 1942 he sent the broker who negotiated the contract between A.K.R.M.M.K. Chidambaram Chettyar and himself to see the agent of the firm, who was then in Rangoon, and to obtain an extension of time for the completion of the agreement and that Radha Krishna Pillai, a witness examined on commission in the City Civil Court of Rangoon, was the then agent. According to the broker he saw the agent sometime before the 10th January 1942 but it was not till the 12th January 1942 that he could take to the agent a letter, which has been strongly relied upon in this case by the respondent, seeking extension of time *sine die*. On this letter, Exhibit B, appears an endorsement in Tamil characters over the date "12-1-42" and it is admitted that they represent the signature of Radha Krishna Pillai.

Later and during the occupation of Burma by the Japanese Army, the building was burnt in a bombing raid. When, after the war, the respondent who went away to China early in February 1942 came back to Rangoon, he was not prepared to pay Rs. 40,000 agreed upon for the site alone. Accordingly some correspondence passed between the parties and their advocates before the suit was finally filed by the respondent for the return of the earnest money of Rs. 5,000 which A.K.R.M.M.K. Firm claimed to forfeit in pursuance of the agreement Exhibit A.

When the suit was filed the plaint was drawn up as if A.K.R.M.M.K. Chidambaram Chettyar was made the defendant. The written statement filed by A.K.R.M.M.K. Chidambaram Chettyar through his agent Chintamani Chettyar drew attention to this defect. In paragraph 1 it was said :

"The plaint is not correctly framed. The property, the subject matter of the suit, belongs to the firm of A.K.R.M.M.K.

of which A.K.R.M.M.K. Chidambaram Chettyar is only one of the partners. The plaintiff ought to have sued the firm of A.K.R.M.M.K. and not A.K.R.M.M.K. Chidambarm Chettyar."

The reply to this filed on behalf of the respondent reads :

"The plaintiff denies that the plaint is not correctly framed inasmuch as the initials of the firm combined with the name of the agent, for that matter the partner, represents the firm which is the custom and usage amongst the Chettyars and he has no knowledge of the other allegations contained in paragraph 1 of the written statement of the defendants "

The matter does not end there. When issues were framed on the 29th August 1947 Mr. Wan Hock, who appeared then for the respondent and appears now before us, said that "the suit is against the firm known as A.K.R.M.M.K. and not against Chidambaram personally." We find also on the record a note made by the learned Judge of the City Civil Court on the 16th March 1948 in the following terms :

"Mr. Venkatram on behalf of the defendant raised the point that the suit as framed was not maintainable as it does not purport to sue the defendant firm but a particular member of the firm only. When the suit was originally heard on the 29th August 1947 by my predecessor immediately after the issues were framed there is a note to this effect : Mr. Wan Hock says that the suit is against the firm known as A.K.R.M.M.K. and not against Chidambaram personally. On that date Mr. Basu was appearing for the defendant and nothing seems to have been done further after that note. In view of this fact I am of the opinion that this point had already been decided by my predecessor and no further issue need be framed on this point."

It is therefore clear that from the very beginning till the 16th March 1948 the plea that the proper parties were not before the Court had been raised.

The trial Court framed three issues and came to the conclusion firstly, that though there were in the

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agreement (Exhibit A) the provisions in paragraphs 5 and 6, time was not in fact the essence of the contract; and, secondly, that even if time had been the essence of the contract an extension had been granted on behalf of the Chettyar firm by its agent Radha Krishna Pillai Accordingly the trial Court granted a decree for Rs. 5,000 against the firm though it was drawn up against A.K.R.M.M.K. Chidambaram Chettyar.

An appeal was preferred to the High Court and a Bench of that Court upheld the decree of the City Civil Court. Dealing with the plea that the suit had been instituted against wrong parties, the Hon'ble Judges of the High Court took the view that that was at best merely a technical plea and, relying on the decisions of the High Court of Judicature at Rangoon in *K.S.A.V. Chettyar Firm* v. *Mahmoo* (1) and *Krishna Prasad Singh* v. *Ma Aye* (2) rejected it. With great respect, it seems to us that the Hon'ble Judges have misconceived the true effect of these two decisions. They have no relevance, in our opinion, to the circumstances of the present case. What was held in the first case was that by a settled usage of Chettyars in India and Burma the agent contracting on behalf of the firm prefixes the *vilasam* of the firm to his signature. It does not follow from this that the agent is the proper party to be sued by the plaintiff. The provisions of Order XXX of the Civil Procedure Code cannot be overridden by this so-called usage. Again, *Krishna Prasad Singh*'s case (2) dealt with circumstances which do not arise in this case. There the amendment allowed would not be under Order I, Rule 10 of the Civil Procedure Code and section 22 of the Limitation Act would not apply. The amendment if allowed would be infructuous in the

(1) 13 Ran. 87. (2) 14 Ran. 383.

present case because the amendment necessary would be the addition or substitution of parties and the new parties added or substituted would be entitled to claim the benefit of the Limitation Act. It must be remembered that the suit was filed on the last day allowed for the institution of suits.

Before us it has been strenuously contended on behalf of the respondent that even if there had been a technical irregularity the suit was clearly one against the firm. We regret that we have not been able to see eye to eye with the learned Counsel for the respondent in this matter. Order XXX, Rule 1 of the Civil Procedure Code is quite clear. It reads :

"Any two or more persons claiming or being liable as partners . . . . . may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court, for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners of such firm, to be furnished and verified in such manner as the Court may direct."

It is admitted that the name of the firm in this case is A.K.R.M.M.K. Firm. On that ground alone it would seem to us that the suit should fail.

But on the merits also we cannot see how the respondent can succeed. Reliance has been placed on the proposition that in respect of sales of immoveable property time is not normally the essence of the contract. The learned authors of Pollock and Mulla's Contract Act (7th Edition) have at page 301 the following :

"In England accidental delays in the completion of contracts for the sale of land within the time named are frequent by reason of unexpected difficulties in verifying the seller's title under the very peculiar system of English real property law. Sharp practice would be unduly favoured by strict enforcement of

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clauses limiting the time of completion, and accordingly Courts of Equity have introduced a presumption, chiefly, if not wholly, applied in cases between vendors and purchasers of land, that time is not of the essence of the contract. But this presumption will give way to proof of a contrary intention by express words or by the nature of the transaction."

In the present case the principle that sharp practice would be unduly favoured by strict enforcement of clauses limiting the time of completion of the contract would be thoroughly inappropriate. There are penal clauses binding on both parties. If the purchaser failed to complete the purchase before the 10th January 1942 the vendor was to forfeit the deposit of Rs. 5,000 in his hand. On the other hand, if it was the vendor who had been delaying the completion of the transaction he had entered into he would be liable not only to refund the deposit of Rs. 5,000 but also to pay a compensation of another sum of Rs. 5,000. The very fact that there are reciprocal agreements to compensate each other would make it clear, within the ambit of section 55 of the Contract Act, that the intention of the parties was that time should be the essence of the contract.

The evidence on the record also supports this conclusion. The respondent's son, as agent and attorney of the respondent in this case, has stated : " The contract should have been completed by 10th January 1942." Sai Choo Twan, witness No. 2 for the respondent, has said : ". . . . . the plaintiff was afraid that if there was no extension of time the earnest money would be forfeited." These statements, added to the fact that the respondent did get his Counsel to write to A.K.R.M.M K. Chidambaram Chettyar on the 12th January 1942 asking for extension of time, are cogent grounds in favour of the claim that time was understood between the parties to be of the essence of the contract.

The learned Judges of the High Court relied on the decision in *Jamshed Khodaram* v. *Burjorji Dhunjibhai* (1) in coming to the conclusion that time was not of the essence of the contract in this case. But the observation of Viscount Haldane, quoted by the learned Judges is, in our opinion, authority for the opposite view. It reads :

> " The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation."

Apply this test to the provisions of the contract (Exhibit A) in this case and we are clearly of the opinion that there was plainly expressed stipulation that time was of the essence.

That takes us to the further question whether there had been any valid extension of time granted by or on behalf of the Chettyar Firm with whom the respondent had contracted. Radha Krishna Pillai was examined on commission and he stated that he was approached by the broker who negotiated the sale for a month's extension and that in view of the circumstance that the respondent was not ready with the purchase price at that particular juncture he agreed to grant one month's time. The respondent's case, however, was that time was extended *sine die*. The trial Judge in his judgment was not quite definite whether he accepted the

(1) 40 Bom. 289 at 298.

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respondent's version or the version given by Radha Krishna but from the trend of the judgment it would appear that he was in favour of Radha Krishna's version. The relevant portion reads :

" It was admitted that the only responsible person left in charge of the defendant's business was this Radha Krishna who endorsed the letter Exhibit B, and therefore taking Radha Krishna's evidence as correct there does appear to be some justification that the sale which was originally agreed between the parties to be completed on the 10th January 1942 was extended further at least for a month if Radha Krishna's evidence is to be accepted. As he was the only person left in charge of the business whatever may have been the extent of his authority, it must be held that under the circumstances enumerated above, the war having broken out and the principal having left Burma hurriedly, this extension on the part of the representative of the defendant must be held to be a proper extension given by the defendant."

There are two things to be said about this. Though at the trial and before us it was claimed that negotiations with Radha Krishna for the extension of time were initiated before the 10th January 1942, Exhibit C written by Mr. Daniel, Advocate for the respondent, to the appellant says :

" A request for extension of the period of the performance *sine die* was also granted by you on the 12th January 1942."

Radha Krishna puts the interview between himself and respondent's broker on the 12th January 1942. Accordingly, if we are to accept Radha Krishna's evidence, when he agreed to the extension the time had already expired for the purposes of the contract. Further, though the learned trial Judge appears to have accepted what the learned Counsel for the respondent before us has strenuously pressed, namely, that Radha Krishna in the circumstances must be treated as an agent of necessity within the meaning of section 189 of

the Contract Act, it is clear that the necessary foundation for such a claim had not been laid either in the pleadings or in the issues or in the evidence before the trial Court. Whether an agent can be said to be an agent of necessity coming within the meaning of section 189 is a mixed question of law and fact. No averments are made in the pleadings and no evidence led from which it would be possible for the learned Counsel to base his contention that Radha Krishna if he did not have authority otherwise to bind the Chettyar Firm could still act on its behalf as an agent of necessity. Moreover, it is clear from section 189 of the Contract Act that for an act by an agent of necessity to bind the principal it must have been performed for the purpose of protecting the principal from loss. There have been no averments on this point, no issues framed, and we are merely asked to surmise at this stage of the proceedings that what Radha Krishna did on the 12th January 1942 could possibly be for the good of his principal.

We therefore come to the conclusion that time was of the essence of the contract, that time had not been validly extended by the firm and that section 74 of the Contract Act would be the only refuge for the respondent if circumstances had justified it. Section 74 would enable him to claim before us that there should be a relief to a certain extent from possible forfeiture of the whole amount of Rs. 5,000. But what are the circumstances here? There was a contract for the sale of the property in question for Rs. 40,000. The respondent had failed to complete it. The vendors would have at the time found it very difficult, if not impossible, to get another purchaser. The principle which was laid down in *Burjorji Shapurji* v. *Madhavlal Jesingbhai* (1) appears to us to be relevant. It was

(1) 58 Bom. 610 at 618.

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there said that if the contract is for payment of the larger sum with a concession enabling a smaller sum to be paid in a particular way in full satisfaction, then section 74 of the Contract Act would not apply for the purpose of scaling down the amount of compensation agreed upon.

In the result the appeal is allowed with costs throughout.

## SUPREME COURT.

SAW CHAIN POON AND ONE (APPLICANTS)

*v.*

ASSISTANT CONTROLLER OF RENTS, RANGOON AND EIGHT OTHERS (RESPONDENTS).*

†S.C. 1950

*Mar. 6.*

*Monthly Leases Termination Act, 1946, s. 4 – Monthly leases when terminate— Urban Rent Control Act, s. 12 –Conditions to be satisfied—Passing of the Decree of the Court.*

*Held :* Where a monthly tenant left Rangoon after December 1941 and there was nobody looking after or was in possession of the premises from June 1943, S. 4 of the Monthly Leases Termination Act applies and a tenant loses his right under the Act.

In spite of the fact that a decree has been passed against a person in possession of a house on the ground that he is a trespasser he has still the right to make an application under s. 12 of the Urban Rent Control Act to the Rent Controller. Requirements of s. 12 to justify the Controller of Rents are—

(1) person making the application must not be a tenant of the premises ;
(2) that he must be in occupation of the premises *bona fide* for residential or business purpose ;
(3) that he must have made a written application of his willingness to pay the standard rent of such premises.

On written declaration being made by the occupant of his willingness to pay the standard rent the Controller of Rents is entitled to grant him a permit to occupy the premises.

*Ba Tu* for the applicants.

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

*Kyaw Myint* for the 2nd, 3rd and 4th respondents.

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

U E MAUNG.—This is an application for directions in the nature or certiorari in respect of an order of the Assistant Controller of Rents, Rangoon, in

* Civil Misc. Application No. 82 of 1949.

† *Present* , U E MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE THEIN MAUNG and U THAUNG SEIN, J.

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Proceedings No. 653W of 1948-49, of the 1st August 1949. This order was sought to be reviewed before the same officer but by his subsequent order of the 24th October 1949 it was confirmed.

The statement of facts made in the application before us shortly would amount to this: that the applicants claim to have been in occupation of the premises in question as tenants of the owners for many years prior to December 1941 and that when war broke out with Japan they went to Upper Burma leaving in the premises, furniture and fittings to the value of Rs. 10,000 and certain other goods. Later they requested a nephew and that nephew's father-in-law to look after the premises and, according to the applicants, they did so until June 1943 when they discontinued looking after the premises and respondents 2, 3 and 4 came into occupation, paying rent since then to the owners of the premises.

If the matter had stopped there it would seem that the applicants would have no right whatsoever to make the present application before us. The Monthly Leases (Termination) Act, 1946, would appear to apply to deprive them of any title in the premises. Section 4 of the Act is quite clear on the point. It reads:

> "Notwithstanding anything contained in any law for the time being in force, if a lessee ceases to occupy or be in possession of an immoveable property by reason of the occupation by the enemy of the place where the immoveable property which is the subject of a lease is situate, the lease of such immoveable property shall be deemed to have been determined with effect from the end of the month in which the lessee so ceased to occupy or be in possession of the property."

On the allegations in the application itself it is clear that after June 1943 there was no one acting on behalf of the applicants in occupation or in possession of the premises.

But the matter is complicated by the fact that a suit was filed in the High Court by the applicants against respondents 2 to 9 for possession of the premises on the basis that they are still the tenants thereof from the owners. The defence provided by the Monthly Leases (Termination) Act, 1946, was apparently taken and the Appellate Side of the High Court has held that the applicants have still a right, subsisting to the date of the decree, as lessees from the owners and that respondents 2, 3 and 4 are trespassers against the applicants. That decision is binding on the parties and we must proceed in dealing with this application on the basis that that is the true state of affairs.

The Assistant Controller of Rents acted on the basis of the position as defined by the High Court and proceeded to apply section 12 of the Urban Rent Control Act. The learned counsel for the applicants strenuously argued before us that section 12 (1) of the Act cannot apply to the facts of the present case. We have listened to him very carefully but we have not been able to agree with him. The requirements of section 12 to justify action by the Controller of Rents would seem to be : (1) that the person making the application must not be a tenant of the premises, (2) that he must be in occupation of these premises *bona fide* for residential or business purposes, and (3) that he must make a written application of his willingness to pay the standard rent of such premises.

The decision of the High Court that the respondents 2 to 4 are trespassers is binding not only on these respondents but also on the applicants. These respondents have been in occupation since June 1943 and there is no suggestion that they did not enter these premises for their residential or business purposes or that they did not use the same for such purposes.

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As the Assistant Controller of Rents has stated in his order, a written declaration of their willingness to pay the standard rent has been made before him. That seems to be the end of the matter.

In these circumstances we hold that the order of the Assistant Controller of Rents cannot be said to be incorrect. It was within his jurisdiction to make the order he did and accordingly the application before us fails. Respondents 2, 3 and 4 will receive costs. Advocate's fees five gold mohurs.

# SUPREME COURT.

## U BA THAN AND SIX OTHERS (APPELLANTS)

†S.C. 1950

*v.*

*Mar. 8,*

## MA AMA (RESPONDENT).*

Keittima *Adoption Act, 1939, s. 5—Registration—If necessary before institution—Registration Act, s. 32* (a), *32* (b) *and 2* (10) *representative—Registration out of time—Document returned for want of proper stamp to advocate—Effect of advocate presenting—Admission of execution by minor's father as representative—Defect in procedure—S. 87 of the Registration Act—Publicity of adoption.*

A minor child six years old was adopted and a deed was executed signed by the father and the adopting parent with a ten rupee currency note attached with undertaking to present the deed for registration and register it when the Registration office opened, but before registration the adopting parent died leaving the child only as his legal representative. A suit was filed with the unregistered document and it was then taken back and registered before the actual hearing.

*Held :* That under s. 5 of the Registration of *Keittima* Adoption Act, 1939 no dispute shall be entertained by any court to inherit as a *Keittima* son or daughter if it was effected after 1st April 1941, unless the same is evidenced by an instrument as mentioned therein. The words in s. 5 are " no disputes " and not " no suits." The suit was competent ; when the deed of adoption was returned for registration before the actual trial and actually registered, then there is sufficient compliance of the section for a registered instrument under s. 47 of the Registration Act operates from the date of its execution.

*Held also :* That the father of the minor could present it under s. 32 (*a*) of the Registration Act as a person who had executed it and also under s. 32 (*b*) read with s. 2 (10) as the representative of the minor.

*Subba Reddy* v. *Surnva Reddy*, A.I.R. (1930) Mad. 425, referred to.

Questions as to when and by whom a document was presented are questions of fact and any party challenging registration on the grounds that the document was not presented in proper time or by proper person must raise such questions in time in the court of the first instance. If a document when presented is insufficiently stamped there is no provision that the presentation is not proper. The Registrar should not have returned the document but impounded it and sent it to the Collector himself.

*Shama Charan Das* v. *Joyenoolah*, (1885) I.L.R. 11 Cal. 750 at 754, referred to and applied.

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* Civil Appeal No. 3 of 1948.

† *Present :* U E Maung, Chief Justice of the Union of Burma, MR. JUSTICE THEIN MAUNG and U THAUNG SEIN, J.

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There is nothing in the Registration Act to prevent a person from showing that the endorsement was inaccurate and proving the real facts.

*Official Receiver* v. *P.L.K.M.R.M. Chettyar Firm*, (1931) I.L.R. 9 Ran. 170, followed.

It is immaterial by whom the physical act of presentation of the document was performed. This question is a mixed question of law and fact and a court of appeal cannot expose a party after he has obtained a decree to the brunt of a new attack of which he had not notice at the hearing.

*Barkhudar Shah* v. *Mst. Sat Bharai*, (1934) I.L.R. 15 Lah. 563 ; ***Bharat Indu*** v. *Hamid Ali Khan*, 47 I.A. 177 at 184 ; *Nathu Piraji Marwadi and others* v. *Umedmal Gadumal*, (1909) I.L.R. 33 Bom. 35 ; *Mathuradas Girdharidas and others* v. *Khemchand Ramdas*, A.I.R. (1948) Sind 95, referred to.

Where a Registrar did not summon the parties referred to in the minor's application as entitled to notice for opposing the registration it is only an irregularity. Presumption of proper registration arises under s. 87 of the Registration Act as " nothing done in good faith pursuant to the Act by any registering officer shall be deemed invalid merely by reason of any defect in procedure ."

*Kanhaya Lal* v. *National Bank of India, Ltd.*, (1923), I.L.R. 4 Lah. 284 at 294 ; *Rafat-un-nissa Begum* v. *Husaini Begum*, (1925) I L.R. 47 All. 292 at 294 ; *Daltatraya Keshav Naik* v. *Gangabai Narayan Naik*, A.I.R. (1926) Bom. 137 ; *Muni Lal and another* v. *Shulam Hussain Nur—Ahmad and others*, (1935) I.L.R. 16 Lah. 1019 ; *S.M.A.R. Chetty Firm* v. *Ko Teik Ka*, (1923) I.L.R. 1 Ran. 22, referred to.

*Held further :* That when a document of adoption is executed in presence of several respectable witnesses there was sufficient publicity of the adoption as required by law.

*Ma Nu and others* v. *U Nyun*, (1934) I.L.R. 12 Ran. 634, referred to.

*P. K. Basu* for the appellants.

*P. B. Sen* for the respondent.

The judgment of the Court was delivered by

MR. JUSTICE THEIN MAUNG.—This is an appeal, filed with the necessary certificate of the High Court under section 5 of the Union Judiciary Act, 1948 from a decree declaring that the respondent Ma Ama as the *keitlima* adopted daughter of the late U Ba Lun, is the sole owner of his estate.

Ma Ama who was about six years of age, at the time of the alleged adoption, had been living in the same house with U Ba Lun since she was about four months old as her father Thet Pe left her with her mother Ma Mya and U Ba Lun employed her shortly after their separation, which according to Thet Pe himself was on account of a divorce by mutual consent. Ma Mya continued to live there even after she had married Thein Tin, and Thein Tin continued to live there even after Ma Mya loss her life in an air raid about five months before the alleged adoption.

On the 12th August 1945 which is the date of the alleged adoption Thet Pe suddenly appeared and proposed to take Ma Ama away from U Ba Lun. So in the presence of elders whom Thet Pe had to fetch at his instance U Ba Lun offered to adopt Ma Ama as his *keittima* daughter, the elders persuaded Thet Pe to accept the offer and leave her with U Ba Lun and Thet Pe agreed to do so. So the deed of adoption Exhibit A was executed by U Ba Lun and Thet Pe and attested by the elders. A ten-rupee currency note signed by U Ba Lun and Thet Pe was attached to the deed ; and the deed itself contains an express undertaking by U Ba Lun "when the Registration Office opens, I will go along with him (Thet Pe) to the Registration Office and register the deed on the day approved by Ko Thet Pe." U Ba Lun died of a sudden illness on the 12th October 1945, *i.e.*, before the Registration Office is reopened ; and the suit for declaration was instituted on the 5th December 1945 against the first two appellants who are the brother and the aunt respectively of U Ba Lun. Thereupon they pleaded that the other appellants (who are the children of the first respondent) also should be made parties to the suit as they had been adopted by U Ba Lun as his *keittima* children by a deed dated the

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19th September 1945 (Exhibit 111). Incidentally this deed contains the following clauses as regards stamp and registration :

" As it is not possible to purchase the Government stamps at present, one ten-rupee currency note being No. 250823 has been affixed instead of the said stamp.

As the Registration Offices have not yet opened at present, I, U Ba Lun undertake that I will have this deed registered as stated above in the Registration Office when the Registration Offices open in future."

After the plaint had been amended and the said appellants had been made parties all the defendants appellants filed a common written statement in which so far as the respondent's adoption was concerned they merely pleaded that the deed was unstamped and unregistered and that the adoption was improbable and remained to be proved. So the only issue framed with reference to it was:

" 3. Was the plaintiff adopted as a *keittima* daughter of U Ba Lun."

Some time after the settlement of issues but before the actual hearing of the suit, the learned District Judge drew the attention of the learned Advocates for both parties to section 5 of the Registration of *Keittima* Adoption Act, 1932 which reads :

" 5. No dispute as to the right of any person to inherit as or through a *Keittima* son or daughter shall be entertained by any Court unless the fact of the adoption, if it was effected after the 1st April, 1941, is evidenced by an instrument—

(i) executed by the person making the adoption and (*a*) by the person who is adopted if not less than 18 years of age at the time of such execution aforesaid, or (*b*) if less than that age, then by the

person or persons, if any, whose consent to the adoption is required by the Burmese Buddhist law, and

(ii) attested by at least two witnesses, and

(iii) registered in Book 4 of the books referred to in sub-section (*1*) of section 5 of the Registration Act."

The learned Advocates accordingly took back the deeds of adoption for registration ; and the respondent and the appellants filed them again after registration on the 6th May, 1946 and the 25th June, 1946 respectively. No further written statement was filed and no further issue, *e.g.* as to the validity of registration was framed thereafter. The suit was tried on the original issues and a declaratory decree was granted to the plaintiff respondent as the deed of adoption of the last five appellants was not executed by the person who was alleged to have given them away as required by section 5 of the said Act. Incidentally it also appears from the evidence of the handwriting expert (Mr. C. E. Hardless) that it was not executed by U Ba Lun at all. After confirming the said decree on appeal the High Court has certified, for the purposes of this appeal that it does involve some substantial questions of law.

The first contention of the learned Advocate for the appellants is that the court of first instance should not have entertained the respondent's suit since her deed of adoption had not been registered at the time of its institution. However, as the High Court has rightly pointed out the words used in section 5 of the said Act are " No disputes " and not " No suits." Besides no registration office was open at the time of the institution of the suit, the deeds of adoption were returned for registration before the actual trial as the registration office at Henzada, the district headquarters opened on the 25th March, 1946 although the

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registration office at Ingabu, where they should ordinarily have had to be registered was not open yet and section 47 of the Registration Act provides :

"A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration."

The second contention of the learned Advocate for the appellant's is that registration of the respondent's deed of adoption is vitiated by the fact that Thet Pe who presented it had no right to do so. However, he could present it under section 32 (*a*) of the Registration Act as a person who had executed it and also under section 32 (*b*) read with section 2 (10) thereof as the representative of the minor respondent who was claiming under it. See *Subba Reddy* v. *Suruva Reddy* (1).

The third contention of the learned Advocate for the appellants is that the documents were presented for registration out of time. He admits that its presentation on or before the 12 April, 1946 would have been within time : but he relies on the endorsement on it that it was presented for registration by Thet Pe on the 23rd April, 1946. The learned Advocate for the respondent has submitted in reply, we think rightly, that the question as to when and by whom the document was presented is a question of fact and that if the question of fact had been raised in time in the Court of first instance he could have led evidence to show that the document was in fact presented by Thet Pe on the 4th April, 1946, *i.e.* well within time. Thet Pe filed an application under sections 25, 30 and 34 of the Registration Act in the office of the Registrar, Henzada on the 2nd April, 1946 to receive and register the document on presentation ; and an

(1) A.I.R. (1930) Mad. 425.

endorsement of the Joint Sub-Registrar on the said application reads:

"4-4-46—Document produced today and returned to Mr. Sen as requested for production before the Collector under section 41 of the Burma Stamp Act. Await."

Mr. Sen was the advocate for Thet Pe and there is nothing to show that Thet Pe himself was not there with Mr. Sen. The High Court of Calcutta has pointed out in *Shama Charan Das* v. *Joyenoolah* (1).

" But there is no provision in the Registration Act or in the Stamp Acts which says that if the document when presented is insufficiently stamped, the presentation shall be no presentation. On the contrary, the procedure provided is wholly inconsistent with that idea, because what the procedure requires (and the procedure was carried out in the present instance) is that the registering officer to whom the document is presented receives it and makes his entry accordingly ; he impounds it and sends it to the Collector ; the Collector takes the necessary steps to compel payment of the proper stamp duty and the penalty ; he then returns the document to the Registering Officer, who shall proceed with the matter. The effect is that the presentation is a good presentation though the actual registration is delayed."

So the Joint Sub-Registrar made a mistake in returning the document. He should have impounded it and sent it to the Collector himself. As has been held by their Lordships of the Privy Council in *Official Receiver* v. *P.L.K.M.R.M. Chettyar Firm* (2) there is nothing in the Registration Act to prevent a person from showing that the endorsement was inaccurate and proving the real facts.

Learned Advocate for the appellants has suggested that Mr. Sen who was Thet Pe's advocate must have handed over the document to the Joint Sub-Registrar on the 4th April, 1946. However, the High Court at

(1) (1885) I.L.R. 11 Cal. 750 at 754. (2) (1931) I.L.R. 9 Ran. 170.

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Lahore has held in *Barkhudar Shah* v. *Mst. Sai Bharai* (1) "Even if the lady did not personally hand the paper to the Sub-Registrar, the presentation was by her; it is immaterial by whom the physical act was performed." *See* also [*Bharat Indu* v. *Hamid Ali Khan* (2), especially the observations of their Lordships of the Privy Council at page 184 thereof.] Having regard to the above rulings and the circumstances of the case, we are of the opinion that it is now too late for the appellants to raise the mixed questions of law and the fact about presentation [Cp. *Nathu Piraji Marwadi and others* v. *Umedmal Gadumal* (3), where the High Court of Bombay held]:

"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."

See also *Mathradas Girdharidas and others* v. *Khemchand Ramdas* (4).

In view of the above finding, it is not necessary for us to consider whether registration of the document is not valid under section 3 of the Registration (Temporary Provisions) Act, 1947 which provides for acceptance for registration beyond time of documents executed during the emergency period, *i.e.* the period commencing with the 1st December, 1941 and ending with the date on which the Registration Office is reopened.

The fourth contention of the learned Advocate for the appellants is that registration of the document is invalid as Thet Pe had no right to admit execution on

(1) (1934) I.L.R. 15 Lah. 563.
(2) 47 I.A. 177, p 184.
(3) (1909) I.L.R. 33 Bom. 35
(4) A.I.R. (1948) Sind 95

behalf of U Ba Lun. In his application, dated the 2nd April, 1946 in the office of the Registrar, Henzada, Thet Pe stated :

" That U Ba Lun, the other executant to the Deed of Adoption, died on or about the 14th October, 1945. He cannot therefore personally appear in the Registration Office to admit his execution of the document. His representative in law, is his heir Ma Ama, the *Keittima* daughter adopted by him by this deed of adoption, and she being a minor, this petitioner her natural father and guardian, is competent to admit execution of the deceased U Ba Lun, as representative on her behalf, for purpose of registration.

That the deceased U Ba Lun also left behind his brother U Ba Than, Head Clerk, Excise Office, Henzada, who claims that his minor children were also adopted as *keittima* by U Ba Lun. Although this petitioner denies the alleged adoption as fabricated and untrue, still if this Hon'ble Office deems necessary, under the law of registration, summons may be issued to the said U Ba Than to enforce his appearance at the Registration Office, to admit the execution of the Deed of Adoption of Ma Ama, by U Ba Lun, as representative of his minor children. "

However, the Joint Sub-Registrar did not summon U Ba Than and proceeded to register the document on Thet Pe's admission probably because he was aware of the litigation that was pending between the parties.

Their Lordships of the Privy Council have stated in *Kanhaya Lal* v. *National Bank of India, Ltd.* (1) :

"Now by section 34, the duty of inquiring as to execution is put upon the Registering Officer, and by section 35 it is provided that if he is satisfied as to various particulars he shall register the documents. Here again the presumption from registration of *omnia praesumuntur rite et solemniter acta* would apply ; but the matter is finally set at rest by section 87 which provides that 'nothing done in good faith pursuant to the Act by any Registering Officer shall be deemed invalid merely by reason of any defect in his appointment or procedure."

(8) (1923) I.L.R. 4 Lah. 284 at p. 294.

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The High Court of Allahabad has held in *Rafat-un-nissa Begum* v. *Husaini Begum* (1):

"That the deed having been presented for registration by a person duly authorized to present it, any error or defect in the procedure of the Registering Officer, subsequent to the presentation, was a defect in procedure within the meaning of section 87 of the Act and that therefore the lower appellate Court had rightly admitted the document in evidence."

The High Court of Bombay also has observed in *Dattatraya Keshav Naik* v. *Gangabai Narayan Naik* (2):

"But assuming that the registering officer was in error in accepting her as Keshav's 'representative' for the said purpose, it was only a defect in procedure which was not sufficient to invalidate the registration."

Even in a case where a mortgage deed had been registered in the absence of the executant, the High Court at Lahore has held:

"That the deed having been presented for registration by a person duly authorized to present it, any error or defect in the procedure of the Registering Officer, subsequent to the presentation, was a defect in procedure within the meaning of section 87 of the Act and that therefore the lower appellate Court had rightly admitted the document in evidence."

[See *Muni Lal and another* v. *Shulam Hussain—Nur Ahmad and others* (3).]

Besides, a Bench of the late High Court of Judicature at Rangoon has held in *S.M.A.R. Chetty Firm* v. *Ko Teik Ka* (4) and others:

"Where a document is presented by a person duly authorized to present it, who thus initiates the jurisdiction of the Registering Officer, and who does all that he is required to do

(1) (1925) I.L.R. 47 All. 292, p. 294.
(2) A.I.R. (1926) Bom. 137.
(3) (1935) I.L.R. 16 Lah. 1019.
(4) (1923) I.L.R. 1 Ran. 22.

under the Act and is guilty of no shortcoming thereunder, it would be contrary to the scheme of the Act, and it could not have been the intention of the Legislature that he should be punished for any error or defect in the procedure of the Registering Officer, subsequent to the presentation."

Moreover at the time of registration there was already a dispute pending in a Court of Justice as to who was entitled to represent U Ba Lun. So registration of the document without admission of execution by a qualified representative of U Ba Lun, who was one of the executants thereof, is a mere defect in procedure within the purview of section 87 of the Registration Act.

The fifth contention of the learned Advocate for the appellants is that the adoption was not voluntary. However, the appellants did not plead any coercion or undue influence in their written statement. They merely pleaded that it "was improbable and remains to be proved." There is no issue as to whether it was voluntary or not. Besides, the evidence clearly shows that U Ba Lun offered to adopt the respondent as his *keittima* daughter as he could not part with her and that Thet Pe accepted the offer only when the elders intervened on behalf of U Ba Lun. U Net for instance says "He (U Ba Lun) remarked that if the child was taken away from him he might die of a broken heart." Even Soe Myint (D.W. 2) had to admit "U Ba Lun explained that the child's mother died at the bombing under his eyes, that Thet Pe did not look after the child well and that he took pity on the child."

The sixth contention of the learned Advocate for the appellants is that Ma Mya was not Thet Pe's lawfully married wife and that Thet Pe accordingly had no right to give the respondent in adoption. However, the appellants did not plead in their written statement that Ma Mya was a mere mistress of Thet Pe. Thet Pe himself has given evidence of her having been his

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lawfully married wife. His evidence is supported to a certain extent by Exhibit 1 ; and there is no evidence to the contrary. Besides Thet Tin, the second husband of Ma Mya who was present at the adoption, has by his conduct thereat acknowledged Thet Pe's right to give her in adoption ; and what is more U Ba Lun, with whom Ma Mya lived about five years, clearly recognized Thet Pe's right to take the child away from him and Thein Tin.

The seventh and last contention of the learned Advocate for the appellants is that there is no repute of the relationship by adoption and no evidence of the respondent having been treated by U Ba Lun as his own child. However, he offered to adopt the respondent in the presence of the elders, *viz.*, U Net, trader (P.W.2), U Ba Thoung, Headman of the village (P.W.3), B. B. Moideen (*a*) Ko Thar Li Kar, trader (P.W.4), Mr. Charles, Pleader and U Ba Thoung, S.I.P., and the deed of adoption has been attested by all of them. Besides, as we have stated above Thein Tin, the step father of the respondent, was present at the adoption ; and both U Soe Myint (D.W.2) and U Po Thet (D.W.3) say that U Ba Lun informed them of the document having been executed. So we are of opinion that there was sufficient publicity of the adoption. [Cp. *Ma Nu and others* v. *U Nyun* (1).] As regards treatment, U Net, U Ba Thoung and Thein Tin have deposed that U Ba Lun brought the respondent up as a child of his own and there is no evidence to the contrary.

We accordingly over-rule the contentions of the learned Advocate for the appellants and dismiss their appeal with costs.

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(1) (1934) I.L.R. 12 Ran. 634

## SUPREME COURT.

THE BURMAH OIL Co. (BURMA CONCESSION), LTD. (APPLICANT)

*v.*

THE COURT OF INDUSTRIAL ARBITRATION, BURMA AND FIVE OTHERS (RESPONDENTS).*

† S.C. 1950

*Mar. 9.*

*Writ of Prohibition and Certiorari*—S. 2 (g), *Trade Disputes Act.*

Where the President in exercise of the powers conferred under s. 9 of the Trade Disputes Act referred 11 matters for decision to the Industrial Court and it was contended that four matters out of eleven referred to did not come within the definition of a Trade Dispute and the Industrial Court had no jurisdiction to entertain them.

*Held*: That the application for prohibition and certiorari was premature. The Industrial Court had not yet opportunity to consider whether all or any of these matters fell within its jurisdiction.

Where several distinct things are referred one or more of which is within the cognizance or competence of the inferior Court and the others are not, the Supreme Court will not presume that the inferior Court will go beyond its jurisdiction.

*Hallack and another* v. *The Chancellor, Masters and Scholars of the University of Cambridge*, 1 Q.B. 593; *The Queen* v. *Twiss*, 4 Q.B. 407 at 413, applied.

*E. C. V. Foucar* (for the applicant).

*Chan Htoon* (Attorney-General, Burma) for the respondents Nos. 1 and 4.

*Yan Aung* for the respondents Nos. 2 and 3.

*G. Horrocks* for the respondents Nos. 5 and 6.

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

U E MAUNG.—We are of the opinion that the decisions in *Hallack and another* v. *The Chancellor*,

* Civil Misc. Application No. 5 of 1950.

† *Present*: U E MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE THEIN MAUNG and U THAUNG SEIN, J.

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THE BURMAH OIL CO. (BURMA CONCESSION), LTD. v. THE COURT OF INDUSTRIAL ARBITRATION, BURMA AND FIVE OTHERS.

*Masters and Scholars of the University of Cambridge* (1) and *The Queen* v. *Twiss* (2) are conclusive authority for the view that the application now before us is premature. As was said in the latter case :

" Where proceedings are pending before the inferior court, having reference to several distinct things, one or more of which is within the cognizance or competence of the court and others are not, this court ought not to assume that the inferior court will go beyond its competency and jurisdiction ; and therefore we ought not to interfere at the present stage of the proceedings."

In the present case all that has happened so far is that the President, in exercise of the power that has been conferred upon him under section 9 of the Trade Disputes Act, has referred eleven matters for decision to the Industrial Court. The learned counsel for the applicants claims that the first four matters referred to the Industrial Court do not come within the meaning of a " trade dispute " as defined in section 2 (*j*) of the Trade Disputes Act. He was, however, constrained to admit that the other seven matters may come within the competence of the Industrial Court. That Court had, at the stage at which the application to this Court was filed for directions in the nature of prohibition and certiorari, merely the general statement of claims filed by the employees' Unions before it. The applicants have not filed their reply to this statement of claims and the Industrial Court has not yet had an opportunity to consider whether any of the eleven matters referred to it fall within its jurisdiction or not. In his affidavit the Secretary of the Industrial Court also says :

" I further say that the Court is not bound to give an award unless it is fully satisfied that a matter referred to it is trade dispute within the meaning of section 2 (*j*) of the Trade Disputes Act."

(1) 1 Q.B. 593. (2) 4 Q.B. 407 at 413.

In these circumstances we must dismiss the application as being premature.

Mr. Foucar for the applicants and Mr. Horrocks for respondents five and six have suggested that we retain the proceedings on the file of the Court inspite of our finding as recorded above. They make this request on the ground that if hereafter the Industrial Court were to come to a finding which they would like to test before us, it would save time and labour to all concerned to be able to make use of the present voluminous proceedings. But that purpose can be served if at the filing of any future applications a request is made to use in connection with that application the papers in these proceedings and such a request can be granted by the Court in proper cases.

The respondents 1 and 4, who are represented by the Attorney-General, will get five gold mohurs as Advocate's fees. Respondents 2 and 3, who are represented by U Yan Aung, will get another five gold mohurs.

The order of stay is discharged.

## SUPREME COURT.

†S.C. 1950

*Mar. 13.*

MA TIN U (APPELLANT)

*v.*

U SHWE KYU AND FOUR OTHERS (RESPONDENTS).*

*Limitation Act, s. 5—Discretion—Discretion when in accordance with law.*

The Court of the Assistant Judge was first created by the Act of 1945 and in 1946 an appeal was by mistake filed in the District Court, when it should have been filed in the High Court as the relevant enactments were not available to the members of the Bar and the litigating public and the appeal was entertained, heard and allowed by the Ditsrict Judge. On appeal to the High Court the judgment of the District Court was set aside by the High Court on the ground that no appeal lay to the District Court. The Respondent then filed an appeal to the High Court and prayed under s. 5 of the Limitation Act to excuse the delay in presenting the appeal and the High Court excused the delay and entertained the appeal and afterwards allowed the appeal.

*Held :* That s. 5 of the Limitation Act vests the exercise of discretion in this case in the High Court and as the High Court gave due consideration to all the relevant facts and exercised its discretion in accordance with law, such exercise could not therefore be interfered with.

*Leong* for the appellant.

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

U E MAUNG.—The only question that has been taken up in this appeal before us is whether the Bench of the High Court, whose judgment is being questioned here, has exercised the discretion vested in it by section 5 of the Limitation Act wisely or not. The appeal preferred to the High Court was no doubt barred by time, it having been filed 320 days after the date due for filing of the appeal. But, as has been noted in the judgment under appeal, the Court of the Assistant Judge was first created by the Act of 1945

* Civil Appeal No. 7 of 1949.

† *Present :* U E MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE THEIN MAUNG and U THAUNG SEIN, J.

and when in 1946 the appeal from the decree of that Court was filed in the District Court at Myingyan, the relevant enactments were not easily available to the members of the Bar and the litigating public. The learned Judges of the High Court have carefully considered the circumstances obtaining in the country at that time and have also discussed in detail the relevant decisions on the subject. As the learned Judges pointed out, "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." Neither the District Court nor the counsel appearing for the appellant and for the respondents noticed, at the time the appeal was pending in the District Court, that it was not the proper Court to which the appeal should have been filed.

Section 5 of the Limitation Act vests the exercise of discretion in the High Court to which the appeal lay. The High Court has exercised that discretion fully aware of all the relevant facts and we cannot say that this discretion has been exercised otherwise than in accordance with law. Moreover, substantial justice has been done in this case. The decree of the trial Court was obviously one which could not have been supported in law, it having granted a mortgage degree against persons who were not parties to the mortgage and who were merely claiming adversely to the mortgagor.

In these circumstances the appeal must be dismissed.

## SUPREME COURT.

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*Mar. 13.*

U BA YI AND EIGHT OTHERS (APPLICANTS)

*v.*

THE OFFICER-IN-CHARGE OF JAIL, YAMÈTHIN (RESPONDENT). *

*Public Property (Protection) Act, s. 7 (3)—Aim, scope and object.*

*Held :* To arrive at the real meaning of the provisions of an act it is always necessary to get an exact conception of the aim, scope and object of the whole Act. Construction is to be made of all the parts together and not of one part only by itself, even when the words are the plainest, as the true meaning of any passage is that which (being permissible) best harmonises with the subject and with every other passage of the Statute.

*The Union of Burma* v. *Maung Maung and two others*, B.L.R. (1949) H.C. 1, p. 20 (F.B.); *Soe Khin* v. *The Union of Burma*, B.L.R. (1949) H.C. 111, followed.

S. 6 (1) of the Public Property (Protection) Act creates a new offence and under s. 5 (2) of the Code of Criminal Procedure in the absence of enactment to the contrary that offence will have to be enquired into under the Code and in view of the provisions of ss. 61 and 167 of the Code no Police Officer would be able to detain in custody a person arrested for an offence under s 6 (1) of the Public Property (Protection) Act for a longer period than 24 hours and no Magistrate would be able to authorize his detention for a term exceeding 15 days on the whole unless he takes action under s. 344.

The Provisions of s. 7 (3) of the Public Property (Protection) Act have been enacted to render ss. 61 and 167 of the Code inapplicable to an offence under s. 6 (1) of the Act. This section allows the Police Officer longer time (up to six months) for investigation. The detention in custody is not by way of punishment in violation of the fundamental principle that a man cannot be detained on mere suspicion but can only be for the purpose of investigation : even though all prejudicial acts are not offences yet most of them are offences and investigation into the rest may also disclose that offences have been committed.

*Ma Lone* v. *The Commissioner of Police, Rangoon and one*, (1949) B.L.R. (S.C.) 8 at 11, referred to.

*Vimalbai Despande* v. *Emperor*, A.I.R. (1945) Nag. 8, followed.

*P. K. Basu* for the applicants in Cr. Misc. No. 433/49.

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* Criminal Misc. Application No. 433 of 1949.

† *Present :* U E MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE THEIN MAUNG and U THAUNG SEIN, J.

*O. S. Woon* for the applicant in Cr. Misc. 13, 14 and 15/49.

*Ba Sein* (Government Advocate) for the respondent.

The judgment of the Court was delivered by

MR. JUSTICE THEIN MAUNG.—We have heard this application together with Criminal Miscellaneous Applications Nos. 13, 14 and 15 of 1950 so far as the common question as to the object, scope and interpretation of section 7 (3) of the Public Property Act, 1947 is concerned; and we have accordingly had the benefit of a thorough discussion thereof not only by the learned Advocates for the applicants but also by the learned Attorney-General, whom we had requested to appear personally for the respondents.

To arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope and object of the whole Act. (*See* Maxwell on Interpretation of Statutes, Ninth Edition, page 22.) It is an elementary rule that construction is to be made of all the parts together and not of one part only by itself even when the words are the plainest, as the true meaning of any passage is that which (being permissible) best harmonises with the subject and with every other passage of the statute. [*See Ibid*, pages 30-31 and *The Union of Burma* v. *Maung Maung and two others* (1), Cp. *Soe Khin* v. *The Union of Burma* (2).]

So section 7 (3) of the Act must be interpreted in the light of the other provisions of the Act and especially in the light of (1) the provisions of the other sub-sections of section 7 itself and (2) the provisions of the other sections which are referred to therein.

Sub-section (3) provides for detention in custody of two classes of persons, *viz*: those who are arrested

(1) (1949) B.L.R. 1 (F.B.) at p. 20. (2) (1949) B.L.R. 111.

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under sub-section (1) and those who are arrested under sub-section (2); sub-sections (4), (5) and (6) provide for what can or should be done about those two classes of persons after they have been arrested and taken into custody; and these sub-sections do not draw any distinction between those two classes of persons.

However, the matter will be much clearer if we deal with those two classes separately.

Sub-section (1) provides:

"Any police officer not below the rank of a Sub-Inspector or any other officer of Government empowered in this behalf by general or special order by the Governor, may, with the prior approval of such authority as may be prescribed by the Governor, arrest without warrant any person whom he suspects of having committed or of committing any of the offences mentioned in sub-section (1) of section 6 in respect of any Public property."

And section 6 (1) reads:

"Notwithstanding anything contained in any other law for the time being in force, if any person is in unauthorized possession of any Public property, or commits theft, misappropriation or mischief in respect of any Public property, he shall be punishable with imprisonment for a term which may extend to seven years, or with whipping, or with both imprisonment and whipping, and shall also be liable to fine."

Section 6 (1) creates a new offence; and according to section 5 (2) of the Code of Criminal Procedure it will, in the absence of any enactment to the contrary, have to be investigated, inquired into, tried or otherwise dealt with according to the provisions of the said Code. In that event sections 61 and 167 thereof would have to be complied with. No police officer would be able to detain in custody a person arrested for an offence under section 6 (1) of the Public Property Protection Act, 1947 for a longer period than twenty four hours, and no Magistrate would be able to authorize his

detention in custody for a term exceeding fifteen days on the whole, unless he takes action under section 344 thereof and even then he would not be able to remand him to custody for a term exceeding fifteen days at a time. So section 7 (3) of the Public Property Protection Act provides :

"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."

It is fairly obvious that the sub-section has been enacted to render sections 61 and 167 of the Code inapplicable and to let police officers have longer time for investigation without applying to any Magistrate for remand.

We are fortified in this view by the facts (*a*) that the arrest is only on suspicion, (*b*) that sub-section (4) provides that if any arrested person is prepared to furnish security, the officer who has arrested him may, subject to such general or special instructions as may from time to time be issued by the President or any person authorized by the President in this behalf, release him on his executing a bond, with or without sureties, undertaking that he will conform to such conditions or directions as the President may from time to time make, (*c*) that sub-section (6)

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provides that such a bond shall be deemed to be a bond taken under the Code of Criminal Procedure and that the provisions of section 514 thereof shall apply to it, (*d*) that detention in custody under sub-section (3) is referred to as "temporary custody" in sub-section (5) (*e*) that sub-section (5) also contemplates a final order being passed by the President in addition to the order for temporary custody under sub-section (3) where he is authorized to do so by any law for the time being in force, which, as the learned Attorney-General has admitted, must be some law other than the Act itself inasmuch as it does not contain any provision like section 5A of the Public Order (Preservation) Act, 1947. [Cp. *Ma Lone* v. *The Commissioner of Police, Rangoon and one* (1)] and (*f*) that reference to a final order in sub-section (5) indicates that an order under sub-section (3) is only an interim order. Besides, there is a presumption that the Legislature does not intend to make any substantial alteration in the law beyond what it expressly declares, either in express terms or by clear implication or, in other words, beyond the immediate scope and object of the statute. On all general matters outside those limits the law remains undisturbed. It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights or depart from the general system of law, without expressing its intention with irresistible clearness. [*See* Maxwell's Interpretation of Statutes, Ninth Edition, pages 85-86. Cp. *Vimalbai Despande* v. *Emperor* (2).] It cannot be the intention of the Legislature that "temporary custody" under sub-section (3) should be by way of punishment in violation of the fundamental principle that a man cannot be punished on mere suspicion. There is

(1) B.L.R. (1949) (S.C.) 8 at 11. (2) A.I.R. (1945) Nag. 8.

no reason why a man should be detained by way of punishment for an offence under section 6 (1) of the Act, if the case cannot be sent up for trial before a Magistrate ; nor is there any reason why he should be let off with "temporary custody" for at most six months only, if the case can be sent up for trial in as much as the offence is punishable with imprisonment for a term which may extend to seven years or with whipping or with both whipping and imprisonment and also fine ; and there is a presumption against intending injustice or absurdity. (*See* ib., p. 207 *et seq.*)

For the above reasons we are clearly of the opinion that detention in custody under section 7 (3) for an offence under section 6 (1) can only be for the purpose of investigation and not for the purpose of punishment and that a person who has been arrested for it under section 7 (1) should either be sent up for trial or released as soon as investigation is complete and that such a person should not be detained in custody for the maximum period of six months automatically. The President's order under Proviso (1) to section 7 (3) is only an order in the nature of remand. It cannot by any means prevent the accused being produced before a Magistrate for trial; and the Magistrate who has seisin of the case may either remand him to custody or grant him bail in accordance with the provisions of the Code of Criminal Procedure.

At one stage of the hearing it was suggested that detention in custody under section 7 (3) might be for the purpose of prevention. However, this suggestion has been dropped as sub-sections (1) and (2) provide only for arrest of persons who are suspected "of having committed or of committing any of the offences mentioned in sub-section (1) of section 6" or "of having committed or of committing any prejudicial

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act " *i.e.*, as they do not contain the words " or of being about to commit." The omission of these words must have been deliberate since section 5 (1) of the Public Order (Preservation) Act, 1947, which is an earlier Act, contains the words " or of being about to act." (*See* also Rule 129 of the Defence of Burma Rules.)

As we have stated above sub-sections (3), (4), (5) and (6) of section 3 contain provisions relating to persons arrested under sub-section (1) or sub-section (2) without any distinction. So they cannot be interpreted in one way as regards persons arrested under sub-section (1) and in another way as regards persons arrested under sub-section (2).

It has been contended that arrests under sub-section (2) are for prejudicial acts and that all prejudicial acts are not offences. Now section 2 (ii) of the Act defines prejudicial act as follows :

> " (*a*) any act directly or indirectly connected with, or relating to, any unlawful activity having for its object the smuggling of any property in and out of Burma in contravention of import and export orders and rules duly made by the Government under the Import and Export Control Act, 1947, and Control of Imports and Exports (Temporary) Act, 1947 ; or
>
> (*b*) any act which directly or indirectly abets or incites or facilitates the commission of any offence in respect of any Public property or the contravention of any rule or order made under this Act, the Export and Import Control Act, 1947, and Control of Imports and Exports (Temporary) Act, 1947, the Public Utilities Protection Act, 1947, the Essential Supplies and Services Act, 1947 ; or
>
> (*c*) any wilful negligence, mismanagement or default on the part of a person who has, or has had, the custody charge or control of any Public property, resulting directly or indirectly in loss, deterioration or destruction of any such Public property ;

(*d*) any dealing by any person directly or indirectly in any Public property which gives rise to a suspicion that the person concerned has obtained such Public property either by commission of theft, misappropriation, mischief, breach of trust or by any wrongful means."

It will be seen that most of the prejudicial acts are offences and that investigation into the rest may also disclose that offences have been committed.

We now proceed to deal with the application for *habeas corpus* in the light of the above decision on the object, scope and interpretation of section 7 (3) of the Act.

The applicants were arrested on the 26th September, 1949, for having committed an offence under section 6 (1) of the Act by "breaking open the Pyawbwe Treasury Vault and looting away all the cash nearly amounting to Rs. 2,00,000." A report of the arrest was made but the President's order for their detention in temporary custody for six months under the Proviso to section 7 (3) of the Act was not received before the expiry of fifteen days from the date of their arrest. So the case had to be sent up for trial before investigation was complete. However, the expected order of the President was received before the case was heard in Court ; and on receipt thereof the case was withdrawn expressly for the purpose of completing investigation. The learned Attorney-General has stated that the investigation is being proceeded with ; the period of six months has not expired yet and the delay in completing the investigation may be due to the state of affairs that has been prevailing in the district for some time.

So having regard to all the circumstances of the case we are satisfied that the applicants are being detained in temporary custody under section 7 (3) of

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the Act not by way of punishment but to complete the investigation with a view to their being sent up for trial for an offence under section 6 (1) thereof.

We accordingly dismiss the application.

## SUPREME COURT.

SEI SHENG (APPLICANT)

*v.*

U THEIN (RESPONDENT).*

† S.C. 1950

*Mar. 20.*

*Conversion—Military Proclamation 11 of 1945—CAS(B) taking possession of cargo boats and delivering to Respondent—Burma Indemnity and Validating Act, 1945, ss. 3 and 5—Inconsistent pleas*—Res judicata—*S. 11, Exception 4 of the Code of Civil Procedure.*

In 1942 appellant left behind in Rangoon three Cargo boats belonging to him owing to circumstances arising out of the war. After British reoccupation in 1945 of the Rangoon Area the CAS(B) and its officer collected cargo boats including the boats of the appellant and these three boats were handed over to the respondent. The respondent repaired these boats and returned them to the appellant on the 12th February 1946. The respondent filed Civil Regular No. 14 of 1947 against the respondent claiming compensation under s. 70 of the Contract Act for repairs done by him to two of the three cargo boats. The appellant filed Civil Regular No. 31 of 1947 for compensation for the use of his boats from the 1st of May 1945 till they were returned. Suit No. 14 of 1947 was decreed by the Trial Court and the decree was confirmed in appeal and there was no further appeal. In Civil Regular No. 31 of 1947 the Trial Court gave a decree but the decree was reversed on appeal.

*Held :* Conversion is wrong done by an unauthorized act which deprives another of his right permanently or for an indefinite time.

*Pollock on Torts*, 14th Edn. 285, followed.

When CAS(B) obtained possession of the cargo boats belonging to the appellant they were finder of goods belonging to another within the meaning of s. 71 of the Contract Act and were subject to the responsibility of a bailee. The bailee as such would not commit any wrong by holding the goods but when he delivers them to a third party a civil wrong of conversion is committed.

The question how far s. 3 of Burma Indemnity and Validating Act, 1945, would give protection to a person in the position of an officer of CAS(B) did not arise in this case as here there was no order within the meaning of s. 5 because the orders referred in that section clearly relate to statutory orders.

Good faith would not absolve a person guilty of conversion of another's property. Where the boats were not duly requisitioned and they belonged to some one else, no question of good faith could be invoked.

A person suffering injury by wrongful conversion may in a special case sue for special damages and if after conversion the goods are re-delivered an action will still lie for the original conversion and the re-delivery will only go in mitigation of damages.

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* Civil Appeal No. 6 of 1948.

† *Present :* U E MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE THEIN MAUNG and U THAUNG SEIN, J.

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*Held further* : That the contention of the respondent that one of the boats did not belong to the appellant was untenable even though the evidence was meagre. There is implied in the decree in Civil Regular No. 14 of 1947 findings that all the cargo boats belonged to the appellant and that repairs to the cargo boats were done for the appellant and that the appellant had enjoyed the benefit thereof. The respondent cannot be allowed to blow hot and cold in one breath even where the provision of s. 11 of the Code of Civil Procedure may not in terms apply. In view of the decree in favour of the respondent in Civil Regular No. 14 of 1947 exception of s. 11 of the Code of Civil Procedure would operate to make the question of ownership of the cargo boats involved in the claim in that suit *Res judicata* as between the parties.

*Bodley* v. *Reynolds*, (1846) 8 Q.B.D. 779 ; *Salloway* v. *McLaughlin*, (1938) A.C. 247 at 258 ; *Owners of Dredger Leisbosch* v. *Owners of Steamship Edison*, (1933) A.C. 449 ; *Re* : *The Mediana Case*, (1900) A.C. 113, referred to.

*Leong* for the appellant.

*Dr. Ba Han* for the respondent.

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

U E MAUNG.—In Civil Suit No. 31 of 1947 of the High Court of Judicature at Rangoon the appellant brought a suit against the respondent for recovery of compensation or reasonable hire for use of three cargo boats and for recovery of accessories to the cargo boats or their value. The amount claimed was Rs. 18,161. The trial Judge granted the appellant a decree for Rs. 10,580 with costs. The appellate Bench of the High Court set aside the decree of the trial Judge and dismissed the appellant's suit.

The relevant facts are simple and hardly in contest. The appellant's case in its essence, as disclosed in the plaint, is that the appellant, who was the owner of the three cargo boats, bearing at the date of the suit Nos. CAS(B) 95, CAS(B) 149 and CAS(B) 150, left them in Burma in or about 1942 owing to the circumstances arising out of the last war, and went away to China. When he came back in 1945 he learnt that

they were in the possession of the respondent who had been making use of them as a rice miller. The appellant averred that the boats were illegally and forcibly taken possession of by the respondent for the first time in June 1942 and that they were all of them returned to him by the 12th February 1946 at his demand. He therefore claimed compensation for their use by the respondent from the 1st May 1945 till they were finally returned to him.

The respondent by his written statement disputed the appellant's title to all three cargo boats but at the hearing it was conceded on his behalf that the appellant was the owner of two of them, namely, those bearing the numbers 149 and 150. The appellant's title to the third boat bearing the number 95 was not admitted either at the trial or before us. The respondent does not deny having taken possession of and used in his business as a rice miller the three cargo boats from June 1945 till they were returned by him to the appellant. But it was claimed by him that he took possession of the cargo boats under the authority of the Rice Area Officer, CAS(B), Rice Project No. 1 Area SEAC and that consequently his possession and use were lawful and he is not liable to pay compensation to the appellant.

The trial Judge held that the three cargo boats are proved to belong to the appellant. The Appellate Bench, however, held that the appellant had not established his title to cargo boat No. 95. Before us it is contended on behalf of the respondent that we should accept the view taken by the Appellate Court in respect of this cargo boat. Attention was drawn at the hearing to the very sketchy nature of the evidence adduced on behalf of the appellant to establish his title to this boat. If the matter had rested there, we might have found ourselves able to support the finding

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of the Appellate Court ; but in Civil Regular Suit No. 14 of 1947 of the High Court of Judicature, which was tried together with the suit now under appeal, the respondent sued the appellant for compensation in the sum of Rs. 6,980 under section 70 of the Contract Act. It was then claimed by the respondent, and his claim has been upheld by the trial Judge as also by the Appellate Bench of the High Court, that having repaired the three cargo boats he was entitled to receive from the appellant the cost of repairs in the sum of Rs. 6,980. The compensation which the respondent received in respecct of cargo boat No. 95 was Rs. 3,662-8-0.

Now, for a right to compensation to accrue under section 70 of the Contract Act the person who claims that compensation must have lawfully done " anything for another person, not intending to do so gratuitously, and such other person enjoys the benefit thereof." There is then implicit in the decree in the connected suit a finding that the repairs to the cargo boat No. 95 were done for the appellant and that the appellant had enjoyed the benefit thereof. The respondent cannot be allowed to blow hot and cold in one breath even where the provisions of section 11 of the Code of Civil Procedure may not in terms apply. In the present case, however, it seems to us that Exception 4 to section 11 would operate to make the question of ownership of this cargo boat one not open to question as between the parties.

The ownership of the three cargo boats being thus beyond dispute and the respondent having admitted to have taken possession and to have made use of them in his business as a rice miller, it is clear that it would be for the respondent to justify his action, for to take possession of another's property and use the same in one's business, as in this case, is *prima facie* an

infringement of the property rights of the owner and would, if not justified, be an actionable wrong.

Sir Frederick Pollock in his treatise on Torts (1) has said " Conversion may be described as the wrong done by an unauthorized act which deprives another of his property permanently or for an indefinite time." It is claimed in this case on behalf of the respondent that in respect of the averments in paragraph 3 of the written statement, namely, " that in or about June 1945 Rice Area Officer CAS(B), Rice Project No. 1 Area SEAC (whose authority has always been valid) authorized defendant to use without payment three unseaworthy cargo boats for the purpose of collecting and supplying paddy and rice as required by the said Rice Project No. 1 Area, " the appellant has not in his reply specifically challenged the authority of the Rice Area Officer referred to and that therefore the legality of the respondent's action in taking possession of and using the cargo boats cannot be said to be in question at the trial. But this argument overlooks the fact that the appellant had, in his plaint, claimed that the action of the respondent in taking possession of and using the cargo boats was illegal and forcible and, as already noticed, interference with other people's property always requires justification. True it is that the averment of forcible taking has been found to be without substance but a mere surplusage would not vitiate the claim, especially as to complete the cause of action for conversion an allegation of employment of force is not necessary.

At the trial the respondent called, in support of his claim that he came into possession of the cargo boats in a lawful manner and that their use by him in business was one for which he cannot be liable at the instance of the appellant, two witnesses Hin Wor and

(1) 14th Edn., p. 285.

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Aung Tin. Hin Wor was a civilian gazetted officer in the CAS(B) Rice Project. Aung Tin claimed to have held an appointment under a Major Neville in the CAS(B) though it is impossible to find from his evidence the true nature of his appointment. All that he could say when asked a definite question : "Did you get any appointment under him?", was "He appointed me verbally. He simply asked me to collect these materials and the gigs. Subsequently he gave me an appointment."

Hin Wor referred in his evidence to a letter, Exhibit 10, written to the respondent from the officer in charge of the CAS(B) Rice Project No. 1 Area wherein appears the following passage : "These C.Bs. were allowed you to use without payment to CAS(B) Rice Project on the condition of 'C.Bs. to be returned to the original owners on their arrival'." To the question put to this witness : "And you did not give a guarantee to U Thein that if the owners came back and claimed the hire of the cargo boats you would be responsible for it?" the answer was : "We did not hold ourselves responsible in any way." All that Aung Tin could say on this aspect of the case was that he found 12 cargo boats, including the three cargo boats in question, adrift and under instructions from Major Neville he collected them and kept them until under the orders of the officer in charge of the Rangoon Rice Area he handed over the said three cargo boats to the respondent.

The following questions and answers from the respondent's examination at the trial are illuminating :

"Q. You did not find out whether CASB had authority to give you the use of these cargo boats without payment to the owners ?

A. I did not.

Q. What CASB said in their letter was that you need not pay anything to CASB, but that does not mean that you need not pay anything to the owners if they turned up ?

A. That is so."

What is established beyond dispute in this case then is that soon after the re-occupation of the Rangoon area by the Allied Forces in 1945 Aung Tin, acting under the instructions of a Civil Affairs Officer, Major Neville, collected together several cargo boats found adrift round about Rangoon area and that later when Major Paine, another officer in the same service, instructed him so to do Aung Tin delivered to the respondent the three cargo boats in respect of which the suit under appeal was instituted. The arrangement between the officers of the Civil Affairs Service and the respondent, as the respondent himself admitted, was that the Military Administration would not themselves charge any hire from the respondent in respect of these cargo boats, but, as also admitted by the respondent, the question of the respondent's liability to the true owners for their use was left entirely open.

The CAS(B) Rice Project or Aung Tin (it does not matter which) was a finder of goods belonging to another within the meaning of section 71 of the Contract Act and accordingly that Project, by itself or through its servant Aung Tin, became subject to the same responsibility as a bailee in respect of these cargo boats. The bailee as such, by holding the goods, would not commit any wrong but when these cargo boats were delivered to the respondent and the respondent having taken possession of them used the same in his business the respondent has *prima facie* committed the civil wrong of conversion.

It has been strenuously argued, however, on behalf of the respondent that the respondent's acts would not

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amount in law to conversion as the Rice Project of the CAS(B) was in law within its rights in delivering possession of the cargo boats to the respondent who acted under that authority in using them in his business. It was faintly contended that the Rice Project and its officers must be deemed to have requisitioned the cargo boats which they found drifting without any watch and that following such requisition they had a perfect right to allow the respondent to use them in his business without attaching any liability to him for so doing. But there was no attempt on the part of the officers to comply with Military Proclamation 11 of 1945 which authorized the requisitioning of property under the Military Administration and these officers never at any time purported to act in exercise of the powers given by that proclamation. It is therefore idle to contend that these cargo boats must be treated as requisitioned articles within the meaning of that Proclamation.

Reliance is placed, in the alternative, on the provisions of sections 3 and 5 of The Burma Indemnity and Validating Act, 1945. The reference to section 5 is farfetched; the word "orders" in this section clearly relates to statutory orders. Section 3 also can have no application to the facts of the present case. As the respondent himself admitted in cross-examination, the question of his liability to the true owner of the cargo boats for what would amount to acts of conversion was left open at the time he received delivery of the cargo boats from Aung Tin. It is not necessary therefore to consider in what circumstances section 3 of the Burma Indemnity and Validating Act of 1945 would give protection to a person who acted under the authority of "a person holding office or employed in the service of the

Crown in any capacity, whether naval, military, air force or civil during the war period."

It is also claimed before us that the respondent throughout acted in good faith and that he is not therefore liable to pay compensation to the appellant for his acts. No authority has been cited to support the proposition that good faith would absolve a person who has committed an act of conversion of another's property. On the other hand, there are authorities that run in the opposite direction. In any event it is impossible to see on the facts of the case how the respondent can be said to have acted in good faith. He knew very well that the boats were not duly requisitioned by the Rice Project and that they belonged to somebody else. In fact the evidence on the record shows that in respect of two of the cargo boats at least he knew at the time he took them over from Aung Tin, and even before then, that the appellant was the owner. It was also said that the respondent dared not disobey the directions of the officers of the Rice Project to take possession of the cargo boats and to use them. There is no evidence to support the suggestion that any disobedience would have entailed serious consequences to the respondent. Even if serious consequences other than in due course of law would have followed the refusal, that would not afford the respondent protection against the appellant's claim. Moreover, we are satisfied that this is a most flimsy pretext. It was to the respondent's interest to have in his possession as many cargo boats as he could get and to use them in his business as supplier of rice to the Rice Project. There was no room really for threats or coercion.

It has been strenuously contended before us that the respondent, having at the demand of the appellant restored possession of the three cargo boats to the

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appellant prior to the institution of the suit, is not liable to pay compensation for the use of the same before such restoration. In support of this contention it has been said that the form of action proper for the wrong of conversion is that of trover and that in trover the wrong doer is purged of what was a wrong by delivery of the goods in respect of which conversion had been committed. This argument overlooks the fact that the person suffering injury by the wrongful conversion may in proper cases sue for special damages. For the conversion in an action for trover for carpenter's tools, where the declaration stated that the plaintiff had been prevented from working at his trade, £10 above the value of the articles was given. [See *Bodley* v. *Reynolds* (1).] In fact, as has been noticed by Mayne in his treatise on Damages (2) "if the defendant, after conversion, redeliver the goods, an action will still lie for the original conversion, and the redelivery will only go in mitigation of damages." In *Solloway* v. *McLaughlin* (3) the judgment of the Privy Council has this passage :

> "How, then, is his position affected by the fact that, not knowing of the conversion, he received from the wrongdoer, and has retained, the very goods converted or their equivalent? It appears to their Lordships that the only effect is that he must give credit for the value of what he has received at the time he received it, and that the damages are reduced by this amount."

In *Owners of Dredger Liesbosch* v. *Owners of Steamship Edison* (4) the House of Lords awarded by way of damages on an action for trespass to a dredger, ending in a total loss of the dredger, not only the market price of the dredger lost but also compensation for disturbance and loss to the owners in carrying out their contract, over the period of delay between the

(1) (1846) 8 Q.B. 779.
(2) 11th Edn. 422.
(3) (1938) A.C. 247 at 258.
(4) (1933) A.C. 449.

loss of the dredger and the time at which the substitute dredger could reasonably have been available for use under the contract, including in that loss such items as overhead charges and expenses of staff and equipment and the like thrown away.

On general principles also it seems clear that the respondent's contention must be rejected. The wrong of conversion was complete with the unlawful possession of the appellant's property by the respondent, especially, as in this case, when that possession was acquired for the purpose of user not authorized either by the appellant or in law. Following that act of conversion there had been subsequent user for several months. In respect of such unauthorized user which constitutes, apart from the original conversion, an infringement of the right of property of the appellant the respondent should be liable to pay compensation. In "The Mediana" (1) the Earl of Halsbury L.C. said :

"Lord Herschell in terms did lay down a much broader principle, and I may say that I myself intended to lay it down, though I may have expressed myself imperfectly, namely, that where by the wrongful act of one man something belonging to another is either itself so injured as not to be capable of being used or is taken away so that it cannot be used at all, that of itself is a ground for damages."

At page 118 of the same report the Lord Chancellor went on to say :

"It appears to me, therefore, that what the noble and learned Lords who gave judgment in your Lordships' House intended to point out, and what Lord Herschell gives expression to in plain terms, was that the unlawful keeping back of what belongs to another person is of itself a ground for real damages, not nominal damages at all. Of course I observe that it has been suggested that this was not an action for trover or detinue ; but

(1) (1900) A.C. 113.

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although those are different forms of action, the principle upon which damages are to be assessed does not depend upon the form of action at all. I put aside cases of trespass where a highhanded procedure or insolent behaviour has been held in law to be a subject of aggravated damages, and the jury might give what are called punitive damages. Leaving that aside, whatever be the form of action, the principle of assessing damages must be the same in all Courts and for all forms of what I may call the unlawful detention of another man's property."

We are therefore of the opinion that the appellant is entitled not merely to the restoration of the cargo boats but also to damages for wrongful use by the respondent of the same in his business during the period he had possession of them.

As regards the amount of compensation, all that has been said before us on behalf of the respondent is that the evidence on which the learned Judge assessed the compensation is meagre. We cannot agree with the learned Counsel in his claim that there is not sufficient materials from which the learned trial Judge could have arrived at the figure he did. Three witnesses were called to prove reasonable hire for cargo boats similar to those in the present case. These witnesses are in the trade and they supported their evidence with documents which have not been seriously challenged. No evidence in rebuttal was adduced on behalf of the respondent.

The result is that the appeal is allowed and the decree of the trial Judge is restored with costs throughout.

## SUPREME COURT.

U MAUNG MAUNG (APPELLANT)

*v.*

DAW THEIN MAY (RESPONDENT).*

†S.C. 1950

*Mar. 20.*

*Negotiable Instruments Act, s. 4—Promissory note—Certain sum—Japanese Currency (Evaluation) Act, 1947.*

By a promissory note executed on the 22nd December 1944 during Japanese occupaiton, the appellant promised to pay Rs. 5,000 to the Respondent or his agent on Demand.

*Held :* That *prima facie* the promise is one for payment of a certain sum as required by s. 4 of the Negotiable Instruments Act. The promise in the promissory note is to pay Rs. 5,000 and the amount is not stated to be payable 'ostensibly in Japanese Military currency notes' and it is a promise to pay in legal currency and therefore to pay a sum certain.

If consideration had been received in Japanese currency it does not necessarily follow that the promissory note is to to be discharged by payment in the same currency and not by payment in legal currency in accordance with the well known principle that a document shall, if possible, be interpreted so as to give it maximum validity.

After enactment of the Japanese Currency (Evaluation) Act, 1947 there is no necessity to depart from the general proposition that when parties to a contract say nothing about the nature of currency in which the agreed price is to be paid, the parties must have intended the price to be paid in legal currency.

*Ko Maung Tin* v. *U Gon Man*, (1947) R.L.R. 149 (F.B) ; *Maung Po Lun and eight others* v. *Ma E Mai and three others*, 1 B.L.J. 111 at 116, referred to.

*Dr. Thein* for the appellant.

*Tun Maung* for the respondent.

The judgment of the Court was delivered by

MR. JUSTICE THEIN MAUNG.—This is an appeal with special leave under section 6 of the Union Judiciary Act, 1948, from a decree on a promissory note which has been confirmed by the High Court.

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* Civil Appeal No. 6 of 1949.

† *Present :* U E MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE THEIN MAUNG and U THAUNG SEIN, J.

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Receipt of consideration and execution of the promissory note are admitted and the only question which has been canvassed in the High Court and in this appeal is that the alleged promissory note is not valid as it does not contain an undertaking to pay a certain sum of money as required by section 4 of the Negotiable Instruments Act.

The promissory note is one by which the appellant promised to pay Rs. 5,000 to the respondent or her agent on demand. *Prima facie* the promise is one for payment of a certain sum as required by the said section. The contention that it is not for payment of a certain sum is based on the fact that the promissory note was executed on the 22nd December, 1944, *i.e.* during the period of Japanese occupation of the country. The appellant's case is that the sum of Rs. 5,000 was mentioned in the promissory note as the amount payable by him " ostensibly in Japanese Military notes ; " and his learned Advocate relies on *Ko Maung Tin* v. *U Gon Man* (1), where the late High Court of Judicature at Rangoon held by a majority, [Sir Ba U J. now Chief Justice of the Union (on leave) holding that the point did not arise] :

" That Japanese so-called currency was never lawful currency in Burma, and a loan of Japanese notes was not loan of money. A promissory note executed in consideration of such notes promising to pay what parties mistakenly regarded as money was invalid. "

The promise in the promissory note is to pay Rs. 5,000 ; the amount is not stated therein to be payable " ostensibly in Japanese Military Notes ; " and, if the matter were entirely *res integra*, we could have decided very briefly that it is a promise to pay Rs. 5,000 in legal currency and therefore a promise to pay a sum certain

(1) (1947) R.L.R. 149.

There is no reason for reading into the promissory note the words "in Japanese currency" or "in Japanese Military Notes" since Japanese currency, even according to the appellant was neither lawful currency nor money.

Even if consideration for the execution of the promissory note had been received by the appellant in Japanese currency as alleged by his learned Advocate, it does not necessarily follow that the promissory note is to be discharged by payment in the same currency and not by payment in legal currency. On this connection it must be remembered that consideration may take any form other than money, although for the purpose of section 4 of the Act, what is promised to be paid must be a certain sum of money.

The interpretation that Rs. 5,000 promised to be paid is Rs. 5,000 in legal currency is in accordance with the well known principle that a document shall, if possible be interpreted *ut res magis v leat quampereat.* Besides it cannot cause any hardship to either party since (*a*) under the circumstances prevailing during the period of Japanese occupation, the promissory note could have been discharged by payment in Japanese currency as well ; (*b*) section 3 (1) of the Japanese Currency (Evaluation) Act, 1947 provides that any debt which had been incurred during the said period and which could have been discharged by payment in Japanese currency notes shall be satisfied or discharged by payment in legal currency notes or coins to be calculated in accordance with the value of the Japanese currency notes ; (*c*) their value in respect of debts incurred in 1944 has been fixed thereby at 40 per cent only of the legal currency ; and (*d*) the respondent himself has asked for and obtained a decree for payment of Rs. 2,000 only, which is the amount claimable under the said Act.

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With reference to *Ko Maung Tin* v. *U Gon Man* (1), Roberts C.J. himself, who wrote the leading judgment therein has stated :

" I respectfully agree with my brother Sharpe J. that, as a general proposition, when parties to a contract say nothing about the nature of the currency in which an agreed price is to be paid, the parties must have intended the price to be paid in legal curreney, "

He added :

" The implication necessarily to be drawn in normal circumstances need not necessarily be drawn in abnormal circumstances "

The abnormal circumstances according to him were that the occupying power " suspected persons who held or helped to circulate British notes of being spies and were apt to deal with them accordingly. " However, there was no evidence whatsoever of the alleged abnormal circumstances. The Japanese merely introduced a parallel system of currency without ousting what was the legal currency of the country and a large amount thereof remained outstanding throughout the period of occupation.

The Full Bench obviously experienced great difficulty in that case (*a*) as Sharpe J, had held that debts incurred during the said period must be discharged thereafter by payment in full in legal currency, although they could have been discharged then by payment in Japanese currency which had depreciated considerably and (*b*) as it would at the same time be absolutely unjust to hold that such debts could be discharged after the said period by payment in Japanese currency which had then become absolutely worthless. It had to avoid the two extremes and find a solution in the interests of justice, since in the words

(1) (1947) R.L.R. 149.

of Pratt J. in *Maung Po Lun and eight* v. *Ma E Mai and three* (1).

"It is the duty of the Courts to administer justice taking a broad view and not to allow litigants to take advantage of legal technicalites and commit what is practically robbery by process of law."

It had even to recommend legislation fixing the value of Japanese currency during different periods of the Japanese occupation; and the said Act is the result of its recommendation.

The solution found by the Full Bench may have been in the best interests of justice before the said Act came into force. But after the enactment of the said Act, there is no necessity to depart, in the interest of justice, from the general proposition that "when parties to a contract say nothing about the nature of currency in which the agreed price is to be paid the parties must have intended the price to be paid in legal currency;" and the equities are entirely in favour of the respondent.

The appeal is dismissed with costs.

(1) 1 B.L.J. 111 at p. 116.

## SUPREME COURT.

† S.C. 1950.

Mar. 20.

U SEIN LIN (APPLICANT)

*v.*

THE CONTROLLER OF RENTS, RANGOON AND TWO OTHERS (RESPONDENTS).*

*Urban Rent Control Act, s. 16 AA (4) (a) as amended by Act LIII of 1948—Jurisdiction of Controller of Rents.*

*Held :* The Controller of Rents has jurisdiction to act under s. 16 AA (4) (a) of the Urabn Rent Control Act only when residential premises are either vacant or about to be vacant. He cannot take action at a time when the premises had already been occupied and his action therefore was without jurisdiction.

*Joseph* for the applicant.

*Ba Sein* (Government Advocate) for the respondents.

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

U E MAUNG.—This application to quash the proceedings of the Controller of Rents in his Proceedings No. 194AA of 1948-49 must be allowed.

The applicant U Sein Lin came into occupation of the rooms in question in December 1949. Apparently about a fortnight after he came into occupation the Controller of Rents, Rangoon, came to know of it and on the 17th December 1949 a notice was issued addressed to "U Sein Lin and Daw Myint or the occupants of Upper Floor of No. 78, 124th Street, Rangoon," to show cause why they should not be summarily evicted from the premises which, according

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* Civil Misc. Application No. 11 of 1950.

† *Present :* U E MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE THEIN MAUNG and U THAUNG SEIN, J.

to the Controller of Rents, they had occupied in contravention of section 16AA of the Ubran Rent Control Act.

Mr. Joseph, who appears for the applicant, has drawn our attention to the provisions of section 16AA (4) (*a*) of the Urban Rent Control Act as amended by Act LIII of 1948 from which it is clear that the Controller of Rents would have jurisdiction to act only when residential premises are either vacant or about to be vacant. In this case he took action at a time when the premises had already been occupied. He has therefore acted without jurisdiction.

The proceedings are accordingly quashed. There will be no order as to costs.

## SUPREME COURT

U TUN TIN (APPLICANT)

*v.*

THE COMMISSIONER, RANGOON CORPORATION AND TWO OTHERS (RESPONDENTS).*

† S.C. 1950.

*Mar. 29.*

*City of Rangoon Municipal Act, s. 18 (3) read with Rule 9, Chapter 9, Schedule I—Meeting meaning of—Adjournment—Power of Mayor.*

Where a meeting of Councillors of the Corporation of Rangoon was convened for the 7th March 1950 at 3 p.m. for election of the Mayor and at about 1 p.m. the Commissioner of the Rangoon Corporation received a note from the Mayor instructing him to inform the Councillors that the meeting could not be held and had been postponed till the 13th of March 1950 but nevertheless at the time mentioned another Chairman was appointed and a Mayor is elected.

*Held:* Under s. 18 (3) of the City of Rangoon Municipal Act read with Rule 9, Chapter 9 of Schedule I the Mayor can adjourn a meeting when he is present, but by keeping away he cannot do so. Every meeting has to be presided over either by the Mayor if he is present or by one of the Councillors chosen by the meeting to be Chairman if the Mayor is absent. Rule 9 provides that any meeting may be adjourned by the Mayor or the Chairman. Though there is authority for the view that in certain circumstances the word 'adjournment' need not be given the technical meaning usually associated with it, yet having reference to the context, the use of the word 'meeting' in s. 18 (3) and reference in Rule 9 to meeting already in session, the word adjournment has to be given its technical meaning.

The meeting held on the 7th March 1950 was a competent meeting and the election held therein was legal.

*Tun Aung* for the applicant.

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

U E MAUNG.—This application must be dismissed. A monthly meeting of the Councillors of the Rangoon Corporation, as required under section 17 of the City of Rangoon Municipal Act read with Rule 1

* Civil Misc Application No. 20 of 1950.

† *Present:* U E MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE THEIN MAUNG and U ON PE, J.

of Chapter IX of Schedule I of the Act, was convened for the 7th March 1950 at 3 p.m. On that day at about 1 p.m. or soon after the Commissioner of the Rangoon Corporation received a note from the then Mayor, the applicant before us, instructing him to post a notice at the Council Chambers informing the Councillors that the meeting fixed for that date could not be held as the Mayor had suddenly taken ill and had postponed the meeting till the 13th March 1950. The applicant had apparently informed a section of the Councillors of the action he had taken with the result that at 3 p.m. on that day the Councillors present belonged mostly to the opposite faction. But there was U Shwe Pyu, the second respondent, who till that date had been acting with the applicant in the deliberations of the Corporation.

The first question that was raised at the gathering of these Councillors at 3 p.m. on that day was whether the Mayor was competent to postpone the meeting originally fixed for that date to another date fixed by himself. The opinion of the legal adviser of the Corporation was sought and he appears to have said that it was within the competence of the Mayor to postpone the meeting in circumstance as in this case. This advice did not prove acceptable to most of the Councillors and there appears to have been a general discussion for the purpose of holding which U Shwe Pyu, the second respondent, was elected Chairman of that meeting. There must have been, as appears from the Minutes of the proceedings of that day, as also from the several affidavits filed by the applicant in support of his application, a good deal of talk and confusion at the meeting. The legal adviser now and again appears to have advised the gathering that they were bound by the Mayor's note postponing the meeting and that they could not go on discussing the

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matter that day. One of the Councillors present, namely Mr. E. Kwet, then proposed that even if the applicant was not justified or was not within his powers in postponing the meeting, the members present that day should out of courtesy to him agree to adjourn the meeting. This proposal was seconded by another member but was opposed by at least one other Councillor present.

It appears also from the materials on the record that most of the Councillors were prepared to concede to the wishes of Mr. E Kwet and to avoid further misunderstanding to postpone the meeting. But they could not agree on a date to which the meeting was to be postponed and much time appears to have been spent in trying to arrive at an agreement on this point. While the discussion was going on it appears that U Thein Maung, the third respondent, suggested that a ten minutes breathing space might enable the members to come back with an agreed solution and this was agreed to by the Chairman.

It is clear therefore that up to the moment of the recess there had been no definite decision arrived at as to what would be done in the matter of postponing or adjourning the meeting already in session on that day. After the recess the members came back under the same Chairman and then it was pointed out to them that under section 17 of the Act it was incumbent upon them, as the meeting was the first meeting in the month of March, to proceed to elect a Mayor for the next term. The meeting accordingly proceeded to elect the third respondent as the Mayor for the new term.

Before us it has been contended on behalf of the applicant that the proceedings of the 7th March 1950 were void for one or other of the reasons placed before us. Firstly it was said that U Tun Tin as the

Mayor on the 7th March 1950 having given notice to the Commissioner of his decision to postpone the meeting till the 13th March 1950, the meeting held on the 7th March 1950 was not competent in law. In support of this view he has drawn our attention to section 18 (3) of the Act read with Rule 9 in Chapter 9 of Schedule I. We see nothing in these provisions to support the thesis which he has raised before us. It is clear from them that the Mayor can adjourn a meeting when he is present at it. By keeping away he cannot do so. According to section 18 (3) every meeting is to be presided over by the Mayor if he is present or if he is absent by such one of the Councillors present as may be chosen by the meeting to be Chairman for the occasion. Similary also, Rule 9 in question provides that any meeting may be adjourned by the Mayor or Chairman of the meeting. The learned Counsel for the applicant relies on a definition which is given in Wharton's Law Lexicon of the word "adjournment." We agree that there is authority for the view that in certain circumstances the word need not be given the technical meaning which is usually associated to it. Nevertheless, the word must be read with reference to the context and, reading with reference to the context, it appears to us that the word "meeting" in section 18 (3) and Rule 9 refers to the meeting already in session. The first objection therefore fails.

The second objection is based on the allegation that prior to the recess already referred to, the Chairman of the meeting, U Shwe Pyu, on the proposal of Mr. E. Kwet supported by another Councillor, had already adjourned the meeting till the 13th March 1950. But it is clear from the materials on record that this is not so. There seems to have been a lot of confused talk and cross-talk but there was never at

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any stage a definite adjournment, as claimed, to the 13th March 1950. There were suggestions that it would be advisable to postpone the meeting but these were not acted upon by the Chairman or agreed to by the Councillors nor in fact was the proposal put to the vote. We are of the opinion therefore that the meeting held on the 7th March 1950 was a competent meeting and the election of the third respondent by the Councillors at that meeting must be upheld.

## SUPREME COURT.

THOMAS DE LA RUE & Co. LTD. (APPLICANT)

*v.*

THE COURT OF INDUSTRIAL ARBITRATION, BURMA AND ONE (RESPONDENTS).*

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*Apl. 14.*

*Directions in the nature of prohibition—Trade Disputes Act—Decision by the Industrial Court on a reference by the President under s. 9 of the Act—Power of the court to modify or to interpret or to review the award—Demands by employees—Discharge of certain employees thereafter—Whether discharge can be subject to reference.*

*Held :* The Industrial Court acted in excess of its jurisdiction under s. 9 in granting relief to employees in the maintenance section who did not attend work of their own accord.

*Held :* The Industrial Court is not competent to interpret, modify or review its own award except in circumstances specified in s. 11 (3) of the Act.

If employees are discharged after a trade dispute has arisen between the employer and employees, the Industrial Court has right to give its decision on the point of dispute.

During the currency of employment, a demand made by employees would constitute a trade dispute sufficient to give jurisdiction to the President to make a reference under s. 9 of the Act and the Industrial Court can hold an enquiry under s. 10. To hold otherwise would mean that any employer or any workman could nullify the whole provisions of the Act by terminating the contract of service before a reference was ordered.

*Steel Bros. Co.* v. *The Court of Industrial Arbitration and two*, Civil Misc. Application No. 72 of 1949; *Rex* v. *The National Arbitration Tribunal*, (1948) 1 K.B. 424, followed.

The continuance of a strike after reference under s. 9 of the Act is illegal.

If some employees voluntarily kept away they could not be said to have been locked out by the employers and no compensation can be given to them by the Industrial Court.

*G. Horrocks* for the applicant.

*Chan Htoon* (Attorney-General) for the respondent No. 1.

*T. P. Wan* for the respondent No. 2.

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* Civil Misc. Application No. 1 of 1950.

† *Present :* U E MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE THEIN MAUNG and U ON PE, J.

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

U E MAUNG.—This application, which was framed in the first instance as one for directions in the nature of prohibition only, was challenged at the hearing as incompetent by the learned Attorney-General on the ground that the Court of Industrial Arbitration whose award is being questioned, in view of section 12 of Trade Disputes Act, has no further jurisdiction in the matter of the trade dispute in question as soon as its award was published under section 10 of the Act. This objection, however, need not be further considered as the applicants have sought and been granted leave to amend the application by including a prayer for directions in the nature of certiorari, both in the alternative and in addition to the original prayer for directions in the nature of prohibition. The leave to amend, application for which was made at the hearing, was granted by us as the original application though it purported to seek directions merely in the nature of prohibition, prayed among other reliefs to have the award of the Industrial Court quashed.

The applicants are a company incorporated in England carrying on business as security printers of currency notes of various countries and they have their principal place of business in Burma at Campbell Road, Rangoon. For some time since July 1949 there have been disputes relating to the conditions of employment between the Company and the second respondents, the Trade Union of the employees of the Company. These disputes culminated, so far as are relevant to the present proceedings, in demands made on behalf of the trade union on the 24th July 1949 by a document a copy of which is filed as Exhibit A in the record of

the Industrial Court. On the 28th July 1949 the applicants, through their Manager, issued a notice of immediate discharge of 88 employees. It is not necessary for us to consider whether this discharge had any connection with the demands made by the trade union. It was claimed on behalf of the applicants that they were "unavoidably compelled to close this factory for lack of business and there is no prospect of the Company having work which would justify the retention of its employees' services." Under the terms of this discharge with immediate effect the applicants offered to pay to the employees affected one months' pay in lieu of notice for the month of August, pay for the whole of July even though the employees were discharged on the 28th July, and holiday pay due to the employees.

The disputes and differences which had been in existence between the Company and its employees became accentuated following the discharge of the 88 employees on the 28th July 1949 and on the 4th August 1949, when the factory after being closed for two days on the 2nd and 3rd August, was re-opened it was discovered that in the interval 36 numbering boxes had been removed by some person or persons unknown. On behalf of the Trade Union it was claimed that the disappearance of these boxes was stage-managed by the company. On the other hand, the applicants claimed that certain elements in the Trade Union had been responsible for this work. It is not necessary and therefore it is not for us to adjudge between these claims. On the 5th August 1949 the Company issued notices of immediate discharge of some 244 employees. By these notices of discharge the employees were told that the Company was compelled to take action "on security grounds coupled with the theft of valuable machinery and materials,"

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and the employees discharged were offered wages for August and September, the latter in lieu of notice, together with any holiday pay due.

The works of the Company were closed altogether on the 5th August 1949 but it is not disputed before us that the maintenance section, comprising some 40 members of the engineering staff and some 40 durwans, was not amongst the employees discharged on the 5th August 1949. On the 6th August when the works re-opened, so far as those employees who were not discharged were concerned, the maintenance section refrained from attending. It has been found by the Industrial Court that "there is no evidence to prove that any worker entitled to enter the factory was prevented from doing so after the 5th August: no notice of discharge had been served on the maintenance staff but they refrained from going to work after the date on their own accord." Before us also it is conceded on behalf of the Trade Union by its Secretary U Aung Myint that the maintenance section of the employees "refrained from attending work in sympathy after the notice of discharge on the 5th August 1949" (*vide* paragraph 12 of his affidavit).

On the 24th August 1949 and by Notification No. 244 of the Government of the Union of Burma in the Ministry of Public Works and Labour (Labour Branch) the President, in exercise of the powers under the provisions of section 9 of the Trade Disputes Act, made a reference to the Industrial Court of Arbitration certain matters in dispute set out in that Notification. The Industrial Court in pursuance of this reference held an enquiry and made an award on the 14th December 1949, which forms the subject of challenge in these proceedings before us.

It appears from the records of the Industrial Court that after the award was published an application was

made by the Company seeking "clarification of certain points in the award" (we quote from the diary entries of the Industrial Court). This application was entertained, the Trade Union was called upon to file its written statement, if considered necessary, and counsel were heard. Later, further orders were passed by the Court on the 31st December 1949. We must say that we cannot see what power the Court had after the award had been published either to modify or to interpret or to review its award. The Court is no more competent than any other person or authority to interpret and has no power to review its own award except in the circumstances specified in section 11 (*3*) of the Act.

By the award of the 14th December 1949 which, in view of what we have said just now, is the only operative decision of the Industrial Court, it was declared that:

"All the workers of the Company who were in the employ of the Company on the 28th July 1949 should be paid their wages till the 31st October 1949. In ordinary course they could have been given notice of discharge on 1st October 1949. The workers need not therefore be paid any wages in lieu of notice. Payments already made to workers will be adjusted accordingly."

It is clear that this conclusion was arrived by the Industrial Court as a result of its deliberation on three of the issues framed, namely,—

"1. Was the closure of the factory by the respondents on 5th August 1949 justified ?

2. Are the petitioners entitled to claim the withdrawal of the notice, dated the 5th August 1949 ?

.....

3. Are the petitioners entitled to a grant of discharge allowance as claimed by them in paragraph 16 (5) of the Statement of Claim ?"

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The first two issues arose under point 1 of the reference made by the President, namely,—

"Withdrawal of the notice, dated the 5th August 1949 for immediate closure of the factory on grounds of security and theft of valuable machinery and materials."

and the 8th issue comes within the purview of the 5th point of the reference, namely,—

"Grant of Compassionate Allowance equivalent to three months' wages *plus* Cost of Living Allowance to all employees without distinction in case of discharge of employees due to there being no work or any other reason; or closure of the factory; or in case of retrenchment."

At the hearing before us it has been strenuously contended on behalf of the applicant Company that the Industrial Court acting under the Trade Disputes Act has no authority to question the decision of any person engaged in trade or business to withdraw from that trade or business. It was said that a person carrying on trade or business is free for any reason or for no reason at all to say that he will not continue to be in that trade or business and that under the guise of an enquiry before an Industrial Court on a reference under section 9 of the Trade Disputes Act that person cannot be called upon to justify his decision to discontinue his trade or business.

It is not necessary in this case, however, to examine this line of attack more closely; for, as we have said before, on the 24th July 1949 certain demands had already been put before the Company on behalf of the Trade Union and the demands would cover the matter of point 5 of the order of reference of the 24th July 1949 and of issue No. 8 in the Industrial Court. It is true that before the reference was made by the President under section 9 of the Trade Disputes Act,

88 persons had been dicharged on the 28th July ; but that discharge after a trade dispute had arisen would not deprive the Industrial Court of the authority to make an award as between those who were parties to the demand and the refusal out of which the dispute arose. In *Steel Bros. Co.* v. *The Court of Industrial Arbitration and two* (1) we held that demands made during the currency of employment by the employees would constitute a trade dispute sufficient to give jurisdiction to the President to make a reference under section 9 of the Act and to the Industrial Court to hold an enquiry under section 10. As Lord Goddard C.J. in *Rex* v. *The National Arbitration Tribunal* (2) pointed out :

"To hold otherwise would mean that any employer, or indeed, any workman, could nullify the whole provisions of the order and the object of the regulation under which it was made, by terminating the contract of service before a reference was ordered or even after the matter was referred, but before the tribunal considered it."

We are in full agreement with the learned Chief Justice that because dismissal is superimposed on a dispute which has existed up to the moment of dismissal the jurisdiction to have the dispute referred or adjudicated upon is not taken away. That being so, it would follow that so far as those persons whose services were terminated on the 28th July 1949 are concerned the Industrial Court was acting within its jurisdiction—a jurisdiction which is bound only by the terms of the reference under section 9 of the Act. As we have indicated already, in deciding to award to these two classes of employees their wages up to the 31st October 1949 the Industrial Court took into

(1) C.M.A. 72 of 1949. (2) (1948) 1 K.B. 424.

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consideration circumstances relevant under points 1 and 5 of the order of reference.

When, however, the Industrial Court proceeded to grant to those employees in the maintenance section, who on the Court's own finding (which is affirmed before us by the affidavit of the Secretary of the Trade Union) refrained from going to work after the 5th August of their own accord, we are clearly of the opinion that the Industrial Court acted in excess of the jurisdiction conferred on it by the reference made under section 9 of the Act. Point 2 of the reference reads :

"Grant of full pay with Cost of Living Allowance to the employees who are prevented from attending work due the alleged lock-out."

It was the case of the employees of the maintenance section at an early stage of this dispute that they did not voluntarily keep away from the works but were locked out by the employers. This claim however has been negatived. These persons must be deemed therefore to have remained on strike. In fact they themselves described their action as "strike in sympathy with those employees whose services had been terminated." Continuance of a strike after a reference under section 9 of the Act has been made is illegal : *see* section 14 (*a*) of the Act. It is true that on the 22nd August 1949 the Company issued to the members of the maintenance section who remained away from work a notice which *Inter alia* reads : "If you do not intend to return to work please advise on the 29th August 1949 after which date we shall consider you as having resigned." Before the date fixed by this notice, the reference to the Industrial Court was made. It may well be that by reason of section 14 (*b*) of the Act the operation of this notice is suspended. On this point, however, we express no opinion.

But, what is beyond dispute is that the case of the employees of the maintenance section who kept away from work on their own volition [which absence from work as from the 24th August 1949 amounted to an illegal strike] cannot at all be brought within the ambit of the six points of reference to the Industrial Court.

Accordingly, while we uphold the award of the Industrial Court in respect of the employees who were discharged on the 28th July and on the 5th August 1949, we quash the award whereby the Court grants relief to those employees who of their own volition kept away from employment from the 6th August 1949. Normally, in such circumstances each party should bear its own costs but in view of the fact that the Company applied for and was granted leave to amend its application to include a prayer for directions in the nature of certiorari at a very late stage, the Company should pay, and we accordingly direct it to pay to the second respondents, ten gold mohurs as costs.

## SUPREME COURT.

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*Apl. 21*

# TAN CHIT LYE (*a*) TET SHIN (*a*) MAW PEIN (APPELLANT)

*v.*

# THE UNION OF BURMA (RESPONDENT).*

*Criminal appeal to the Supreme Court—Principles to be followed—Questions of fact—Whether can be gone into—Confession—Meaning of.*

*Held :* That the principles applicable to the exercise by the Supreme Court of its Appellate Jurisdiction in Criminal matters has been explained in *U Saw and 4 others* v. *The Union of Burma*, (*1948*) B.L.R. 249.

Article 157, Limitation Act prescribes the period of limitation for an appeal by the Government against an order of acquittal. No departmental instructions can over-rule the statutory provision.

*Held further :* That an appeal on facts against an order of acquittal is allowed. But in exercising such powers the High Court should and will always give proper weight and consideration to such matters as (i) the views of the Trial Judge as to the credibility of the witnesses, (ii) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (iii) the right of the accused to the benefit of any doubt, and (iv) the slowness of an Appellate Court in disturbing findings of fact arrived at by a Judge who had the advantage of seeing the witnesses. These rules and principles are well known and recognized in the administration of justice.

*Sheo Swarup* v. *King-Emperor*, 56 All. 645 at 651, followed.

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. Thus 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, is not a confession.

Where there were materials other than the alleged confession on which the appellant could be found guilty the Supreme Court will not interfere with the decision of the High Court.

*Dr. Thein* for the appellant.

*Ba Sein* (Government Advocate) for the respondent.

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* Criminal Appeal No. 3 of 1950.

† *Present :* U E MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE THEIN MAUNG and U THAUNG SEIN, J.

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

U E MAUNG.—In *U Saw and four others* v. *Union of Burma* (1) we have explained the principles applicable to the exercise by this Court of appellate jurisdiction in criminal matters and it is not necessary to reiterate the same here.

The appellant in this case, who had been acquitted at the trial before the District Magistrate, Rangoon, was, on appeal by the State under section 417 of the Criminal Procedure Code, convicted of the offence for which he stood trial. The order of acquittal by the trial court was made on the 14th May 1949 and the appeal to the High Court was preferred on the 26th August 1949.

The first point that was taken before us by the learned counsel for the appellant, placing reliance on a decision of the High Court of Judicature at Rangoon in *King-Emperor* v. *U San Win* (2) is that the appeal to the High Court being preferred more than three months after the order of acquittal should never have been accepted inasmuch as there appears in paragraph 828 of the Burma Courts Manual a caution that no appeals against acquittal " will ordinarily be sanctioned after the expiration of three months from the date of the order of acquittal. " But this after all is merely a departmental instruction and cannot over-ride the statutory provisions in Article 157 of the First Schedule to the Limitation Act, which allows an appeal against an order of acquittal to be preferred within six months from the date of the order of acquittal appealed from.

Relying again on the same decision of the High Court of Judicature at Rangoon the learned counsel

(1) (1948) B.L.R. 249. (2) 10 Ran. 312.

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for the appellant also contended before us that no question of law having been involved in the appeal to the High Court—the appeal turning entirely on facts—that appeal was not competent. But, as has been rightly pointed out by the Privy Council in a later case, *Sheo Swarup* v. *King-Emperor* (1):

"Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (i) the views of the trial Judge as to the credibility of the witnesses; (ii) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (iii) the right of the accused to the benefit of any doubt; and (iv) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognized in the administration of justice."

It is further contended before us that the learned Judge of the High Court allowed himself to be influenced by materials not admissible in evidence. It was said that the learned Judge should not have taken into consideration the statement made by the prosecution witnesses that when they first went into the premises where they made a search later, the appellant, to the enquiry of the Excise Officer, stated in reply that he was the occupier of the premises. In the first place we cannot accept the learned counsel's contention that such a statement would be inadmissible

(1) 56 All. 645 at 651.

under section 25 of the Evidence Act, as being a confession. This point has been considered as far back as 1939 by the Privy Council in *Pakala Narayan Swami* v. *King-Emperor* (1), reproduced in *Mangilal* v. *The King* (2). The relevant passage will be found at page 798 and we are in full agreement with the Privy Council when it said :

". . 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."

Moreover, it cannot be said that apart from the contested statement in question there was no material on which the learned Judge of the High Court could have come to the conclusion that the appellant was guilty of the offence for which he stood his trial. This is not a case where the conviction was recorded on no evidence at all. There are on the record materials from which the learned Judge could have come to a conclusion different from that of the trial Magistrate. It cannot therefore be said that this is a case for interference by us by way of special appeal.

The appeal is therefore dismissed and the appellant, who is on bail, will be re-committed to prison to serve the remainder of the term to which he was sentenced by the High Court.

(1) 18 Pat. 234. (2) (1941) Ran. 784.

## SUPREME COURT.

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*May 10.*

THE NAMTU WORKERS' UNION (APPLICANT)

*v.*

THE COURT OF INDUSTRIAL ARBITRATION, BURMA AND TWO OTHERS (RESPONDENTS).*

*Trade Dispute—Meaning of—Trade Disputes Act, s. 2, Clause (j)—Reference by President to Industrial Court—whether conclusive of the existence of trade dispute.*

When the President of the Union made a reference to the Industrial Court regarding a claim of three months pay as Evacuation Compensatory allowance made by the Members of the Union owing to the evacuation and the consequent closure of the Burma Corporation Ltd. in 1942 on account of the war, and the Industrial Court by its Award held that the claim, made after the war, could not be regarded as connected with non-employment or as the subject matter of a trade dispute, and the Union applied for a writ of mandamus against the decision of the Industrial Court.

*Held :* That a writ of mandamus can only issue to direct the performance of a public duty where a public authority has failed in its legal obligation to perform such duty. Where the President of the Union in exercise of his powers under s. 9 of the Trade Disputes Act makes a reference to the Industrial Court such reference is not conclusive of the matter being a trade dispute. "Trade Dispute" is defined in the Act elaborately. Where the Industrial Court properly held that there was no trade dispute it had not evaded any statutory duty imposed upon it. It is open to the Industrial Court as well as the Supreme Court to decide whether there is a trade dispute or not.

*Banerji* for the applicant.

*Ba Sein* (Government Advocate) for the respondents Nos. 1 and 3.

*C. A. Soorma* for the respondent No. 2.

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

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* Civil Misc. Application No. 9 of 1950.

† *Present :* U E MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE THEIN MAUNG and U AUNG THA GYAW, J.

U E MAUNG.—By a Notification, dated the 18th August 1948 of the Government of the Union of Burma in the Ministry of Public Works and Labour (Labour Branch) the President of the Union made a reference to the Industrial Court, *inter alia*, of "Grant of three months pay as Evacuation Compensatory Allowance" as a matter arising out of a trade dispute between the Burma Corporation Limited and its employees, being members of the Namtu Workers' Union.

The claim for the grant of three months pay as Evacuation Compensatory Allowance arose out of the closing down of the Burma Corporation Mine at Namtu early in 1942 as a result of the outbreak of the war with Japan. The Burma Corporation Limited ceased working the mine on the Japanese forces occupying Burma and employees who were not residents of the locality evacuated from the mine area to their respective homes in and out of Burma. Inevitably of course these evacuees could not take away with them the bulk of their personal belongings and they also suffered losses on the way of a proportion of their belongings which they managed to take away from the area. Some of these employees who had thus to evacuate the mine area in 1942 came back and re-joined the services of the Burma Corporation Limited in 1945 and they claim that having had to leave the bulk of their goods and belongings in the mining area for no fault of their own they should be paid evacuation compensatory allowance equivalent to three months pay.

This claim, however, was made not in 1942 but in 1948 and the employers claimed before the Industrial Court that such a claim did not constitute a "trade dispute" within the meaning of section 2, clause (*j*) of the Trade Disputes Act. The Industrial Court by

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its Supplementary Award of the 2nd September 1949 said in this connection :

"Had the claim been made before the evacuation in 1941 that it should be a term of service of the employees that they shall be paid certain amounts as evacuation allowance, we have little doubt that that claim could have been the subject matter of a trade dispute. We do not think, however, that it is open to the Union to raise a trade dispute on this matter at this stage. We do not think that the matter can be regarded as coming within the scope of the words 'connected with non-employment' used in the definition of the term 'trade dispute.' We hold therefore that the claim for Evacuation Compensatory Allowance cannot form the subject matter of a trade dispute within the meaning of that term under the Trade Disputes Act."

The Namtu Workers' Union, representing the aggrieved employees, has now applied to this Court for directions in the nature of mandamus and we have heard its learned counsel Mr. Banerji at length. It is elementary learning that mandamus can only issue to direct the performance of a public duty which the authority to whom the directions are issued has failed in respect of its legal obligation to perform. The learned counsel for the applicant being fully aware of this principle has claimed that once the President of the Union in exercise of his powers under section 9 of the Trade Disputes Act has referred "any particular matter at issue between employers and employees" the Industrial Court is not at liberty to consider whether the matter so referred is within the ambit of the definition of "trade dispute" or not. Mr. Banerji claims that when the Industrial Court said : "We hold therefore that the claim for Evacuation Compensatory Allowance cannot form the subject matter of a trade dispute within the meaning of that term under the Trade Disputes Act" it had exceeded its jurisdiction and that by that excess of jurisdiction it failed to

perform what, according to the learned counsel, was incumbent on it, namely, to consider the question of the grant of evacuation compensatory allowance on the merits.

The proposition propounded on behalf of the applicant Union, namely, that the inclusion of any particular matter as being in issue between the employers and the employees in the order of reference by the President under section 9 of the Trade Disputes Act is conclusive of such matter being a trade dispute, is one so revolutionary that without the strongest authority in support thereof we find it hard to contemplate. Mr. Banerji has frankly conceded that he has not been able to find any authority in support of this proposition. When it was pointed out to him that his contention that the President's reference is conclusive for the Industrial Court as far as the question whether any matter formed part of a trade dispute would involve the corollary that it would not be open to this Court also to go behind the President's decision, Mr. Banerji tried to differentiate between this Court and the Industrial Court in this respect. But we can see no difference in principle. Either the President's reference is conclusive of the nature of the dispute or it is not. If it is conclusive in law it is binding on all Courts in this country. If it is not conclusive it cannot be binding on one Court and not on another.

Further, if Mr. Banerji's contention is correct there was no necessity for an elaborate definition of the term " trade dispute " in the Act. It would have sufficed for the Act to have provided that such matters as the President may deem to be a trade dispute shall be inquired into by the Industrial Court.

The result is that in our opinion the Industrial Court in holding that the claim for evacuation

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compensatory allowance in the circumstances arising in this case cannot form the subject matter of a trade dispute and in consequence in refusing to hold a further enquiry on the merits of the claim, cannot be said to have evaded the statutory duty imposed on it. The application for mandamus therefore fails and is dismissed with costs. Advocate's fees ten gold mohurs.

## SUPREME COURT.

BO AYE KO (APPLICANT)

*v.*

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

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*May 10.*

*Writ of* habeas corpus—*Public Order (Preservation) Act, s. 5A* (4)—*Arrest of person outside territorial jurisdiction—Later order in substitution—Whether jurisdiction of Supreme Court affected.*

The detenue was arrested at Hmawbi on the 26th of May 1949 and was detained in the Rangoon Central Jail under the order dated the 30th May 1949 of the Deputy Commissioner of Police, Rangoon under section 5A (*1*) (*b*) of the Public Order (Preservation) Act. On the 20th March 1950 the detenue applied to the Supreme Court for a writ of *habeas corpus* and while the proceedings were in the Supreme Court the Deputy Commissioner of Police, Rangoon, cancelled his order and the Deputy Commissioner, Insein, passed an order directing the detention of the applicant in the Rangoon Central Jail until further orders and then passed another order under sub-section 4 of section 5A of the said Act transferring the applicant to Insein Jail for further detention.

*Held :* That the present confinement of the applicant at the date of the hearing in an area under military administration is an attempt to evade the jurisdiction of the Supreme Court and such an attempt by the executive authorities interfering with the rights assured by the Constitution could not be encouraged.

The mere fact that the applicant is a White Pyithu Yebaw Leader would not bring the applicant within the purview of section 5A (*1*) (*b*) of the Public Order (Preservation) Act.

*Mya Thein* (Government Advocate) for the respondents.

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

U E MAUNG.—When this application was called before us for hearing on the 8th May 1950 we were told by the learned Government Advocate appearing to

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*Criminal Misc. Application No. 86 of 1950.

† *Present :* U E MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE THEIN MAUNG and U AUNG THA GYAW, J.

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show cause against the application for direction in the nature of *habeas corpus*, that the applicant on that date was being detained in Insein Jail Annexe and under the orders of the Deputy Commissioner, Insein. The learned Government Advocate then claimed that as Insein District is under military administration this Court could not be competent to proceed further with the application. Normally we would have agreed with him and would have dismissed the application as one outside our jurisdiction to entertain.

But a closer examination of the record discloses a most deplorable state of affairs. On the 20th March 1950 the applicant, a detenu then in the Rangoon Central Jail under section 5A (*1*) (*b*) of the Public Order (Preservation) Act under the orders of the Deputy Commissioner of Police, Rangoon, dated the 30th May 1949, applied to this Court through the authorities of the Rangoon Central Jail for directions in the nature of *habeas corpus*. The application was duly transmitted to this Court and on the 29th March 1950 the Judge in Chambers directed issue of notice to the Commissioner of Police, Rangoon, and the Superintendent of Central Jail, Rangoon, to show cause by the 21st April 1950. When the case came before the Judge in Chambers on the 21st April 1950 it was stated on behalf of the Commissioner of Police that he had cancelled the order of detention issued by him and had nothing more to do with the detention of the applicant whose continued detention was claimed to be under the orders of the Deputy Commissioner, Insein.

The applicant in his petition stated that he was arrested at Hmawbi on the 26th May 1949 and was detained in the Rangoon Jail following his arrest. This averment is not challenged and appears to be correct. Apparently this was the reason for the Commissioner of Police withdrawing his order of

detention as he came to realize that he had acted without territorial jurisdiction in the case.

Notice was then issued to the Deputy Commissioner, Insein, and he submitted copies of his orders of the 30th March 1950 and 29th April 1950. By his order of the 30th March 1950 he directed the detention of the applicant in the Rangoon Central Jail until further orders, obviously in continuation of the detention which to that date had been under the orders of the Deputy Commissioner of Police, Rangoon. The other order is one under sub-section (*4*) of section 5A of the Act transferring the applicant from the Rangoon Central Jail to the Insein Jail Annexe for futher detention.

The bare recital of these facts is sufficient to show that the confinement of the applicant at the date of the hearing in an area under military administration and by a Deputy Commissioner exercising authory in such an area is the result of an attempt to evade the jurisdiction of this Court in an application already within the seizin of this Court. To accept the plea of bar to the jurisdiction of this Court would be to encourage the invasion by the executive authorities of the rights which the Constitution of this country has assured to each one of its citizens. In fact, if what was done in this case after the filing of the application for directions in the nature of *habeas corpus* can be established to be intentional, we are clearly of the opinion that proceedings for contempt would be appropriate.

Coming now to the facts, it is said by the Deputy Commissioner, Insein, in his affidavit that the applicant is a White Pyithu Yebaw leader who was arrested in the Company of Boh Mya Tha Dun (of whose activities we are not told anything) at Hmawbi on the 26th May 1949 and that they were believed to be then on their way to Magwe. How these facts would bring the applicant within the purview of section 5A (*1*) (*b*

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of the Pubilc Order (Preservation) Act we are at a loss to see. No other allegation has been made against the applicant and on this state of the record we are satisfied that the detention of the applicant is not in accordance with law.

We accordingly direct that the applicant be released forthwith.

## SUPREME COURT.

S. HAQUE (*a*) ISLAM (APPLICANT)

*v.*

N. AHMED (RESPONDENT).*

†S.C. 1950

*May 23.*

*Government of Burma Act, 1935, ss. 41 and 42—Governor's declaration, dated 10th December 1942—Constitution Act, ss. 23 (4), 222, 226 (1)—Existing laws—General Clauses Act, s. 4 (1), particular date—Meaning of—Adaptation Order 226 (2)—Urban Rent Control Act, 1948, whether* ultra vires *of the Constitution—Validity of agreements generally.*

*Held :* The Urban Rent Control Act, 1948, was enacted by the Governor of Burma on the 2nd January 1948 when the Government of Burma Act, 1935, was in force. It was made in pursuance of the proclamation of 10th December 1942 by the Governor assuming to himself under s. 139 of the Government of Burma Act, all the powers vested by that Act in the Legislature of Burma. Unlike ordinances under ss. 41 and 42 of the Government of Burma Act, an act of the legislature did not require any public notification. In this respect the Act followed the English Rule that proclamation or any other form of publication of an Act of Parliament was never necessary to make an Act complete.

S. 222 of the Constitution defines "existing law" as a law passed before the commencement of the Constitution by any legislature, authority or person, etc. The Urban Rent Control Act, 1948, complies with this definition. It provides in s. 1 (3) that it shall come into force at once except the provisions of s. 16A and 16B. Though the Act was not published in the *Gazette* till the 17th January 1948 it cannot be said that the Act could not have come into force before that date The fact that the Act is not specifically mentioned in the Adaptation of Laws Order made by the President of the Union of Burma under s. 226 (2) of the Constitution does not affect its validity because the Act shall come into force "at once." These words are sufficiently specific taking into consideration the fact that the authenticated copy of the Act bore the date the 2nd January 1948.

*Held also :* That the Act is consistent with s. 23 (4) of the Constitution. The right of private property is, with certain reservations, guaranteed by the Constitution but the right to contract is not a fundamental right assured thereby. The central idea of the Urban Rent Control Act is the restriction of rents of premises in urban areas, and the Act extends no further than placing restraint on the untrammelled exercise of consensual letting of premises in the urban areas.

An agreement has no inherent vitality. Rights and obligations attaching to one voluntarily made are creatures of the statute. The Contract Act which

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* Civil Appeal No. 17 of 1949.

† *Present :* U E MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE THEIN MAUNG and U THAUNG SEIN, J.

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regulates the subject principally postulates equality of status between the contracting parties. Where the parties do not enjoy equality, recognition is withheld from agreements. Again certain rights and liabilities are attached by law to contracts and they are not allowed to be varied by agreement. Parliament has a right to take measures to prevent owners of premises in residential areas from taking advantage of abnormal conditions, to the detriment of the general public and exacting excessive or unreasonably high rent and a duty is imposed on Parliament under s. 29 of the Constitution to make laws to give effect to the limits permitted for the use of private property to the detriment of the general public.

*Tun Sein* for the applicant.

*N. Bose* for the respondent.

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

U E MAUNG.—The concise statement of facts and of the arguments which under the provisions of Order XIII, Rule 1 of the Rules of the Supreme Court the appellant in this case has filed reads : "That the Urban Rent Control Acts of 1948 and of 1946 are *ultra vires* of section 23 (*4*) of the Constitution of the Union of Burma." At the hearing, the learned counsel for the appellant has at length amplified his challenge of the validity of the Acts of 1946 and 1948.

The suit out of which the appeal arises was instituted under the provisions of the Urban Rent Control Act of 1948 and the reference in the alternative in the concise statement of facts and arguments filed by the appellant is the result of the learned counsel for the appellant not being able to make up his mind whether, apart from the question of constitutionality, the Act of 1946 or the Act of 1948 is the enactment which is in operation. In Civil Appeal No. 8 of 1949 where the learned counsel for the appellant in this case appears for several respondents he seeks to support the decision of the learned Chief Judge of the City Civil Court who in Civil Rent Reference No. 50 of

1948 took the view that the Act of 1948 does not form part of the body of "existing laws" which, within the meaning of section 226 of the constitution, continues in force in the Union, that the purported repeal by that Act of the earlier Act of 1946 is ineffective and that apart from any constitutional defect, the Act of 1946 is the enactment in force today. The learned counsel for the appellant relies *in toto* on the reasoning adopted by the learned Chief Judge of the City Civil Court in the proceedings under appeal in Civil Appeal No. 8 of 1949 and desires us to affirm the view stated by the learned Judge.

The Urban Rent Control Act of 1948 was enacted by the Governor of Burma on the 2nd January 1948, two days before the Constitution of the Union of Burma came into operation. The Government of Burma Act, 1935, was then in force and the Urban Rent Control Act, 1948, was made in pursuance of the Proclamation of the 10th December 1942 by the Governor of Burma assuming to himself under section 139 of the Government of Burma Act all the powers vested by or under that Act in the Legislature of Burma. In clause 2 of the Proclamation the Governor declared that "in exercising legislative powers under or by virtue of this Proclamation the Governor, acting in his discretion, shall prepare such Bills as he may deem necessary and declare as respects any Bill so prepared . . . that he assents thereto in His Majesty's name . . . . ." As such, the Urban Rent Control Act, 1948, is not a Governor's Act within the meaning of section 43 of the Government of Burma Act.

Unlike Ordinances under sections 41 or 42 of the Government of Burma Act, which require promulgation for them to become of the body of laws in force, an Act of the Legislature did not require, except in

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circumstances defined in section 38 (2) of the Act, any public Notification thereof to become of the body of laws of the land. In this respect the Government of Burma Act followed the English rule that proclamation or any other form of publication of an Act of Parliament was never necessary to make the Act complete. Section 222 of the Constitution defining "existing law" refers to any law "passed or made before the commencement of this Constitution by any legislature, authority or person, etc." The Urban Rent Control Act made as it was on the 2nd January 1948 complies with this definition. The Act in section 1 (3) provided that it "shall come into force at once except the provisions of sections 16A and 16B which shall come into force on such date as the Governor may appoint in this behalf." Accordingly this Act was, as a legislative enactment, perfected on the 2nd January 1948 and it has in the clearest terms disclosed the intention that it was to come into force on the making thereof, which, on the face of it, was the 2nd January 1948.

In these circumstances it would appear as if there can be no possible room for thinking that this Act of 1948 is not by virtue of section 226 (1) of the Constitution continued as of the body of the law in force in the Union of Burma until repealed or varied in due process. But the learned Chief Judge of the City Civil Court allowed himself to be misdirected by two entirely irrelevant factors into thinking that the Urban Rent Control Act of 1948 did not become part of the law of the land in the Union of Burma and that the earlier Act of 1946, which the later Act purported to repeal, is the operative enactment on the subject in the Union of Burma. These two considerations are the provisions of section 4 (1) of the General Clauses Act and the mention of the Urban Rent Control Act,

1946 in the Adaptation Order of the 4th January 1948 made by the President of the Union of Burma under the provisions of section 226 (2) of the Constitution.

The Urban Rent Control Act of 1948 though made on the 2nd January 1948 was not published in the *Burma Gazette* till the 17th January 1948. The learned Chief Judge of the City Civil Court misapplying, as it appears to us, section 4 (1) of the General Clauses Act held that the Act could not have come into force before the 17th January 1948 and that it does not come within the ambit of section 226 (1) of the Constitution which makes existing laws "continue to be in force." Moreover from the fact that the Urban Rent Control Act of 1948 was not specifically mentioned in the Adaptation of Laws Order of the 4th January 1948 made by the President of the Union of Burma under section 226 (2) of the Constitution, whereas the earlier Act of 1946 was the learned Chief Judge deduced that the Act of 1948 was, not intended to be operative in the Union.

As we have already said, the Urban Rent Control Act specifically provides that with the exception of sections 16A and 16B "the Act shall come into force at once." That being so it is difficult to understand the reasoning which would enable one to exclude the operation of the words "if the Act is not expressed to come into operation on a particular day" governing section 4 (1) of the General Clauses Act as it stood on the 2nd of January 1948. The qualifying word "particular" requires that the date of the Act coming into force should be made specific in the Act itself if the rule that the Act will come into force on the first publication in the *Gazette* is to be excluded, and we can think of nothing more specific than the words "at once" when it is borne in mind that the date of

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making of the Act appears on the authenticated copy of the Act.

At the hearing, the learned counsel for the appellant very frankly drew our attention to a subsequent Notification—No. 250 of the 20th May 1948 of the Ministry of Judicial Affairs—by which the President amended the earlier Adaptation Order and specifically mentioned the Urban Rent Control Act of 1948 as one of the Acts in respect of which adaptations under section 226 (2) of the Constitution are made. He suggested that this subsequent Notification may have the effect of making the Act of 1948 part of the "existing laws" in force in the Union. But, as we have already said, the specification or the non-specification in the Adaptation Order of any enactment forming part of the "existing laws" within the meaning of sections 222 and 226 (1) of the Constitution is entirely irrelevant for our purpose. Section 226 (2) enables the President to make such amendments to and variations in existing laws as may be necessary to meet the new conditions resultant on the change over from the Government of Burma Act, 1935, to the Constitution. Section 226 (2) does not empower the President to make what was not part of the existing laws part of the body of the laws in force in the Union.

It is clear to us that the contention on behalf of the appellant that the Urban Rent Control Act of 1948, not being consistent with section 23 (4) of the Constitution cannot continue to be in force in the Union, arises from a confusion of thought between the right of private property and the right to enter into contractual relations. The right of private property is, subject to certain reservations, guaranteed by the Constitution but the right to contract is not a fundamental right assured by the Constitution. The central idea of the Urban Rent Control Act is the restriction of rents of

premises in urban areas. For such purpose provisions are made for the fixation of what is known as "the standard rent," which is intended to represent a fair return to the landlord. But settlement of "standard rent" in itself would not achieve the purpose of restricting rents of premises. Under abnormal conditions that obtained and still obtain in urban areas in Burma residential premises are very few and the number of tenants in search of residential premises outnumber very greatly available premises. Provision therefore has to be made for allotment of tenancies to be taken out of the hands of the owners or, if left in the hands of the owners, the disposal of such tenancies by them are required to be under the supervision or with the approval of the Controller appointed under the Act. Such provisions are obviously necessary if the intention of the legislature in making provision for the fixation of "standard rents" is not to be defeated. Then, again, restrictions have to be placed on the ejectment of tenants as, if left unrestricted, the landlord would be able to defeat through the machinery of such suits the intention of the legislature. A class of persons known as "statutory tenants" are accorded rights approximating to those enjoyed by persons under a contractual tenancy. All these provisions are incidental to the central purpose of preventing owners of dwelling houses intended for letting from taking advantage of the extraordinary conditions that obtained and still obtain in urban areas in the Union of Burma to exact excessive or unreasonably high rents from tenants.

We are satisfied that the Urban Rent Control Act, 1948, extends no further than placing restraint on the untrammelled exercise of consensual letting of premises in urban areas. Such restraints are not obnoxious to the Constitution. An agreement has no inherent

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vitality ; rights and obligations attaching to agreements voluntarily made are creatures of the statute ; and the Contract Act, the principal enactment on the subject, postulates equality between the parties to the agreement. It assumes that in general men are best judges of their own interests and enforces such arrangements as are voluntarily made betwean adults at arm's length. But where the conditions are such that the parties do not enjoy equality, such as where circumstances indicate duress, coercion or undue influence, the presumption of equity and justice of consensual arrangements fails and the law withholds recognition from such agreements. Then again, parties to certain classes of contract are not allowed to vary by agreement the rights and liabilities which the law attaches to them ; *see*, for instance, sections 133 and 151 of the Contract Act and a mortgager may not by agreement clog the equity of redemption.

Section 23 (*2*) of the Constitution provides that " no person shall be permitted to use the right of private property to the detriment of the general public." Section 29 of the Constitution imposes on the Parliament the duty to make laws to give effect to such a provision in the Constitution. Parliament therefore not only has a right to take measures to prevent owners of premises in residential areas from exacting excessive or unreasonably high rents, taking advantage of abnormal conditions, to the detriment of the general public but is under a duty to do so.

For these reasons, the appeal fails and is dismissed with costs. Advocate's fees ten gold mohurs.

## SUPREME COURT.

S. THUKARAM (APPLICANT)

*v.*

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

†S.C. 1950

*May 29.*

*Urban Rent Control Act, ss. 11 (1) (a), 13 (1) and 14 (b)—Code of Civil Procedure, s. 2 (ii)—Constitution Act, s. 25 (2)—Directions in the nature of mandamus.*

K. V. S. Iyer, a tenant of Room No. 5 of House No. 231-237, Mogul Street, Rangoon, died in November 1949 but the rent continued to be received later by the landlords. They however did not accept it from the applicant a son of the deceased tenant and he sought to deposit the rent with the Controller of Rents. The Controller held that the claimant must first obtain a declaration of status as a legal representative from a Civil Court.

*Held:* On an application for a mandamus, that at the stage of deposit of rent with the Controller, it is not necessary that the status of the person who seeks to deposit should be established. S. 2 (ii) of the Code of Civil Procedure defines legal representative as including even an intermeddler. Deposit of rent can operate as a shield only to a person who is in occupation of the premises and a tenant's legal representative is included in the definition of tenant. The deposit enures for the benefit of the legal tenant and does not give the depositor any right adverse either to the landlord or to the tenant. Therefore no enquiry was called for as to the status of a person making deposit under s. 14 (*b*) of the Act and the Controller is bound to accept the deposit.

*R. Jaganathan* for the applicant.

*Ba Sein* (Government Advocate) for the 1st respondent.

*A. I. Modan* for the 2nd respondent.

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

U E MAUNG.—One K. V. S. Iyer, who admittedly was the tenant of Room No. 5 of the premises known

* Civil Misc. Application No. 26 of 1950.

† *Present:* U E MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE THEIN MAUNG and U THAUNG SEIN, J.

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as Nos. 231—237, Mogul Street, Rangoon, holding it from the landlords who are the 2nd respondents before us, died in the early part of November 1949. The rent for the room, however, was received without any dispute by the landlords till January 1950. It does not appear from the records who tendered the rents thus accepted by the landlords. In February 1950 some dispute appears to have arisen as to the representation of the interests of K. V. S. Iyer, deceased. In the objections filed before us by the 2nd respondents they claim "that they have been reliably informed and believe it to be true that there are other heirs and legal representatives of the deceased K. V. S. Iyer."

Whatever the real reason may have been the rent payable in February 1950 for the room was not accepted by the landlords and the applicant, who claims to be a son and heir of K. V. S. Iyer, sought to deposit the rent with the Controller of Rents, City of Rangoon. The Controller in his Proceedings No. 31-D of 1949-50 took the view that it was not for him, when the landlords stated "that they are not aware that the applicant is a son and legal representative of the late K. V. S. Iyer," to decide on the disputed question of representation to the deceased tenant. The Controller recognises, as is apparent from his order of the 27th February 1950 in these proceedings, that under section 2 (*g*) of the Urban Rent Control Act, 1948, a "legal representative" of a tenant within the meaning of the Civil Procedure Code is a tenant; but he expresses the view that a claimant as a legal representative must first obtain a declaration of his status as such from a civil Court before making an application to him to deposit the rent under section 14B of the Act.

In the first place, taking sub-section (*1*) and sub-section (*2*) of section 14B of the Urban Rent

Control Act together, it seems reasonably clear that at the stage of the deposit of the rent with the Controller it is not necessary that the status of the person who seeks to make a deposit should be established. A person who intermeddles with the estate of a deceased may place himself under obligations to the creditors of the estate and may be liable to pay on behalf of the estate the rents which are due from the estate. Section 2, sub-section (*11*), of the Code of Civil Procedure defines a "legal representative" to include an intermeddler. It is obvious from clauses (*a*) of section 11 (*1*) and 13 (*1*) read with section 14B of the Urban Rent Control Act, 1948, that the deposit of rent can operate as a shield only to a person who is in occupation of the premises, and that the tenant, which term includes the tenant's legal representative or representatives is not liable to be ejected for non-payment of rent. The deposit thus enures for the benefit of the real tenant and does not give to the depositor if he is not a tenant or a legal representative of the tenant any right adversely to either the landlord or to the tenant or his legal representative.

That being so, we are clearly of the opinion that no enquiry whatsoever was called for as to the status of a person who makes a deposit under section 14B of the Act. The Controller is bound to accept the deposit and the consequences which flow from the deposit as between the landlord and his tenant are matters regulated by the Act itself.

In these circumstances we direct the Controller to receive the deposit or deposits of rent made by the applicant in respect of Room No. 5, second floor, of House No. 231-237, Mogul Street, Rangoon, under section 14B of the Urban Rent Control Act. There will be no order as to costs.

## SUPREME COURT.

†S.C. 1950

*June 5.*

SAW BENSON (APPLICANT)

*v.*

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

*Application for writ of* habeas corpus *—Public Order (Preservation) Act, s. 5A—Direction to detain outside the jurisdiction of a district—Jurisdiction of Supreme Court not like that of an appellate court.*

Where the applicant was first detained by the order of the Deputy Commissioner, Amherst, and the order was withdrawn and the Deputy Commissioner, Insein, made an order under s. 5A of the Public Order (Preservation) Act directing applicant's detention in the Rangoon Central Jail and later the President under s. 5A (4) directed his detention in Insein Central Jail.

*Held :* That an order under s. 5A (1) (*b*) can specify the place or places where the detenu is to be confined and a Deputy Commissioner empowered under the Act may direct confinement at a place outside his district. As the detenu had his permanent residence and carried on business in Insein District, the Deputy Commissioner, Insein, had jurisdiction to order his detention, though the detenu was at that time in Rangoon. The fact that an order of detention is passed during the pendency of *habeas corpus* proceedings before the Supreme Court does not necessarily make it illegal.

Where the Deputy Commissioner came to conclusions of fact *bona fide* and reasonably the order will not be interfered with. The Supreme Court does not exercise the powers of an appellate court in *habeas corpus* proceedings and will not embark on detailed examination of the evidence.

*Kyaw Myint* and *P. M. Beecheno* for the applicant.

*Ba Sein* (Government Advocate) for the respondent.

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

U E MAUNG.—This application for directions in the nature of *habeas corpus* was instituted on the

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* Criminal Misc. Application No. 75 of 1950.

† *Present :* U E MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE THEIN MAUNG and U THAUNG SEIN, J.

S.C. 1950

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20th March 1950 when the applicant was under detention in the Rangoon Central Jail under the orders of the Deputy Commissioner, Amherst, acting under section 5A of the Public Order (Preservation) Act. The applicant, prior to the 17th January 1949, had his permanent residence at Thamaing in the Insein District, where he carried on business as a haulage contractor and petrol retailer. On that date he left with his family for Thatôn where he resided for little over a month. On the 28th February 1949—it is not necessary for us to consider why and under what circumstances he did so—he went to Moulmein where he was arrested and the order of detention passed against him.

The order of detention made by the Deputy Commissioner, Amherst, was, however, withdrawn by that officer on the 24th March 1950 apparently because he entertained doubts about his jurisdiction to act in the matter of a person whose permanent residence was outside Amherst District and who had not been long enough in the Amherst District to do anything there to give the Deputy Commissioner jurisdiction. But on the 23rd March 1950, the Deputy Commissioner, Insein, had made an order under section 5A of the Public Order (Preservation) Act directing the detention of the applicant in the Rangoon Central Jail where he had been already detained under the order of the Deputy Commissioner, Amherst. On the 7th May 1950 the President, under section 5A (*4*) of the Act, directed the applicant to be transferred from the Rangoon Central Jail to the Central Jail at Insein and he was accordingly transferred to the latter place on the 11th May 1950.

The first point taken on behalf of the applicant before us is that the Deputy Commissioner, Amherst,

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acted without jurisdiction in directing the detention of the applicant in the Rangoon Central Jail, which is outside the Amherst District, or at all. It was urged that the Deputy Commissioner's jurisdiction is defined by the delegation of powers under section 7 of the Act and that it is only within his own district that a Deputy Commissioner may act under the preventive provisions of the Act. It is said that the applicant, not being a resident of Amherst District and his activities, if any, being either in Insein District or in Thatôn District, there could not have been any apprehension to public peace or public safety in the district of Amherst. It may well have been so, but the detention operative at this date is not one under the order of the Deputy Commissioner, Amherst, who had cancelled his order on the 24th March 1950. The operative order of detention at this date is that made by the Deputy Commissioner, Insein, on the 23rd March 1950. The possibilities of the Deputy Commissioner, Amherst, acting in excess of his jurisdiction would not therefore be a matter relevant to the proceedings where the applicant seeks release from present detention.

The question whether an Officer directing detention can direct the confinement of the detenu in a place outside the district though not, for the reasons given above, arising in respect of the Deputy Commissioner, Amherst, must be considered as it has an important bearing on the subsequent detention order made by the Deputy Commissioner, Insein. It appears to us that this objection overlooks the provisions of section 5A (*4*) of the Public Order (Preservation) Act. Section 5A (*4*) of the Act empowers the President or his delegate, in respect of a person directed to be detained under section 5A (*1*) (*b*), during the currency of the order for detention, to specify from

time to time the place or places where the detenu is to be confined. We are clearly of the opinion therefore that a Deputy Commissioner empowered to act under the Public Order (Preservation) Act may direct the confinement of a person detained under his orders at a place outside his district.

Dealing with the subsisting order of detention of the 23rd March 1950 it has been claimed that the Deputy Commissioner, Insein, has no territorial jurisdiction to order the detention of the applicant, the latter being at the time of the order an involuntary resident of Rangoon. The short answer to that seems to be that the applicant, apart from his involuntary exile from Insein, had his permanent residence and carried on business in Insein District. The activities which are alleged against him and which the Deputy Commissioner, Insein, claims make him a danger to the maintenance of public order and public safety were all within Insein District. If at liberty, it is more than likely that the applicant will go to his permanent home where also he has his business interests. In these circumstances it is impossible to accept the contention on behalf of the applicant that the Deputy Commissioner, Insein, has no jurisdiction over the applicant so far as action under section 5A of the Public Order (Preservation) Act is concerned.

The present detention of the applicant is challenged on several grounds. It has been contended that the applicant having instituted proceedings in this Court for directions in the nature of *habeas corpus* on the 20th March 1950, the order of detention made on the 23rd March 1950, during the pendency of the said proceedings, must be treated as a nullity. For this proposition no authority has been adduced. Whilst we would be prepared to prevent the evasion of the jurisdiction of this Court by holding that,

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notwithstanding a further order of detention during the pendency of proceedings in this Court being made by a Deputy Commissioner exercising authority in an area under military administration where ordinarily the writ of this Court would not run, the Court would not lose seizin of the proceedings, we cannot accept the applicant's contention that such an order of detention must necessarily be illegal.

On the merits it has been claimed on behalf of the applicant that the incidents relied upon by the Deputy Commissioner, Insein, for his order are capable of an innocent explanation and that the applicant has done nothing to make him a person proper to be detained under the Public Order (Preservation) Act. This may or may not be so but this Court is not sitting as an appellate tribunal and it is not competent to embark into minute examination of every detail of the activities alleged against the applicant and of the evidence in support of such allegations.

It has not even been alleged by the applicant that the Deputy Commissioner has not come to the conclusions he did *bona fide*. It is also not at all clear from the record that the Deputy Commissioner did not have before him materials from which he could have honestly come to the conclusion he did. The Deputy Commissioner has stated that he is satisfied that the activities of the applicant are such as would make his being at liberty a danger to the maintenance of public order and public safety. He has in his affidavit stated the facts and incidents on which to base that satisfaction. It cannot be said that no reasonable person can arrive at the conclusion the Deputy Commissioner does from such facts and incidents. That seems to us to be the end of the matter.

Incidentally it was mentioned at the hearing by the learned Advocate for the applicant that though the original order of detention of the 28th February 1949 made by the Deputy Commissioner of Amherst directed the confinement of the applicant in the Rangoon Central Jail, it was not till 1st June 1949 that he was taken to that jail. The affidavit of the Superintendent U Seik of the Rangoon Central Jail supports these allegations. It appears that in the interval between the order and 1st June 1949, the applicant was detained in the Town Lock Up, Barr Street, Rangoon. It is not clear under whose orders this was done. As far as the materials on the record go, this detention in the Rangoon Town Lock Up was unauthorized. It is to be hoped that similar detentions in unauthorized places of confinement do not happen again.

The application is dismissed.

## SUPREME COURT.

†S.C. 1950

*June 19.*

H. J. HEWITT (APPLICANT)

*v.*

MRS. H. J. HEWITT (*a*) MA YAN (RESPONDENT).*

*Divorce Act, ss. 7, 36 and 55—Refusal of Application for costs for wife's defence in an application for divorce on the ground of adultery—Order whether appealable—Application for alimony* pendente lite—*Whether appeal lies against such order—Granting of alimony—The discretion of court.*

*Held :* That though s. 55 of the Burma Divorce Act provides that all decrees and orders are appealable, yet the said provisions are subject to the two provisos limiting the right. The second proviso provides that there shall be no appeal as to costs only. Hence no appeal lay against the order of the District Judge refusing an application of wife for costs for her defence. But an appeal against the refusal of alimony *pendente lite* was competent.

The granting or withholding of alimony *pendente lite* is a matter of judicial discretion of the court and the appellate court having exercised its discretion fairly the decision in respect of that portion should not be interfered with.

*Garlinge* v. *Garlinge*, 44 All 745 ; *Ste. Croix* v. *Ste. Croix*, 41 Cal 35 ; *Masih* v. *Masih*, (1949) All. 802 ; *Dwyer* v. *Dwyer*, 66 I.C. 494 ; *A* v. *B*, 22 Bom. 612 ; *Savuriammal* v. *Santiago*, 7 L.B.R. 347 ; *Wilkinson* v. *Wilkinson*, 30 Cal. 48 ; *Iswarayya* v. *Iswarayya*, A.I.R. (1930) Mad. 154 ; *Stuart* v. *Stuart*, 57 All. 884 ; *Steedman* v. *Wheeler*, (1944) 1 Cal 258 ; *Williams* v. *Williams*, (1929) Pat. 315 ; *Russell* v. *Russell*, (1892) p. 152 ; *Robertson* v. *Robertson*, (1881) 6 P.D. 119 ; *Thompson* v. *Thompson*, (1939) p. 1, referred to.

*T* v. *B and B*, 44 P.R. 486 ; *Chamarette* v. *Chamarette*, A.I.R. (1947) Lah. 176, dissented from.

The historical background of the Divorce Act considered

*P. K. Basu* for the applicant.

*Tun I* for the respondent.

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

U E MAUNG.—It appeared, at the early stages of the hearing of this appeal that we might have to

* Civil Appeal No. 18 of 1949.

† *Present :* U E MAUNG, Chief Justice of the Union of Burma, U ON PE and U THAUNG SEIN, JJ.

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consider the effect of section 7 of the Divorce Act, 1869, as also of section 55 of the same Act. There have been different views held in India on the true construction of section 7 and there is a dearth of authority in the Indian Courts on the true meaning of section 55. But, as it turns out, it is not necessary for us to attempt the solution of the interesting and much debated problem relating to the true meaning of section 7.

The appellant, an Anglo-Indian Christian, married the respondent, a Burmese Muslim, on the 29th May 1933 under the Christian Marriages Act. The husband was away from Burma during the Japanese occupation while the wife remained at Rangoon. On the re-occupation of Burma by the forces of the lawful Government the husband came back to Burma. The wife thereafter appeared to have gone away from the house where the husband left her during his absence and where she had been living and the husband obtained a decree for restitution of conjugal rights. The decree was made on the 27th January 1947 and on the 19th February 1947 the husband filed a petition under the Divorce Act for dissolution of his marriage with his wife alleging various acts of adultery with the co-respondent during his absence from Burma. The wife entered appearance and made two applications, one for alimony *pendente lite* under the provisions of section 36 of the Divorce Act and the other for a deposit in Court of her costs for the defence against the petition for dissolution based on her alleged adultery.

The District Judge (U Tin Toon) before whom these applications were made rejected them *in limine* he being of the opinion that a wife against whom a decree for restitution of conjugal rights is outstanding has no right to make an application either for alimony

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or for a deposit for costs for defence in a suit for divorce filed by the husband. An appeal was filed against the refusal of the two reliefs sought and the High Court of Judicature at Rangoon, in Civil First Appeal No 38 of 1947, remitted the two applications to the District Court to be heard and determined on their merits. It does not appear that any objection was taken then to the maintainability of an appeal against the refusal of both reliefs or either of them and the Appellate Bench of the High Court of Judicature did not consider this question. The key-note of the Appellate judgment remitting the applications for decision on merit is to be found in the words of Blagden J. where he said :

"The learned District Judge, mistakenly considering, as I understand him, that the present appellant was in contempt and therefore had no right to move the Court, dismissed both her applications out of hand. In my opinion, he was clearly mistaken in this . . ."

The District Court then held an enquiry into the application on affidavits and the learned District Judge (U Maung Maung) rejected both applications in a very short judgment. On further appeal against the second refusal of both reliefs the Appellate Bench of the High Court Act set aside the order of the District Court and directed the appellant before us to pay to the respondent a sum of Rs. 25 per mensem as alimony *pendente lite* with effect from the date of her original application, namely, 22nd May 1947 and further directed the appellant to pay into Court a sum of Rs. 500 for use of the respondent in order that she may be able to defend the petition for dissolution of marriage.

The decisions in *Garlinge* v. *Garlinge* (1), *Ste. Croix* v. *Ste. Croix* (2), *Masih* v. *Masih* (3) and

(1) 44 All. 745. (2) 44 Cal. 35.
(3) (1949) All. 862.

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*Dwyer* v. *Dwyer* (1) were relied upon by the Appellate Bench of the High Court as establishing the right of the wife to an order for deposit of her costs for defence where she is sued by the husband for dissolution of marriage with her. No specific reference was made in the judgment to section 7 of the Divorce Act; and no independent examination of the true meaning of this section appears to have been undertaken; but the Indian authorities proceed on the application of section 7. In the matter of the grant of alimony *pendente lite*, section 36 of the Divorce Act having made it a matter at the discretion of the Court, the Appellate Bench after an examination of relevant authorities came to the conclusion that the discretion should be exercised in favour of the wife even though the husband's petition for dissolution is based on acts of alleged adultery by the wife.

For reasons which will become apparent later, it is not necessary, as we have said at the outset of this judgment, to determine here finally the true construction of section 7 of the Divorce Act. It will suffice for us to note that the words "principles and rule" appearing in that section have been differently interpreted in the Courts in India and Burma. One view is that these words refer to practice and procedure; another view is that they relate to matters of substantive law; and yet a third view is held that they relate to quasi-substantive rather than adjective law. See the cases of *A* v. *B* (2), *Savuriammal* v. *Santiago* (3), *Wilkinson* v. *Wilkinson* (4), *Ramsay* v. *Boyle* (5), *Iswarayya* v. *Iswarayya* (6), *Stuart* v. *Stuart* (7) and *Steedman* v. *Wheeler* (8).

Section 7 of the Divorce Act, 1869, appears to have been based on section 22 of the Matrimonial Causes Act

(1) 66 I.C. 494.
(2) 22 Bom. 612.
(3) 7 L.B.R. 347.
(4) 47 Bom. 843.
(5) 30 Cal. 48.
(6) A.I.R. (1930) Mad. 154.
(7) 57 All. 884.
(8) (1944) 1 Cal. 258.

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of 1857; the main divergence being that whereas the English Court for Divorce and Matrimonial Causes was enjoined to act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have *heretofore acted and given reliance*; the Divorce Act enjoined the Courts in similar terms to act on principles and rules on which the Court for Divorce and Matrimonial Causes in England (for this Court was substituted the Supreme Court of Judicature in England by an amendment of the Divorce Act) for the time being acts and gives relief. Section 22 of the Matrimonial Causes Act has since been repealed by the Supreme Court of Judicature Consolidation Act, 1925, which has enacted instead sections 32 and 103. These sections make it incumbent on the High Court in England to act so far as regards *procedure and practice* in the exercise of its jurisdiction, when not otherwise expressly provided by the Act or rules thereunder, as nearly as may be *in the same manner* as that in which it might have been exercised by the Court to which it formerly appertained. The interesting though difficult tasks of construing section 7 of the Divorce Act in the light of these circumstances and of evaluating the effect of the change in the point of view in England from the earlier cases to the later cases on the validity or otherwise of the wife's claim for costs of defence, exemplified for instance in *Williams* v. *Williams* (1), are however not necessary in the present appeal; for we are satisfied that no appeal lay from the order of the District Court refusing the wife's application for deposit in Court of costs of her defence.

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(1) (1929) Pat. 315.

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Section 55 of the Divorce Act regulates appeals from Courts exercising jurisdiction in divorce proceedings. Leaving out the provisions not relevant for our purpose, the first paragraph reads :

"All decrees and orders made by the Court in any suit or proceedings under this Act . . . . . may be appealed from, in the like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction . . . may be appealed from, under the laws, rules and orders for the time being in force."

The manner of the exercise of the appellate jurisdiction and the extent of such jurisdiction are two different things and the meaning of the first paragraph of section 55 of the Divorce Act, if read, unobsessed by preconceived notions of the extent of appellate jurisdiction under the Civil Procedure Code, is clear. All decrees and orders whatsoever in divorce jurisdiction are appealable so far as this paragraph is concerned. It is only when we come to the provisos that we find restrictions placed on this absolute right of appeal from all decrees and orders in divorce proceedings.

That the legislature intended section 55 of the Divorce Act in the sense just indicated is clear from a study of its historical background and of the course of development of the practice in the exercise by Courts having divorce jurisdiction in England. Section 55 of the Matrimonial Causes Act of 1857 made "any decision by the Court in any matter" which may be made by the Judge Ordinary alone appealable to the full Court, the decision of the Court being final subject to an appeal in proper cases to the House of Lords. At the time of the Act of 1857 the Judge Ordinary could deal with only certain specified matters but as the result of the amendment by the Matrimonial Causes Act, 1860, the Judge Ordinary was clothed with powers to deal with all original

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petitions and subsidiary matters. It was on this system in force in 1860 in England that the Divorce Act of 1869 was modelled. The Judicature Act of 1881 transferred the appellate jurisdiction which section 55 of the Matrimonial Causes Act vested in the Full Court to the Court of Appeal set up under the Supreme Court of Judicature Act, 1873. But no restriction on the right of appeal existed other than that where the order is one which under rules of the Court was to be made at the discretion of the trial Judge, no appeal lay without the leave of that Judge. Section 1 of the Judicature Act of 1894 places further restriction on the right of appeal and these restrictions have been repeated in section 31 of the Judicature Act of 1925. The Act of 1925 repeals also in terms section 55 of the Matrimonial Causes Act of 1857 which is replaced to a certain extent by section 27 of the Act.

Our conclusions then are that all decisions by a Court exercising matrimonial or divorce jurisdiction, except such as are specifically stated in provisos 1 and 2 of section 55 of the Divorce Act, are open to appeal, the manner of the exercise of the appellate jurisdiction only being such as is defined in that section. In the view we take of section 55 we dissent from the reasons stated for the decisions in *T* v. *B and B* (1) and *Chamarette* v. *Chamarette* (2).

The second proviso in section 55 of the Divorce Act reads : " provided also there shall be no appeal on the subject of costs only ". Though for the sake of convenience the two matters have been considered in one consolidated appeal, in reality there were two appeals to the High Court against rejections of two distinct applications by the trial Court. One relates to alimony *pendente lite* which clearly is appealable in view of what we have said above and the other relates

(1) 44 P.R. 486. (2) A.I.R. (1947) Lah. 176

to deposit of the wife's costs for defence by the husband petitioning for dissolution of marriage. Section 31 (*1*) (*h*) of the Judicature Act of 1925 provides that no appeal shall lie without the leave of the Court or Judge making the order from an order of the High Court as to costs only which by law are left to the discretion of the Court. This is a substantial reproduction of section 49 of the Judicature Act of 1873. In *Russell* v. *Russell* (1) the Court of Appeal (Lindley and Kay L, JJ.) held that where the Divorce Court had rejected an application by the wife for security for costs against her husband, no appeal lay. The restriction on the right of appeal from an order for costs is in England qualified but the restriction under our Divorce Act is absolute. We hold therefore that there can be no appeal where the District Courts rejects the wife's application for either security for costs or for deposit of such costs.

We are not unaware of the decisions in *Robertson* v. *Robertson* (2) and *Thompson* v. *Thompson* (3) which seem to suggest that in England in certain circumstances an appeal may be competent from an order similar to the order in question in this appeal without the leave of the trial Judge. But these are extreme cases and turn on the qualification in the English Act to the restriction on the right of appeal against costs.

The application for alimony *pendente lite* was rejected almost summarily in a very short judgment in the trial Court whereas the appellate Court discussed the materials on the record relevant to the application. The grant or withholding of alimony *pendente lite* is under the provision of section 36 of the Divorce Act a matter of judicial discretion of the Court and the Appellate Bench having exercised its discretion fairly

(1) (1892) p. 152. (2) (1881) 6 P.D. 119.
(3) L.R. (1939) p. 1.

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we refuse to interfere with its order in this respect. But when the Appellate Bench set aside the order of the District Court rejecting the application for deposit of the wife's costs it acted without jurisdiction and its order in that behalf must be set aside. We accordingly dismiss the appeal in so far as it relates to the grant by the High Court to the respondent an order for alimony *pendente lite*. We allow the appeal in so far as the High Court ordered the deposit of Rs. 500 by the appellant in Court for the costs of defence by the wife and set aside such order. In the circumstances each party will bear its costs throughout.

## SUPREME COURT.

G. C. MANGAPATHY (APPELLANT)

*v.*

THE GOVERNMENT OF THE UNION OF BURMA (RESPONDENT).*

† S.C. 1950

*June 19.*

*Defence of Burma Rules—Rules 89A and 96—Lorries requisitioned under by Government—S. 151, Contract Act—Duty of Government—Conditions for liability.*

Appellant's lorries were requisitioned by the Commissioner of Police, Rangoon, on behalf of the Government of Burma on the 9th December 1941 at Rs. 15 per diem under s. 89A of Defence of Burma Rules and the lorries were left behind by the government on evacuation and the owner received, payment for hire up to the date of abandonment, *i.e.*, 20th February 1942 and now claimed the value of lorries.

*Held:* That the provisions of s. 151 of the Contract Act would not in terms apply to the facts of the case. The lorries having been lawfully requisitioned, their taking was not an act of trespass and the use by Government was lawful. The duty of Government in such circumstances is not higher than that of a person in lawful possession of another's goods. The Government was only bound to take reasonable care. Except where the negligence or wrongful act of the person in lawful possession of another's goods had been a proximate cause of the loss or destruction thereof, the damage must lie where it falls. As the government had taken as much care of the appellant's properties as of their own property, there was no question of negligence or wrongful act on their part—the government cannot be held liable for the price of the lorries.

*Goldman* v. *Hill*, (1919) 1 K.B. 443; *Broadwater* v. *Blot*, Holt, N.P., 547; *Searle* v. *Laverick*, (1874) 9 Q.B.D. 653 at 663-64, referred to and applied.

*P. B. Sen* for the appellant.

*Ba Sein* (Government Advocate) for the respondent.

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

U E MAUNG.—We are clearly of the opinion that there are no merits in this appeal.

The appellant's two lorries were on 9th December 1941 requisitioned on behalf of the Government of

* Civil Appeal No. 15 of 1949.

† *Present:* U E MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE THEIN MAUNG and U THAUNG SEIN, J

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Burma by the Commissioner of Police, Rangoon, on hire basis, the compensation for the use thereof being fixed under Rule 89A of the Defence of Burma Rules at Rs. 15 per diem. Thereafter the lorries remained in the use of the Government of Burma in the Rangoon area till 20th February 1942. On that date the invading forces of the enemy were at the gates of Rangoon and the department of the Government of Burma administering the employment of requisitioned and other vehicles was forced to evacuate from Rangoon.

The appellant has admitted that he himself left Burma on the 27th December 1941, leaving, in his own words " all my valuable things behind in Burma as I could not carry them with me nor sell them to any one." His explanation for abandoning his valuables was " I could not have saved them." When he left for India the appellant did not leave any agent in Burma to act on his behalf.

In December 1946 the appellant came back from India after having, whilst in India, received payment from the Government of Burma of a sum of Rs. 2,220 representing compensation for use of the lorries at the rate of Rs. 15 per diem from the 9th December 1941 to the 20th February 1942. He then claimed in the suit out of which this appeal arises, after serving on the Government of the Union of Burma the necessary notice under section 80 of the Civil Procedure Code, a decree for Rs. 6,000 being the estimated value of the two lorries. The appellant alleged in his plaint that the lorries were used by the Government of Burma for the purpose of evacuation from Rangoon and that his demand for their return was not complied with. On these allegations the appellant in paragraph 5 of the plaint claimed that " the defendants as bailees are liable to return the said lorries or pay their value to the plaintiff." There was also a claim for accounts

for the user of the lorries after the 20th February 1942 but that claim has not been pressed either in the High Court on appeal or before us and we need not say anything more on this aspect of the case.

The learned Chief Judge of the City Civil Court granted the appellants a decree for Rs. 3,000 holding that the appellant was entitled to claim by way of compensation under Rule 96 (1) of the Defence of Burma Rules for the loss of the lorries which the learned Judge valued at Rs. 3,000. Cross appeals were filed by the appellant and by the Government of the Union of Burma before the High Court which dismissed the appeal of the appellant and allowed the appeal of the respondents. The two appeals were disposed of by one judgment on the 4th February 1949.

The Appellate Bench of the High Court took the view that a claim for compensation under Rule 96 of the Defence of Burma Rules was not maintainable after the expiry of the Defence of Burma Act and the rules framed thereunder, which took place on the 31st July 1947. The Appellate Bench, however, was of the opinion that the suit was not one under Rule 96 of the Defence of Burma Rules and proceeded to consider the appellant's claim on the merits. The learned Judges, relying on the averments in paragraphs 2 and 5 of the plaint that the lorries were requisitioned on hire basis and that the defendants as bailees were liable to return the said lorries or to pay their value to the plaintiff, applied the provisions of section 151 of the Contract Act and having, on the evidence on the record, come to the conclusion that the lorries were lost in spite of the respondents having taken such care thereof as is required by section 151 of the Contract Act, dismissed the appellant's claim entirely.

It is from the judgment and decrees in these two appeals that the appellant has by leave of this Court

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preferred this appeal under section 6 of the Union Judiciary Act.

Before us the learned counsel for the appellant based his claim in the alternative on Rule 96 of the Defence of Burma Rules and on the right of an owner of goods who had been deprived thereof to recover either the goods or their value.

The claim based on Rule 96 of the Defence of Burma Rules can be shortly disposed of. It is not necessary to consider whether the expiry of the rules on 31st July 1947 would have affected the right, if any, that had accrued to the appellant under the rules prior to their expiry. Suffice it to say that Rule 96 in none of its three sub-rules gives the person whose property had been requisitioned the right of suit for compensation in a Court of Law. Rule 96 (1) merely gives the owner a right to such compensation " as may be fixed in accordance with the provisions of the rule "; sub-rule 2 provides for compensation to be fixed in the first instance by agreement between the Government and the owner and failing such agreement the Governor (now the President) is required to specify the authority or person by whom the dispute is to be adjudged and compensation to be awarded ; and sub-rule 3 enables the Governor (now the President) to prescribe the conditions which the person making adjudication shall have regard to when determining the amount of compensation payable.

The learned counsel for the appellant strenuously contended before us that the Government having requisitioned the lorries under Rule 89A of the Defence of Burma Rules is in law bound to return the lorries after the purpose of the requisition had been fulfilled or to pay the value of the lorries. He says that the relationship was not one of bailment ; it was not a transaction voluntarily entered into by the

appellant ; and that it was by a compulsory acquisition that the Government obtained possession of the lorries. So far, we are prepared to agree with him and to accept his contention that the provisions of section 151 of the Contract Act would not in terms apply to the solution of the dispute. But it must be remembered that when the Government, it may be without the appellant's consent or against his will, took possession of the lorries on the 9th December 1941 there was statutory authority for the action. That taking was therefore not an act of trespass and the possession and user by the Government following the taking were lawful. Accordingly the only basis of the appellant's claim for damages can be that of an owner against a person in lawful possession of his goods for an act of conversion or for an act of negligence, whereby the owner is totally deprived of his goods.

We cannot think that the duty of Government in respect of the lorries compulsorily acquired can be higher than that of any other person in lawful possession of another person's goods. The decision of the Court of Appeal in *Goldman* v. *Hill* (1) indicates the circumstances in which the owner of goods may obtain damages from a person who was in possession of them and who having been in lawful possession of them failed to return them to the true owner on demand.

The dictum of Gibbs, C.J. in *Broadwater* v. *Blot* (2) quoted with approval by a very strong Bench in *Searle* v. *Laverick* (3) appears to us so appropriate that we quote it below :

" All the defendant is obliged to observe is reasonable care. He does not insure ; and is not answerable for the wantonness

(1) (1919) 1 K.B. 443. (2) Holt, N.P. 547.
(3) (1874) 9 Q.B. 122 at p. 130.

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or mischief of others. If the horse had been taken from his premises, or had been lost by accidents which he could not guard against, he would not be responsible. I admit that particular negligence must be proved, by occasion of which the horse was lost, or gross general negligence, to which the loss may be ascribed, in ignorance of the special circumstances which occasioned it. If there were a want of due care and diligence generally, the defendant will be liable."

The liability of the person who had possession of another's goods and who had lost them by a wrongful act on his part is exemplified in the appeal case, *Bristol and West of England Bank* v. *Midland Railway Company* (1) where Fry, L.J. said :

" I think it is reasonable to say that the man who ought to have the goods shall not be allowed to set up a wrongful prior act by which he has made away with the goods. He who ought to produce the goods of the man who has the title to the goods and the property in the goods, cannot discharge himself by saying, ' I have wrongfully made away with them, but that was before the accruer of your title '."

Except, then, where the negligence or the wrongful act of the person in lawful possession of another's goods had been the proximate cause of the loss or destruction thereof, it is clear that the damage must lie where it falls. The findings of the Appellate Bench, supported by the evidence on the record, are that the lorries had to be left in Rangoon in the course of general evacuation on the 20th February 1942 when the invading forces of the enemy were at the gates of Rangoon and that they were lost in spite of the respondents having taken as much care of them as of their own property. On these findings no question of negligence or wrongful act on the part of the respondents, conducing to their inability to return the lorries

(1) (1891) 2 Q.B.D. 653 at 663 and 664.

which were at one time in their lawful possession, arises.

The appeal therefore fails and is dismissed with costs.

## SUPREME COURT.

† S.C. 1950

*June 19.*

ABDUL GAFFAR (APPLICANT)

*v.*

U KYAW NYUN AND ONE (RESPONDENTS).*

*Sea Customs Act, s. 167 (8)—Appellate order of Financial Commissioner—S. 191 (1) amended—Revision by Minister of Finance and Revenue—Hearing before Secretary—Proceedings judicial—President acting under s. 191 exercises judicial function—Criminal Procedure Code, s. 5 (2), s. 439 (2)—Rules of Natural Justice in judicial proceedings—Constitution of Burma, s. 152—Supreme Court whether bound by earlier ruling.*

1. The Collector of Customs when he imposes fines and penalties under the Sea Customs Act, and Appellate authority acting under s. 18 of the said Act exercise judicial functions. Similarly the President of the Union, when exercising his power of revision under s. 191 of the Act exercises under s. 150 of the Constitution limited functions of a judicial nature. They are all, therefore, bound to act on judicial principles.

Exercise of a judicial function is individual. Therefore, prior to the amendment of the General Clauses Act which came into operation on the 1st March 1950 the President was bound to exercise his judicial functions personally. But after the amendment all the functions of the President including judicial functions, can be exercised by the Minister in charge of the Ministry concerned.

Custom Officer exercising power under s. 182, Appellate Authority acting under s. 188 and the President acting under s. 191 of the Sea Customs Act administer criminal justice.

A Court of criminal jurisdiction has ordinarily no power to review its own decision. A review of a decision is not provided for by the Criminal Procedure Code but if the power of revision is exercised in a criminal case under a Special Law, s. 439 (2) of the Code of Criminal Procedure would become applicable by reason of s. 5 (2) of the Code. Rules of Natural Justice require that no man shall be condemned unheard and therefore, before an order to the prejudice of any person is made he must be given an opportunity of making his defence even though there be no provision in the code for such hearing.

That after the 1st March 1950 the Minister of Finance and Revenue was the proper authority to hear and decide the dispute in the revision proceedings. The officer who heard the Applicant and recommended decision in his favour had no jurisdiction to hear the case. Hence the proceedings must be quashed.

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* Civil Misc. Application No. 27 of 1950.

† *Present:* U E MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE THEIN MAUNG and U THAUNG SEIN, J.

*Held also*: That there is no bar either under s. 152 of the Constitution or elsewhere to the Supreme Court reconsidering its earlier ruling of law laid down in a previous decision by itself.

S. 121 of the Constitution does not apply to judicial proceedings.

Reference to an inappropriate section in an order due to clerical mistake when such mistake does not prejudice any one may be ignored.

The effect of decisions in *Gwan Kee* v. *The Government of the Union of Burma and Ranchhoddas Jethabhai & Co.* v. *The Secretary to the Union Government, Ministry of Judicial Affairs and two others*, explained.

*P. M. Beecheno* for the applicant.

*Chan Tun Aung* (Assistant Attorney-General) for the respondents.

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

U E MAUNG.—The applicant, a dealer in textiles, obtained a licence to import into Burma cotton printed longyi cloth. Certain goods which the applicant claims to conform to the terms of the licence arrived in Burma on or about the 21st October 1948 and they were examined by the Collector of Customs, Rangoon, for the purpose of seeing that they were regularly imported. After examination the Collector, acting under section 167 (*8*) of the Sea Customs Act, directed the said goods to be confiscated subject, however, to redemption under section 183 of the Act upon payment of a fine of Rs. 7,372 being twice the value of the goods together with the duty involved. This order was appealed against before the Financial Commissioner (Commerce) who held that the goods imported by the applicant were covered by the import licence granted to him. He therefore set aside the order of the Collector and directed the goods to be released on payment of the ordinary duty involved. This appellate order was passed on the 24th August 1949. Thereafter, on the 20th January 1950 the 1st respondent, who is an Additional Secretary to the Government of the Union

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in the Ministry of Finance and Revenue, sought the orders of the Hon'ble Minister if revision proceedings under section 191 (2) (*b*) of the Sea Customs Act should be opened to consider the correctness of the appellate order of the Financial Commissioner (Commerce).

On the 24th January the Hon'ble Minister passed orders directing the opening of revision proceedings and instructing the 1st respondent to hear the applicant in objection and to submit the proceedings to him for final orders. Notice was accordingly issued to the applicant calling upon him to show cause before the Additional Secretary to the Government of the Union of Burma, Ministry of Finance and Revenue, at 10 a.m. on the 31st January 1950, why proceedings "by way of revision under section 191 (*1*) of the Sea Customs Act (as amended)" should not be taken in respect of the orders of the Financial Commissioner (Commerce). It may be noted here incidentally that the reference to section 191 (*1*) is inappropriate but this is merely a clerical error which has not, in itself, prejudiced the applicant in any way in the conduct of the proceedings and we shall say no more about it.

On the 31st January 1950 the applicant appeared before the 1st respondent and showed cause against the order of the Financial Commissioner being set aside. The proceedings on that date before the 1st respondent were oral and on the 6th February 1950 the 1st respondent submitted a note to the Hon'ble Minister for Finance and Revenue. It may be noted here that in this note the 1st respondent recommended that the decision of the Financial Commissioner be upheld.

On the 8th March 1950 the Hon'ble Minister passed orders setting aside the appellate order of the Financial Commissioner and affirming the original order of the

Collector of Customs. An order in that sense, issued in the name of the President of the Union of Burma and under the hand of the 1st respondent, was communicated to the applicant.

As the hearing on the 31st January 1950 was before the 1st respondent and as the order setting aside the appellate order of the Financial Commissioner was issued in the name of the President under the hand also of the 1st respondent, the applicant, having had no access to the files of the Finance and Revenue Department, assumed that the whole proceedings in revision were taken before and by the 1st respondent on behalf of the President. Accordingly, when the application in certiorari was made to this Court it questioned the jurisdiction of the 1st respondent to act in revision under section 191 (2) (*b*) of the Sea Customs Act in the name of the President of the Union. It was only when in obedience to a notice of this Court the Finance and Revenue Ministry submitted the proceedings in File No. 271RC49 of 1949 that the facts set out above were fully elicited. It will be on the facts as thus disclosed that this application will be dealt with.

The principles relevant to the determination of the present application have recently been laid down in two decisions of this Court, namely, in *Gwan Kee* v. *The Government of the Union of Burma* (1) *and Ranchhoddas Jethabhai & Co.* v. *The Secretary to the Union Government, Ministry of Judicial Affairs and two others* (2). It is unfortunate that to a certain extent these two decisions are conflicting and it will be our duty here to solve the conflict. There is no bar, either under section 152 of the Constitution or elsewhere, to the Supreme Court reconsidering a

(1) B.L.R. (1949) S.C. 151. (2) B.L.R. (1950) S.C. 68.

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ruling of law laid down in a previous decision by itself.

In *Gwan Kee* v. *The Government of the Union of Burma* (1) this Court by implication accepted that jurisdiction in revision under the Sea Customs Act is judicial. The application there was for directions in the nature of certiorari. The learned Attorney-General who appeared on behalf of the respondents in that case did not claim that the application for directions in the nature of certiorari was not competent and the Court dismissed the application on other grounds. In doing so it held that section 121 of the Constitution applied to the exercise of the jurisdiction. This, in view of the general acceptance, both by the Court and at the Bar, of the judicial nature of the proceedings in revision before the President under section 191 of the Sea Customs Act, arose clearly from inadvertence,—the attention of the Court not having been directed to the fact that section 121 of the Constitution deals with "executive action of the Union Government."

In the later case, *Ranchhoddas Jethabhai & Co.* v. *The Secretary to the Union Government, Ministry of Judicial Affairs* (2) this Court had explicitly held that in exercising the powers under section 191 of the Sea Customs Act the President is acting as a judicial functionary. We reproduce as apposite the following passages from the judgment in the case:

"Another fallacy which we trace running through the contentions of the applicants has been to identify the Collector of Customs with the President of the Union or with the Government of the Union. It has been said on behalf of the applicants that the Collector of Customs in making his application to this Court must be deemed to have been acting on behalf of the Government of the Union and that the Government of the Union must be regarded as bound, to the extent that the Collector of Customs is, by what has happened in these proceedings. The principle

(1) B.L.R. (1949) S.C. 151. (2) B.L.R. (1950) S.C. 68.

*respondeat superior* cannot be applicable here and it is difficult to see on what principle the claim can be justified. It has also to be borne in mind that the Collector of Customs when he imposes fines and penalties under the relevant provisions of the Sea Customs Act is exercising a judicial function and the exercise of a judicial function is individual. In that capacity the Collector of Customs is not a representative of either the President of the Union or the Government of the Union of Burma. He is for the time being a judge bound to act in his individual judgment, subject, of course, to control by other authorities exercising judicial functions to whom he may be subordinate.

The second line of attack on the competence of the revision proceedings is due, in our opinion, to the not unnatural confusion between the President as the executive head of the Union and the President who, when exercising his powers under section 191 of the Sea Customs Act, functions as an authority vested under section 150 of the Constitution to exercise limited functions and powers of a judicial nature and is bound therefore to act on judicial principles. That the Customs officer exercising the powers vested in him by section 182 of the Sea Customs Act, the appellate authority acting under section 188 of the Act and the President exercising powers under section 191 are all judicial functionaries clearly emerge from the fact that they are administering criminal justice. Section 167 refers to the acts falling within the First Schedule as 'offences' for which, in the words of the same section, the person responsible 'is punishable' with the 'penalties' set out in the third column of the Schedule. The learned Assistant Attorney-General has frankly conceded that this is a proposition which he is not prepared to controvert."

The learned Assistant Attorney-General who appears for the respondents in the present application before us has not found it possible to review his admission made in the earlier case. Giving anxious consideration to the matter, we are satisfied that the jurisdiction exercised under section 191 of the Sea Customs Act is a judicial one. That being so, it follows that section 121 of the Constitution does not apply to the exercise of such powers and that there can be no delegation of these powers by the President in whom

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the legislature has vested the exercise thereof. At the time the revision proceedings were opened and prior to 1st March 1950, when the General Clauses (Amendment) Act of 1950 came into operation, such proceedings, for the reasons which we have already set out, could be only by and before the President. It was not competent then for the Additional Secretary to the Government of the Union or for the Hon'ble Minister of Finance and Revenue to initiate or proceed with them in the name and on behalf of the President. With the General Clauses (Amendment) Act coming into operation whatever powers which till then could be exercised by the President personally becomes capable of being exercised on his behalf by the Government, that is to say, by the Minister in charge of the Ministry concerned.

It is not necessary here to solve the question whether the proceedings which till the 1st March 1950 were without jurisdiction, and therefore a nullity, can, from the stage when they had arrived at on that date, be continued by reason of the amending Act by the Hon'ble Minister ; for, even assuming that they could be, the further proceedings of the Hon'ble Minister cannot be supported as conforming to the rules of natural justice. In Gwan Kee's case (1) it is true this Court held that in a proceeding in revision the person to whose prejudice an order was to be or has been made was not entitled to be heard in his defence before such orders were passed. This is what the Court said :

"The next and the last point urged is that the President exceeded his jurisdiction in passing the order which he did without issuing notice to the applicant and giving him an opportunity to offer an explanation in his defence. If the amending Act is referred to, it will be seen that only in the matter

(1) B.L.R. (1949) S.C. 151.

of review should notice be issued to the party likely to be affected by the result but in the matter of revision under section 2 (*b*) it is not necessary to issue notice."

With great respect, it seems to us that nothing turns on a specific provision being made for hearing of the party likely to be affected by the result in review proceedings. A Court of criminal jurisdiction has ordinarily no power to review its own decisions ; and section 191 (1) of the Sea Customs Act was intended to grant to what was—for reasons which have already been stated by this Court in Ranchhoddas' case (1) in the passage reproduced above—a judicial tribunal administering criminal justice powers to review its own decisions. A review of a decision in such a sense is not provided for by the Criminal Procedure Code and in the absence of a provision of the nature of proviso (*c*) to section 191 (1) of the Sea Customs Act there is no statutory obligation for a notice before reviewing a previous decision to the prejudice of a party thereto. In the case of a revision, however, once it is accepted that it is in exercise of criminal jurisdiction under a special law, section 439 (2) of the Criminal Procedure Code would, by reason of section 5 (2) of the Code, become applicable. Moreover, if, as is clear, the proceedings in revision is judicial in nature, rules of natural justice require that before an order to the prejudice of any person is to be made he must be given an opportunity of making his defence. That no man shall be condemned unheard is an elementary principle of judicial administration.

In the present case, the applicant had a hearing it is true ; but that was before a person who had no jurisdiction whatsoever to act. Nothing turns on the fact that this officer who heard the objections of the applicant was so far convinced of the correctness of

(1) B.L.R. (1950) S.C. 68.

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the Financial Commissioner's order that he recommended that no action be taken in revision, and we shall say no more about this matter. The Hon'ble Minister for Finance and Revenue who was the proper authority to hear and decide the dispute in revision proceedings, had before him only a note of the hearing before the 1st respondent who, for the purposes of a judicial proceeding, must be treated as a total stranger.

For these reasons the proceedings in File No. 271RC49 of 1949 of the Government of the Union of Burma, Finance and Revenue Ministry, Customs Branch, are quashed with costs.

Advocate's fees fifteen gold mohurs.

## SUPREME COURT.

ARIFF MOOSAJEE DOOPLY AND ONE (APPELLANTS)

*v.*

DR. T. CHAN TAIK (RESPONDENT).*

†S.C. 1950

*June 29.*

*Suit for Redemption of mortgage—Form of decree—Code of Civil Procedure, Order 34, Rule 4 (2), (3)—Deposit of lawful currency—Japanese Military notes if such deposit—"Money" in Order 21, Rule (1) (a), Civil Procedure Code meaning of—Acceptance—S. 63, Contract Act and s. 4, Japanese Currency Evaluation Act.*

Where, in satisfaction of a mortgage by deposit of title deeds, created before the War, the mortgagee deposited Rs. 35,250 into Court and a final decree for redemption was passed by the City Civil Court on 23rd April 1948, and the decree was set aside on appeal, after reoccupation by the High Court.

*Held* : That if procedure fixed by the Code of Civil Procedure had been strictly followed, a preliminary decree under Order 34, Rule 4 (3) should have been passed and it could be only in terms of the lawful currency of the land. The only question then would be whether such a decree could have been discharged by payment into Court of Japanese Military Notes. The trial Judge did not examine this question. Japanese Military Notes were not lawful money and were no better than tokens with an exchange value.

*Ko Maung Tin* v. *U Gon Mau*, (1947) Ran. 149 (F.B), referred to and applied.

Such deposit cannot discharge the decree under Order 21, Rule 1, Code of Civil Procedure.

*Held also* : That if the deposit had been accepted by the defendant, both under s. 63, Contract and s. 4 of the Japanese Currency (Evaluation) Act, such acceptance might release the mortgagees. The rule, however cannot ordinarily be extended to cover a deposit into Court. Payment into Court under Order 21, Rule 1 (1) (*a*), Code of Civil Procedure can only be by payment into Court of money payable under the decree.

*P. K. Basu* for the appellants.

*E. C. V. Foucar* for the respondent.

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* Civil Appeal No. 9 of 1949 arising out of Special Civil 1st Appeal No. 18 of 1947 of the High Court of Judicature at Rangoon.

† *Present* : U E MAUNG, Chief Justice of the Union of Burma, U ON PE and U THAUNG BIN, JJ.

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

U E MAUNG.—The appellants who are the sons and executors of the will of one M. E. Dooply who died on the 16th June 1944, instituted a suit for redemption of an equitable mortgage created by M. E. Dooply on the 10th April 1941 in favour of the defendant to secure a loan of Rs. 30,000. At the time of the institution of the suit the Japanese Army was in occupation of Burma and the Court before which the suit was instituted was the City Court of Rangoon.

In the plaint it was claimed that on 28th September 1944 full payment in discharge of the debt had been made by the plaintiffs and it was on this basis that a decree for redemption was sought. The defendant by his written statement disputed the plaintiff's claim that they had before the institution of the suit paid off all dues under the mortgage. The other allegations in the plaint were admitted. Accordingly, at the stage up to the making of the preliminary mortgage decree as required by Order 34, Rule 4 of the Civil Procedure Code the only point at issue was whether, prior to the institution of the suit, the mortgage had been fully discharged or not. If, as claimed by the appellants, the debt had been fully discharged, it would have been the duty of the Court to direct a final decree for redemption to issue under Order 34, Rule 4 (2) of the Civil Procedure Code; whereas if the defendant's contention was established the preliminary decree would have had to be under Order 34, Rule 4 (3).

On the 8th March 1945, before witnesses were examined, the plaintiffs applied for leave to deposit in Court a sum of Rs. 35,250 in Japanese Military notes. The plea in the plaint that the debt had been discharged prior to the institution of the suit was not formally withdrawn but it is clear from the terms of the petition

of the 8th March 1945 that the plaintiffs did not intend to press that plea.

Witnesses were examined on the 11th and 19th April 1945 and the 2nd plaintiff then admitted that all that happened on the 28th September 1944 was that a letter and a cheque for Rs. 35,250 drawn on the then Burma State Bank were left with a person unknown, said to be the defendant's assistant, and that the person signed in the despatch book in acknowledgment of the receipt of the letter and the cheque. He further admitted that when later he interviewed the defendant, on being informed that the cheque had not been presented at the Bank, "the defendant stated that as when the loan was given on the mortgage the loan was given in English money it may be repaid in English money when it was repaid". It is clear then that the defendant never accepted the offer of repayment in Japanese Military notes in discharge of his claims under the mortgage.

On these materials it was clearly the duty of the trial Court to have made a preliminary redemption decree in accordance with Order 34, Rule 4 (3) of the Civil Procedure Code ; but as before the making of the preliminary decree a deposit in Court of Rs. 35,250 in Japanese Military notes had been made the learned Judge considered that strict adherence to the practice of making a preliminary decree to be followed by an investigation into the question whether the deposit was such as would in law amount to a discharge of the liability declared under a preliminary mortgage decree, would be unnecessary. He therefore passed a final decree on the 23rd April 1945 without first making a preliminary decree. In doing so the learned Judge said :

"As the plaintiffs have already deposited in Court the amount of principal and interest due on the mortgage and as the defendant has not disputed the correctness of the said amount due, no

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preliminary decree is passed, but it is hereby ordered that there shall be a final decree for redemption against the defendant."

An appeal was preferred against this final decree to the High Court of Judicature at Rangoon, Rangoon having been reoccupied by the forces of the lawful Government on the 5th May 1945 and the learned Judges of the High Court sitting in appeal allowed the appeal of the defendant by two separate judgments of great erudition and of some length. Against the decision of the Appellate Bench of the High Court the present appeal has been preferred to this Court under section 6 of the Union Judiciary Act.

It cannot be said, and in fact it has not been said, on behalf of the appellants before us that their obligation under the mortgage of 1941 was not in terms of the lawful money of the country. It also cannot be disputed that the amount of principal and interest due, as should have been declared by the City Court of Rangoon if it had followed the strict procedure for making a preliminary decree for redemption under Order 34, Rule 4 (3) of the Civil Procedure Code, should have been in terms of the lawful currency. The only question then outstanding would be whether this indebtedness in terms of the lawful currency of the land could have been discharged by a deposit in Court of Japanese Military notes of the nominal value of Rs. 35,250 on the 8th March 1945. As is clear from the extract from the judgment of the trial Court reproduced above, the learned trial Judge did not examine this question. He merely assumed that these Japanese Military notes deposited into Court would amount to a discharge of the obligation.

Mr. Basu who appears for the appellants, with his usual ingenuity, claims that the enemy in occupation of Burma between the years 1942 and 1945 could have imposed on the inhabitants of the country, so long as

the occupation lasted, the obligation to recognise the Japanese Military notes at their face value for use as media of exchange and that the appellants, so long as the occupation lasted, could have claimed as against the defendant that these notes which they were depositing in Court were worth their face value. This ingenious contention, however, does not help the appellants to surmount the difficulty inherent in such Japanese Military notes not being lawful money. They were no better than tokens which were given and had value as media of exchange so long as the occupation lasted. A Full Bench of the High Court of Judicature in *Ko Maung Tin* v. *U Gon Man* (1) held that Japanese Military notes were documents with a value in exchange for goods, and had thus a purchasing value. Four of the five Judges held that Japanese Military notes never formed part of the currency system in Burma and was not "money". Ba U, J., as he then was reserved decision on this point but it is clear from his judgment that he refused to put Japanese Military notes on an equality with the lawful currency of Burma. Nothing has been said before us on behalf of the appellants to justify our dissenting from the view held by the Full Bench of the High Court of Judicature. With the reoccupation of Burma by the lawful government Japanese Military notes became worthless and were not recognised by the lawful government as having any value after the re-occupation. If, then, Japanese Military notes were not "money" the deposit into the City Court of Rangoon of these notes on the 8th March 1945 cannot, in itself, have the effect of discharging the obligation under the mortgage.

True it is that if following the deposit into Court such deposit had been accepted by the defendant, such acceptance may by reason of section 63 of the Contract

(1) (1947) Ran. 149.

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Act, as also by reason of section 4 of the Japanese Currency (Evaluation) Act, 1947, have the effect of releasing the plaintiffs from their liability. Mr. Basu seeks to extend the principle to an acceptance by the Court which he claims must be deemed to have acted on behalf of the defendant in receiving the deposit. But we see no justification for extending the rule to cover a deposit into Court. A creditor can discharge his debtor if he so chooses by accepting payment of a sum much smaller than that owing to him or for any other consideration, or even without consideration. Adjustment in whole or in part of the decree out of Court in any manner to the satisfaction of the decree-holder will be effective in law and may be recorded under the provisions of Order 21, Rule 2 of the Civil Procedure Code. But where a decree for money is sought, through the machinery of the Court, to be discharged, whether in full or *pro tanto*, it can only be by payment into Court of money payable under the decree ; this follows from Order 21, Rule 1 (1) (*a*) of the Civil Procedure Code.

It is not relevant to the enquiry that so long as military occupation lasted, the military commander could have by exercise of irresistible force compelled acceptance of military notes at their face value. To contend, as Mr. Basu did, that the City Court of Rangoon on the 8th March 1945 could not have, without laying itself open to such pains and penalties as were held out by the military ordnance relating to military notes, refused the deposit of such notes in Court is to beg the question. Inherent in the contention is the proposition, which we have rejected, namely, that the military commander could have validly imposed a parallel currency system and equated such currency to the lawful currency of Burma.

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

## SUPREME COURT.

K. K. CHAKRABORTY (APPELLANT)

*v.*

R. B. RAKSHIT (RESPONDENT).*

†S C. 1950

*June 30.*

*Defence of Burma Rules—Rules 90 (2) (a), 90 (2) (b)—Object of—Occupation of Burma by enemy—If rules suspended—Exchange of Japanese Currency with Burmese—Contract for—If legal—Pleadings in High Court should be precise.*

Where appellant alleged that respondent offered to act for him and obtain Rs. 35,000 in British Burma notes in exchange for Japanese military papers of the nominal value of Rs. 35,000 and the Japanese notes were accordingly delivered and appellant claimed payment of the amount in British currency.

*Held that :* Viewed as a contract of agency, the object of the contract was the acceptance of Rs. 35,000 in British Burma notes in payment for the true and not the notional value of Japanese military notes of the nominal value of Rs. 35,000. Viewed as a contract between principals, the appellant agreed to accept Rs. 35,000 in British Burma notes in payment of a like sum in Japanese Currency and in either case, the object or consideration of the contract would fall within Rule 90 (2) (*b*), Defence of Burma Rules and be illegal. Viewed as an exchange of goods (Japanese currency) for cash, it may not fall within Rule 90 (2) (*a*) but it offends Rule 90 (2) (*b*). The contract is illegal and void.

The object of Rule 90 is to prevent depreciation of lawful currency and loss of confidence in it, which would mean loss of confidence in the Government to prosecute the war successfully. On Burma being occupied by the enemy, the necessity to prevent such mischief, would be more pressing.

It is desirable that in the High Court, original side, pleadings should be precise.

*Thein Moung*, *Tun Sein* and *D. N. Dutt* for the appellant.

*Kyaw Myint* and *P. K. Basu* for the respondent.

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

U E MAUNG.—The appellant's case as disclosed in paragraphs 1 and 2 of his plaint, which has not been

* Civil Appeal No. 13 of 1948.

† *Present :* U E MAUNG, Chief Justice of the Union of Burma, U OHN PE and U THAUNG SEIN, JJ.

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drawn up with the degree of precision that is desirable and should have been insisted upon in pleadings before the Original Side of the High Court, appeared to have been that the respondent in February 1943 offered to act on behalf of the appellant and obtain Rs. 35,000 in British Burma notes in exchange for Japanese Military paper of the nominal value of Rs. 35,000. Respondent was to take away the Japanese paper to the Shan States and make the exchange there. The British Burma notes to be obtained in exchange were, according to the appellant, to be kept in the safe custody of the respondent till the war then going on with the Japanese was over when the respondent was to deliver them to the appellant. This offer of the respondent was accepted by the appellant who delivered to him Japanese Military paper of the nominal value of Rs. 35,000.

Thus put, the appellant's case appeared to have been on a contract of agency which would require the appellant to establish, if he is to succeed on the facts, that the respondent did exchange the Japanese paper of the nominal value of Rs. 35,000 for British Burma notes of Rs. 35,000. Before us, however, the appellant sought to put his case, not on agency but on a contract under which in consideration of the appellant having delivered to the respondent Japanese paper of the nominal value of Rs. 35,000 the respondent undertook to deliver to the appellant Rs. 35,000 in British Burma notes. Apart from the objection on a point of law, which the respondent took to the legality of the transaction whether as appeared to have been presented in the plaint or else presented before us on appeal, the latter presentation of the appellant's case would have the advantage that, if he could establish the contract in that form, there is no necessity for him to go further and prove that the respondent did in fact

succeed in obtaining British Burma notes in the Shan States.

The suit went to trial before Thein Maung J., then sitting on the Original Side of the High Court of Judicature. Evidence was taken, both on commission and before Court, the learned Judge having rejected the plea taken by the respondent in defence that the agreement alleged by the appellant and forming the basis of his claim for a decree for Rs. 23,000 is illegal and void in law. The learned Judge in a lengthy judgment discussed the evidence adduced by both sides and came to the conclusion that there was an agreement as alleged by the appellant in paragraphs 1 and 2 of the plaint and that the respondent did succeed shortly thereafter in obtaining in the Shan States British Burma notes in exchange for the Japanese paper which the appellant delivered to the respondent in pursuance of the agreement.

The Appellate Bench of Tun Byu and Aung Tha Gyaw JJ., of the High Court held on the evidence that the respondent did receive delivery of the Japanese paper of the nominal value of Rs. 35,000 from the appellant for the purpose of having them changed into British Burma notes on behalf of the appellant but that it was not proved that the respondent did succeed in effecting the change. The Bench again rejected the plea taken by the respondent that the original transaction relied upon by the appellant is illegal and therefore void in law.

With great respect to the three learned Judges of the High Court, it is clear to us that the view taken by them that the original transaction, whether treated as one creating agency in the respondent or as a contract under which the respondent bound himself to deliver to the appellant Rs. 35,000 in lawful currency, does not offend Rule 90 of the Defence of Burma Rules

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cannot possibly be upheld. Viewed as a contract of agency the object of the contract was the acceptance by the respondent on behalf of the appellant of Rs. 35,000 in British Burma notes in payment for the true, and not the notional, value of Japanese Military notes of the nominal value of Rs. 35,000. Viewed as a transaction between two principals the contract is one by which the appellant agreed to accept Rs. 35,000 British Burma notes in payment for Japanese Military notes of the nominal value of Rs. 35,000. In either case the object or the consideration of the contract would appear to fall within Rule 90 (2) (*b*) of the Defence of Burma Rules and be illegal.

The learned counsel for the appellant supports the reasoning of the learned trial Judge that the transaction "must be regarded, not as exchange of one currency or legal tender for another but as sale of goods for cash in British currency and the agreement for such exchange must be regarded as an ordinary agreement for sale of goods." This reasoning might have been cogent if it is sought to apply to Rule 90 (2) (*a*) of the Defence of Burma Rules which prohibited the buying or selling of lawful currency for an amount other than its face value. The transaction of buying or selling no doubt involves the price in money of the article bought or sold and Japanese Military notes having been held not to be money Rule 90 (2) (*a*) may not be applicable to a transaction as in the present case. The learned trial Judge, however, did not consider the implications of Rule 90 (2) (*b*).

Reliance also was placed on a decision of a Bench of the High Court of Judicature at Rangoon in *Ahuja* v. *Sen Gupta* (1) and the learned counsel for the appellant seeks to deduce from the judgment the proposition that during the occupation of Burma by

(1) Special Civil 1st Appeal No. 2 of 1946.

the military forces of the enemy the Defence of Burma Act remained suspended. The passage relied upon reads as follows :

"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."

This quotation does not support the appellant's theory of suspended animation of the Defence of Burma Act. Besides, the mischief which Rule 90 of the Defence of Burma Rules intended to prevent was the depreciation of lawful currency owing to the loss of confidence therein by those in Burma. Loss of confidence in the lawful currency would mean loss of confidence in the strength and might of the lawful Government to successfully combat the war then in progress. The neccessity to prevent this mischief would not be removed on Burma being occupied by the enemy ; in fact the necessity would become more pressing than ever. It is therefore impossible to accept that on Burma being occupied by the enemy the object and intention behind Rule 90 of the Defence of Burma Rules had passed away. Moreover, we are not prepared to accept the proposition that an Act of Legislature can become obsolete on the reason for its enactment ceasing to operate.

It follows from all this that the transaction relied upon by the appellant as supporting a cause of action for the payment to him by the respondent of a sum of Rs. 35,000 in lawful currency, less the amount which he admitted he received from the respondent, is

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illegal and therefore void. It may be noted here that the respondent did not admit that he had paid to the appellant the sums which the appellant claims to have received ; but we need not go further into this aspect of the case. The admission of the appellant against his own interests is binding on him even though it may not be binding on the respondent.

The result is that the appeal, which has as its root the claim that the transaction of February 1943 either as exemplified in paragraphs 1 and 2 of the plaint or as stated before us at the hearing is one of binding force in law, must be and is hereby dismissed with costs.

## SUPREME COURT.

EU HPE YAR AND ONE (APPELLANTS)

*v.*

TEH LU PE (RESPONDENT).*

† S.C. 1950

*July 5.*

*Promissory note—Suit on—Suit for money lent—Necessary averments in each case—Negotiable instrument consideration for loan or loan followed by negotiable instrument—Loan by Buddhist couple—Contract with one alone—Suit by such party—Non-joinder of others, Order 1, Rule 13, Code of Civil Procedure.*

Appellants borrowed two sums and in consideration thereof executed two promissory notes in favour of one only of a Chinese Buddhist couple, and the claim was decreed in two courts.

*Held :* That the suit in the case was not solely on the promissory notes but on the original consideration also. A suit on a promissory note need not aver the loan which formed the consideration. All that is necessary is to plead execution of the instrument and prove it, while the defendant could prove absence of consideration.

It is one thing for a negotiable instrument to be given and accepted as consideration for the loan and an entirely different thing for a loan to be made and in consideration thereof, the borrower making a negotiable instrument. In the first case, the loan is merged in the instrument and in the latter case it is only a collateral security.

*Maung Chit* v. *Kareem Oomer*, 12 Ran. 153, referred to.

The respondent alone was the party with whom the contract was made as he was not acting as agent or trustee of his wife, he could sue for enforcing the contract, even though the money belonged to the Buddhist couple. The plea was not taken in the first instance and would not be available in appeal.

*K. R. Venkatram* for the appellants.

*T. Wan Hock* for the respondent.

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

U E MAUNG.—This appeal arises out of a suit by the respondent claiming a decree for Rs. 15,300 against

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* Civil Appeal No. 10 of 1949.

† *Present :* U E MAUNG, Chief Justice of the Union of Burma, U ON PE and U THAUNG SEIN, JJ.

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the appellants. The first paragraph of the plaint reads as follows :

"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 jointly executed 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."

The plaintiff-respondent claims that the promissory notes were lost in the bombing just at the beginning of the last war and he sought to prove the promissory notes by secondary evidence. The defendant-appellants do not dispute that they had borrowed Rs. 10,000 on the same day as that alleged by the plaintiff in the case. Their case, however, is that the promissory notes were executed by them in favour not only of the plaintiff but of his wife as well and that they had repaid the loans which they had taken on the promissory notes executed by them. In support of their case they produced two documents which they allege to be the two promissory notes executed by them and returned to them on repayment.

The defence story of the return of the promissory notes on repayment has been rejected by the two Courts below and that concurrent finding has not been challenged before us by the appellant's counsel.

The principal question of law which engaged the two lower Courts has been whether the documents which were relied upon by the plaintiff and which the plaintiff claims to have been lost were admissible in evidence and whether secondary evidence had been properly adduced of these documents at the trial. Many rulings were cited before the Appellate Bench of the High Court which discussed all the decisions in detail. Before us also the learned counsel for the

appellant desires to agitate the question whether the On-Demand promissory notes relied upon by the plaintiff could have been admitted in evidence if still in existence and whether secondary evidence of these documents, assuming them to have been lost had been properly tendered. No doubt these are questions of the greatest importance and may have to be considered by this Court sooner or later ; but they do not arise in the present case. As the Appellate Bench of the High Court at pages 14 and 15 of the judgment held, the suit was not one solely on the promissory notes but was one on the original consideration as well. The original loan was alleged in the first sentence of the plaint which we have reproduced earlier in our judgment. Evidence has been led and on that evidence the two lower Courts have held that the plaintiff did lend to the defendants Rs. 10,000 and that this sum has not been repaid yet.

A suit on a promissory note, pure and simple, need not aver in the plaint the loan which formed the consideration. It is not for the plaintiff in a suit on a promissory note or any other negotiable instrument to allege or to prove the consideration which supports the negotiable instrument. All that is necessary in a plaint of that nature is for the plaintiff to aver the making of the document and once he has proved the making the burden that lies on him is discharged. It is for the defendant, if he can, to aver and establish the absence of consideration.

The learned counsel for the appellants relies on the decision of a Full Bench of the High Court in *Maung Chit* v. *Kareem Oomer* (1) and in particular on a passage in the judgment of Page C.J. that if a negotiable instrument is given by the borrower to the lender and the negotiable instrument is itself the

(1) 12 Ran. 153.

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consideration for the loan, the lender is restricted to his rights under the negotiable instrument, in support of his case that the present plaint must be treated as one in a suit based on the promissory notes. But it is one thing for the negotiable instrument to have been given and accepted as the consideration for the loan ; it is entirely a different thing for a loan to have been granted and in consideration of the loan for the borrower to have made a negotiable instrument. In the one case, the loan is merged in the negotiable instrument, and in the other the negotiable instrument merely forms a collateral security for the repayment of the loan.

Another contention pressed before us on behalf of the appellant is that the suit, in the absence of the respondent's wife as a party thereto, is incompetent. The respondent and his wife are Chinese Buddhists and under the personal law applicable to them, namely the Buddhist Law, the money lent to the appellants forms part of their joint estate. From this Mr. Venkatram seeks to deduce that the suit by the respondent alone to recover the money lent is not competent. In the first place, this plea was not taken earlier and Order 1, Rule 13 of the Civil Procedure Code would appear to bar the appellants from taking this plea in appeal before us. Further, the respondent's case which had been accepted by the Courts below is that, whatever the source of the funds, it was he and he alone with whom the appellants contracted in the matter of the loan. In that transaction it is not suggested that the respondent was acting in any sense as agent or trustee of his wife and the exceptions of doubtful validity which judicial pronouncements have engrafted on the rule that a person not a party to the contract cannot sue on the contract cannot be sought in aid by the appellants. That the wife may have a right to call her husband to account for the sum

realised on the decree has no relevancy in this connection.

The appeal fails and is dismissed with costs.

## SUPREME COURT.

†S.C. 1950

*July 7.*

HAJEE SAHIB HAJEE MOHAMED BROS. (APPELLANT)

*v.*

PUDUVEETTU ABDUL MOHAMED SHERIFF AND ONE (RESPONDENTS).*

*Tort—Goods taken after door broken—Whether taker, finder of goods—Joint tort-feasors—Release of one—Finding by courts below as only a covenant not to sue—Mixed question of law and fact.*

*Held :* That persons, who take possession of goods, after breaking doors of the rooms where such goods are kept (the rooms being leased by the owner of goods from the landlords) and who knew fully that they were the property of others, are not innocent finders of goods.

*Tan Soon Li* v. *The Burma Oil Co., Ltd.*, (1941) Ran. 153.

The question whether a release deed whereby one of the several tort-feasors is released from liability reserving the right of action against others amounts to release of all or only a covenant not to sue the party released, is a mixed question of law and fact. Concurrent findings of both the Courts cannot therefore be challenged.

*P. K. Basu* for the appellant.

*H. Subramanyam* for the respondents.

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

U E MAUNG—The appellant sued the respondents for recovery of a sum of Rs. 1,12,510 being compensation for various acts of conversion of his goods committed by the respondents and two other persons in 1942. These goods were left behind in various places in Burma when in February 1942, on the approach of the invading Japanese army, the appellant went away to India. The appellant's case is

* Civil Appeal No. 13 of 1949.

† *Present :* U E MAUNG, Chief Justice of the Union of Burma, U ON PE and U THAUNG SEIN, JJ.

that these goods were taken possession of by the respondents and two others who disposed of them as their own property. The suit was instituted against the two respondents as the appellant had come to a settlement with the two co-tort-feasors of the respondents. The trial Court granted a decree to the appellant for Rs. 37,720. The 1st respondent appealed and the appellant filed a cross-objection with the result that the Appellate Bench varied the decree in favour of the appellant to a sum of Rs. 21,713 only.

The appellant in his appeal before us claims that he is entitled to a decree in all for Rs. 43,192-2-0, whereas the respondents by their cross-objections before us claim that the appellant's suit should be dismissed *in toto*.

It will be more convenient in the disposal of this appeal to consider first the respondents' objections to the decree of the Appellate Bench. The respondents' case is that they were innocent finders of goods and that by what they did with the goods of the appellant they had not committed any wrong. This plea, it must be noted, was not pressed very seriously either in the Courts below or before us. The respondents and the two others who acted with them knew full well that the appellant was the owner of the goods and to take possession of these goods they had to break open the door of the rooms which to their knowledge were leased by the appellant from the landlords. In these circumstances, even if section 3 of the Custodian of Property Act had not been enacted the respondents could not have brought their case within the ruling of *Tan Soon Li* v. *The Burma Oil Co., Ltd.* (1).

Mr. Subramanyam, who appears for the respondents, frankly conceded after some slight argument that the

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(1) (1941) Ran. 153.

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respondents and their co-tort-feasors are liable to pay to the appellant compensation for the value of the goods taken possession of by them.

Another ground taken by the respondents is that because the appellant had by document Exhibit R renounced all claims against two joint tort-feasors the appellant had no right of suit against the respondents for the acts of conversion committed by all four joint tort-feasors. The Courts below, however, have come to concurrent findings that Exhibit R evidences merely an agreement not to sue the other tort-feasors and that it was not a deed of release of the joint tort-feasors of the respondents from liability in respect of the conversion. The document expressly reserves the appellant's right to take action against the respondents. This concurrent finding on a question of mixed fact and law is binding on the respondents and Mr. Subramanyam has not seriously attempted to challenge it. We must therefore hold that this objection also fails.

The appeal relates to the value of the appellant's goods in Edward Street, Rangoon, taken possession of by the respondents. The appellant claims that these goods were of the value of Rs. 31,000. This claim was accepted by the trial Court. The Appellate Bench of the High Court held that the goods in these premises were of the value of Rs. 9,520-14-0 only as alleged by the respondents and it is the difference between these two amounts that forms the subject of the present appeal. That the goods were of the value Rs. 31,000 when the appellant left Rangoon in February 1942 after having kept the premises bolted from inside at the back and iron-barred and locked from outside at the front, is not seriously disputed. The appellant has given evidence on the point supported by his books and he has not been seriously

cross-examined on this aspect of the case. What the respondents were mainly concerned in seeking to establish was that when in the beginning of April 1942 they took over the premises and the contents thereof there was a hole in the front door through which the goods inside would have been carried out by looters and that when in June 1942 they took account of the goods they found them worth not more than Rs. 9,520-14-0. It has been contended on behalf of the respondents that between the 8th March 1942 and the beginning of April 1942 when the respondents first took possession of the premises, the bulk of the goods in the premises must have been looted following the state of lawlessness in the City of Rangoon at that time.

P. M. Abdul Rahman, 1st witness for respondent No. 1, who obviously is very much interested in the respondents, has told the Court that when on the 21st or 22nd March 1942 he passed by the premises in question he found in one of the front doors a hole about one foot broad and 5 feet high. He also said that when he peeped through the opening he saw about 50 or 60 bags in the room and some other goods lying loose on the floor. The 2nd respondent, who was the first among the respondents and their joint tort-feasors to take charge of the goods, required a leading question from his counsel to say that when he took the goods the shop had been looted. K. M. Hassan Aliar, 2nd witness for 2nd respondent, admitted that the lock over the iron bars in the front of the premises was intact when he and others took over the premises. This witness was one of the joint tort-feasors with whom the appellant had made a settlement. It has been suggested that the witness is partial in favour of the appellant ; but it is clear from his evidence that he harbours a feeling that by the

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settlement which his agent, in his absence from Burma, had made with the appellant he did not get a fair deal from the appellant.

The testimony of Vahid Ullah, 4th witness for the appellant, who the respondents admit had been kept by them as the durwan in charge of the premises since 1st April 1942, is to the effect that the premises in question showed no signs of having been looted before they were taken over by the respondents in April 1942. This is supported to a large extent by the testimony of the witnesses called by the defence as to the state of the doors in front and at the back of the premises. At the back the premises were bolted from inside. At the front the iron bars across the door and the lock on them were intact. There was said to be an opening in one door leaf which, according to this witness, was about one foot in breadth. That this was not a very large hole is clear from the statement of K. M. Hassan Aliar (2nd witness for 2nd respondent) that the repairs cost only about Rs. 30 or Rs. 40. A man might be able to slip through that opening but it would not be possible for him to have got out carrying any article of any appreciable size. The looting, if any, through the opening in the front door must have been on the very smallest scale. If goods in any appreciable quantity had been taken away, as they must have been, through the back doors of the premises the looters would not have been so considerate as to re-bolt the doors from inside after doing so It must also be remembered that the goods stored in these premises were drugs and herbs which, in the interval between the 20th February and the first week of April 1942, could not have found a ready sale and were therefore not such as would have attracted the looters who had at that time goods of greater immediate value to choose from in their activities.

In this state of testimony the respondents claim that they are not liable to pay compensation in excess of the admitted amount of Rs. 9,520-14-0 which they say represented the result of their taking inventory of the books in the premises in the presence of two witnesses in June 1942. We have examined the evidence of these two witnesses and we are not very much impressed by it. Moreover, the said inventory and the books of the business jointly carried on by the respondents and their joint tort-feasors are not forthcoming. It is suggested that they have been withheld by K. M. Hassan Aliar (2nd witness for 2nd respondent) who had settled his liabilities with the appellant. But we have already given our reasons for thinking that this witness is not at all favouring the appellant's cause. The accounts given by the respondents and this witness of how the account books and other documents evidencing the taking of the inventory came to be unavailable to the Court are conflicting. Hassan Aliar claims that the account books were destroyed when late in 1944 the premises at 286, Edward Street, where they were kept, was bombed. But it is clear from the evidence on record that 286, Edward Street, was never bombed ; and one of the account books, Exhibit Y, was produced before the Court. The 1st respondent told the Court that when in August 1947, after the suit was instituted, he asked Hassan Aliar about the account books he was told they were then with him. When this respondent was asked if he made any attempt to get the account books from Hassan Aliar then only he said that Hassan Aliar said he was not sure whether the books were in existence or not. It is significant that this witness tells the Court that after this inquiry from Hassan Aliar he did not make any subsequent attempts to get the books

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from Hassan Aliar. Hassan Aliar also though cited as a witness was not summoned to produce the account books.

In these circumstances we find it impossible to hold with the Appellate Bench of the High Court that the bulk of the goods in the premises 194-196, Edward Street, Rangoon, must have been carried away by looters before the respondents took possession of the premises through their durwan in early April 1942. We are also unable to accept, as did the Appellate Bench, the contention on behalf of the respondents that the goods which they took possession of were not worth more than Rs. 9,520-14-0. It follows therefore that as far as the value of the goods in No. 194-196, Edward Street, is concerned the appellant is entitled to have the trial Judge's decision affirmed. As we have said earlier the dispute before us is only over the value of the goods in these premises.

We therefore allow the appeal of the appellant with costs. This means that the appellant will get a decree for Rs. 43,192-2-0 against the respondents with costs in proportion at the trial, with full costs in the appeal before the Appellate Bench of the High Court and with full costs before us.

## SUPREME COURT.

HASHIM AZAM BHAKHRA (APPELLANT)

*v.*

EBRAHIM ARIFF ASHRAFF AND THREE OTHERS (RESPONDENTS).*

† S.C. 1950

*July. 7.*

*Trusts Act—ss. 1, 44, 76—Rules of Mohamedan Law—Silent—Effect—Provision in deed for five trustees—Whether four alone can file suit.*

Where a deed of waqf created by a Mohamedan provided that there should always be five trustees and in case of vacancy, the survivors could appoint to the vacancy, but a vacancy was not filled up and the remaining four trustees alone filed a suit for recovery of monies,on behalf of the Trust.

*Held:* That s. 1 of the Trusts Act, provides that nothing contained in the Act affects the rules of Mohamedan Law as to waqf, but there was nothing in the rules of Mohamedan Law which conflict with ss. 44 and 76 of the Trusts Act. The provision in the document of Trust that there should always be five trustees does not exclude the operation of ss. 44 and 76 expressly or by implication and on the death of one of several co-trustees, the trust survives and the trust property passes to the others.

*Rajendronath Dutt* v. *Shaik Mohamed Lal*, 8 I.A. 135, distinguished.

*Bechu Lal* v. *Oliullah*, 40 Cal. 338; *Krishna Bhatta* v. *Udayavar Srinivasa Shambagu*, A.I.R. (1917) Mad. 750, referred to.

By continuing to act, the surviving trustees may have committed a breach of trust; but a stranger to the trust cannot say that in spite of the trust surviving and the surviving trustees having the same rights, as the original trustees, the survivors cannot sue.

*K. R Venkatram* for the appellant.

*E. C. V. Foucar* for the respondents.

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

U E MAUNG.—The short point for decision in this appeal is whether four trustees out of five appointed by the trust deed, the fifth having died and no appointment

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* Civil Appeal No. 14 of 1949.

† *Present:* U E MAUNG, Chief Justice of the Union of Burma, U ON PE and U THAUNG SEIN, JJ.

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for a new trustee having been made in the meanwhile in terms of the trust deed, can sue to recover against a stranger of the trust for tortious acts committed by that stranger in respect of the trust property. By a document of 17th April 1947 executed by Hajee Ariff Ebrahim Ashraff creating a trust to be known as Hajee Ariff Ebrahim Waqf it was provided that after his death there shall always be five trustees of the said waqf. The document proceeds to name the first five trustees, being the four respondents and Ebrahim Ajam Ashraff. It was also provided in the document that in the event of any vacancy occurring in the office of the trustees the remaining trustees are to appoint a new trustee from among certain classes of persons specified in the document.

Ebrahim Ajam Ashraff, it appears, died in or about 1941 ; and it is the case of the surviving trustees that during their absence in India when Burma was occupied by the enemy the appellant took possession of the building and acting as the landlord thereof had collected rents amounting to Rs. 1,152. On this allegation the surviving trustees sued for recovery of this sum from the appellant.

As stated at the outset of this judgment the appellant objected to the filing of the suit on the ground that four trustees only are not competent to sue for the recovery of the sums due to the trust. This plea was accepted by the learned 3rd Judge of the City Civil Court of Rangoon but on appeal to the High Court it was rejected by the Appellate Bench of that Court. On appeal before us by special leave against the judgment of the Appellate Bench of the High Court Mr. Venkatram for the appellant claimed on the authority of *Rajendronath Dutt* v. *Shaik Mohamed Lal* (1) and *Bechu Lal* v. *Oliullah* (2) that the suit by the

(1) 8 I.A. at p. 135. (2) 40 Cal. 338.

four surviving trustees must be incompetent. The Calcutta case applied the decision of the Privy Council without any discussion. The Privy Council's decision proceeded on the special facts of the case; there was in that case a sale in his personal capacity by one of the trustees of the trust property; and the defendant who purchased the property from this trustee claimed, and rightly in our opinion, that in a suit by the other trustees against him to set aside the sale, the trustee-vendor should be made a co-defendant in the suit.

It is true that the trust here is a Mohamedan Trust and section 1 of the Trusts Act begins with the following :— "But nothing herein contained affects the rules of Mohamedan law as to waqf "; that is to say, any provision in the Trusts Act conflicting with the rules of Mohamedan law as to waqf must give way to these rules, but where Mohamedan law is silent the Act applies. Mr. Venkatram has not been able to draw our attention to any rule of Mohamedan law that would conflict with the provisions of sections 44 and 76 of the Trusts Act. We also know of no such rule.

It was also contended by Mr. Venkatram that the provision in the document appointing the first five trustees should be treated as having made an express provision to the contrary such as would exclude the operation of either section 44 or section 76 of the Trusts Act. We cannot agree with him that the requirements in the document " that there shall be five trustees always " negative expressly or by implication the rule enunciated in section 76 of the Act that on the death of one of several co-trustees the trust survives and the trust property passes to the others. It may well be, though the point does not arise for determination in this case and we refrain from deciding it that the four surviving trustees by their continued

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HASHIM AZAM BHAKHRA v. EBRAHIM ARIFF ASHRAFF AND THREE OTHERS.

inaction to have the board of trustees brought to its full strength may have committed a breach of trust for which in proper proceedings a beneficiary may hold them to account; but it is a different thing altogether for a stranger to the trust, to say that in spite of the trust surviving and the trust property or such right therein as the five original trustees had, passing to the four survivors, these four survivors cannot sue to recover from him the rents which he had improperly collected on the trust property.

The decision of the Madras High Court in *Krishna Bhatta* v. *Udayavar Srinivasa Shambagu* (1) relied upon Mr. Foucar for the respondents has, in our opinion, correctly stated the rule on this point.

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

Advocate's fees ten gold mohurs.

(1) A.I.R. (1917) Mad. 730

## SUPREME COURT.

MAUNG THA SHWE (APPLICANT)

*v.*

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

† S.C. 1950

*July 10.*

*Public Order (Preservation) Act—Suspicion that detenue concerned in dacoity, murder, robbery—Proper remedy.*

Where the applicant was detained under the Public Order (Preservation) Act, as he was suspected in series of robbery, dacoities and murders.

*Held :* That the Public Order (Preservation) Act cannot be applied to such cases. The proper action to take was under the preventive sections of the Criminal Procedure Code.

*Ba Sein* (Government Advocate) for the respondents.

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

U E MAUNG.—The Public Order (Preservation) Act cannot apply to the applicant in this case. The report on which the detention order was made by the Deputy Commissioner, Amherst, reads :

" Nga Tha Shwe, son of U Sein of Mudon was arrested by Mudon police as he was suspected in series of dacoity, robbery and murder in Mudon Police Station Jurisdiction and connived with criminals from other villages."

If these allegations are true, action should have been taken under the preventive sections of the Criminal Procedure Code.

We, therefore, direct that the applicant be released forthwith.

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* Criminal Misc. Application No. 131 of 1950.

† *Present :* U E MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE THEIN MAUNG and U THAUNG SEIN, J.

## SUPREME COURT.

† S.C. 1950

*July 24.*

# EPHRAIM SOLOMON (APPLICANT)

*v.*

# THE COLLECTOR OF RANGOON (RESPONDENT).*

*Directions for mandamus—Requisition by Collector—No duty of Collector to de-requisition—If application lies.*

Where the Collector of Rangoon requisitioned certain premises under the Requisitioning (Emergency Provisions) Act, 1947 and directed it to be made available to a Chinese School.

*Held:* That there is no duty cast on the Collector to de-requisition under the Act and as there was no duty, there could be no application for directions in the nature of a mandamus. By allotting the premises to the school, the Collector may have committed a wrong but there may be remedy elsewhere but not by a writ to the Supreme Court.

Facts on which the decision was made were as follows :—

The Applicant Ephraim Solomon is the owner of the house known as No. 297, Godwin Road, Rangoon. Some people trespassed on this house during the Japanese occupation and ran a school there known as the Hwa Sha Chinese School. These trespassers never paid any rent to the Applicant. The Applicant then filed a suit being Civil Regular Suit No. 302 of 1947 for recovery of possession of the premises and obtained a decree. He applied for execution of the decree in Civil Execution No. 19 of 1950. The judgment-debtors took time on several occasions for vacating, and it appears that they then approached the Government for the requisition of the said building and allot it to them for running the said school. The Collector then requisitioned the building in question and allotted to them for running the Hwa Sha Chinese School. The Applicant then applied under s. 25 of the Constitution of Burma for a direction in the nature of mandamus.

*Kyaw Myint* for the applicant.

*Ba Sein* (Government Advocate) for the respondent.

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* Civil Misc. Application No. 36 of 1950.

† *Present* : U E MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE THEIN MAUNG and U THAUNG SEIN, J.

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

U E MAUNG.—The order requisitioning the premises in question reads :

"I do hereby under the provisions of section 2 of the Requisitioning (Emergency Provisions) Act, 1947, requisition the premises known as No. 297, Godwin Road, now occupied by the 'Hwa Sha' Chinese School.

I do further direct that the whole of the said premises shall be made available for the use of Civil Government forthwith . . . . . ."

This order was made on the 19th April 1950. It cannot be said that the order contravenes any of the provisions of the Requisitioning (Emergency Provisions) Act. The learned counsel appearing for the applicant very frankly concedes that if the Court is to grant a mandamus directed to the Collector of Rangoon it cannot be one directing the Collector to de-requisition the premises but not to allot them to the Hwa Sha Chinese School. But, as the learned counsel also conceded, it cannot be said that there is anything in the Act under which the Collector is bound to act in that sense. It may well be that by allotting the premises to the school the Collector has committed a wrong for which the applicant may have his remedy elsewhere ; but the application to this Court is clearly misconceived.

In these circumstances the application must be dismissed. We make no order as to costs.

## SUPREME COURT.

†S.C. 1950

*July 5.*

ABDUL RAZAK (APPELLANT)

*v.*

U PAW TUN AUNG & CO. (RESPONDENTS).*

*Pledge of jewels—Document vesting property on non-redemption by date fixed—Validity—Sale without notice—Contract Act, s. 196—Claim for redemption in 1944—Conversion or wrongful detention—Specific Relief Act, ss. 10 and 11—Contract Act, ss. 39 and 73.*

*Held:* A clause in a document evidencing a contract of pledge, purporting to vest the pledged articles absolutely in the pledgee on failure to redeem by end of April 1942 curtails the statutory right of redemption and is invalid.

The pledgor, coming to know of the sale held without notice to him could not sue for return of the specific articles against the pledgee alone.

There is a distinction between the cause of action for conversion and the cause of action in wrongful detention. The former is based on an unequivocal act of ownership by the defendant over plaintiff's goods without any right or authority while the latter is based on a wrongful withholding of the plaintiff's goods by defendant, being in possession of the same.

*Beaman* v. *A. R. T. S. Ltd.*, 64 Times L.R. 285 at 287, referred to.

*Rosenthal* v. *Alderton*, (1946) 1 K.B. 374, distinguished.

A bailee cannot be heard to plead his own wrong in discharge of his duty under the contract of bailment.

*Reeve* v. *Palmer*, 5 C.B.N.S. 84; *Wilkinson* v. *Verity*, L.R. (1871) 6 C.P., 206; *Donald* v. *Suckling*, L.R. (1866) 1 Q.B.D., 585; *Coldman* v. *Hill*, L.R. (1919)1 K.B. 443 at 449, referred to.

The Courts cannot be invited to a mere *brutum fulmen* and no decree can be passed for return of moveables not in defendant's possession. Ss. 10 and 11 of the Specific Relief Act apply only to cases when defendant is in possession of specific moveables and Order 20, Rule 10 of the Code of Civil Procedure applies only where a decree for possession can properly be made.

Any excess by the possessor of rights under a contract will be a breach of contract and it may also be a wrong. A mere irregular exercise of power, by way of sub-pledge or a premature sale, is not a conversion. It is at most a wrong done to the reversionary interest of an owner out of possession and the owner must show he is really damnified.

*Halliday* v. *Holgate*, (1868) 3 Ex. 299; *Mulliner* v. *Florence*, L.R. (1878) 3 Q.B.D. 484; *Bristol and West of England Bank* v. *Midland Railway Co.*, L.R. (1891) 2 Q.B.D. 653; *Button* v. *Haviside*, L.R. (1907) 2 K.B. 180 at 188; *Solloway* v. *McLaughlin*, L.R. (1938) A.C. 247; *Johnson* v. *Stear*, (1863) 15 C.B. (N.S.) 329, referred to.

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* Civil Appeal No. 3 of 1949.

† *Present:* U E MAUNG, Chief Justice of the Union of Burma, U TUN BYU Chief Justice of the High Court, and U ON PE, J.

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ABDUL RAZAK v. U PAW TUN AUNG & Co.

*Alliance Bank of Simla* v. *G. Lal and one*, I.L.R. 8 Lah. 373, not followed.

*Motilal* v. *Lakhmichand*, A.I.R. (1943) Nag. 162, distinguished.

A comparison of Article 48-A and 48 of the Limitation Act, 1st Schedule, indicates that the Legislature does not contemplate a sale of the pledged article by the pledgee otherwise than in accordance with s. 176, Contract Act.

If a party undertakes to do an act on a future date and earlier disables himself from performing the act, it is open to the injured party to treat that conduct as a violation or wait till the day fixed. The option is that of the aggrieved party not that of the party committing the wrong. The wrong in this case is failure to return the goods as contracted upon tender of money due and s. 73, Contract Act would regulate the rights of the parties and the damages.

*Tun Sein* for the appellant.

*P. K. Basu* for the respondents.

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

U E MAUNG.—The facts of this case are very simple and not in dispute. The appellant pledged certain gold articles with the respondents on the 17th January 1941 to secure a loan of Rs. 950. A document was executed evidencing the transaction and in that document was inserted a clause which purported to vest the pledged articles in the respondents absolutely if the appellant failed to redeem them by the end of April 1942. This clause has been held, in our opinion rightly, by all the Courts below to be inoperative to curtail the right of the appellant to redeem the pledged articles any time before a sale complying with the requirements of section 176 of the Contract Act. In September 1942 the respondents, without giving the appellant such notice as is required by section 176 of the Contract Act, sold the pledged articles. At the time of the sale, because of the conditions resulting from war-like operations in Burma by and against the enemy then in occupation, the appellant had evacuated

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from his usual residence and was therefore not aware of the sale. In April 1944 the appellant for the first time came to learn of the sale of the pledged articles in September 1942. He came to know of this sale when he sought to redeem the pledged articles and was informed by the respondents that they could not accept redemption as they had previously sold the pledged articles. But it was not till 31st March 1947 that the appellant sought to vindicate his rights by instituting Civil Suit No. 19 of 1947 in the Court of the Second Assistant Judge, Akyab, claiming the redemption of the pledged articles or their value as at date of suit less the amount due in respect of the loan secured on the pledge of these articles. The respondents claimed then as also in the Courts below that after April 1942 they became absolute owners of the pledged articles in terms of the agreement referred to above.

The Courts below agreed in rejecting the respondents' claim that after April 1942 they had become the owners of the pledged articles. The respondents did not claim that the sale in September 1942 complied with the requirements of section 176 of the Contract Act. Accordingly, the Courts below agreed in holding that the appellant was entitled to relief against the respondents ; but on the nature of the relief and the cause of action to support that relief there has been a difference of opinion. The trial Court and the District Court of Akyab considered that the appellant was entitled to a decree in the alternative for the return of the gold articles pledged on repayment of the loan or their value assessed on the prevailing price of gold at the date of the suit in 1947 less the amount due on the loan. Mr. Justice Thaung Sein in second appeal and the Appellate Bench of the High Court composed of U Thein Maung C.J. and U San Maung J., on

appeal under section 20 of the Union Judiciary Act (Mr. Justice Thaung Sein having granted a certificate that the case was a fit one for further appeal), took the view that the appellant was entitled to nothing more than compensation on the basis of a conversion of the gold articles by the respondents on or about the 14th September 1942 when they were sold by the respondents to a third party. The trial Court and the District Court assessed the damages in lieu of the return of the pledged articles at Rs. 2,794-14-0. The High Court granted the appellant a decree for Rs. 308-14-0 only.

The appellant claims before us, as he did in the Courts below, that the remedy which he is entitled to seek and which he has sought in the suit under appeal is one based on the unlawful detention by the respondents of the gold articles pledged with them in spite of his offer to redeem the same in April 1944. The respondents on the other hand claim that the proper and only remedy open to the appellant was for damages for the wrong of conversion involved in the unauthorized sale of the pledged articles by the respondent in September 1942. With respect to the learned Judges below and in spite of the very learned arguments before us by counsel on both sides, we are satisfied that neither the appellant nor the respondents have offered the right solution of the problem and the Courts below have erred in their decisions on the controversy.

The appellant has known since September 1944 that the respondents had parted with the possession of the pledged articles by a sale to a third party in September 1942. Accordingly when in 1947 he instituted the suit under appeal it is clear to us that he could not sue for the return of the specific articles including only the respondents as defendants.

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In *Beaman* v. *A. R. T. S. Ltd.* (1), Denning J. has, in our opinion, correctly drawn the distinction between the cause of action in conversion and the cause of action in wrongful detention. He says :

" 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 or 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 possession of the plaintiff's goods "

*Rosenthal* v. *Alderton* (2), strongly relied upon by the learned counsel for the appellant, does not militate against this view. Evershed J. (as he then was) did not go beyond conceding to a plaintiff, unaware of an earlier sale by the bailee, the right to sue for possession of the specific moveable bailed ; but the relief that followed was not in detinue but for conversion. This is in consonance with the rule in *Reeve* v. *Palmer* (3), and *Wilkinson* v. *Verity* (4) that a bailee may not be heard to plead his own wrong in discharge of his duty under the contract to deliver the article bailed on the bailment being terminated. As Pollock in his treatise on Law of Torts (5) has stated :

" He (bailee) may be liable for conversion by refusal to deliver, when he has had possession and has wrongfully delivered the goods to a person having no title. He cannot deliver to the person entitled when the demand is made, but, having disabled

(1) 64 Times L.R. 285 at p. 287.
(2) (1946) 1 K.B. 374.
(3) 5 C.B.N.S. 84.
(4) L.R. (1871) 6 C.P. 206.
(5) 14th Edn., p 293.

himself by his own wrong, he is in the same position as if he still had the goods and refused to deliver."

*Donald* v. *Suckling* (1) concedes an action in detinue to a pledgor who has made a tender of the sum due ; but the claim in that case was against the purchaser from the pledgee.

In *Coldman* v. *Hill* (2), Bankes L.J. quoted with approval from Stephen's Commentaries :

" Where upon a contract of bailment the bailor complains of a failure to re-deliver the article, the remedy is (according to the circumstances) by action of detinue, trover, on promises, or on the case for negligence. "

The claim in detinue, the bailee having lost possession of the article bailed by theft, was dismissed ; but the bailee was held liable for negligence.

The Courts cannot be invited to a mere *brutum fulmen*. A decree for delivery of specific moveables where it is clear that the defendant is not in possession is meaningless. Sections 10 and 11 of the Specific Relief Act regulate suits for possession of specific moveables ; and it is clear that such suits are permissible only where the defendant is in possession of the articles whose delivery is sought. Order 20, Rule 10 of the Civil Procedure Code applies only where a decree for possession can be properly made.

Amplifying the respondent's case that the only remedy that is open to the appellant in the circumstances here is by way of damages for the unauthorized sale of the pledged articles in September 1942, the learned counsel for the respondent puts the

(1) L.R. (1866) 1 Q.B.D. 585. (2) (1919) 1.K.B. 443 at p. 449.

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action in conversion. Bullen and Leake's Precedents of Pleadings (1) has the following:

"In the case of a bailment which gives the bailee only a lien without power of sale, an unauthorized sale or pledging of the property bailed terminates the bailment, and is a conversion; whilst in the case of a pledge, a sale or sub-pledge is not so inconsistent with the original contract as to terminate it and therefore does not amount to a conversion."

The rule has been similarly summarised by Pollock in his Law on Torts at page 291:

"Where a bailee has an interest of his own in the goods (as in the common cases of hiring and pledge) and under colour of that interest deals with the goods in excess of his right, questions of another kind arise. Any excess whatever by the possessor of his rights under his contract with the owner will of course be a breach of contract, and it may be a wrong. But it will not be the wrong of conversion unless the possessor's dealing is wholly inconsistent with the contract under which he had the limited interest, as if the hirer for example destroys or sells the goods. That is a conversion, for it is deemed to be a repudiation of the contract, so that the owner who has parted with possession for a limited purpose is by the wrongful acts itself restored to the immediate right of possession, and becomes the effectual true owner capable of suing for the goods or their value. But a merely irregular exercise of power, as a sub-pledge or a premature sale, is not a conversion; it is at most a wrong done to the reversionary interest of an owner out of possession, and that owner must show that he is really damnified."

*Donald* v. *Suckling* (2) denied the pledgor an action in conversion against the purchaser from the pledgee, who had irregularly exercised the power of sale, on the ground that at the date of sale the pledgor did not have an immediate right to possession of the article pledged.

*Halliday* v. *Holgate* (3) affirmed the principle where a pawnee of moveables had sold the articles pledged

(1) 9th Edn. p. 349 (2) L.R. (1866) 1 Q.B.D. 585.
(3) (1868) 3 Ex. 229.

with him that, even assuming the sale to be wrongful, the immediate right to the possession of the articles pledged was not by the sale revested in the pledgor and that he could not therefore maintain an action for conversion. The same rule was enunciated in *Mulliner* v. *Florence* (1) where a distinction was drawn between a holder of a lien and a pledgee. The Court of Appeal in *Bristol and West of England Bank* v. *Midland Railway Co.* (2) is, in our opinion, authority for nothing more than the principle which Fry L.J. has enunciated at page 663 of the report:

"I think it is reasonable to say that the man who ought to have the goods shall not be allowed to set up a wrongful prior act by which he has made away with the goods. He who ought to produce the goods of the man who has the title to the goods and the property in the goods, cannot discharge himself by saying, 'I have wrongfully made away with them, but that was before the accruer of your title'."

In *Button* v. *Haviside* (3) Vaughan Williams L.J. puts the claim of a pledgor, in circumstances similar to the present, as arising on the contract of bailment and the breach of the contractual duty to re-deliver the goods on repayment of the sum secured on the pledge.

It is significant, also, that Lord Atkin, in *Solloway* v. *McLaughlin* (4) said:

"But on the actual facts of a mandate accepted for the express purpose of being fraudulently misused by the agent, the agent never had the right to claim or to hold security, still less to dispose. Their disposal of the deposited shares amounted to nothing short of conversion."

Reliance has been placed on behalf of the respondents on *Johnson* v. *Stear* (5). Erle C.J. in

(1) L.R. (1878) 3 Q.B.D. 484.
(2) L.R. (1891) 2 Q.B.D. 653.
(3) L.R. (1907) 2 K.B. 180 at 188.
(4) L.R. (1938) A.C. 247.
(5) (1863) 15 C.B. (N.S.) 329.

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delivering the judgment of the majority of the Court, said :

"In trover by the assignee under the bankruptcy of one Cumming, the facts were that Cumming had deposited brandy lying in a dock with one Stear, by delivering to him the dock-warrant, and had agreed that Stear might sell, if the loan was not repaid on the 29th of January ; that, on the 28th of January, Stear sold the brandy, and on the 29th handed over the dock-warrant to the vendees, who on the 30th took actual possession.

Upon these facts the questions are,—first, was there a conversion ? and, if yes,—secondly, what is the measure of damages ?

To the first question our answer is in the affirmative. The wrongful sale on the 28th, followed on the 29th by the delivery of the dock-warrant in pursuance thereof, was, we think, a conversion. The defendant wrongfully assumed to be owner in selling ; and, although the sale alone might not be a conversion, yet, by delivering over the dock-warrant to the vendees in pursuance of such sale, he interfered with the right which Cumming had of taking possession on the 29th if he repaid the loan ; for which purpose the dock-warrant would have been an important instrument. We decide for the plaintiff on this ground ; and it is not necessary to consider the other grounds on which he relied to prove a conversion."

The learned Chief Justice, later in the judgment, conceded that though the plaintiff's action was in name for the wrongful conversion, it was in substance for breach of contract in not keeping the pledge till the given day. The substantial ground on which the majority of the Court proceeded being that the "act of the pawnee did not annihilate the contract nor the interest of the pawnee in the goods," the doubt which Mellor J. expressed in the later case of *Donald* v. *Suckling* (1) if the plaintiff's only remedy for damages was not by action on the contract is, in our opinion, well justified. Blackburn C.J. in the later case interpreted the decision of the majority of the Court

(1) L.R. (1866) 1 Q.B.D. 585.

in *Johnson* v. *Stear* (1) as being that "although the owner was entitled to maintain an action against the pawnee for a breach of contract in parting with the goods, yet that the contract itself was not put to an end by the tortious dealing with the goods by the pawnee, so as to entitle the owner to bring an action to recover the goods as if the contract never had existed."

A decision of the Lahore High Court in *Alliance Bank of Simla* v. *G. Lal and one* (2) has been cited before us as an authority for the proposition that a pledgee making a sale of pledged articles other than in compliance with the requirements of section 176 of the Contract Act commits the wrong of conversion. At page 382 of the report Tek Chand J. said :

> " The case is clearly one of wrongful conversion and it is well settled that in cases of this kind, the measure of damages is ordinarily the value of the goods on the date of such conversion."

No authority is cited and no discussion of the principles was made to justify this statement that the case was clearly one of wrongful conversion. The learned Judge merely assumed it to be self-evident.

*Motilal* v. *Lakhmichand* (3) has been cited as supporting the respondents in their contention but the point did not arise in that case as the learned Judge held that the sale complied with the requirements of section 176 of the Contract Act and the learned Judge refused to discuss the plea that the sale might have amounted to an act of wrongful conversion under different conditions.

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(1) (1863) 15 C.B. (N.S.) 329. (2) I.L.R. 8 Lah. 373.
(3) A.I.R. (1943) Nag. 162.

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A comparison of Article 48 with Article 48-A, both of the First Schedule to the Limitation Act, provides a clear indication that the Legislature does not contemplate a sale of the pledged article by the pledgee other than in accordance with section 176 of the Contract Act as amounting to the wrong of conversion.

Even assuming with Sir Frederick Pollock in the passage earlier quoted from his treatise on the Law of Torts, that a premature sale by a pledgee may possibly be treated as an innominate wrong done to the reversionary interest of an owner out of possession the event in this case will not be affected. For, as was said at page 209 of the report in *Wilkinson* v. *Verity* (1), "in case where a man undertakes to do an act upon a future day, and before the day arrives disables himself from performing the act, or positively and absolutely refuses to be bound by or perform his contract, and, so to speak, declares off the bargain himself, and absolves the other party, it is in the option of such other party at his election to treat that conduct as of itself a violation and breach of the contract, or to insist upon holding the repudiating party liable, and to sue him for non-performance when the day arrives." Later in the same judgment, Willes J. affirmed the right of the bailor to elect "to wait until there is a breach of the bailee's duty in the ordinary course by refusal to deliver up on request."

These principles are embodied in section 39 of the Contract Act. The option to act on an anticipatory breach of contract, namely, the premature sale by the pledgee disabling himself from performing his obligation to return the goods pledged when later redemption is sought of him on payment of money lent on their security, is entirely with the pledgor. The

(1) L.R. (1871) 6 C.P. 206.

defendant cannot be allowed to set up his prior act of anticipatory breach as an answer to the cause of action in breach of contract arising on tender of money lent by the pledgor.

It is clear therefore to us that if the appellant was wrong in putting his claim for delivery of specific articles pledged and for damages only in the alternative, it is equally incorrect of the respondents to contend that the appellant's true and only remedy is by way of damages for conversion as on the sale of the pledged articles in September 1942. The rights of the parties in this case under the transaction of the pledge are regulated by the provisions of the Contract Act. It is a contract of bailment and it is in the contractual duty to return the articles pledged on repayment of the loan or tender thereof that the respondent has failed. The wrong is the breach of contract committed in April 1944 when on a tender being made of the sum lent the creditor rejected the tender and refused to perform the contractual obligation to re-deliver the articles pledged with him. Section 73 of the Contract Act would regulate the rights of the parties and damages would have to be assessed as on the date of breach of contract.

The result therefore is that, regrettable though the course may be, we are forced to direct that the decrees of all the Courts below be set aside and the proceedings remanded to the trial Court to determine the average price of gold prevailing in April 1944 and to assess damages as for a breach then committed of a contract to re-deliver the articles pledged on payment of sum due on the loan. In the circumstances it is only equitable that the costs of the parties to this stage should lie where they fell. We accordingly make no order as to costs.

## SUPREME COURT.

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*July 25.*

# EBRAHIM DAWJEE JEEWA (APPELLANT)

*v.*

# AJAM MOHAMED LOOVAWALLA (RESPONDENT).*

*Goods left after looting—Respondent locking premises and obtaining permit from Commission—Conversion or trespass—Test—Control—Powers of Appellate Court—Order 41, Rule 33, Code of Civil Procedure—Interference where permissible—Damages—Presumption against spectator—Burden in appeal.*

Goods in appellant's shop were looted in part after British evacuation and a portion was still in the premises.

The Respondent locked the premises and handed the keys to one I. G. Mohamed with instructions to hand over the keys to any one he liked or to a person who had obtained a permit from the Hiraoka Commission. The 3rd defendant obtained such permit and the keys were handed over to him by I. G. Mohamed and the 3rd defendant sold the goods. A decree was passed against all defendants by the trial Court as joint tort-feasors. Respondent alone appealed without making other two joint tort-feasors as parties and the trial Court's judgment was set aside. On further appeal to the Supreme Court :

*Held :* There was effective exclusion of others when the premises were locked and respondent had full control and exclusive occupation.

*Kirk* v. *Gregory*, (1876) L.R. 1 Ex. 55, distinguished.

A finder of goods is bound to answer to the true owner and cannot deliver them to any except the true owner.

*Issack* v. *Clark*, 80 E.R. 1143 at 1148 (K.B.), followed.

The delivery of keys gives the transferee power over goods which he had not before and amounts to a symbolic declaration that the transferor no longer intends to meddle with the goods.

*Wrightson* v. *McArthur and Hutchinsons Ltd.*, (1921) 2 K.B. 807, referred to.

The Respondent was guilty of conversion when he transferred possession of the goods to I. G. Mohamed by handing him the keys with instructions to transfer possession to any one who brought a permit from the Japanese Hiraoka Commission.

*Hiort* v. *Bolt*, (1874) L.L.R. 9 Ex. 86, followed.

*Stephens* v. *Elwall*, (1815) 4 M. & S. 257 ; *Fowler* v. *Hollins*, (1872) 7 Q.B. 616 ; *Hollins* v. *Fowler*, (1874) 7 H.L. 757 ; *Barker* v. *Furlong*, (1891) 2 Ch.

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* Civil Appeal No. 11 of 1949.

† *Present :* U E MAUNG, Chief Justice of the Union of Burma, U THAUNG SEIN and U ON PE, JJ.

172 ; *Clayton* v. *Le Roy*, (1911) 2 K.B. 1031 ; *Caxton Publishing Co.* v. *Sutherland Publishing Co.*, (1939) A.C. 178 at 201-202 ; *Lancashire and Yorkshire Railway Co.* v. *MacNicoll*, 88 L.J. (K.B.) 501 ; *Towne* v. *Lewis*, 137 E.R. 241 ; *England* v. *Cowley*, (1873) L.E. 8 Ex. 126 ; *Consolidated Co.* v. *Curtis and Son*, (1892) 1 Q.B. 495 at 497, discussed.

A person is liable in respect of a wrongful act for all consequences which he ought reasonably to have foreseen.

*Muhammad Issa El Sheikh Ahmed* v. *Ali*, (1947) A.C. 414 ; *Monarch Steamship Co. Ltd.* v. *A/B Karlshamns Olje Fabriker*, (1949) 1 A.E.R., 1, referred to.

The question whether a decree against joint tort-feasors will be *res judicata* against a co-defendant, reserved.

The right of appellate court to interfere with the decree of the trial court where some of the parties have not appealed against decrees against them arises under Order 21, Rule 33, Code of Civil Procedure.

There is a fair consensus of authority in the courts in India in favour of wide power if as a result of the appellate court's interference with the decree, it is necessary in the ends of justice to adjust the rights of the parties.

*Babaji Dhondshet* v. *The Collector of Salt Revenue*, (1887) 11 Bom. 596 ; *Subramanian Chettiar* v. *Sinnammal*, (1930) 53 Mad. 881 ; *Somar Singh* v. *Mussammat Premedi*, 3 Pat. 327 at 334 ; *Bhutnath Deb* v. *Sashimukkhi* A.I.R. (1926) Cal. 1042 at 1043-44 ; *Rukia* v. *Mewa Lal*, 51 All. 63 ; *Madan Lal* v. *Gajendrapal*, 51 All. 575 at 578 ; *Kamalakanta Debnath* v. *Tamijaddin*, 61 Cal. 919, referred to.

As in this case, the extent of appellant's liability, is co-extensive with other defendants, and arises in the same suit on the same evidence, if the appellate court comes to the conclusion that the award is excessive, the ends of justice require variation in favour of the non-appealing parties also.

A right of appeal, under s. 20, Union Judiciary Act or s. 96, of the Code of Civil Procedure is a substantive right.

*National Trustees Co. of Australia* v. *General Finance Co. of Australia*, (1905) A.C. 373 ; *Delhi Cloth and General Mills Co.* v. *Income-Tax Commissioner, Delhi*, 54 I.A. 421 ; *Sadar Ali* v. *Dalimuddin*, 56 Cal. 512, referred to.

The right of appeal is a right to have the decision of an inferior court put to judicial examination by a higher court and to have it rectified, if wrong. The remedy may not be available to some by lapse of time and it remains untouched but the appellate court can exercise the power, unless it is otherwise curtailed. The decisions in 2 Ran. 541 and 6 Ran. 29 only decide that section 3, Limitation Act should not be circumvented by adding a respondent against whom the appeal is barred.

*V.P.R.V. Chokalingam Chetty* v. *Seethai Acha*, 2 Ran. 541 and 6 Ran. 29, referred to.

*Badri Narayan* v. *East Indian Railway Co.*, 5 Pat. 755, distinguished.

The burden is on the party challenging the decision of the trial Judge to establish that it is incorrect. Unless the appellate court is of the opinion that no other conclusion is possible and that the decision of the trial Judge is wrong, the finding on damages should not be interferred with. The largest amount of injury which can be sustained would probably be considered to be

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the amount to be awarded by the Tribunal which has to award compensation if the party guilty of a wrong did not produce the best evidence available of the true value of goods converted.

*Armory* v. *Delamirie*, 93 E.R. 664 ; *Rammersmith Railway Co.* v. *Brand*, (1869) L.E. 4 H.L. 171 at 224 ; *Wardour* v. *Berisford*, 23 E.R. 579 ; *Watt* v. *Thomas*, (1947) A.C. 484 at 493, referred to.

*P. M. Beecheno* for the appellant.

*E. C. V. Foucar* for the respondent.

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

U E MAUNG.—In the suit of which this appeal is the outcome the appellant claimed damages in the sum of Rs. 1,35,000 for conversion of his goods and in the alternative for an account against the respondent and two other persons.

The appellant, prior to 1942, had been carrying on business in hardware and mill stores in 28th Street, Rangoon. On the 21st December 1941, following the outbreak of the war with Japan, the appellant left for India leaving the keys of the shop with one G. H. Jeewa, who had been in his employment in the shop and who appears to be related to him. He left also some cash and a few blank cheques signed by him with this Jeewa to enable him to carry on business on his behalf during his absence from Burma. However, G. H. Jeewa himself left Rangoon on or about the 22nd February 1942 on the invading forces of the enemy coming close to the City of Rangoon. It is in evidence that Jeewa locked the premises before he left Rangoon and made over the keys of the shop and of the safe therein, together with such papers relating to the business as he managed to carry with him on his evacuation from Rangoon, to the appellant when the two met in India. Employed along with G. H. Jeewa in the shop was Lay Maung a witness for

the appellant at the trial and Ismail Fakir Mohamed, who was the 3rd defendant in the suit out of which this appeal arises. The 3rd defendant was a clerk on a salary of Rs. 40 per mensem and it is not disputed that both the 3rd defendant and Lay Maung, whose salary was also about the same as that of the 3rd defendant, evacuated from Rangoon about the same time that G. H. Jeewa did. Lay Maung and the 3rd defendant, however, did not go away from Burma altogether and came back to Rangoon after the Japanese forces had occupied the city.

Following the state of lawlessness on the evacuation of the lawful government from Rangoon many shops and premises in Rangoon were looted and it is common ground that the appellant's shop did not escape looting. The plaintiff's case was that whatever escaped looting in his shop by persons unknown was taken possession of by the three defendants who disposed of the goods as if these had been their own property and thereby wrongfully converted the plaintiff's goods to their own use and benefit. In paragraph 4 of the plaint the plaintiff made this allegation :

"In or about the month of March 1942 the 1st defendant took possession of the plaintiff's said business and all of the plaintiff's said stocks therein and secured the said premises with lock and key."

The 1st defendant referred to is the respondent before us In paragraph 5 of the plaint we find this allegation :

"Thereafter, upon a date of which the plaintiff is unable to give better particulars than in the month of March 1942, or early April 1942, the 1st defendant opened the said business and together with the 2nd and 3rd defendants sold the plaintiff's said stocks. The defendants and each of them thereby wrongfully converted the plaintiff's said stocks to their own use and benefit."

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Two separate written statements were filed, one by the respondent and the other jointly by the 2nd and 3rd defendants. The respondent in paragraphs 6 and 7 of his written statement "specially denies the allegations in " paragraphs 4 and 5 of the plaint. The 2nd and 3rd defendants state in paragraph 4 of their written statement that the "allegations in paragraph 4 are not admitted." They proceed in the next paragraph to "deny the allegations in paragraph 5 of the plaint."

The suit went to trial before Thein Maung J. on the Original Side of the High Court of Judicature at Rangoon. The learned Judge having found that the 1st and 3rd defendants are liable to the plaintiff in the sum of Rs. 33,786 and the 2nd defendant in the sum of Rs. 33,486 and all the three defendants are joint tort-feasors and their liabilities in the said amounts are joint and several, granted the appellant a decree "for recovery of the said amounts not exceeding Rs. 33,786 in all jointly and severally from the three defendants with costs *ad valorem*."

The 2nd and 3rd defendants were content to accept this decree and did not appeal but the respondent preferred on appeal against the judgment impleading the appellant only in that appeal. No objection, however, was taken before the Appellate Bench of the High Court to the competency of the appeal in the absence from the record of the 2nd and 3rd defendants and the Appellate Bench composed of Tun Byu and Aung Tha Gyaw JJ. allowed the respondent's appeal and dismissed the respondent from the suit. It is against this appellate judgment that the appeal to this Court under section 5 of the Union Judiciary Act was preferred.

The trial on the Original Side of the High Court was a very protracted one. Several witnesses were

called on both sides and the parties were subjected to very close and lengthy cross-examination, with the result that the trial occupied over 20 working days. If we may be allowed to say so, the learned trial Judge has examined the evidence on the record with that degree of thoroughness that is characteristic of him. With equal care has the Appellate Bench scrutinised the materials on the record ; and has on the facts come to a conclusion directly opposite to that arrived at by the learned trial Judge. Difficult though the task may be to choose between these two opposite conclusions on the facts it would normally have been our duty to attempt it. But certain factors to which the attention of the learned Judges below had not been directed would, in our opinion, conclude this appeal and we refrain from making for ourselves a close scrutiny of the evidence on the record.

Earlier in our judgment we have set out certain extracts from the pleadings. At the trial, however, the respondent departed from the total denial made by him in his written statements and we are of the opinion that on the admissions made by the respondent a case of conversion has been clearly established against him. The respondent when examined at the trial claimed that about the second week of April 1942 one Arab Ali, who was then living next door to the appellant's shop, came to him and told him that the appellant's shop was being looted by the Japanese and he went with Arab Ali to the appellant's shop. There they saw the Japanese taking out goods from the shop and loading the trucks which they had brought with them with such goods ; and as it would have been dangerous to interfere with the Japanese in what they were doing he claimed that he and Arab Ali went away for a while. Later, they came again to the shop and the two of them closed the premises with padlocks provided by

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the respondent. He and Arab Ali then went to one Ismail Gulam Mohamed, a leader of their community and to this Ismail Gulam Mohamed he claims that he delivered the keys of the padlocks over the premises of the appellant. When he was asked if, as the result of this delivery of the keys to Ismail Gulam Mohamed, it was contemplated that Ismail Gulam Mohamed should make over the keys to anybody with or without his knowledge and consent the answer was: "My permission was not necessary ; if anybody wanted to open the shop with the keys he could go to Ismail Gulam Mohamed ". To the question : " Did you tell Ismail Gulam Mohamed that he could make over the keys to any one he liked ?" the answer was: "Yes, I told him to hand over the keys to such person who got a permit to open the shop."

The respondent has also admitted that prior to locking up the appellant's premises with the goods therein, there had been discussion between the 3rd defendant and himself for some days. The 3rd defendant was then living in the same garden with him and he told the 3rd defendant immediately after he had delivered the keys to Ismail Gulam Mohamed of what he had done. In his examination-in-chief the respondent claimed that the 3rd defendant sought his advice in connection with the shop and he told the 3rd defendant that "if he made an application to Hiraoka Commission it would be possible for him to get the shop." An application was in fact made as suggested by the respondent Enquiries were made of the respondent by one Ebrahim representing that Commission and the 3rd defendant obtained a permit on the strength of which the keys left by the respondent with Ismail Gulam Mohamed were received by him. With these keys the 3rd defendant opened the shop and disposed of the goods therein.

We have invited the learned counsel for the respondent to say whether, in view of these statements, the respondent has not convicted himself out of his own mouth for conversion of the plaintiff's goods. We have heard the learned counsel at length and we are satisfied that on the respondent's own showing he is liable for damages in conversion of such of the appellant's goods as were locked up by him in the circumstances he has alleged.

It has been strenuously contended by the learned counsel that in locking the premises the respondent cannot be deemed to have taken possession either of the premises or of the goods therein. He says that it would be at the most an act of trespass. The decision in *Kirk* v. *Gregory* (1) is relied on for this proposition; but the facts there are radically different from the facts here. There the owner of certain jewellery and diamond rings died suddenly. His attendants and others in the house, unaware of the death, were feasting and drinking. His sister-in-law who was in the house took out of an unlocked drawer in the room where the deceased lay some diamond rings and jewellery belonging to the deceased and placed them with a watch belonging to the deceased in a box and put the box into a cupboard in another room for safety. It was from that cupboard that the rings and jewellery were found missing later. To the count of the declaration alleging that the defendant had converted to her own use the jewellery and diamond rings missing, the Judge at the trial ruled that there was no evidence of conversion. In that case there was no effective occupation or control in the sense of an unqualified power to exclude others in the defendant. She had moved the valuables from where they were but she had thereafter no dominion over

(1) (1876) L.R. 1 Ex. 55.

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the jewellery and no physical control over them. In the present case there was effective exclusion of others from the premises once the premises were barred and locked, with the keys in the respondent's possession. Whatever the motive of the respondent might have been, once he had locked the premises with the keys in his possession he came to have full control of the place to which admission was to be gained by means of the keys to exclusion of others. We have no doubt whatsoever that the respondent had taken such possession as the nature of the property admitted of.

The learned counsel for the respondent claims that the extraordinary conditions obtaining in March/April 1942 in the City of Rangoon were such that the locking up of the premises would not be effective to give full control of the place locked up to the exclusion of others. He says that in those days there was no law and order, as we normally understand it, there was no regular administration and looters and other evil characters could break open locked premises with impunity. The answer to that suggestion has been given in Pollock's Possession in the Common Law at pages 12 and 13 where the learned author said :

"Now it is evident that exclusive occupation or control in the sense of a real unqualified power to exclude others, is nowhere to be found. All physical security is finite and qualified. A strong man is worse to meddle with than a weak man or a child, but the strong man also may be overpowered. It is harder to break into a safe than a cupboard, a house than a field, a prison or a fortress than a house ; but locks may be picked, bolts forced, walls broken."

At page 15 the learned author has quoted from Mr. Justice Holmes' Lectures on Common Law :

"A powerful ruffian may be within equal reach and sight, when a child picks up a pocket-book ; but if he does nothing

the child has manifested the needful power as well as if it had been backed by a hundred policemen."

Precarious as the physical control over the premises and the goods therein may have been, we are satisfied that the respondent by locking up the premises had taken effective physical possession of the premises and the goods.

In taking possession of the goods in the circumstances obtaining at the time, we do not consider it conclusive that t e respondent had committed a wrong. As Coke C.J. more than 300 years ago in *Issack* v. *Clark* (1) said :

" When a man doth finde goods, it hath been said, and so commonly held, that if he doth dispossess himself of them, by this he shall be discharged, but this is not so, as appears by 12 E. IV. fol. 13, for he which findes goods is bound to answer him for them who hath the property ; and if he deliver them over to any one, unless it be unto the right owner, he shall be charged for them, for at the first it is in his election, whether he will take them or not into his custody, but when he hath them, one only hath then right unto them, and therefore he ought to keep them safely ; if a man therefore which findes goods, if he be wise, he will search out the right owner of them, and so deliver them unto him ; if the owner comes unto him, and demands them, and he answers him, that it is not known unto him whether he be the true owner of the goods, or not, and for this cause he refuseth to deliver them, this refusal is no conversion, if he do keep them for him, 2 R. III. fol. 15, a good case to this purpose. There may be a Trover and no Conversion, if he keep and lay up the goods, by him found, for the owner. It is the Law of Charity, to lay up the goods which do thus come to his hands by trover, and no trespass shall lie for this."

However, the respondent after having taken the goods into his custody did not stop there. He delivered the keys of the premises to I. G. Mohamed instructing him to hand them over to anyone with a permit from the Hiraoka Commission. The effect of the delivery

(1) 80 E.R. 1143 at 1148 (K.B.)

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of the keys to I. G. Mohamed would amount in law to a transfer of the possession of the goods to I. G. Mohamed. Judicial decisions in England to the year 1883 on the effect of the delivery of the keys of premises where goods were stored have been collected and considered at pages 60 to 68 of Pollock's Possession in the Common Law and it is unnecessary to repeat them here. We are in full agreement with the conclusion arrived at by the learned author as the result of his examination of the authorities that " the delivery of the keys gives the transferee a power over the goods which he had not before, and at the same time is an emphatic declaration (which being by manual act instead of word, may be called symbolic) that the transferor intends no longer to meddle with the goods." *Wrightson* v. *McArthur and Hutchinsons Ltd.* (1) supports that conclusion.

The result in law is therefore that on the respondent's own showing he had taken possession of the goods of the appellant and had transferred possession over them to I. G. Mohamed with instructions for I. G. Mohamed in turn to transfer them to anyone who brought a permit from Hiraoka Commission. On the authority of *Issack* v. *Clark* (2) the respondent by transferring possession of the goods to I. G. Mohamed would be liable in conversion. Later authorities in no way militate against this view.

In *Stephens* v. *Elwall* (3) Lord Ellenborough C.J. said :

" For a person is guilty of conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another who had himself no authority to dispose of it. And the Court is governed by the principle of law, and not by the hardship of any particular case."

(1) (1921) 2 K.B. 807. (2) 80 E.R. 1143 at 1148 (K.B.)
(3) (1815) 4 M.&S. 257.

*Fowler* v. *Hollins* (1) and *Hollins* v. *Fowler* (2) are very strong authorities for the view which we have taken. In the Exchequer Chamber Brett J., as he then was, said at page 630 :

"The true proposition as to possession and detention and asportation seems to me to be, that a possession or detention, which is a mere custody or mere asportation made without reference to the question of the property in goods or chattels, is not a conversion."

We do not see how it can possibly be suggested in the present case that in delivering possession of the keys to I. G. Mohamed with instructions to deliver them again to any one with a permit from the Hiraoka Commission there was no more than a mere custody or mere asportation made without reference to the question of the property in the goods. At page 632 of the report Martin, B. said :

". . . the assumption and exercise of dominion—and asportation is an exercise of dominion—over a chattel inconsistent with the title and general dominion which the true owner has in and over it is a conversion, and that it is immaterial whether the act done be for the use of the defendant himself or of a third person."

On appeal before the House of Lords Blackburn J. said at page 766 of the report :

"From the nature of the action, as explained by Lord Mansfield, it follows that it must be an interference with the property which would not, as against the true owner, be justified, or at least excused, in one who came lawfully into the possession of the goods."

At page 795 of the report Lord Chelmsford said :

". . . any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived

(1) (1872) 7 Q.B. 616. (2) (1874) 7 H.L. 757.

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of them, and disposes of them, whether for his own benefit or that of another person, is guilty of conversion."

The proposition would lose none of its cogency if for the qualification "fraudulently" we substitute, "in circumstances not affecting his title."

The Lord Chancellor at page 797 of the report said :

"In my opinion they did act, in relation to the sellers, in a character beyond that of mere agents ; they exercised a volition in favour of Micholls & Co., the result of which was that they transferred the dominion over and property in the goods to Micholls, in order that Micholls might dispose of them as their own ; and this, as I think, within all the authorities, amounted to a conversion."

*Hiort* v. *Bott* (1) is again another strong case against the respondent. Here as in that case there was no occasion for the respondent to have taken custody of the appellant's goods ; he had no duty to perform in relation to the goods but he had chosen to take custody thereof. Having assumed a control over the disposition of these goods he had had caused them to be delivered to a person who had no right to them. It must be remembered that the respondent had for many years been associated with the appellant as a partner in similar business as that which later both of them carried on separately. The respondent knew full well that Ismail Fakir Mohamed, the 3rd defendant was only a clerk under the appellant on a salary of Rs. 40 per mensem. He also knew full well that in March/April 1942 there was no one in Burma who had a right to represent the appellant.

*Barker* v. *Furlong* (2) does not carry the matter very far except that Romer J., bases his decision on the dictum of Lord Chelmsford in *Hollins* v. *Fowler* (3),

(1) (1874) L.R. 9 Ex. 86. (2) (1891) 2 Ch. 172.
(3) (1874) 7 H.L. 757.

*Clayton* v. *Le Roy* (1) is a majority decision but the Court was divided not on the law but on the facts. At page 1055 of the report Vaughan Williams L.J. said:

"In order to amount to an assertion of dominion, it is not necessary to say either 'It is mine' or 'It is not yours', but it is necessary to assert by word or act such a right as is inconsistent with the dominion of the plaintiff. A man may not assert any other person's title, but he may nevertheless do an act which is inconsistent with the dominion of the true owner."

It would be impossible to conceive of an act more inconsistent with the dominion of the true owner than for the respondent in possession of the keys to deliver them to I. G. Mohamed with instructions in turn to deliver them to any person who produced a permit from Hiraoka Commission, when it is remembered that the respondent knew that there was no one in Burma at that time who could lawfully represent the true owner.

In *Caxton Publishing Co.* v. *Sutherland Publishing Co.* (2) Lord Porter accepted the definition of conversion given by Atkin J. as he then was, in *Lancashire and Yorkshire Railway Co.* v. *MacNicoll* (3). The definition was reproduced in the judgment and Lord Porter proceeded to say:

"Atkins J. goes on to point out that, where the act done is necessarily a denial of the owner's right or an assertion of a right inconsistent therewith, intention does not matter. Another way of reaching the same conclusion would be to say that conversion consists in an act intentionally done inconsistent with the owner's right, though the doer may not know of or intend to challenge the property or possession of the true owner."

As we have said before there was no necessity for the respondent to have acted as he did. He was under no

(1) (1911) 2 K.B. 1031. (2) (1939) A.C. 178 at 201 and 202.
(3) 88 L.J. (K.B.) 501.

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obligation to take the appellant's goods into his custody. It cannot be said that he had not intentionally taken custody of the goods or that he had not intentionally delivered possession of these goods to I. G. Mohamed. This act of transfer of possession coupled with instructions given to I. G. Mohamed would clearly be an act intentionally done inconsistent with the appellant's right as owner. That being so, we agree with Lord Porter that it would not matter in the least whether in acting as the respondent did he intended or did not intend to challenge the property of the appellant in the said goods.

The learned counsel for the respondent has placed before us certain decisions he considers would be helpful to him. *Towne* v. *Lewis* (1) is not relevant to the facts of the case before us. As Coltman J. said:

"Here, there was a full and complete admission of the plaintiff's title to the bill, and a promise to deliver it to him. There was nothing more than evidence from which the jury might, if they pleased, have found a conversion, if they had been satisfied that there had been wilful and unreasonable delay on the defendant's part in complying with the plaintiff's demand."

*England* v. *Cowley* (2) has this ratio decidendi: "A limited interference with the plaintiff's property, where all along the plaintiff is himself in possession, does not constitute conversion". Kelly, C. B. incidentally said of a person in possession of moveable property that any dealing with it, inconsistent with the true owner's right would be conversion.

Collins J., as he then was, in *Consolidated Co.* v. *Curtis & Son* (3) has said:

"No doubt there is considerable difficulty in framing an exact and exhaustive definition of a conversion, and it is not easy to

(1) 137 E.R 241. (2) (1873) L.R. 8 Ex. 126.
(3) (1892) 1 Q.B., 495 at 497.

draw the line at the precise point where a dealing with goods by an intermediary becomes a conversion. The difficulty is diminished by remembering that in trover the original possession was by a fiction deemed to be lawful and some act had therefore to be shown constituting a conversion by the defendant of the chattel to his own use, some act incompatible with a recognition on his part of the continuous right of the true owner to the dominion over it. All acts, therefore, as suggested by Blackburn J., in his opinion given to the House of Lords in *Hollins* v. *Fowler* (1), which are consistent with the duty of a mere finder such as the safe guarding by warehousing or asportation for the like purpose, may well be looked upon as entirely compatible with the right of the true owner, and, therefore, as not constituting a conversion by the defendant."

Can it be said in this case that the acts of the respondent are consistent with the duty of a mere finder who had taken the goods into his custody without being under any obligation to do so?

On what principles, then, should the extent of the respondent's liability for the wrong of conversion by delivery of possession of the appellant's goods to I. G. Mohamed be determined? The respondent not only clearly foresaw that the goods would come to be at the disposal of whoever should obtain a permit from the Hiraoka Commission but also intended that result. A person is liable in respect of a wrongful act for all consequences which he ought reasonably to have foreseen: *Muhammad Issa El Sheikh Ahmed* v. *Ali* (2) and *Monarch Steamship Co. Ltd.* v. *A/B Karlshamns Olje Fabriker* (3). Again, it is elementary learning that intended consequences are never too remote. We hold therefore that the liability of the respondent is co-extensive with that of the 3rd defendant.

In the view we take of the nature and extent of the respondent's liability, it is unnecessary to decide whether, in the absence from the record of the 2nd and

(1) (1874) 7 H.L. 757. (2) (1947) A.C. 414. (3) (1949) 1 A.E.R 1.

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3rd defendants, it is open to the respondent to claim either before the Appellate Bench of the High Court or before us that he is not at all liable in damages. The antecedent questions, if the rule in *Merryweather* v. *Nixan* (1) or that in *Palmer* v. *Wick Steamship Co.* (2) is the law in this country and if the decree made by the trial Judge as in this case operates as *res judicata* between co-defendants, are of some nicety and difficulty. We reserve consideration of these questions till they do arise directly.

The decree of the Appellate Bench of the High Court must in the circumstances be set aside. The Appellate Bench allowed the respondent's appeal on the preliminary ground that he was not at all liable in damages. Now that we have held that his liability is co-extensive with that of the 3rd defendant, he is entitled, if he can, to convince the Appellate Bench that the 3rd defendant's true liability (and therefore his own) is in a sum smaller than that assessed by the trial Judge. Whether he can be allowed to do so without the other defendants being brought on the appellate record of the High Court and, if their presence on the record is necessary, whether and how they are to be brought on it, are matters primarily for the Appellate Bench of the High Court and we see no useful purpose in anticipating that Court.

We allow the appeal and set aside the decree of the Appellate Bench of the High Court. We remit the case to the Appellate Side of the High Court to determine such matters as may be outstanding in the appeal before it as a result of our judgment and in the light of the observations made therein. The findings of the High Court in appeal will in due course be reported to this Court and after hearing counsel further final orders on the questions still outstanding between

(1) (1799) 8 T.R. 186. (2) (1894) A.C. 318.

the parties, including costs of this appeal, will be made by this Court.

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This judgment was delivered by the same learned Judge on the 16th August 1950.

After judgment was delivered on the 25th July 1950 learned counsel for the parties requested us before remitting the appeal, if at all, to the High Court as contemplated in that judgment, to record our decision on certain questions of law. As it appears to us that this request was calculated to save duplication of labour both at the Bench and the Bar and to expedite the disposal of the longstanding dispute between the parties we agreed to hear learned counsel on certain questions of law which we shall later amplify. In taking this course we are not unmindful that what, at the request of the learned counsel, we agree to do is, to a certain extent, inconsistent with the course which we had indicated in our earlier judgment. But, by that judgment we had not divested ourselves of the seizin of the case and we had also at the request of the learned counsel granted them liberty from time to time to apply for such directions as may be necessary. We are satisfied, therefore, that we are competent to adjudicate on the points taken before us at the subsequent hearing.

In our earlier judgment we said :

"The Appellate Bench allowed the respondent's appeal on the preliminary ground that he was not at all liable in damages. Now that we have held that his liability is co-extensive with that of the 3rd defendant, he is entitled, if he can, to convince the Appellate Bench that the 3rd defendant's true liability (and therefore his own) is in a sum smaller than that assessed by the trial Judge. Whether he can be allowed to do so without the other defendants being brought on the appellate record of the High Court and, if their presence on the record is necessary, whether and how they are to be brought on it, are matters

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primarily for the Appellate Bench of the High Court and we see no useful purpose in anticipating that Court."

At the subsequent hearing we were invited by the learned counsel to decide finally the two questions which we propounded for determination by the Appellate Bench of the High Court in the first instance. The learned counsel have pointed out, and rightly, that the views of the Appellate Bench of the High Court on these two questions cannot be final and that it is this Court which will ultimately have to give the final decision.

Mr. Foucar for the respondent claims that it is competent for his client to question the correctness of the sum awarded by way of damages against his client by the trial Judge in the absence of the 2nd and 3rd defendants before the High Court in appeal and before us. His contention is that while it may not be permissible for the respondent in an appeal, here these defendants are not made parties, to seek a variation of the trial judgment to their disadvantage, what he is now seeking is a variation to their advantage and that Order 41, Rule 33 of the Civil Procedure Code permits the Appellate Court to vary the judgment of the trial Court in their absence from the appellate record so long as such variation is to their advantage. The problem then is an entirely different one from that which we left open in our earlier judgment : Whether the respondent could have obtained in appeal complete absolution for himself from liability under the trial decree without the other two defendants being made parties ?

*Babaji Dhondshet* v. *The Collector of Salt Revenue* (1) and *Subramanian Chettiar* v. *Sinnammal* (2) represent the high water mark of the power of an Appellate

(1) (1887) 11 Bom. 596. (2) (1930) 53 Mad. 881.

Court under Order 41, Rule 33 of the Civil Procedure Code as judicially interpreted in India. In *Babaji Dhondshet* v. *The Collector of Salt Revenue* (1) the facts were that two plaintiffs, father and son, sued the defendant for recovery of possession of two salt pans and for mesne profits. The trial Court granted a decree in respect of one salt pan only. Against this decree one of the plaintiffs appealed and the defendant filed cross-objection against the decree in the appeal filed by that plaintiff. The Appellate Court dismissed the plaintiff's appeal and allowed the defendant's cross-objection. It was held that in these circumstances the other plaintiff, who was not a party either to the appeal or to the cross-objection, was bound by the decision of the Appellate Court. We confes that we fail to appreciate the reasoning of the Bombay High Court which led it to hold in effect that a decree passed jointly in favour of two persons can be questioned in a cross-objection against any one of them. A cross-objection is in reality a cross-appeal and an appeal against only one of the joint holders of the decree is clearly incompetent.

In *Subramanian Chettiar* v. *Sinnammal* (2) the plaintiff who sought redemption of certain immoveable property was granted a decree for redemption by the trial Court. Against this decree no appeal was preferred by the defendant but the plaintiff, who considered that the amount fixed for redemption was in excess of what was legitimately due in redemption, appealed questioning only the correctness of the sum fixed by the trial Court. The Full Bench of the Madras High Court took the view that in such circumstances the Appellate Court can not only dismiss the plaintiff's appeal but also, in that appeal set aside the entire decree of the trial Court and dismiss the plaintiff's

(1) (1887) 11 Bom. 596. (2) (1930) 53 Mad. 881.

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suit. Here again it is difficult to appreciate the reasons adduced by the Full Bench in support of the view it took.

We quote these two cases only to illustrate to what extent Order 41, Rule 33 of the Civil Procedure Code had been invoked to support the exercise of plenary powers by the Appellate Court.

In *Somar Singh* v. *Mussammat Premedi* (1) Jwala Prasad J. said:

"Apart from this, the High Court had full seizin of the appeal, and under Order 41, Rule 33, of the Civil Procedure Code, it had full power to pass such decree, in favour of all or any of the respondents or parties whether they were actually before the Court or not, as the justice of the case required. This provision in the Code is new, but it has given effect to the principles from time to time enunciated by learned Judges in dealing with cases that came before them where they found that it was their incumbent duty as a Court of Appeal to do full justice to the case and to the parties involved in the case—whether all of them were before the Court or not."

In *Bhutnath Deb* v. *Sashimukkhi* (2) Suhrawardy J. considered the effect of Order 41, Rule 33. He expressed his views as follows:

"By the use of the expression 'respondent or parties' in the section I understand that the appellate Court may pass an order in favour of the respondents who have not appealed, and it may similarly decide any question in favour of a party, by which I understand a party to the suit and who is not a respondent in the appeal. Otherwise, there was no sense in using the words 'respondents or parties.' The learned Judges in the cases above referred to may have been induced to form the opinion they did in view of the illustration attached to the section, but it is hardly necessary to say that the illustration does not limit the section and is not intended to illustrate its full scope. The view that appeals to me is supported by the decision in the case of *Ambika Charan Chakravarti* v. *Sasitara Debi*, (1915) 22 C. L.J. 61.

(1) 3 Pat. 327 at 334. (2) A.I.R. (1926) Cal. 1042 at 1043-1044

The section should be given a broad and generous interpretation in view of the fact that it is intended to secure consistency in the administration of justice and avoid anomalies which may result if the Court is held to be helpless in giving effect to its own decision to the full extent. Where the rights of parties depend on the same obligation, *e.g.*, contract, and where the Court finds that the contract is genuine or not genuine, it may give effect to its finding by holding all the parties liable under the contract or by exonerating all the parties who are sought to be made liable, without consideration as to whether such parties are before it or not. But the power which the Court is vested with under this section must be exercised in the interest of and for the furtherance of justice as has been observed in the case of *Gangadhar Muradi* v. *Barabashi Padihari*, (1915) 22 C.L.J. 390. 'As the result of the appellate Court's interference in favour of the appellants further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience.'"

The Allahabad High Court in *Rukia* v. *Mewa Lal* (1) struck a discordant note and said the word "parties" in Order 41, Rule 33 was not intended to connote persons other than those who had been arrayed as appellants or respondents in the appeal. It defined the powers of the Appellate Court under Order 41, Rule 33 as follows :

"Order 41, Rule 33, of the Code of Civil Procedure empowers the court of appeal to interfere with a portion of the decree passed by the primary court against which no appeal or cross-objection has been preferred, and is restricted to cases where, without disturbing the grounds upon which the judgment of the trial court proceeds, the appellate court considers that the decree should be modified in order to do justice to all the parties concerned, including such as have not set the law in motion. If the appellant has failed to appeal from a portion of the decree which was against him, or the respondent has not availed himself of his right to prefer a cross-objection, the appellate court is empowered to readjust the rights of the parties before it where the ends of justice call for such an adjustment. The powers

(1) 51 All. 63.

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conferred under this rule are very wide, but they are to be resorted to with great care and circumspection, and not as a matter of course but only where strong grounds exist for the exercise of such powers."

In *Madan Lal* v. *Gajendrapal* (1) of the same High Court the correctness of the decision in this case was questioned. The later Bench expressed the view that Order 41, Rule 33 "clearly allows a decree in favour of a plaintiff who has not appealed". The Bench proceeded to state :

"Otherwise we should have found in the rule in the place of the words 'all or any of the respondents or parties' the words 'all or any of the appellants or respondents."

In *Kamalakanta Debnath* v. *Tamijaddin* (2) Nasim Ali J. held that Order 41, Rule 33 of the Civil Procedure Code empowers the Appellate Court to pass a decree in favour of a party to the suit who has not been joined in the appeal but that it does not authorise the Appellate Court to pass a decree to the prejudice of a person who was not made a party to the appeal.

It thus appears that there is a fair consensus of authority in support of the contention on behalf of the respondent that the Appellate Bench of the High Court, and consequently this Court, would be competent at the instance of the respondent to vary to the advantage of the 2nd and 3rd defendants the decree of the trial Court if the ends of justice so require, even though the 2nd and 3rd defendants were not made parties either before the High Court in appeal or before us. We have held that the respondent's liability is co-extensive with that of the 3rd defendant. It is on the same set of testimony and in the same suit that the trial Judge has arrived at the amount of damages in

(1) 51 All. 575, at 578. (2) 61 Cal. 919.

which the defendants are liable. If on the evidence we come to the conclusion that the extent of the respondent's liability in damages has been over-assessed by the trial Judge it cannot be disputed that the ends of justice would require the decree of the trial Judge against 2nd and 3rd defendants also to be varied to their advantage and avoid an incongruity.

Apart altogether from authority, it is clear to us that Order 41, Rule 33 of the Civil Procedure Code must be interpreted in the sense sought to be put on it by the learned counsel for the respondent The appeal from the trial Judge in this case was under section 20 of the Union Judiciary Act which reads: "An appeal shall lie to the High Court from the judgment of a single Judge of the High Court sitting in the exercise of its original jurisdiction. . . . " For our purpose, however, it would not have made a difference if the appeal had been one under section 96 of the Civil Procedure Code which reads :

"96 (1). Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court."

The right of appeal thus given, either by the Union Judiciary Act or by the Civil Procedure Code, is a substantive right: see *National Trustees Co. of Australia* v. *General Finance Co. of Australia* (1), *Delhi Cloth and General Mills Co.* v. *Income Tax Commissioner, Delhi* (2) and *Sadar Ali* v. *Dalimuddin* (3). Now, what is that substantive right which is given by either of these enactments ? It is a right to have the decision of an inferior Court put to judicial

(1) (1905) A.C. 373 (2) 54 I.A. 421.
(3) 56 Cal. 512

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examination by a higher Court to test the correctness or legality of that decision and to have that decision, if found incorrect or not in accordance with law, rectified by the higher Court. Though the remedy in respect of that right may be taken away from the 2nd and 3rd defendants on the expiry of the period provided by the Limitation Act, the substantive right otherwise remains untouched ; and with this right the power of the Appellate Court in an appeal properly before it to vindicate that right, unless that power has been otherwise curtailed. Can it then be said in a case like the present that there is any provision in the Civil Procedure Code or elsewhere or any principle of law which would operate to curtail such power of the Appellate Court ? Reference has been made to *V.P.R.V. Chokalingam Chetty* v. *Seethai Acha* (1) and the same case on appeal before the Privy Council (2) by the learned counsel for the appellant in support of his contention that with the barring of the remedy to the 2nd and 3rd defendants by way of an appeal the appellant is entitled to hold the decree against them and, with that, the decree against the respondent which the trial Court had granted him. But a careful study of the decision of the Rangoon High Court and of the Privy Council does not lend support to the learned counsel's claim. In our opinion the true basis of these decisions is that the prohibition under section 3 of the Limitation Act against appeals being accepted beyond the time set by the Limitation Act should not be allowed to be circumvented by the indirect method of adding a respondent against whom the appeal is barred. The substantive right of a very valuable kind which by operation of *res judicata* a party has obtained against a non-vigilant appellant should normally be indefeasible.

(1) 2 Ran. 541. (2) 6 Ran. 29.

Where the appeal as originally instituted was not competent because of the absence of necessary parties, there is in law no appeal before the Court ; and in such a case, as the Patna High Court has in *Badri Narayan* v. *East Indian Railway Co.* (1) held it would not be open to the Appellate Court to add the omitted respondent and cure the initial incompetency of the appeal. In the present case, in so far as the respondent challenges the quantum of damages awarded to the appellant by the trial Judge, the 2nd and 3rd defendants may be persons interested in the result of the appeal ; but they are not necessary parties in the sense that they may possibly be, if the respondent seeks to establish that the 2nd and 3rd defendants only are liable in damages in the sum awarded by the trial Judge.

The rule of natural justice that no one shall be damnified unheard cannot apply here. The decree passed against the 2nd and 3rd defendants can at the worst remain affirmed as a result of the appeal by the respondent. That decree cannot be varied except to their advantage in the further hearing before the Appellate Bench of the High Court to which we may remit the appeal. While therefore, we are satisfied that the Appellate Bench would have power to direct the addition of the 2nd and 3rd defendants as respondents, we cannot see the necessity or the expediency of applying the provisions of Order 41, Rule 20 of the Civil Procedure Code. If brought on the record these defendants may enjoy the privilege of being heard in support of the respondent's challenge of the quantum of damages awarded by the trial Judge to the appellants ; but they are not entitled to the privilege of a hearing *ex debito justitiae ;* and no special reason exists for a discretion being exercised in their favour.

(1) 5 Pat. 755.

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The only outstanding question in this appeal, then, is the amount of damages to be awarded to the appellant. The amount assessed by the trial Judge is being questioned in appeal and we had by our earlier judgment contemplated the hearing of this disputed matter to be in the first instance by the Appellate Bench of the High Court, whose finding is to be examined by us on a report thereof by that Bench. This as submitted by the learned counsel will involve a duplication of arguments in the two Courts ; and we agree with them that the principles of section 103 of the Civil Procedure Code may with profit be adopted.

After hearing learned counsel on the question of the amount of damages to be awarded to the appellant, we shall pass final orders in the appeal.

---

This final judgment was passed by the same learned Judge on 21st August 1950.

We have now heard learned counsel on the true measure of damages to be awarded to the plaintiff-appellant and we have no hesitation in coming to the conclusion that nothing that has been said before us on behalf of the respondent—and Mr. Foucar has said all that can possibly be said—would justify our interference with the damages assessed by the learned trial Judge. It is true, as the learned counsel for the respondent has contended, that the evidence adduced by the appellant was of a comparatively sketchy nature and also that the witnesses called by him to estimate the value of his goods converted by the 3rd defendant differ in their valuation ; but for reasons which we shall now proceed to state we are satisfied that the respondent cannot legitimately complain against the sum awarded by the learned trial Judge

The appellant's shop, with its stock of hardware and mill stores was left locked without anyone in

charge on the general evacuation of Rangoon in 1942. Following that evacuation the shop suffered the fate, common to other premises in Rangoon, of being looted by lawless characters. It was then that between the respondent and the 3rd defendant, in the words of the respondent "talk was going on about the plaintiff's shop for some days" and following the talk the respondent locked up the premises with his own padlock. Having done this the respondent handed over the keys to I. G. Mohamed with instructions to transfer them to anyone who obtained a permit from the Hiraoka Commission. The respondent then told the 3rd defendant of what he had done and suggested (in his own words) that "if the 3rd defendant made an application to the Hiraoka Commission it would be possible for him to get the shop." When the 3rd defendant on this applied to the Hiraoka Commission and an enquiry consequent on that application was made from the respondent by an officer of that Commission, the respondent, to quote him, "told him about those whom I know including the 3rd defendant" with the result that the 3rd defendant obtained the permit, the keys and the shop with the goods therein.

When questioned in cross-examination: "Being prepared to assist the 3rd defendant to obtain possession of the plaintiff's shop, did you think it proper to ensure the 3rd defendant to keep proper accounts?" The reply of the respondent was: "Yes, I think it proper". Having made this admission the respondent goes on to claim that he did not ask the 3rd defendant to keep proper accounts of the goods taken over and sold, that he did not attempt to find out if the 3rd defendant kept any accounts and that he did not know if the 3rd defendant did keep accounts at all. He merely assumed that "since he (3rd defendant)

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had opened the shop he must keep regular accounts". It is clear that the learned trial Judge did not accept the respondent's claim that he had no knowledge whatsoever in regard to the accounts, if any, kept by the 3rd defendant. We also take the same view. The conduct of the trial shows clearly that the respondent and the 3rd defendant could not have been acting independently, as the respondent desires the Courts to accept. The 3rd defendant in cross-examination admitted that he had been instructing not only his advocate but also the respondent's advocate and that the respondent had been giving instructions not only to his own advocate but to the advocate of the 3rd defendant, as well.

The 3rd defendant admits that he kept accounts of the various sale transactions he carried on during the Japanese occupation out of the appellant's goods but claims that the account books were burnt during an air raid in January-February 1944. That the 3rd defendant did keep accounts of the sales is spoken to by the 2nd defendant also who claimed to be a mere assistant in the shop. The 2nd defendant also vaguely supported the 3rd defendant's story that the account books were destroyed by fire. But there are circumstances on the record from which we feel entitled to conclude that these account books were never destroyed as claimed by the 3rd defendant and that, if the respondent and the 3rd defendant who had been acting together in the conduct of their respective defences had so cared, the books would have been available to the Court.

The 3rd defendant claims that the account books were destroyed in January-February 1944 while he was living in a hut on Prome Road opposite the University site. The 2nd defendant who admittedly parted company from the 3rd defendant by the end of March

1944 was definite that he last saw these account books on 15th of March 1944 when the books and the permit from the Hiraoka Commission were taken to the Income-tax Adviser U Ba Sein for the purpose of the income-tax proceedings in respect of this shop and business. Exhibit 24, which is a receipt granted to the 3rd defendant by the Income-tax Adviser, is dated 11th November 1944 ; and on the income-tax demands, Exhibits 21 and 22, in respect of which obviously advice had been sought from U Ba Sein appear respectively the dates 28th October and 31st October 1944. U Ba Sein, though admittedly in Rangoon at the date of the trial and his exact address was known to the 3rd defendant, was not called as a witness. The letter written on 19th July 1945 by the 3rd defendant to the appellant (Exhibit C) states definitely that the account books were then in existence and in the possession of the 3rd defendant. At the trial the 3rd defendant produced from his custody a stock-book which has been numbered Exhibit 1. This stock book bears the date 31st March 1940 and relates to goods then in the shop of the appellant. Why this stock book was not destroyed and only the account books came to be burnt during the Japanese occupation, is not satisfactorily explained.

The account books, which we consider the respondent and the 3rd defendant could have produced but did not, would no doubt have been the best possible evidence in the establishment of the true measure of damages to be awarded to the appellant. Failing the production of these account books the respondent cannot have a legitimate grievance if the learned trial Judge had to do the best he could on such materials as were on the record to arrive at the value of the goods converted. Madha, whom the learned trial Judge has accepted as a witness of truth, has estimated the goods

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taken over by the 3rd defendant to be of the value between Rs. 50,000 and Rs. 60,000 as at the date of such taking over. That Madha was present at the shop when it was opened and taken over by the 3rd defendant is admitted by the 3rd defendant himself. Madha is obviously not a partisan witness prepared to perjure himself in the interests of the appellant. If he had been a partisan witness it would have been the easiest thing for him to have said that he made a more leisurely inspection of the goods in the shop before he arrived at his estimate of their value. His valuation therefore cannot be totally rejected though we agree that it has to be counter-checked with the other available materials on the record. Lyall (P.W. 1) valued these goods at between Rs. 20,000 and Rs. 40,000. He explains that he valued them so low because similar goods, looted from various places in the City of Rangoon about the time, were thrown on the market. He said of those days that "the kind of article that cost about Rs. 500 would fetch about Rs. 5 only". If the premise on which Lyall based his valuation can be accepted *Josling* v. *Irvine* (1) relied on by Mr. Foucar may be apposite. But whatever the position might have been about the end of February 1942 when there was absolute lawlessness in the city, the evidence on the record is conflicting as to the relevant prices of hardware and mill stores before evacuation and about the time the 3rd defendant obtained a permit from the Hiraoka Commission and opened the shop. Madha claimed that such goods had appreciated in value and Seedat, exaggerated though his estimate may have been, supports Madha. M. S. Kaka, another witness for the appellant, stated in respect of the mill stores and hardware that "the selling price of such goods in May-June 1942 was

(1) (1861) 158 E.R. 210.

double the pre-war rates on the general average." His estimate was tested by reference to vouchers and other documents evidencing the market rates of such goods at the relevant periods and the witness stood the test well.

Mr. Foucar for the respondent, relying on *Josling* v. *Irvine* (1) contended that the sale proceeds in the years 1942 to 1944 would not provide a true measure of the damages for the act of conversion in May 1942. He may be right; but the learned trial Judge has not based his finding in respect of the measure of damages on such sale proceeds. He merely employed the figures of Rs. 2,40,000 in Japanese currency admitted to have been collected in the course of these three years by the 3rd defendant from the sale of the appellant's goods, in making a counter-check of the evidence adduced on behalf of the appellant.

In these circumstances we feel that the appellant can properly invoke the principles laid down in *Armory* v. *Delamirie* (2). Mr. Foucar has suggested in the present case that his client's duty would be merely to rebut the testimony adduced by the appellant in proof of the value of the goods converted and that in the absence of more cogent evidence than that which the appellant has been able to adduce at the trial there was no duty cast on him to assist the Court in any way. In *Armory's case* (2) the Chief Justice directed the jury that unless the jeweller who took out the stones from the jewel found by the plaintiff and produced to the jeweller for examination "did produce the jewel, and shew it not to be of the finest water, they should presume the strongest against him and make the value of the best jewels the measure of the damage". Lord Cairns in

(1) (1861) 158 E.R. 210. (2) 93 E.R. 664.

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*Rammersmith Railway Co.* v. *Brand* (1) said in application of the rule in Armory's case :

"There is a well-known principle which applies to such cases, which is, that if the persons against whom the claim is made are not willing to bind themselves as to the maximum number of trains, or the weight, or the speed, then the sum must be taken most strongly against their company : upon the principles enunciated in the well-known old case of *Armory* v. *Delamirie*. And the largest amount of injury which can be sustained would probably be considered to be the amount to be awarded by the tribunal which has to award compensation."

We do not go so far in pressing the maxim *odium spoliatoris* in this case as has been in *Wardour* v. *Berisford* (2) where even though the wrong-doer, who had opened a bundle of papers relating to an account which had been sealed up and left in his hands, satisfied the Lord Chancellor that all the papers entrusted to him had been produced, yet his claim for a debt based on the entries in the same accounts was rejected.

This case is, in our opinion, pre-eminently one where the rule which the House of Lords has laid down in *Watt* v. *Thomas* (3) should find application. As Lord Thankerton said :

"The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

Or again, as Lord Macmillan said :

"If the case on the printed evidence leaves the facts in balance, as it may be fairly said to do, then the rule enunciated in this House applies and brings the balance down on the side of the trial judge."

(1) (1869) L.E. 4 H.L. 171 at 224. (2) 23 E.R 579.
(3) (1947) A.C. 484 at 493.

It may be possible in this case to think that the figure arrived by the learned trial Judge in assessing damages to be awarded to the appellant is not absolutely correct. But can any other figure based on the materials before us be more exact? After all, an appeal is a judicial examination of the decision of a lower Court for the purpose of finding if that decision is incorrect and, if so, to rectify it. The burden is on the party challenging that decision to establish that the decision is incorrect. Can we say of the trial Judge in this case that "after reading the printed record, and after making allowance for possible exaggeration and giving full weight to the judge's estimate of the witnesses, no conclusion is possible except that his decision was wrong?" (1). We can come to no such conclusion in the present case.

It follows therefore that the appeal must be allowed. The judgment and decree of the Appellate Bench of the High Court is set aside and the decree of the leaned trial Judge confirmed. The appellant is entitled to his costs in this Court and before the Appellate Bench of the High Court.

(1) Per Lord Du Parcq in 1947 A.C. at 493.

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ACCUSED AGED 15—*S. 19-A* (1) (a), *Arms (Temporary Amendment) Act, 1949—Young Offenders' Act, s. 15—Proper sentence.* There was a skirmish between a police party and White PVOs. Three of the skirmishers were left in a paddy field after the skirmish. Appellant one of the three was found holding a Japanese rifle loaded with two live cartridges. He was convicted and sentenced for transportation for life by the trial Court. It was found that he was aged only about 15. *Held:* That under the Young Offenders' Act, s. 15 no person under 16 shall be sentenced for death or transportation. However the accused was found fighting against the police with firearms and the offence was a serious one and he must be deemed to be a depraved or unruly character and a sentence of imprisonment sufficiently adequate to prove a deterrent should be passed. Appellant sentenced for two years rigorous imprisonment.

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AMENDMENT OF PLAINT—*Suit stated to be under s. 9, Specific Relief Act—Amendment application after evidence closed—Change omitting reference to s. 9—Whether different causes of action—Order 6, Rule 17—Civil Procedure Code—Principles governing amendment. Held:* The principles governing applications for amendment of plaint are settled. Leave to amend should be refused if (1) it is not necessary, (2) the plaintiff's suit will be wholly displaced by the proposed amendment, (3) the effect is to take away from defendant a legal right which has accrued to him by lapse of time, (4) the amendment would introduce a new and inconsistent case, at a late stage, or (5) the application is not *bona fide. U Naing and others* v. *Ko Sein*, A.I.R. (1938) Ran. 125; *E.K.S. Chettyar Firm* v. *Maung Min Maung and others*, A I R. (1933) Ran 247, distinguished. *Ma Shwe Mya* v. *Maung Mo Hnaung*, 48 I.A. 214 at 217, followed. The averments in the present case amounted to no more than a repetition of the original allegations and did not prejudice the defendant's defence or result in any injustice to him. To describe the allegations in the original plaint as under s. 9 of the Specific Relief Act, without an allegation of dispossession by defendant otherwise than in due course of law, is a mistake in pleadings due to lack of skill. It is the duty of courts to decide the rights of parties and not to punish them for their mistakes in the conduct of cases. *Cropper* v. *Smith*, 26 Ch. D. (1884) 700 at 710, followed. The plaintiff's object was to recover possession but only asserted in a form which the Statute did not permit. *Charan Das and others* v. *Amir Khan and others*, 47 I.A. 255 at 262, followed. *Narain Das* v. *Het Singh and others*, 40 All. 637, referred to and approved.

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APPEAL—*Non-joinder of necessary party—Effect of*—Where the plaintiff filed a suit for the recovery of possession of a piece of land from the 1st defendant and added his own vendor as a party to the suit and the Court held that the vendor was the owner of the land and conveyed good title to the Plaintiff and decreed the

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suit; the defendant preferred an appeal but did not make the vendor a party to the appeal. The District Court dismissed the appeal on the ground that the appeal was incompetent for the failure of the defendant-appellant to add the vendor as a party. *Held*: That as the vendor was a necessary party to the suit and it having been found that the vendor was the owner and the decision as to the ownership has become final, the principle laid down in *V.P.R.V. Chokalingam Chetty and one* v. *Seethai Achi and others*, I.L.R. 6 Ran. 29 (P.C.), applied and the appeal was rightly dismissed as incompetent. The finding that the vendor was the owner has become *res judicata* between the vendor and the defendant. *V.P.R.V. Chokalingam Chetty and one* v. *Seethai Achi and others*, 2 Ran. p. 541; *Sundara Ramanujam Naidu* v. *Sivalingam Pillai and another*, 47 Mad. p. 150; *Serajul Huq Khan* v. *Abdul Rahman*, 29 Cal. p. 257; *Munni Bibi* v. *Tirloki Nath and others*, 58 I.A. p 158, followed. *Ma On Thin* v. *Ma Ngwe Yin and another*, 7 Ran. 398; *Lakhajee and another* v. *Sein Dass and another*, A.I.R. (1940) Ran. 97; *Arulayi and others* v. *Rakka Kudumban*, A.I.R. (1938) Mad. 501, distinguished.

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APPEAL—*Points of law—When can be raised for the first time—Estoppel—What constitutes estoppel—Sale by one of the executors.* When a question of law is raised for the first time in an appeal upon the construction of a document or upon facts admitted or proved beyond controversy, in the interest of justice, the plea should be entertained. But the course ought not in any case to be followed, unless the court is satisfied, that the evidence upon which the court is asked to decide, establishes beyond doubt that the facts, if investigated would have supported the new plea. The evidence given on one point cannot be interpreted or treated as evidence of another point not raised by the parties in the trial court, where evidence is necessary, or is not complete, permission to raise a new point will not be granted. *Connecticut Fire Insurance Co.* v. *Kavanagh*, (1892) A.C. 473; *Ram Kinkar Kai and one* v. *Tufani Ahir and others*, A.I.R. (1931) All. 35 (F.B.); *A.R.M.N.A. Chettyar Firm* v. *R.M.V.S. Chettyar and others*, (1938) R.L.R. 256; *M. E. Moola Sons Ltd.* v. *Burjorjee*, (1932) I.L.R. 10 Ran. 242, followed. If a person by word or conduct has intimated that he consents to an act which had been done or that he will not offer opposition, he cannot then question the legality of the act afterwards. *Cairncross* v. *Lorimer*, (1860) 3 Macq. 827 at 829, followed. Where there are several executors, and one of them only proves the Will and is granted Probate then he is the only person who can deal with the estate, where the power of management was given to executors jointly and severally, one of the executors who proved the Will can sell the properties of deceased.

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ARMS (EMERGENCY PUNISHMENT) (TEMPORARY) ACT, 1949 s. 2 (*1*) (*d*). *Held*: That Arms (Emergency Punishment) (Temporary) Act, 1949 has been enacted for certain special purposes. Where it is in conflict with the Arms Act it must be held to supersede the more general provisions of the Arms Act.

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BUDDHIST MOTHER—*Marrying Mohamedan and changing religion—Succession to estate—Unconverted Buddhist daughter—Rights of—Burma Laws Act (XIII of 1898) s. 13—"Parties"—Meaning of—Interpretation of Statutes—Interpretation conflicting with accepted principles to be avoided.* Where a Buddhist mother married a Mohamedan, after conversion to the latter faith, and died and her unconverted Buddhist daughter claims a share in her estate. *Held*: That the claim is governed by Mohamedan Law under which a non-Muslim cannot be an heir and her suit must fail. The personal law of the deceased governs succession to the estate. *C.V.N.C.T. Chedambaram Chettyar* v. *Ma Nyein Me and others*, 6 Ran. 243; *Balwant Rao and others* v. *Baji Rao and others*, 47 I.A. 213; *Mitar Sen Singh* v. *Maqbul Hasan Khan and others*, 57 I.A. 313, referred to and applied. The law applicable to such a case is to be found in s. 13 (*1*) of the Burma Laws Act. S. 13 (*3*) of the same Act is not applicable. The word "parties" in s. 13 (*a*), (*b*) and (*c*) does not mean parties to the suit but has reference to the inception of the right involved in the action. *Bhagwan Baksh Singh* v. *Drigbijai Singh and others*, 6 Luck. 487; *Gobind Dayal* v. *Inayatullah*, 7 All. 775 (F.B); *Khoo Haing Sein and three others* v. *Khoo Peing Hoe and three others*, Bur. L.J. Vol. I, 56; *John Jiban Chandra Datta* v. *Abinash Chandra Sen*, (1939) 2 Cal. 12, approved. Where two interpretations are possible, the one most in accord with justice, convenience, reason and legal principles, should be applied, as it is most improbable that the legislature would overthrow fundamental principles. *Maxwell on Interpretation*, referred to.

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BURMA COURTS ACT, 1945—*S. 5—Suit filed before Subordinate Judge—Decided by Assistant Judge—Jurisdiction—Code of Civil Procedure, ss. 21 and 99. Held*: That under s. 5 of the Courts Act, 1945 there are three grades of Civil Courts, the District Court, the Court of the Assistant Judge and the Subordinate Judge. The jurisdiction conferred on the Judges is personal. There is a departure from the old system when an Assistant Judge or Subordinate Judge could exercise territorial jurisdiction and preside over more than one court and the jurisdiction was in the courts. The decision by an Assistant Judge "sitting as First Subordinate Judge" in a suit instituted before the latter Judge is without jurisdiction and not merely an irregularity which can be cured under s. 99 of the Code of Civil Procedure, nor is it an objection to the place of suing under s. 21 of the Code of Civil Procedure.

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BURMA EXCISE ACT—*Ss. 30 (a) and 46—Enhanced punishment for offender with previous conviction—Summons case or warrant case—Case tried as summons case and fines of Rs. 100 and Rs. 60 imposed—Trial—Illegal or irregular.* Where applicants, husband and wife, were convicted under s. 30 (*a*) of the Burma Excise Act for being in possession jointly of excisable articles without a permit, and were sentenced to pay fines of Rs. 100 and Rs. 60, as being previous offenders under s. 46 of the Act on a trial as a summons case. *Held that :* As the maximum sentence liable to be imposed in the case, is imprisonment for one year or a fine of Rs. 2,000, for a subsequent conviction for the same offence, the magistrate could not try the case as a summons case under the Criminal Procedure Code. *Gayaprasad* v. *Emperor*, A.I.R. (1932) Nag. 111 ; *Sufar Golai* v. *Emperor*, A.I.R. (1938) Cal. 205, referred to. Such a trial is not a mere irregularity curable under s. 537, Criminal Procedure Code.

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BURMESE BUDDHIST LAW—*Estate of deceased step grandparent—Rival claims of daughter of* Kilitha *daughter and* Apatittha *daughter—Justice, equity and good conscience*—Kilitha, *if illegitimate. Held :* That in a contest to the estate of a deceased step-grandparent governed by Burmese Buddhist Law, as between the child of a *Kilitha* daughter and the daughter of an *Apatittha* son, both are entitled to inherit. A *Kilitha* child is not an illegitimate child but only inferior to children born of parents who live openly together. *U E Maung*'s Buddhist Law, p. 194-195, referred to *Ma Sein Hla* v. *Maung Sein Hnan*, (1903-04) 11 L.B.R. 54, distinguished. *Digest*, I, 17, referred to. The status of an *Apatittha* son cannot be higher than that of a *Kilitha* son. *Manukye*, Vol. X, s. 51, referred to. *Kinwun Mingyi*'s *Digest*, Vol. 1, s. 301, referred to. A *Kilitha* child will, unlike an *Apatittha* child, exclude other relations from inheritance. *U E Maung*'s Buddhist Law, p. 225, referred to. The peculiar circumstances in the case did not fit in with the contingencies in the case law nor provided for in the *Dhammathats* and in accordance with the principles of justice, equity and good conscience, each claimant was held entitled to half.

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CIVIL PROCEDURE CODE, S. 110, PARAGRAPH 2—*S. 5* (c), *Union Judiciary Act, 1948—Value of subject-matter of the appeal—Mortgage decree—Value of debt or of property given as security.* For the purposes of granting a certificate under s. 5 (*c*) of the Union Judiciary Act, as under s. 110 (2) of the Code of Civil Procedure, the judgment must involve directly or indirectly some question respecting the property, the value of which is not less than Rs 10,000. In a suit on a mortgage, the mortgagee cannot obtain more than the amount claimed under the decree which, in this case was less than Rs. 10,000. It is not the value of the

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property that is the test. *M. E. Moolla & Sons, Ltd.* v. *Leon Shain Sway*, (1926) 4 Ran. 92 at p. 94 ; *De Silva* v. *De Silva* (1904) 6 B.L.R. 403 at p. 406 ; *N. C. Galliara* v. *A.M.M. Murugappa Chetty*, (1934) 12 Ran. 355 at p. 363 and 364 ; *Mrs. Constance M. Writer* v. *A. M. Khan*, 1950 B.L.R. 65, referred to and followed. *Nadir Hussain and others* v *Municipal Board, Agra*, (1937) All. 405 at p. 410 ; *Ishwari Prasad Singh and others* v. *Sir Kameshwar Singh Bahadur and others*, (1941) A.I.R. Pat. 288, distinguished

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CIVIL PROCEDURE CODE, ORDER 33, RULES 3 (1) (*b*) 4 AND 5—*Leave to sue* in forma pauperis—*No cause of action disclosed and first application dismissed—Maintainability of subsequent application.* Where an application to sue *in forma pauperis* was dismissed on the ground that it did not disclose any cause of action and a second application is competent. *Held :* That a rejection of any of the grounds mentioned in Rule 3 will be a rejection under that rule, and not under Rule 4. The rejection under Rule 4 refers to rejection for the reasons set out therein and is not meant to cover a rejection under Rule 3. The mere fact that a notice is issued before an application is rejected under Rule 3 does not make the rejection one under Rule 4. *Dr. A. Karim and one* v. *Pandit Laic Ram and others*, (1939) R.L.R. 263, distinguished. *Maung Shwe Tha and others* v. *Ma U Kra Zan*, (1932) I.L.R. 13 Ran. 475, referred to.

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CODE OF CIVIL PROCEDURE, S. 37, Order 21, Rule 95—*Decree-holder auction purchaser—Delivery of possession to—Whether relates to execution, discharge or satisfaction of decree—Remedy—Agreement after execution—Whether adjustment—Whether revision lies.* The Respondent having purchased a house at a court auction in execution of his own decree applied for delivery of possession under Order 21, Rule 95 of the Code of Civil Procedure. Later parties filed a joint petition that applicant was to deliver vacant possession after removal of buildings before 10th January 1948 and upon failure the court should act in accordance with the original application. Upon a further application by the Respondent the court ordered execution as first prayed for. On appeal the District Court held that no appeal lay. It was contended for the appellant that the Respondent is a party to the suit, that the question of delivery of possession relates to execution, discharge or satisfaction of the decree within s. 47 of the Code of Civil Procedure. *Held:* The question whether applicant had or had not failed to give vacant possession after removing the buildings before the 10th of January 1948 arose out of the agreement and the agreement itself was not an adjustment of the

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decree. *Held further:* That the auction purchaser's right to possession against the judgment-debtor is not a question relating to execution, discharge or satisfaction of the decree. *Held:* That the question whether there has been a breach of a condition in any agreement is a pure question of fact which the trial Court had jurisdiction to decide and there is no ground for revision of the order of the trial Court. *J. A. Martin* v. *S. M. Hashim and others*, (1930) I.L.R. 8 Ran. 162, followed. *Semabi* v. *Ganapatrao Yadarao Pande*, A.I.R. (1938) Nag. 212; *Kashinatha Ayyar* v. *Uthumansa Rowthan*, (1902) 25 Mad. 529=12 M.L.J. 1; *Kattayat Pathumay* v. *Raman Menon*, (1903) 26 Mad. 740=13 M.L.J. 237; *Sandhu Taraganar* v *Hussain Sahib*, (1905) 28 Mad. 87=14 M.L.J. 474; *Vevindramuthu Pillai* v. *Maya Nadan*, (1920) 7 A.I.R. Mad. 324=54 I.C. 209=48 M.L.J. 32 (F.B); *Kailash Chandra Tarapdar* v. *Gopal Chandar Poddar*, (1926) 13 A.I.R. Cal. 798=95 I.C. 494=53 Cal. 781=30 C.W.N. 649=43 C.L.J. 345 (F.B.); *Kalipada Mukherji* v. *Basantakumar Dutta*, (1932) A.I.R. Cal. 126=138 I.C. 177=59 Cal. 117=35 C.W.N. 877; *Bhagwati* v. *Banwari Lal*, (1909) 31 All. 82=1 I.C. 416=6 A.L.J. 71 (F.B.); *Mohsin Raza Khan* v. *Haidar Bakhsh*, (1928) 15 A.I.R. All. 368=115 I.C. 869=50 All. 670=26 A.L.J. 498; *Kedar Nath* v. *Arun Chandra Sinha*, (1937) 24 A.I.R. All. 742=172 I.C. 57=(1937) A.L.J. 889=I.L.R. (1937) All. 921 (F.B.); *Tribeni Prasad Singh* v. *Ramasray Prasad Choudhuri*, (1931) 18 A.I.R. Pat. 241=133 I.C. 337=10 Pat. 670=12 P.L.T. 423 (F.B.); *Hargovind Fulchand* v. *Bhudar Raoji*, (1924) 11 A.I.R. Bom. 429=83 I.C. 932=48 Bom. 550=26 Bom. L.R. 601 (F.B.); *Hira Lal Mohan Lal* v. *Ramachandra*, (1930) 17-A.I.R. Bom. 375=125 I.C. 703=54 Bom. 479=32 Bom. L.R. 619; *Brij Lal* v. *Durga*, (1920) A.I.R. Lah. 159=56 I.C. 254=1 Lah. 134=132 P.L.R. (1920); *Gaya Bakhsh Singh* v. *Rajentra Bahadur Singh*, (1928) A.I.R. Oudh, 199=110 I.C. 83=3 Luck, 182=5 O.W.N. 108 (F.B.).; *Prosunmo Kumar Sanyal* v. *Kali Das Sanyal*. 19 Cal. 685; *Karlon Bibi* v. *V.M.R.P. Chettyar*, (1941) R.L.R 767; *Haji Dada* v. *Pannalal*, 169 I.C. 99, considered.

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CODE OF CIVIL PROCEDURE, S. 115—*Interference with interlocutory orders in revision. Held:* The High Court will interfere in revision with interlocutory orders from which no appeal lies if irreparable damage would be caused by refusal to interfere. *Jupiter General Insurance Company, Limited* v. *Abdul Aziz*, 1 Ran. 231, referred to and followed. It is a material irregularity to decide a case in the absence of a necessary party. *Umed Mal* v. *Chand Mal*, 53 I.A. 271; *Lala Atma Ram* v. *Lala Beni Prasad and others*, 62 I.A. 257 or 57 All. 678, referred to. If the order of the Lower Court amounts to a decision dismissing a necessary party from the suit and driving him to a separate litigation such order can be revised under s 115 of the Code of Civil Procedure. It is desirable that where there are common questions of law or fact to decide the same court in order to avoid possible conflict of decisions in separate suits should decide those questions in one suit. *C S. Govindaraja Mudaliar* v. *Alagappa Thambiram and others* A.I.R. (1926) Mad. 911, referred to and applied.

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CODE OF CIVIL PROCEDURE, ORDER 41, Rule 27—*Recording of evidence of witnesses—Waiver in the Trial Court—Second Appeal—Erroneous finding of fact—When can be questioned—Legal effects—Question of law. Held:* That when a witness had been

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waived deliberately by the party no opportunity should be given under Order 41, Rule 27, Code of Civil Procedure in appeal. The proper legal effect of a proved fact is essentially a question of law. *Nafar Chandra Pal* v. *Shukur and others*, 45 I.A. 183 at 182 ; *Ram Gopal and another* v. *Shamskhaton and others*, 14 I.A. 228 at 232-33, referred to and applied. Where the Lower Courts had not attempted to consider what was the legal effect of certain facts proved in the case and gave undue consideration to the absence of a witness there is sufficient ground for interference under s. 100, Code of Civil Procedure.

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CODE OF CRIMINAL PROCEDURE, s. 350—*Evidence partly heard by one Judge and continued by another—Whether valid—Waiver by accused—Effect.* Where one Magistrate heard a case under summary procedure and his successor continued the hearing from the point left off and convicted the accused. *Held :* Under s. 263 of the Code a Magistrate need not record evidence in a summary trial. But if he does record the evidence, that evidence does not form part of the record for according to s. 263 the judgment recording the substance of the evidence "shall be the only record". Therefore in a summary trial, one Magistrate cannot use the evidence recorded by his predecessor under s. 350 of the Code. Conviction based on such evidence is illegal for the error committed by the Magistrate affects his jurisdiction. *Emperor* v. *Hemandas Devansingh and others*, (1936) A I.R. Sind 40 ; *Nannier* v. *Desalier*, 55 Mad. 795 at 799, referred to.

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CODE OF CRIMINAL PROCEDURE—*S. 528 (4) and (5)—Transfer of cases from one Court to another—Reasons for—to be recorded—Functions judicial—Personal knowledge of judge. Held :* S. 528 (5) of the Code of Criminal Procedure provides that a Magistrate making an order shall record in writing his reasons for so doing. A transfer of a case at the whim or caprice of the Magistrate seriously interferes with the working of Courts and shakes the confidence of the public. Transfer of a case is a judicial function and must be exercised with due observance of the procedure and formalities which have to be followed. *Sugnomal Tahilram* v. *Phapandas Relumal*, A.I.R. (1936) Sind 237 at 240 ; *Gowardhandas Kapur* v *Abbas Ali*, A.I.R. (1930) Lah. 168 at 169, applied. It is a fundamental of the due administration of justice that Judges and Magistrates should not only be fair and impartial but should also appear to reasonable persons to be fair and impartial. *Vellu Thevar and another* v. *King-Emperor*, 10 Ran. 180, followed.

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COMPROMISE ORDER—*Application to set aside Arbitration Act, 1944, s. 33—Whether application under lies.* A compromise between the parties provided for challenging or contesting all matters under s. 33 of the Arbitration Act, 1944. The applicant made an independent application under the said section. Upon objection that no independent application lay. *Held* : That the compromise contained no provision precluding an independent application or restricting the remedy and the intention of the parties is not relevant. The duty of the Court is only to construe the terms of the compromise and so construed that an independent application lay.

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CONTRACT ACT, s. 70—*Conditions of Liability—"Lawfully"—Meaning of—"Person enjoys the benefit" Official Receiver—If such person—Position of. Held* : S. 70 of the Contract Act requires three conditions *viz.*, that a thing must be done lawfully, that it must not be done gratuitously and the person sought to be charged must have enjoyed the benefit. To support a suit under this section, there must be an obligation, express or implied, to repay. *Ram Tuhul Singh* v. *Biseswar Lall Sahoo*, (1875) 2 I.A. 131 at 143, followed. The terms of the section are wide but must be applied with discretion to do substantial justice in cases where a contractual relationship cannot be imputed. *Suchand Ghosal* v. *Balaram Mardana*, (1911) 38 Cal. 1 at 7, referred to. The word "lawfully" in the section is not a surplusage. The question in each case would be whether the person paying had a lawful interest in making it. "Lawful" has a wider meaning than legal. *Gopeswar Banerjee* v. *Brojo Sundari Devi*, (1922) 49 Cal. 470 at 473 ; *Raja Baikunto Dey Bahadur* v. *Uday Chand Maiti*, (1905) 2 C.L.J. 311 ; *Punjabhai* v. *Bhagwandas*, (1929) 53 Bom. 309 at 313-314 ; *Chedi Lal* v. *Bhagwan Das*, (1888) 11 All. 234 ; cited with approval. A receiver is merely an officer of court, sometimes referred to as the hand of the court. He acquires no proprietory interest in the property. He is not the agent or representative of any party to the suit and holds the property for the benefit of the party ultimately successful in the suit. He cannot therefore be said to be a person who had benefited by the repairs to the property, belonging to another person. *Po Shan* v. *Maung Gyi*, 5 Lower Burma Rulings, 213 at 215 ; *Maung Ohn Tin* v. *P.R.M.P.S.R.M. Chettyar Firm and others*, (1929) 7 Ran. 425 at 426 ; *Eastern Mortgage and Agency Co. Ltd. and T. C. Tweedle* v. *Muhammad Fazlul Karim and another*, (1925) 52 Cal. 914 at 931 ; *Ma Joo Tean and another* v. *The Collector of Rangoon*, (1934) 12 Ran. 437 at 440 ; *Harihar Mukerji* v. *Harendra Nath Mukerji*, (1910) 37 Cal. 754, referred to and followed.

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CONTRACT ACT, s. 231—*Rights of undisclosed Principal—S. 11 (1) (f), Urban Rent Control Act—"Reasonably and bonâ fide"—Meaning of.* Where the appellants had taken a lease of one floor of a house from the owner's son and subsequently the owner filed a suit for ejectment claiming that the house was wanted *bonâ fide* and reasonably for her occupation. *Held:* That the house having been leased on behalf of his illiterate mother by the son he must have done it on behalf of his mother. Under s. 231 of the Contract Act a principal can claim the benefit of a contract entered into by the agent in his own name and a suit for the ejectment by the principal was competent. That the owner had resided in the house prior to war; and the desire of the owner to occupy the same house is *bonâ fide*, as he desired to live together with her son and family—the son having retired from service, such desire cannot be said to be unreasonable because the owner had lived in another house previously. The requirements of s. 11 (*1*) (*f*) of the Urban Rent Control Act have therefore been duly complied with.

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CRIMINAL PROCEDURE—*Trial of case as summons case—Proceeded as Warrant case trial later—Irregularity or illegality—Failure of justice. Held:* When a criminal case was tried as a summons case at the start and then proceeded as a warrant case, the conviction is not illegal. The Magistrate is bound to apply the procedure laid down for a warrant case, when he finds that an offence triable as a warrant case has been committed. *In Re. K. V. Venkata Ramaier and others*, A.I.R. (1938) Mad. 815, followed. *Raja Ratnam Pillai* v. *Emperor*, A.I.R. 36 Mad. 341, not approved. If a mandatory provision of the Code of Criminal Procedure is infringed it does not follow therefrom that there has been a miscarriage of justice. *Nga U Khine and others* v. *King-Emperor*, 13 Ran. 1, referred to.

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EJECTMENT UNDER—Ex parte *decree for ejectment—Set aside later—Application for reinstatement by defendant—S. 144 or s. 151 of Code of Civil Procedure—Order under s. 144 of the Code—If appeal lies—Revision—Interference.* Where the lower court gave a decree for ejectment *ex parte* and put plaintiff in possession in execution and the decree was later set aside upon defendant's application and the court purported to put the defendant back in possession under s. 144, Code of Civil Procedure. *Held:* That s. 144 of the Code of Civil Procedure applies only when the decree had been varied or reversed by any appellate or revisional authority; and the order for restoration was in this case one under the inherent power of court under s. 151, Code of Civil Procedure and not under s. 144. Where substantial justice has been done, the High Court will not interfere in revision. The error in quoting s. 144, Code of Civil Procedure is only a technical error. *Valab Das and one* v. *Maung Ba Than and Jivandas Savchand* v. *Maung Ba Than*, 1 Ran. 372, followed.

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ESSENTIAL SUPPLIES AND SERVICES ACT (XLVII OF 1947)—*S. 8 (1) and (2) to be read with s. 517, Criminal Procedure Code—"Shall be liable to confiscation"—Meaning—Order of acquittal under s. 8 (1)—If can be varied or ignored by District Magistrate under s. 250, Criminal Procedure Code. Held:* The words "shall be liable to confiscation" in s. 8 (2) of the Essential Supplies and Services Act, 1947 does not mean the same thing as "shall be confiscated." The discretion of the Court with reference to disposal of property conferred by s. 517 of the Criminal Procedure Code, is not in any way fettered by s. 8 (2). What is envisaged by s. 8 (2) is that the Court should bear in mind the desirability of confiscating the property mentioned in that sub-section. As the accused has been acquitted by the trial Court on a charge under this sub-section, it is not open to the District Magistrate purporting to act under s. 520, Criminal Procedure Code to come to a contrary finding; as there was no appeal against the acquittal and such an appeal did not lie to that Court.

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EVIDENCE ACT, SS. 30, 101 AND 133—*Confession of a co-accused and testimony of an approver—Distinction—Criminal Procedure Code, s. 342 (1), (2)—Statement and evidence of a co-accused how far can be used against another. Held:* That the confession of a co-accused is not on the same footing as testimony of an approver which is substantive evidence in the sense that conviction can be based on it alone under s. 133 of Evidence Act. If there be no *primâ facie* evidence against an accused person, confession of a

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co-accused should be excluded. It cannot be used to fill up the gap in the evidence of the prosecution. *Khaw Taw and one* v. *The Union of Burma*, (1948) B.L.R. 310, followed. Similarly evidence given by a co-accused under s. 342 (1) as amended, of the Code of Criminal Procedure *may* be used as against a co-accused when the co-accused had opportunity to cross-examine and of calling evidence in rebuttal. *U Saw and nine others* v. *The Union of Burma*, (1948) B.L.R. 217, followed. *Po Han and Tun Ei* v. *The King*, (1947) R.L.R. 319, distinguished. But it is a fundamental principle that in a criminal trial the burden of proof lies on the prosecution to establish the charge beyond reasonable doubt and this principle has been recognized in s. 101 and illustration (*a*) to that section together with definition of 'proved' in s. 3 of Evidence Act. Where an accused person should have been discharged for want of *primâ facie* evidence against him, the court should not use the evidence of a co-accused given under s. 342 (1) of the Code of Criminal Procedure to fill up the gaps in the prosecution. The word used in s. 342 (1) is *may* and not 'shall.' *King-Emperor* v. *U Damapala*, 14 I.L.R. Ran. 666 (F B.) 681, followed.

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EVIDENCE Act—*Ss. 32, 43, 65 and 76—Previous deposition in Criminal case whether admissible—Judgment of Criminal Court if relevant in Civil case—Copy of deposition not bearing seal—Secondary evidence admissibility of*—res judicata—*Judgment by District Court under s. 42, Specific Relief Act—Whether the District Court legally competent to issue negative declaration—Nature of such jurisdiction—Change of religion right to inheritance if affected—Caste Disabilities Removal Act, 1850.* Plaintiff who was 62 years old brought a suit for administration and partition claiming that he was the eldest surviving son of the deceased by his first wife. The suit was resisted by the widow and others *inter alia* on the ground that the Plaintiff was not a son of the deceased but was the son of his first wife by her previous marriage, and that issue was *res judicata* by reason of a prior decision on admission in a suit brought by the deceased as Plaintiff in the District Court of Myaungmya against the present Plaintiff as Defendant for a declaration that the present Plaintiff was not his son but was his step-son. The Plaintiff by way of reply contended that the District Court had no jurisdiction to grant a negative declaration under s. 42 of the Specific Relief Act and that therefore the previous proceedings could not be *res judicata* in a subsequent suit. Defendants also relied on evidence given by the deceased in a Criminal case between the deceased and the present Plaintiff in which the deceased stated that the present Plaintiff was his step-son, and also relied on the judgment in the Criminal case. *Held*: That the Plaintiff was admittedly at a disadvantage when he has to prove incident which took place 63 or 64 years ago, but it is Plaintiff's duty to give convincing evidence regarding his claim of paternity. *Khwaja Ahmed Khan* v. *Mt. Harmuzi Khanam and others*, (1921) A.I.R. Oudh, p. 81, referred to. The statement by the deceased relating to the relationship by marriage between the present Plaintiff and the deceased in a Criminal case is admissible under s. 32 (5) of the Evidence Act. A copy of the judgment in the Criminal case, however, is irrelevant under s. 43 of the Evidence Act as the existence of such a judgment was not relevant for any purpose. *Muhamdi Begum* v. *Durga Prasad and another*, 40 I.C. 452; *Pedda Venkatapathi* v. *Ganagunta Balappa and others*,

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A.I.R. (1933) Mad. 429; *L. Sri Ram and others* v. *Mohamed Abdul Rahim Khan and one*, A.I.R. (1938) Oudh, 69, referred to. As the proceedings in the Criminal case had been lost or destroyed, the defendant was entitled to give secondary evidence of the contents of the relevant document filed in the criminal case. The objection that the copies did not bear the Seal of the Court and therefore, could not be considered as certified copies of public documents is untenable. *Sri Ram and others* v. *Muhammad Abdul Rahim Khan and others*, 172 I.C. 882; *K. O. Kalandan* v. *V. P. Kunhunni Kidavu and others*, 6 Mad. 80; *In the Matter of Collision between "Ava" and "Brenhilda"*, (1880) 5 Cal. 568; *C. P. Narain Singh* v. *B. P. Narain Singh*, 5 Pat. 777, referred to. Copyists who prepared the copies having sworn to the genuineness of the copies and the signatures appearing thereon there is a presumption that the acts of the Court have been regularly carried out. *Baijnath and another* v. *Sribhagwan and others*, A.I.R. (1926) All. 691, followed. Copy of the judgment in the Civil Suit in the District Court of Myaungmya between the deceased and the plaintiff is admissible as the issue now raised had been concluded by the decision of a competent Court in a previous suit. *Maroti Laxman Koshti and others* v. *Jagannathon Lachmandas Gadewal and another*, A.I.R. (1939) Nag. 72, referred to. The question whether the plaintiff was son or step-son had been finally raised and determined in the previous suit and was therefore, *res judicata*. The application of the principles of *res judicata* dealt with by s. 11, C.P.C. should not be influenced by technical consideration but by matter of substance within the limits allowed by law. *Kalipada De and others* v. *Devijapada Das and others*, (1930) I.A. 57, followed and applied. The District Court of Myaungmya had jurisdiction to entertain the previous dispute. Jurisdiction may be divided into three heads with reference to (*a*) the subject-matter, (*b*) the parties or (*c*) the particular question which calls for decision; where the Court possesses inherent jurisdiction and merely assumes or exercises it in an irregular or illegal manner the judgment is not a nullity. *Sukh Lal Sheik* v. *Tara Chand Ta*, 33 Cal. 68; *Ashutosh Sikdar* v. *Behari Lal Kirtanis*, I.L.R. 35 Cal. 61; *H. N. Roy* v. *R. C. Barua Sarma*, (1921) I.L.R. 48 Cal. 138, referred to. In entertaining the previous suit brought by the deceased for a declaration that the present Plaintiff was a step-son, the District Court was acting within its competence. *B. S. Vaktuba* v. *T. A. Raisinghji and others*, (1910) 34 Bom. 676; *Chinnasami Mudaliar and another* v. *A. Mudaliar*, 29 Mad. 48, referred to. *Daw Pon* v. *Ma Hnin May*, A.I.R (1941) Ran. 220; *Mahmud Shah* v. *Pir Shah*, A.I.R. (1936) Lah. 858; *Maung Aung Thein* v. *Maung Ba Maung*, (1940) Ran. 54, distinguished. Plaintiff's contention that all the parties claimed through the deceased and therefore the plea of *res judicata* was not available is not legally sustainable because plaintiff is not claiming under the deceased. *Syed Ashgar Reza Khan* v. *Syed Mohamed Mehdi Hossein Khan and others*, 30 I.A. 71; *Muppanar and others* v. *Vijayathammal*, 6 Mad. 43, distinguished. Under the Caste Disabilities Removal Act, 1850, the rule of Mohamedan Law by which a non-Muslim is excluded from succession to a Muslim has been abrogated and Plaintiff had not lost his right of inheritance by apostacy. *Rupa and others* v. *Sarder Mirza and others*, A.I.R. (1920) Lah. 276; *C.V.N.T. Chidambaram Chettyar* v. *Ma Nyein Me and others*, 6 Ran. 243, followed.

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EVIDENCE ACT, s. 35—*Admissions contained in a judgment—Admissibility—Order 41, Rule 23, Code of Civil Procedure—Preliminary point. Held :* A previous judgment containing an admission made by a party against whom the judgment was sought to be used is relevant under s. 35 of the Evidence Act. Where a court acted upon an oral admission and recorded it in its judgment it constitutes the only official record and is admissible as such admission. *Krishnasami Ayyanger* v. *Rajagopala Ayyangar and others*, 18 Mad. 73 ; *Gujju Lall* v. *Fatteh Lall*, I.L.R. 6 Cal. 171 ; *Byathamma* v. *Ayulla*, I.L.R 15 Mad. 19 at 23 ; *Parbutty Dassi* v. *Purno Chunder Singh*, I.L.R. 9 Cal. 586 ; *Thama* v. *Kondan*, I.L.R. 15 Mad. 378 ; *V. E. R. Subbaraya Chettiar and others* v. *Sellamuthu Asarti*, A.I.R. (1933) Mad. 184, referred to. *Collector of Gorakpur* v. *Ram Sunder Mal and others*, A.I.R. (1934) (P.C.) 157 at 165, followed. The expression "preliminary point" occurring in Order 41, Rule 23 of the Code of Civil Procedure is not confined to such a legal point only as may be pleaded in bar of a suit but comprehends the necessity for determining other points or issues. *Ramachandra Joishi* v. *Hazi Kassim*, 16 Mad. 207 ; *Malayath Veetil Raman Nayar and others* v. *Krishnan Nambudripad*, 45 Mad. 900 ; *Mata Din and others* v. *Jamna Das and another*, 27 All. 691 ; *Megan Dube and another* v. *Pran Singh and others*, 30 All. 63 ; *Kamta and others* v. *Parbhu Dayal and another*, 39 All. 165, referred to.

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FOREIGN EXCHANGE CONTROL REGULATION ACT, 1947—*S. 9 (2) and s. 24 (1)—Jewels removed from baggage before customs examination—Whether any offence committed—Or attempted under s. 511, Penal Code. Held :* No offence is committed under s. 24 (*1*) read with s. 9 (*2*) of the Foreign Exchange Control Regulation, 1947, where jewels contained in a tin are removed from the baggage before customs examination, as no jewellery has been taken out of Burma, without written permission of the Controller of Exchange. Nor can there be a conviction for attempt under s. 511, Penal Code as an attempt cannot be said to have been committed, unless the full offence would have been completed if not interrupted. S. 511, Penal Code is only applicable to attempts to commit an offence punishable under the Penal Code and not one punishable under a Special enactment.

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HIGH TREASON ACT, s. 3 (*1*)—*Offence under High Treason Act—When committed. Held :* Under s. 3 of the High Treason Act in order to constitute an offence under the High Treason Act the

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purpose and intention must be of a general public nature as contradistinct from a private one such as theft or robbery. *R.* v. *Gordon*, (1781) 21 State Trials, 486 at 644, 645; *R.* v. *Hardie*, (1820) 1 State Trials (N.S.) at 765, followed. In a crimin l case it is *not* incumbent for an accused to show what was the object and the meaning of the acts done, but for the prosecution to make out these against the accued. The onus is upon the prosecution to show that the object of the mu ltitude which rise and assemble to attain the same by force and violence is of a general public nature as distinguished from a merely private one.

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HIGH TREASON ACT—*S. 3 (1)—Onus of proof—Purpose and intent of accused—Public nature as against private—Firing on Police Party to escape. Held:* It is the duty of the prosecution to make out the case charged against the accused. "Waging War" is defined in s. 2 of the High Treason Act and the decision in *Aung Hla and others* v. *King-Emperor*, (9 Ran. 404) dealing with an offence under s. 121, Penal Code lays down the principles to be followed in such a case. The intention of the accused must be to attain an object of a general or public nature by force or violence. *R.* v. *Gordon*, (1781) 21 State Trials, 486 at 644, 645; *R.* v. *Hardie*, (1820) 1 State Trials (N.S.) at 765, referred to When the accused fired on a Police Party with intent to escape, it cannot be said they were achieving any object of a general or public nature and a conviction for High Treason is not sustainable but only one under s. 333, Penal Code read with s. 511.

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LEASE AND LICENCE—*Difference between—Effect of instrument to be considered—S. 105 of the Transfer of Property Act.* A document between the parties contained clauses that ' F ' allotted in his business premises a portion mentioned and for allotment of such space the appellant was to pay a sum of Rs. 100 as " guarantee commission " on the business and radio sales, etc., and that the parties were to observe strictly business hours on week days, Sundays and holidays. *Held :* That the document was one evidencing the licensing of a portion of the suit premises for selling radios, etc. *Held further :* The test for determining whether a transaction is a lease or a licence is to see whether the sole and exclusive occupation is given to the grantee. *The Acting Secretary to the Board of Revenue* v. *Agent, South Indian Railway Co. Ltd.*, (1925) 48 Mad. 368 ; *Frank Warr & Co. Ltd.* v. *London County Council*, (1904) K.B. 713 at 720, referred to. *Secretary of State for India in Council* v. *Bhupalchandra Ray Chaudhuri*, 57 Cal. 655 ; *Glenwood Sumber Co. Ltd.* v. *Phillips*, (1904) A.C. 405, distinguished.

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LIABILITIES (WAR-TIME ADJUSTMENT) ACT, 1945, ss, 3 AND 5—*Limitation Act ; Schedule I, Article 181—Execution—Meaning of.* Where a decree-holder obtained a decree for money on 12th July 1946 and applied for execution on the 11th July 1949 without obtaining leave to execute, but on 5th August 1949 he applied for leave under s. 3 of the Liabilities (War-Time Adjustment) Act, 1947, and the application was granted by the High Court. *Held :* That Article 181, First Schedule Limitation Act, does not apply to an application for leave under s. 3 of the Liabilities (War-Time Adjustment) Act. There is nothing in the said section to indicate when the period of limitation for an application is to commence, and nowhere else in the Act has any such period been fixed. S. 3 must be read strictly as it encroaches on the ordinary right of a person to execute a decree or order. Execution means carrying out the judgment or order of a court into effect and must be so read in s. 3. The decree cannot be said to have been made effective unless something has been done to make it so. Order 21, Rule 17, sub-rules (1), (2) and (4), also indicate the meaning in the same sense. It is therefore sufficient if the leave of the court under s. 3 is filed in the Execution proceedings before the executing Court passes an order allowing execution. An application for leave to execute and an application to execute are different applications and question to be decided in these applications are different. An application for execution might be rejected for formal or technical difficulties. In an application for leave to

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execute, s. 5 of the Liabilities (War-Time Adjustment) Act, 1945 describes the matters to be considered. It is not necessary to consider in such application whether the execution application is barred by limitation. This must be considered in the execution proceedings itself.

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LIMITATION ACT, ss. 4 AND 14—*Courts Emergency Provisions Act, 1947.* An application for execution was filed in 1944 but closed on 2nd February 1945 and the decree-holder made a fresh application for execution within the meaning of s. 4 of Limitation Act—on 20th May 1948 claiming that as the Court was closed up to the 31st March 1947 under the provisions of Court Emergency Provisions Act, the period during which the Court was closed should be excluded. *Held :* That the application was barred by limitation. S. 4 of the Limitation Act does not extend the period of limitation and time during which the Court was closed could not be excluded in computing the period of limitation. S. 4 is distinct from s. 14 of the Limitation Act and the language employed in s. 4 has nothing to do with computing the prescribed period or altering it. *Maqbul Ahmad* v. *Pratap Narain Singh*, I.L.R. (1935) 57 All. 242 at 248, referred to and followed.

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NOTICE UNDER S. 106, TRANSFER OF PROPERTY ACT AND S. 11 (*1*) (*a*), URBAN RENT CONTROL ACT, 1948—*Sent by registered post—Wrong address—No presumption of service. Held :* The despatch of a notice under s. 106, Transfer of Property Act and s. 11 (*1*) (*a*), Urban Rent Control Act, 1948 by registered post to a person at a wrong address will not raise any presumption of service. The burden of proof is on the party asserting to show that inspite of a wrong address being given on the notice, it was in fact delivered to the defendant. The service of notices under the above sections is a condition precedent to the filing of an ejectment suit.

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ORDER 21, RULE 89 (1) (*b*), CODE OF CIVIL PROCEDURE—*Person handing such property or holding interest acquired before sale—Revision.* Where a decree-holder purchased property in public auction and deposited 25 per cent on the date of the sale but prior to confirmation applied under Order 21, Rule 89 of the Code of Civil Procedure to set aside the sale stating that the judgment-debtor had sold the house to him long before the court sale explained the circumstances under which he had to bid, and asked that the sum deposited by him be taken to be the 5 per cent for payment to the Purchaser. *Held :* That his failure to deposit in Court the amount specified in the sale proclamation as that for the recovery of which the sale was ordered was a mere technical error. The executing Court was wrong in holding that the applicant was not competent to present an application under Order 21, Rule 89 of the Code of Civil Procedure. This error on the part of the Court resulted in its failure to exercise a jurisdiction vested in it by law. The execution sale is complete after the bid has been accepted and the deposit paid under Rule 84. *Mohamed Yacoob* v. *P.L.R.M. Firm and others*, (1931) 9 Ran. 608 followed.

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ORDER 41, RULE 22, CODE OF CIVIL PROCEDURE—*Decision in favour of a party—Whether cross-objections necessary—Specific Relief Act, s. 42—Bare declaration—When party entitled to partition—Maintainability.* Where a suit had been dismissed by the trial Court on merits, but the trial Court at the same time held that the suit for bare declaration that plaintiff was an *orasa* son, without asking for partition, was sustainable against the defendants. *Held :* That notwithstanding the fact that on cross-objections had been filed under Order 41, Rule 22, Code of Civil Procedure the respondents could support the judgment in their favour upon an issue decided against them. It was not necessary to file cross-objections in the circumstances of the case, as the defendants had no right of appeal against a judgment in their favour. *Abinashchandra Ghosh* v. *Narahari Methar*, (1930) I.L.R. 57 Cal. 289 ; *Tausukh Rai* v. *Gopal Mahton*, (1929) I.L.R. 8 Pat 617 ; *Midnapur Zamindari Company, Limited* v. *Naresh Chandra Roy*, (1921) I.L.R 48 Cal. 460 (P.C.), referred to. *A. Caspersz* v. *Kishori Lal Roy and others*, (1896) I.L.R. 23 Cal. 922 at 929, distinguished. *Held also :* That the proviso to s. 42, Specific Relief Act, prohibits the court from granting a decree for bare declaration, where the plaintiff, being able to ask further relief, omits to do so. In the present case, the plaintiff could and should have asked for partition ; as he had persisted even in appeal that the suit was properly filed he could not be allowed to amend the plaint at that stage of appeal. *Surayanarayanamurti and one* v. *Tammanna and another*, (1902) I.L.R. 25 Mad. 504 at 506 ; *Purans and others* v. *T. Ammal and others*, A.I.R. (1937) Ran. 427 at 428, referred to and followed. *Natesa Ayyar* v. *Mangalathammal*, A.I.R. (1933) Mad. 503 ; *Vedanayaga Mudaliar* v. *Vedammal*, (1904) I.L.R. 27 Mad. 591, distinguished Purpose for which letters are issued and the object for which an Administration suit is filed cannot be said to be the same. *Maung Ye Gyan* v. *Ma Hmi and three others*, (1900—02) 1 L.B.R. 155 at 157, referred to.

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PENAL CODE, SS. 84 AND 302 (1) (*b*)—*Murder committed by person undergoing sentence of transportation—Accused subject to fits—Test—Knowledge of nature of act—Unsoundness of mind—When a defence.* A person, undergoing a sentence of transportation for life, stabbed a convict warder to death on the chest with a pointed weapon and claimed that he came under the provision of s. 84 of the Penal Code as he was subject to epileptic fits of giddiness and that he was not liable to conviction and cannot be sentenced to death under s. 302 (1) (*b*), Penal Code. *Held:* On appeal, that under s. 84, Penal Code, which is in substance the same as the law laid down in the answers of the Judges to the House of Lord, in *Mcnaghten*'s case, it is only unsoundness of mind which materially impairs the cognitive faculties of the mind so that the offender is incapable of knowing the nature of the act or that he is doing wrong, that exempts from criminal liability. *Queen-Empress* v. *Kader Nasyer Shah*, (1886) I.L.R. 23 Cal. 604; *Nga Po Tha* v. *Queen-Empress*, (1893—1900) Printed judgments, Lower Burma 249; *Mani Ram* v. *The Crown*, (1927) I.L.R. 8 Lah. 114; *Ghungar Mal Ghania Lal* v. *Emperor*, A.I.R. (1939) Lah. 355; *Maung Gyi* v *King-Emperor*, 7 L.B.R. 13; *Tun Baw* v. *King-Emperor*, 6 L.B R. 100 (F.B.); *Nga Sein Gale* v. *King-Emperor*, (1934) 12 Ran. 445, referred to. There was no evidence that the cognitive faculties were so impared in this case and the conduct of the accused subsequent to the occurrence showed that he stabbed human beings in vital parts for reasons, real or imaginary, the conviction for murder was correct.

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PROMISSORY NOTE—*Signature as agent not in document—Negotiable nstruments Act, 1881, ss. 26, 27, 28—Whether execution on behalf of undisclosed principal could be proved.* Where two promissory notes in favour of appellant were signed by P. P. Thevar and there was nothing on the instrument to suggest

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that P. P. Thevar acted as agent for anybody. *Held :* That the name of the person to be charged upon a negotiable instrument should be clearly stated in the instrument so that the responsibility is made plain and can be instantly recognized. *Sadasuk Janki Das* v. *Sir Kishan Pershad*, (1919) I.L.R. 44 Cal. 663 at 668-669, followed. *Ramgopal Ghose* v. *Dhirendra Nath Sen and others*, (1927) I.L.R. 54 Cal. 380 at 387-388, referred to.

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PURCHASE OF CAR BY AGREEMENT AND RECEIPT OF PART CONSIDERATION—*When property passes—Intention of parties—Principles of construction of documents—Delivery of car—Balance price not paid—Award of damages.* By an agreement dated the 9th April 1949 the Appellants and Respondent entered into a contract for the purchase of a car for a sum of Rs. 14,500 and an advance of Rs. 10,000 was paid. The agreement provided that on failure to pay the balance sum of Rs. 4,500 by the 30th April 1949, the sum advanced, *i.e.*, Rs. 10,000 was to be forfeited and the car must be returned. The appellants failed to pay the balance sum of Rs. 4,500 by the due date. The owner sued for recovery of the car and the claim was decreed in the trial Court. *Held :* That the question whether the property in the car passed depends on the intention of the parties which has to be gathered from the terms of the contract, the conduct of the parties, and the circumstances of the case. The Sale of Goods Act qualifies the rules by which such intention is to be ascertained. It is the duty of the Court to look at the whole agreement and find out what its substantial effect is. *In the Parchim*, (1918) A.C. 157 at p. 161 ; *Alexander Knox Mc Entire and John Arthur Macsnchy* v. *Crossley Brothers Limited*, (1895) A.C. 457 at pp. 462-463, referred to and followed. It is nowhere stated in the agreement or the receipt for Rs. 10,000 that the property in the car was not to pass until the balance price was paid. On the contrary the wording of the agreement that "*the Purchasers have this day bought*" implies that a sale has been effected and property has passed. Reading the agreement as a whole it is clear that there was a complete sale by which the property in the car had passed to the appellants, and as there is no provision in the agreement to terminate the contract and/or to cancel the sale on the failure of the appellants to pay the balance price, the respondent is not entitled to get possession of the car. *Bhimji N. Dalal* v. *The Bombay Trust Corporation, Ltd.*, (1930) 54 Bom. Series, p. 381 at p. 396 ; *The Auto Supply Co. Ltd.* v. *V. Ranghunatha Chetty*, (1929) 52 Mad Series, p. 829 at pp. 835 and 836 ; *Sardar Param Pal Singh* v. *Sarder Budh Singh*, A.I.R. (1938) Lah. 62 ; *Abas Ali* v. *Kodhusao*, (1929) A.I.R. Nag. p. 30 ; considered. *Held also :* That it is a proper case for awarding damages instead of ordering the case to be returned. *Steedman* v. *Drinkle and others*, (1915) A.I.R. (P.C.) 94 at 95 ; *Kilmer* v. *British Columbia Orchard Lands Ltd.* (1913) A.C. 319 ; *Arya Pradishak Pratinidhe Sabha* v. *Chaudhri Ram Chand and others*, (1924) A.I.R. Lah. 713 at 716 ;

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*Callianji Harjivan* v. *Narsi Tricum*, (1895) 19 Bom, 761 ; *Kallian Dass* v. *Tulsi Dass*, (1899) 23 Bom. 786 ; *K. H. Skinner* v. *Rose Skinner and others*, (1925) Lah. 132, referred to.

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RANGOON CITY CIVIL COURTS ACT, SS. 17 AND 25—*Suit under—Permissive occupation must be proved—Revision against—When finding of fact can be considered. Held :* In order that an applicant may succeed in a proce ding under s. 17, Rangoon City Civil Courts Acts, it is necessary for him to prove that defendant is a tenant or in permissive occupation. *Savari Ammal* v. *A. Jaganathan Servai*, (1947) R.L.R. 387, referred to. S. 25 of the City Civil Courts Act is almost identical with s. 25, Burma Small Causes Courts Act. It is only in exceptional cases that the Hight Court will interfere with findings of fact in such cases, *viz.*, when the finding is perverse or unwarranted by the evidence. *Siva Dass Day* v. *Ashabi and one*, 3 Ran. 471, referred to.

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RANGOON CITY CIVIL COURTS ACT, s. 23—" *According to law* "—*Interference in revision on question of fact—When permissible.*—The phrase " according to law " cannot be held to exclude cases in which there has been a grossly erroneous decision on facts. A Judge is not bound to refer in his judgment to each and every item of evidence relied on by the parties. The High Court does not ordinarily interfere on a question of fact but it will interfere only when the decision is perverse or so obviously incorrect in its nature as to amount to an error of law. *Siva Dass Dey* v. *Ashabi and one*, (1925) 3 Ran. 471 at 473 ; *Abdul Qadir* v. *Narandra Mohan Ghose Chowdhury and one*, (1931) A.I.R. All. 210 ; *Maung Bo Saw* v. *Maung Thwe*, (1927) A.I.R. Ran. 159, *Mohanlal Maganlal* v. *Jivanlal Amratlal*, (1927) 51 Bom. Series, 814 at 816 ; *Nathuram Shivnarayan* v. *Dhularam Hariram*, (1920) 45 Bom. 292, referred to.

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REGISTRATION OF DOCUMENT—*Formalities—Registration when complete—Registration Act, ss. 52* (1) (c) *and 61* (2) *and 87—Non-copying of document in Book 1 if an irregularity and curable.* Where deed of sale was presented for registration and a receipt was obtained from the Registration office on 24th April 1945 but the document was never returned to the party and the deed was not copied into Book No. 1 under s. 52 (*1*) (*c*) of the Registration Act. *Held :* That the document was not duly registered, as the registration was not complete. The certificate

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is that which gives the document the character of a registered instrument as the Act expressly says that the certificate shall be sufficient to allow its admissibility in evidence. In its absence, the object of the Registration Act will have been defeated. *Muhammed Ewaz and others* v. *Birj Lal and another*, I.L.R. All. Vol. I, p. 465, referred to. The fact that applicant was not responsible and could not be penalized for others' defaults is irrelevant—as the point for decision was whether there was a valid registered document. This does not amount to a defect in procedure curable under s. 87, Registration Act. *Ma Kha* v. *S. I. Ispahany*, (1946) Ran. 192, distinguished.

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REVISION OF ORDER GRANTING APPLICATION UNDER ORDER 9, RULE 13, CODE OF CIVIL PROCEDURE—*Interlocutory Order. Held:* That where an application under Order 9, Rule 13 of the Code of Civil Procedure for setting aside an *ex parte* decree was granted by the trial Court a revision lies to the High Court. The High Court will not interfere in revision against an Interlocuto y Order unless some grave injustice or hardship would result on failure to do so. *Radha Mohan Datt* v. *Abbas Ali Biswas and others*, (1931) 53 All. 612 at 617-618 ; *U Ba U* v. *U Ywet*, (1948) B.L.R. 172 *L.P.R. Chettyar Firm* v *R. K. Banerji*, (*O.R.*), (1931) 9 Ran. 71, applied. It is difficult to see how grave injustice or real hardship could be said to be sustained by the plaintiff if an *ex parte* decree in his favour is set aside and he is compensated in costs therefor.

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SALE OF GOODS—*Contract for "May" Shipment of 400 drums—60 offered—Divisibility of contract—White oil—Contract void because of likelihood of being used for adulteration—Appropriation out of larger quantity—Refund of advance. Held:* Where

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goods are sold by description, the description amounted to a warranty or a condition that the goods are of the kind described. Before a buyer can be compelled to take any thing in fulfilment, it must be shown that the goods are those bargained for ; otherwise the buyer is not bound to take it. The time of shipment of goods is vital and of the essence of the contract. *Edmund Bowes* v. *Charles Shand*, (1876-77) 2 A.C. 455 ; *J. Aron & Co.* v. *Comptoir Wegimont*, (1921) 3 K.B. 435 ; *James Finlay & Co. Ltd.* v. *N. V. Kwik Hoo Tong Handel Mattschappji*, (1929) 1 K.B. 40, referred to and followed. Where a contract provided for supply for 400 drums of white oil, of May shipment, the buyer is not bound to accept any lesser quantity, unless the contract provides for the same. *Renter* v. *Sala*, L.R. (1878-79) IV C.P.D. 239, followed. In the absence of material from which it could be inferred that the oil was wanted for adulteration purposes the contract is not void on this ground. A contract for sale of unascertained goods is not complete, until the goods are appropriated with the assent express or implied of the purchaser. *Badische Anlin Und Soda Fabrik* v. *Hickson*, (1906) A.C. 419, referred to Subject to special provisions of the contract, payments on account of purchase price are recoverable if the consideration for which that price is being paid wholly fails. *Fibrosa Spolka Akeyjna* v. *Fairbairn Lawson Combe Bargour, Ltd.*, (1943) A.C. 32 ; *Piari Lal and others* v. *Mina Mal Balkishan Das*, (1926) I.L.R. 50 All. 52, referred to.

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SINO-BURMAN BUDDHIST—*Governed by Burmese Buddhist Law—Family Arrangement—Reduced to document - Immoveable property effected worth more than Rs. 100—The effect of non-registration.* Where certain immoveable properties are acquired by a Sino-Burman Buddhist during his coverture with the Respondent, a Burmese Buddhist, and the property (valued at more than Rs. 100) was claimed under a family arrangement under an unregistered document. *Held :* That the law applicable to the case was Burmese Buddhist Law. *Tan Ma Shwe Zin and others* v. *Koo Soo Chong and others*, (1939) R.L.R. 548, followed. The property on the death of the husband, became the property of the wife. The Family Arrangement relied on, involved properties worth more than Rs. 100 and was reduced to the form of a document, therefore registration was necessary under s. 17 of the Registration Act. No oral evidence regarding Family Arrangement is therefore admissible in law. *Ram Gopal* v. *Tulshi Ram and another*, 51 All. 79 (F.B.).

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SPECIAL CRIMES (TRIBUNAL) ACT, 1947, SS. 5 AND 8—*Nature of trial before—Revision of order of discharge whether lies to the High Court—Union Judiciary Act, 1948, s. 24—S. 439, Criminal Procedure Code—Interpretation of.* Respondents were sent up for trial before a Special Tribunal constituted under the Special Crimes (Tribunal) Act, 1947, under ss. 409/109 and 420/120B, Penal Code and discharged. A revision was filed by Government and objection was raised on behalf of the Respondents that no revision lay. *Held:* Under s. 5 of the Special Crimes (Tribunal) Act, 1947, cases, coming before the Special Tribunal will have to be tried as warrant cases. S. 8 of the same Act makes Criminal Procedure Code applicable to trials before the Special Tribunal and to all matters which arose out of or connected with such trials and the section further provides that the Special Tribunal will be treated as if it were a Court of Session. The order of dicharge in the present case is clearly a matter which arises out of a case heard by the Special Tribunal acting as if it were a Court of Session exercising original jurisdiction. The Special Tribunal must be regarded as a court which is inferior to the Hight Court. Further under s. 24 of the Union Judiciary Act, 1948, the High Court ordinarily has revisional power over all courts subject to its appellate power and the Special Tribunal is one of such courts. Consequently a revision was competent. *Held further:* That the terms of s. 439, Criminal Procedure Code is comprehensive in language and full effect must be given to the terms of the section. The main idea underlying s. 439 is to enable the High Court to rectify cases of injustice or illegality when the person affected is unable to appeal. *Emperor* v. *Bishen Das*, (1910) 8 I.C. 116 at 164-165. *The National Bank of India Ltd.* v. *G. V. Kothandarama Chetti and one*, (1913) 14 Cr. L.J. 509 at 535, referred to and applied.

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TENANT—*If includes legal representative—Urban Rent Control Act, s. 2 (g)—Code of Civil Procedure, s. 2—Death of tenant—If tenancy terminated—Transfer of Property Act, s. 111. Held:* That legal representatives of a deceased tenant continuing in occupation of leased premises are not trespassers, under s. 2 (g), Urban Rent Control Act, 1948, the definition of tenant includes a legal representative. A person who intermeddles with the

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estate of the deceased is also a legal representative under s. 2, Code of Civil Procedure. On the death of a lessee, the lease is not terminated under s. 111, Transfer of Property Act and the scope of the said section cannot be enlarged beyond the terms of the section. The English Law under which tenancy terminates on the death of a tenant, is different from the law of Burma. *Messrs Barnett* v. *Mrs. E. Fowle and one*, (1925) I.L.R. 3 Ran. 46 at 47, referred to.

CHOW YEE (*a*) AH FOON *v.* KAN AH KONG AND ONE ... 304

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TRADES DISPUTE (AMENDMENT) ACT, 1948, s. 7 (5)—*Rule of interpretation of documents. Held:* That the instrument must receive a construction according to the plain meaning of the words and sentences therein contained. One must look at the whole instrument, and inasmuch as there may be inaccuracy and inconsistency, you must, if you can, ascertain what is the meaning of the instrument taken as a whole in order to give effect, if it be possible to do so, to the intention of the framer of it. It appears to be arguing in a vicious circle to begin by assuming an intention apart from the language of the instrument itself, and having made that fallacious assumption to bend the language in favour of the assumption so made. But where from the imperfection of the language, it is impossible to know what that intention is without inquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from these circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they are used. *Charles Robert Leader and Henrietta Leader* v. *George F. Duffey and Amyatt Edmond Ray*, (1888) 13 A.C 294 at 301; *The River Wear Commissioners* v. *William Adamson and others*, (1876-77), II Appeal Cases, 743 at 763, followed. Under s. 7 of the Trade Disputes (Amendment) Act if an agreement is arrived at in a dispute as a result of negotiations conducted by either a Board or a Conciliation Officer, such an agreement, duly signed by the accredited representatives of both parties, shall be legally binding upon both parties to the dispute and failure on the part of either party to comply with it will be punishable. Therefore, where a person entered into a contract to employ only members of the Earth Diggers' Association, but afterwards failed to give the work to the members of that Association, he committed an offence under the Act.

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TRADE MARK MEANING OF—*Invented name or word—When legal right to exclusive use of trade-mark acquired—Limits of such right—Colourable imitation by defendant—Passing for—Infringement of right—Remedy.* Plaintiff was a manufacturer of beedies, their goods bore rectangular labels in violet colour containing the words "MOULANA BEEDY" with the capital letter "M" enclosed in a ring between the words "Moulana and Beedy." Their goods had been sold in the market for the last 15 or 16 years and they had declared this trade-mark to be theirs in 1944 and 1946 which referred to a previous declaration in 1934. The first and second defendants left plaintiff's service and

recently joined the third defendant in manufacturing and selling beedies bearing labels of identical colour and size and called "Moulavi Beedy", the capital letter "M" being enclosed in a ring exactly like the plantiff's label. The plantiff's goods were sold at Rs. 16 per thousand and the defendant's at Rs. 12-8. Upon plaintiff claiming a permanent injunction and damages for infringement of their trade-mark. *Held:* A trade-mark is a symbol applied or attached to goods offered for sale in the market go as to distinguish them from similar goods and to identify them with a particular owner. The trade-mark indicates that is the goods of the proprietor of such trade-mark and a mark includes a device-brand, heading, label . . . . . or any combination thereof. The word "Moulana" in plaintiff's trade-mark is an invented name to distinguish plaintiffs goods from other's goods. The test of an invented word is that it must have been substantially new at the date of registration and used only to denote his goods down to the date of registration. Its production need not involve any great ingenuity or invention as in patent one. *Sirumal* v. *Emperor*, A.I.R. (1932) Sind 94, referred to. The registration of the trade name "Moulana Beedy" with the device mentioned was made with a view to its being used by plaintiffs on beedies of their manufacture and they have all along intended to use the label from 1934 to distinguish their goods from those of others. The plaintiffs have built up a fairly large wholesale business and were entitled to protection. The fact that a large number of other makers with other marks with the central circular device and the alphabet by way of imitation and that no action was taken against them is irrelevant as it may not be worth while to spend money on every man of straw who violates the plaintiffs' right and cannot deprive the plantiffs of their right of suit. *Moolji Sicca & Co.* v. *Ramjan Ali*, A.I.R. (1930) Cal. 678, referred to. A right of property may be acquired in such a trade-mark and it is based on the proved association in the market of the device, name, sign, symbol or other means in question with the goods of the plaintiff. The use by defendant on such goods of the trade-mark will amount to a false representation that the goods are manufactured by the plaintiff. *Thomas Bear & Sons (India) Ltd.* v. *Prayag Narain and an other*, A.I.R. (1940) (P.C.) 86 at 87, referred to and followed. *Mohamed Esuf* v. *Rajaratham Pillai*, I.L.R. (1933) Mad. 402; *William Wotherspoon and another* v. *John Currie*, 5 L.R. (Eng. and Irish Appeal Case) 508, referred to. As the beedy put on the market by the defendant was wrapped round with a paper label of the same colour as plaintiffs' and the words "Moulavi Beedy" printed on it with circular device containing the capital letter "M" in exactly the same fashion as the plaintiffs' amount to colourable imitation of plaintiffs' trade-mark; no general rule can be laid down as to what is a colourable imitation and this is a question of fact to be decided in each case having regard to the circumstances. *Payton & Co. Ltd.*, v. *Snelling Lampard & Co. Ltd.*, (1901) A.C. (P.C.) 308, followed. The Court looking at the exhibits and paying due attention to the evidence adduced must come to an independent judgment on this point and not surrender its own independent judgment to any witness. *Anglo-American Drug & Chemical Co.* v. *Swastik Oil Mill Co., Ltd.*, 59 Bom. 373; *R. Johnston & Co.* v. *Archibald Orr Ewing & Co.*, (1881-82) 7 A.C. 219; *William Dimech* v. *Goffredo Allessandro Chretien and another*, A.I.R. (1931) (P.C.) 15, referred to and applied. It is not necessary to give actual proof of deception; it is sufficient there is probability of deception. In the circumstances in which

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property for Rs. 150 was by an unregistered deed the mortgage is invalid for want of registration but under s. 53-A of the Transfer of Property Act where any person contracts to transfer for consideration any immoveable property by writing then though the contract is required to be registered and is not registered the transferor shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property other than a right expressly provided by the terms of the contract. S. 53-A speaks of contracts to transfer immoveable property. Immoveable has not been defined in the Transfer of Property Act but is defined in the General Clauses Act including lands, benefits to arise out of land, etc., a mortgage is a transfer of immoveable property no less than a sale though a sale involves a transfer of partnership as well. S. 53-A applies to usufructuary mortgages where the mortgagee in part performance of the contract has taken possession. *Ma Kyi* v. *Ma Thon*, 13 Ran. p. 274, referred to. *Gopal Pandey* v. *Parsotam Das*, I.L.R. 5 All. p. 123; *Indar Sen and one* v. *Naubat Singh and others*, I.L.R. 7 All. 553, referred to and applied. *U Hmat and one* v. *Daw Shwe Lok and two others*, Civil 1st Appeal No. 31 of 1946, High Court of Judicature at Rangoon, followed.

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TRANSFER OF PROPERTY ACT, s. 54—*Minor plaintiffs—Represented in suit by uncle—Interest if adverse—Effect—S. 99 of Code of Civil Procedure. Held*: That under s. 54 of the Transfer of Property Act a transfer of immoveable property of the value of less than Rs. 100 may be made either by registered instrument or by delivery of possession. As in this case the claim was based on an unregistered document for Rs. 10 there was no proof of delivery of possession, the applicant had no title to the property covered by the unregistered deed. *Held further*: Where the next friend was the maternal uncle looking after the minors after their mother's death, the fact that he built a hut on the disputed land, did not show that he attempted to assert any title adverse to the minors. The objection to representation even if sustainable was an irregularity not in any way affecting the decision or merits of the case. *Hardi Narain Sahu* v. *Ruder Perkash Misser*, I.L.R. 10 Cal. 626 at 634, followed.

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TRANSFER OF PROPERTY ACT, s. 54.—*Sale of immoveable property worth less than Rs. 100 by unregistered sale deeds.—Whether passes title.* Where the plaintiffs claimed purchase of an immoveable property worth less than Rs. 100 by an unregistered deed of sale and it was neither pleaded nor proved that there was oral sale followed by delivery of possession. *Held*: That the sale was invalid and did not pass any title to the purchaser. It was essential either that the possession should change or that there must be a registered deed. *Maung Mya Maung* v. *Ma Khine and others*, A.I.R. (1936) Ran. 497, distinguished; *Muthukaruppan Samban and others* v. *Muthu Samban*, (1915) I.L.R. 38 Mad. 1158; *Kuppuswamy Goundan* v. *Chinnaswami Goundan and others*, A.I.R. (1928) Mad. 546 at 548; *Sohan Lal and others* v. *Mohan Lal and others*, (1928) I.L.R. 50 All. 986 at 990; *Tribhovan Hargovan* v. *Shanker Desai*, (1943) Bom. 653, followed.

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TRANSFER OF PROPERTY ACT, s. 105—*Instrument of lease—Ss. 105 and 107 of Transfer of Property Act. Held :* That a lease is defined in s. 105 of the Transfer of Property Act. Under s. 107 a lease of immoveable property from year to year for any term exceeding one year can be made only by a registered instrument and all other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. A lease implies that there should be two parties the Lessor and the Lessee and the instrument of lease contains covenants that both the Lessor and the Lessee agree to. Therefore a lease cannot be effected unless the Lessor is a party to the instrument of lease. As Exhibit A in the case was signed by one party only it can in effect be no more than an agreement to lease. *Observations in U Tha Nyo* v. *Maung Kyaw Tha by Carr J.*, (1925) 3 Ran. 379 at 380, followed. *Mt. Nasiban* v. *Mohammad Sayed*, (1936) A.I.R. Nag. 174, distinguished.

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UNION CITIZENSHIP (ELECTION) ACT, 1948 s. 8 (2)—*Reference to High Court by Minister—"Residence" meaning of in s. 3—Limitation.*— Respondent was born at Tavoy on 27th December 1923 where he resided till 1935 and went to Penang for further study. He used to come back to Tavoy for one month every half year upto 1941 and was out of Burma from 1941 till the 23rd of June 1946. He applied for Citizenship under the Union Citizenship Election Act, 1948. This was allowed by the Officer on 1st July 1949 but the Minister on behalf of the Union referred the application to Court on 20th November 1949. *Held :* S. 8 (2) of the Act, under which the reference was made, did not prescribe any period of limitation within which the Minister must refer the application to Court. Such omission is deliberate. Therefore there is no period of limitation for reference by the Minister. The meaning of the word "resides" has to be gathered from the intention of the legislature in s. 3. Such intention is obtained by interpreting the language according to its obvious meaning. The same word need not necessarily have the same meaning in different enactments, not even in different sections in the same enactment, and therefore rulings under s. 20 of the Code of Civil Procedure and other statutes are not applicable. *Rama Chandra Sakha'ram* v. *Keshav Durga'ji*, (1882) I.L.R. 6 Bom. 100 at 101 ; *Parish Council of the City of Parish of Edinburgh* v. *Local Government Board for Scotland*, (1915) A.C. 717 at 722, referred to. As a matter of fact the context and subject-matter indicate that the natural meaning must be given to the word "reside." The Legislature has chosen this word instead of the word "domicile." S. 3 of the Act is only a reproduction of the s. 11 (iv) of the Constitution of Burma. The Legislature clearly regarded the Citizenship as a matter of the utmost importance as it involves rights and duties on the part of

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the Citizen and the State. The phrase " has resided for a period of not less than 8 years " must mean actual residence. This view is further strengthened by the fact that the Legislature has allowed the choice of two different periods as also a margin of two years out of 10 for absence from Burma. Judged in this way the Respondent was not entitled to a Citizenship Certificate. *Srimati Anilabala Chaudhurani* v. *Dhirendra Nath Saha and another*, A.I.R. (1921) Cal. 309 at 311, followed.

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UNION JUDICIARY ACT, s. 5—*Certificate—Substantial question of law—Must be one open to argument. Held :* Though the subject-matter of the dispute in the court of the first instance and still in dispute in appeal is not less than Rs. 10,000 no certificate under s. 5 of the Union Judiciary Act can be granted unless the appeal involves some substantial question of law. This condition is satisfied even if the question of law is one between the parties and not of general importance. However the question of law involved must be fairly open to argument. Where the principles of law are well settled their application to a particular set of facts is not a substantial question of law. *Raghunath Prasad Singh and one* v. *Deputy Commissioner of Partabgarh and others*, 54 I.A. 126 ; *M. C. Patail and one* v. *H. G. Ariff and others*, (1935) I.L.R. 13 Ran. 744 ; *Mathura Kurmi* v. *Jugdeo Singh and others*, (1928) I.L.R. 50 All. 208 ; *Mussammat Umrao Bibi and others*, v. *Ram Kishen and others*, (1932) I.L.R. 13 Lah 251, referred to. *Dwarka Nath Pal Mohan Chaudhuri* v. *Rivers Steam Navigation Co. Ltd.*, (1917) A.I.R. (P.C.) 173 ; *The Rivers Steam Navigation Co.* v. *Choutmull Doogar and others*, (1899) I.L.R. 26 Cal. 398, discussed.

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UNION JUDICIARY ACT, s. 5—*Criminal Case—Special leave. Held :* Where no question of the validity of any law having regard to the provisions of the Constitution as set out in the Union Judiciary Act, 1948, s. 5 (*a*), is involved, no leave for appeal to the Supreme Court can be granted.

MOGYO (*a*) BA THAW (*a*) MAUNG THAW *v.* THE UNION OF BURMA ... ... ... ... ... 399

UNION JUDICIARY ACT, s. 5 (*c*)—"*Involves directly or indirectly*"—*Meaning of. Held :* S. 5 (*c*) of the Union Judiciary Act, 1948 like the second paragraph of s. 110 of the Code of Civil Procedure requires that the judgment decree or final order must involve directly or indirectly some claim or question respecting property of the value of not less than Rs. 10,000. It is the extent to which the decree or order has operated to the prejudice of the Applicant that determines the value of the appeal whatever may be the value of the property. If the appeal involves nothing beyond the subject-matter of the appeal the first paragraph of s. 110 of the Code applies. The second paragraph of the said section applies only when the appeal involves some claim or question to or respecting property *additional to* the actual subject-matter in dispute in appeal. Where there was no dispute about the ownership of a house, and the dispute related only to the question whether the tenancy could be split and the respondent ejected from the house, and the suit for ejectment was valued at Rs. 1,500 for jurisdiction the decree did not involve directly or indirectly some claim or question respecting property of the value of Rs. 10,000 or more under s. 5 (*c*) of the Union Judiciary Act, even though the value

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was Rs. 40,000. *N. C. Galliara* v. *A.M.M. Murugappa Chetty*, (1934) I.L.R. 12 Ran. 355 ; *M. E. Moolla and Sons Ltd* v. *Leon Shain Sway*, (1926) I.L.R. 4 Ran. 92 ; *Gnanamanikkam Ammal* v. *S.R. Samson*, (1931) I.L.R. 9 Ran 52 ; *P.L.M.C.T.M. Kasiviswanathan Chettyar* v. *P.L.M C.T.K. Krishnappa Chettyar*, (Civil Misc. Appln No. 10 of 1949, High Court, Rgn.), referred to. *Dhanna Mal and others* v *Rai Sahib Lal Mati Sagar*, 75 I.C. 654 ; *A. V. Subramania Ayyar* v. *Sellammal*, (1916) I.L.R 3 Mad. 843 ; *Maharaja Kesho Prasad Singh* v. *Shiva Saran Lal*, 3 Pat. L.J. 317 at 321, referred to.

MRS. CONSTANCE M. WRITER *v.* A. M. KHAN ... ... 65

UNION JUDICIARY ACT, s. 24 ... ... ... ... 376

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UNSOUNDNESS OF MIND AS DEFENCE ... ... ... 352

UPPER BURMA LAND AND REVENUE REGULATION, s. 45—*Sale for arrears of Revenue—S. 41* (1) (d)—*Rules 170 and 171. Held :* Under the Upper Burma Land and Revenue Regulation, s. 45 read with s. 171 a sale of immoveable property by Assistant Collector will have to be confirmed by the Collector, and only when the sale becomes absolute the title does pass. But when the sale is confirmed, it takes effect from the date of the sale.

M. M. SHERAZEE *v.* DAW KHIN SAN .. ... 124

URBAN RENT CONTROL ACT, 1946—*Ss. 5, 11, 16, 17, 18 and 19—Standard rent fixed—Whether effective from date of Act or order. Held :* There is nothing in the Urban Rent Control Act to indicate that rent in the respect of any premises after the commencement of the Act should, in all cases, be reckoned to be at the rate fixed by the Rent Controller. A contract of lease, agreed upon between the parties, should be considered to be binding and subsisting until it is modified by agreement or by operation of law. There is no provision in the 1946 Act to support the contention that the contractual right shall be deemed to have been modified with effect from the date the Act came into force, where an order fixing standard rent is passed. This would be giving a retrospective effect to the order, for which clear provisions would be required in the Act, expressly or by implication.

S. I. ABOWATH AND FIVE OTHERS *v.* T. H. KHAN ... 308

URBAN RENT CONTROL ACT, 1948—*S. 11* (1) (d)—' Bonâ fide ' *required for erection or re-erection of building—Whether landlord should also live in new house. Held :* What is required to be proved under s. 11 (*1*) (*d*) of the Urban Rent Control Act, 1948 is that the landlord should require the premises, which is in possession of the tenant, *bonâ fide* for construction of a building thereon. The fact that the landlord took proceedings out of spite because rent was reduced in Rent Control Proceedings is only one factor in judging of the *bonâ fides*. There is nothing in the clause to support the suggestion that the landlord should erect the building for his own use or occupation.

C. AH FOUNG (*a*) CHOW FUNG MEE (*a*) CHAW FONG MEE *v.* K. MOHAMAT KAKA AND TWO OTHERS ... ... 346

URBAN RENT CONTROL ACT, 1948, s. 11 (*1*) (*f*), s. 12, s. 13 (*1*)—*Landlord purchasing after the Act—Whether can take advantage of s. 11* (1) (f)—*Statute construction general rule. Held :* The Urban

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Rent Control Act contemplates two distinct classes of persons, *viz.*, tenant and persons permitted to remain in occupation under s. 12 ; s. 11 (*1*) of the Act does not apply to a person who has been permitted to remain in occupation as he is not a tenant within the meaning of that section. The section applicable to such a person is s. 13 (*1*).

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URBAN RENT CONTROL ACT, 1948, s. 11 (*1*) AND TRANSFER OF PROPERTY ACT, s. 106—*Consolidate notice under—Notice not strictly accurate—Effect—"Rent lawfully due"—Meaning of—Tenant building—Title to building after tenancy terminated.* The Appellant was the tenant of the house No. 489C, Prome Road, belonging to the Respondent. In the notice served on the tenant to determine the tenancy, the number of the house was given as 489 and not 489C and the receipt of the notice was admitted. It was contended that notice was invalid owing to mention of the wrong number. *Held :* The notice was good and effective in law. The test of sufficiency of notice, is what it would mean to the tenant conversant with all the facts and circumstances and not what they would mean to a stranger. *Harihar Banerji* v. *Ramshashi Roy*, (1919) I.L.R. 46 Cal. 458 (P.C.), followed. There is no definition of 'rent lawfully due' mentioned in s. 11 (*1*) (*a*), Urban Rent Control Act, 1948. S. 2 (*i*) of that Act defines standard rent, as the rent fixed by Rent Controller and in other cases, as defined in s. 2 (*f*) (*ii*) ; where no standard rent is fixed but there is a contractual rent, such rent must be deemed to be the rent lawfully due. Where a previous tenant erected a building and his tenancy ceased, he could not remove the building and the landlord had the right to lease out the land and the house standing thereon. *Gobindaprasad Shaha* v. *Charushcela Dasee*, (1933) I.L.R. 60 Cal. 1042, referred to.

S. L. BARUA *v.* S. M. ABOWATH ... ... ... 404

URBAN RENT CONTROL ACT, s. 19—*Decision under—By Assistant District Court*—persona designata—*Whether revision lies.* Where the Assistant Rent Controller of Bassein fixed standard rent under s. 19 of the Urban Rent Control Act which was set aside by the First Assistant Judge, Bassein and the said order was sought to be revised under s. 115 of the Code of Civil Procedure. *Held :* That the Assistant Judge is a *persona designata* and did not act as a court and the High Court has no power of intervention in revision. *H. A. Aziz* v. *Kilvoboy*, I.L.R. 4 Ran. 305 ; *The Municipal Corporation of Rangoon* v. *M. A. Shakur*, (1925) I.L.R. 3 Ran. 560 at 576, applied and followed.

AH YAR *v.* U KALA ... ... ... ... 285

URBAN RENT CONTROL ACT, s. 2 (g) ... ... ... 304

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WITHDRAWAL OF PROSECUTION—*No reasons given—Public policy how far a safe guide—S. 494, Criminal Procedure Code—Order of Magistrate whether judicial.* Where a Magistrate granted permission under s. 494 (*b*), Criminal Procedure Code to withdraw a charge on the ground of public policy and no other reasons were given. *Held on revision:* That the Magistrate had failed to exercise his judicial discretion and his failure to do so by not recording reasons is a sufficient ground for interference in revision. Reasons must always be given by a Magistrate to justify such orders. *In Re, Sadayin*, (1908) 5 Mad. L.T. 216; *Gulli Bhagat* v. *Narain Singh*, 11 Pat. 708; *Lakshmi Narain Verma and another* v. *Mohamed Hanif*, A.I.R. 52 Lah. 368; *Ratansha Kavasji Medhora* v. *Keki Behramasha Pardiwala and others*, I.L.R. (1945) Bom. 141; *Dattatraya Govindrao* v. *Emperor*, (1938), 25 A.I.R. Nag. 76; *Kapa Kasi Viswanadham* v. *Bondili Madan Singh and others*, A.I.R. 35 (1948) Mad. 422, not followed. *Abdul Gani* v. *Abdul Kader*, 1 Ran. 756, followed. *Emperor* v. *Milanmal Hardasmal and another*, A.I.R. (1943) Sind 161; *Rajni Kanta Shaha* v. *Idris Thakur*, (1921) 48 Cal. 1105; *Umesh Chunder Roy* v. *Satish Chundra Roy and others*, 22 C.W.N. 69; *Jagat Chandra Roy* v. *Kalimuddi Sardar*, (1922) 26 C.W.N. 880; *The King* v. *Ba Khin and others*, A.I.R. (1940) Ran. 189; *Sher Singh* v. *Jitendranath Sen*, A.I.R. (1931) Cal. 607, referred to. The High Court must always be in a position to say whether a discretion vested in the court has been properly exercised. Permission to withdraw a prosecution cannot be given as a matter of course nor can it be unreasonably withheld. It is of considerable public importance that nothing is done in a court which would give rise to suspicions about interference in the course of justice. *Devendra Kumar Roy* v. *Syed Yar Bakht Chaudhury and others*, A.I.R. (1939) Cal. 220 at 224, referred to and followed.

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## APPELLATE CIVIL.

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

GURBACHAN SINGH (APPELLANT)

*v.*

JOS. E. FERNANDO (RESPONDENT).*

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*Jan. 16.*

*Lease and Licence—Difference between—Effect of instrument to be considered —S. 105 of the Transfer of Property Act.*

A document between the parties contained clauses that 'F' allotted in his business premises a portion mentioned and for allotment of such space the appellant was to pay a sum of Rs. 100 as "guarantee commission" on the business and Radio sales, etc. and that the parties were to observe strictly business hours on week days, Sundays and holidays.

*Held :* That the document was one evidencing the licensing of a portion of the suit premises for selling Radios, etc.

*Held further :* The test for determining whether a transaction is a lease or a licence is to see whether the sole and exclusive occupation is given to the grantee.

*The Acting Secretary to the Board of Revenue* v. *Agent, South Indian Railway Co. Ltd.*, (1925) 48 Mad. 368 ; ***Frank Warr & Co. Ltd.*** **v.** *London County Council,* (1904) K.B. 713 at 720, referred to.

*Secretary of State for India in Council* v. *Bhupalchandra Ray Chaudhuri*, 57 Cal. 655 ; *Glenwood Sumber Co. Ltd.* v. *Phillips*, (1904) A.C. 405, distinguished.

*D. N. Dutt* for the appellant.

*F. S. Havock* for the respondent.

U SAN MAUNG, J.—In the suit out of which this appeal has arisen the plaintiff-respondent, Jos. E. Fernando, obtained a decree for the ejectment of the defendant-appellant Gurbachan Singh from the portion

* Civil 1st Appeal No. 49 of 1949 against decree of 3rd Judge, City Civil Court of Rangoon, in Civil Regular Suit No. 1092 of 1948.

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of the premises known as 217, Sule Pagoda Road, Rangoon, which was in occupation of Gurbachan Singh and for payment of Rs. 500 found to be due to the plaintiff-respondent as " guaranteed commission."

The defendant-appellant's defence in that suit as well as his main ground of appeal in this case is that he was in occupation of the portion of the suit premises as a sub-tenant of Fernando and not merely as his licensee, that the agreement, Exhibit A, dated the 7th July 1947 was a " sham " document which was never meant to be acted upon, and that, in any event, even in terms of the agreement Exhibit A he is not liable to be ejected from the suit premises. As the facts of the case have been fully set out by the 3rd Judge of the City Civil Court who tried the suit, it is not necessary to recapitulate them here. On the pleadings the learned trial Judge framed six issues as set out below :

(1) Whether the agreement dated the 7th July 1947, is valid and binding on the parties ?

(2) Is the defendant a licensee or a sub-tenant of the portions allotted to him in the suit premises ?

(3) Did the defendant pay Rs. 100 a month as a guaranteed commission or as rent ?

(4) Is the plaintiff entitled to a decree for possession of the portions of the premises in suit ?

(5) Is the plaintiff entitled to get Rs. 250 or any amount as representing 10 per cent commission on the nett profits out of the sale of goods other than radios, gramophones, etc ?

(6) Is the plaintiff entitled to get Rs. 500 from the defendant by way of arrears of guaranteed commission ?

On the evidence before him he came to the conclusion that the agreement dated the 7th July 1947, was valid and binding on the parties, that the defendant-appellant was a mere licensee of the portions of the suit premises which were allotted to him, that the

payments of Rs. 100 a month by him to the plaintiff-respondent were by way of " guaranteed commission," that the plaintiff-respondent was entitled to a decree for possession of the portions of the suit premises occupied by the defendant-appellant and also to Rs. 500 due as arrears of " guaranteed commission " but not the sum of Rs. 250 claimed as commission on the nett profits out of the sale of goods other than radios, gramophones, etc.

In this appeal by Gurbachan Singh it was urged on behalf of the appellant that the learned trial Judge should have held on the evidence, that Gurbachan Singh who was occupying a portion of the premises in suit since the 1st of May 1947, was a sub-tenant of Fernando on the same terms as Harbhajan Singh who had preceded him (Gurbachan Singh), that the learned Judge erred in not holding that the document Exhibit A, executed on the 7th July 1947, was a " sham " document executed for the purpose of evading the Urban Rent Control Act and of meeting any possible objection by the landlord, that the trial Judge erred in not giving due weight to the following admitted facts, namely, (*a*) that Harbhajan Singh was paying rent at Rs. 100 per month for the portion of the suit premises, (*b*) that the plaintiff-respondent's account book shows payment of rent by Harbhajan Singh at the rate of Rs. 100 per month, (*c*) that on the plaintiff-respondent's own admission the defendant-appellant had to permit him to occupy a space $4' \times 22'' \times 48''$ high for his show case, (*d*) that the plaintiff-respondent himself made the entries in the defendant-appellant's account book showing that the payments made to the plaintiff-respondent were by way of rent and (*e*) that the plaintiff-respondent was still carrying on business in the suit premises although he had alleged that the business had been sold to one Mr. R. O. Hindle.

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In this appeal three points appear to arise for our determination :—(1) Is the document Exhibit A dated the 7th July 1947, a " sham " one never meant to be acted upon, or, does it embody the terms agreed upon between Jos. E. Fernando and Gurbachan Singh ? (2) If Exhibit A is genuine and valid is it a document evidencing sub-lease of the portions of the suit premises mentioned therein or does it operate as a mere license to occupy these portions ? and, (3) if Exhibit A is a mere license is the defendant-appellant liable to be ejected from the portion of the suit premises occupied by him for breach of any of the conditions contained in Exhibit A or in pursuance of item 3, which provides that Gurbachan Singh would be allowed to carry on his business in radio as well as radio servicing for so long as Fernando carry on his business in the suit premises ?

As regards (1), there is no doubt the fact that although the defendant-appellant actually occupied a a portion of the suit premises since the 1st of May 1947, the document, Exhibit A, was only executed on the 7th July, 1947. According to the defendant-appellant, at the end of June 1947, the landlord who visited the suit premises found three or persons occupying the premises in addition to his tenant Fernando and that Fernando was collecting rent of over Rs. 500 from these persons while he himself was paying only Rs. 200 as rent. Therefore, the landlord proposed to Fernando that the rent should be enhanced. Two or three days later, Fernando asked him (Gurbachan Singh) to sign the agreement, Exhibit A, saying that he wanted to avoid complications with the landlord and the Rent Controller. As he had then become very friendly with Fernando he signed the agreement on the understanding that his position as sub-tenant was not to be affected thereby. According to the plaintiff-respondent, however, before Gurbachan Singh

came into occupation it was agreed that he would sign a similar agreement as that of Harbhajan Singh, his predecessor, who was a mere licensee occupying a portion of the suit premises on payment of "Guaranteed commission." Although the defendant-appellant actually occupied the suit premises on the 1st of May 1947 the agreement could not be executed till the 7th of July 1947 as he (Fernando) was stricken with grief owing to the death of his wife and daughter who were passengers on S.S. "Harvey Adamson" which sank on its voyage from Rangoon to Tavoy. The learned trial Judge accepted the plaintiff-respondent's version in preference to that of the defendant-appellant and, in our opinion, he was right in doing so. In the letter, Exhibit 6, dated the 28th April 1947 addressed to Gurbachan Singh, Fernando told Gurbachan Singh that he could occupy the portion previously occupied by Harbhajan Singh if he would refund to Harbhajan Singh the sum of Rs. 300 paid by the latter as rent to date and that he would have to sign an agreement in the same form as that executed by Mr. Harbhajan Singh. The defendant-appellant did have to sign the agreement, Exhibit A and it must be presumed, unless the contrary is proved to be true, that Exhibit A was the agreement referred to in the letter Exhibit 6. Although Gurbachan Singh would have it that the agreement which Harbhajan Singh had to sign was an ordinary tenancy agreement he has not been able to substantiate his allegation. He has neither produced a copy of the agreement signed by Harbhajan Singh nor cited Harbhajan Singh as a witness. Furthermore, although he would have it that in the receipts granted to him by Fernando the payments were mentioned as "rent" and not as "guaranteed commission," he has not produced any of these receipts as exhibits in the suit. He contended

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that these receipts were stolen from inside the file which he kept in this almirah which was not under lock and key and that these receipts were in his possession at the time he filed his application before the Rent Controller for the fixation of standard rent for the portion of the suit premises occupied by him. However, his explanation is on the face of it, most unsatisfactory. By June 1947, Fernando was disputing the nature of his occupancy of the portion of the suit premises and it is but natural that any man of ordinary prudence would keep the receipts under lock and key as they were valuable documents in support of his contention that he was a sub-tenant and not a mere licensee. The failure of Gurbachan Singh to produce the receipts granted to him by Fernando tends to support Fernando's story that he had recorded in them payments made to him as "guaranteed commission."

Great stress has been laid by the learned Advocate for the defendant-appellant upon the fact that in the account books of the defendant-appellant payments to Fernando were recorded as rent and that the entries were made by Fernando himself. However, Fernando was acting as a part-time Accountant of Gurbachan Singh and his explanation that he had to enter the payments as rent because Gurbachan Singh had told him that this was necessary for Income-tax purposes, is amply corroborated by Gurbachan Singh's own evidence. Gurbachan Singh had to admit in cross-examination, "I did ask the plaintiff to write the payments as rents for purpose of Income-tax." Besides, the fact that the agreement Exhibit A, is genuine is borne out by the fact that in reply to the notice, Exhibit 2, dated the 1st June 1948, from Mr. Pillay for Fernando to Gurbachan Singh that the latter had failed to carry out the terms of the agreement dated the 7th July 1947, Mr. Dadachanji for Gurbachan

Singh wrote in his letter, Exhibit B, dated the 9th June 1948 as follows :

"Your letter of the 1st instant addressed on behalf of your client Mr. Jos. E. Fernando to my client Mr. Gurbachan Singh, has been placed in my hands with instructions to reply thereto as follows :

That he would be obliged if you would let me know as to which conditions of *the agreement* have been broken by him and on which particular term your client bases his right to eject him from the premises."

If, as the defendant-appellant now contends, the document Exhibit A, dated the 7th July 1947, was a "sham" one not meant to be acted upon this is not the sort of reply one would have expected from him. He would have taken this opportunity offered to him of repudiating the agreement *in toto* instead of asking which of the conditions therein had been broken by him.

As the answer to the second point would depend very largely upon a proper construction of the document Exhibit A, it is necessary to set out below some of the important conditions embodied therein. These are as follows :

(1) Fernando would allot in his business premises namely, No. 217, Sule Pagoda Road, Rangoon, the spaces mentioned below for the purpose of carrying on a business in radio sales and radio servicing on terms to be stipulated in the agreement.

(2) The space allotted would measure 17 feet in length and 5 feet in width along the northern side of the show-room for the purpose of building a teakwood fixture and also for keeping two show-cases measuring 4′ × 22″ × 36″ high *reserving* a space 4′ × 22″ × 48″ high for Fernando's own show-case. Furthermore, a space 5′ wide was allotted along the northern side of the premises just below the loft and another space 5 feet

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wide was allotted in the back room with access to the lavatory and the bathing-room.

(3) For allotting these spaces Gurbachan Singh was to pay Fernando monthly on or before the 5th day of each month a sum of Rs. 100 as "guaranteed commission" on Gurbachan Singh's business in radio sales, gramophone record sales and for servicing of radios. An additional commission of 10 per cent on nett profits on goods other than radios, radio parts gramophones and gramophone records must also be given but before such goods were brought in and sold in the suit premises prior permission therefore must be obtained by Gurbachan Singh from Fernando.

(4) Both Fernando and Gurbachan Singh were to observe strictly business hours as from 8-30 a.m. to 5-30 p.m. on week-days and also Sundays and other holidays.

This document, on the face of it, is one evidencing the licensing of a portion of the suit premises by Fernando to Gurbachan Singh for the specific purpose of selling radios, gramophones and gramophone records and for the servicing of radios. This is especially clear from the fact that before Gurbachan Singh could bring in other goods for sale prior permission therefor must be obtained from Fernando. Furthermore, even in the space allotted to him Gurbachan Singh could only put show-cases of certain specified demensions. In that space Fernando reserved to himself the right of keeping his own show-case. Furthermore, Gurbachan Singh was to observe the same business hours as those observed by Fernando himself. From this latter fact it is apparent that Fernando was in control of the entrance to the premises. On Gurbachan Singh's own admission the space allotted to him by Fernando according to the terms of the document Exhibit A, was about one-fifth

of the whole of the suit premises. Except for the portion formerly occupied by Dr. Tsatos as a sub-tenant the whole premises appear to be one big common room with one small room at the rear, Dr. Tsatos' portion being the only one which had been partitioned off from the rest. After Dr. Tsatos had left, the space occupied by him was occupied by one Mr. Sidhwa on the same basis as the defendant-appellant Gubachan Singh, that is to say, by payment of "guaranteed commission." One, Mr. Godfrey occupied a portion of the loft by paying Rs. 45 a month as "guaranteed commission." One, Mrs. Adams occupied a portion of the suit premises as a sub-tenant. After Mrs. Adams left Gurbachan Singh was able to obtain from the Rent Controller permission to occupy the portion formerly occupied by Mrs. Adams on the same terms and conditions as those of Mrs. Adams. It is not known on what terms Mrs. Adams was allowed to occupy a portion of the suit premises. However, it seems clear to us that the defendant-appellant Gurbachan Singh himself cannot be regarded as a sub-lessee of the space allotted to him by Fernando as per terms of the document Exhibit A. He could never have been in exclusive possession of this space notwithstanding his assertion to the contrary. As held by a Special Bench of the Madras High Court in "*The Acting Secretary to the Board of Revenue* v. *Agent, South Indian Railway Co. Ltd.* (1) "the test for determining whether a transaction is a lease or a license is to see whether sole and exclusive occupation is given to the grantee." In this connection the observations of Kumaraswami Sastri J. seem apposite. The learned Judge observed at page 377 of the Report "A 'lease' is defined in

(1) (1925) 48 Mad. p. 368.

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section 105 of the Transfer of Property Act and a 'license' is defined by section 52 of the Easements Act. In both cases certain rights are conferred on the lessee or the licensee. In the case of a license something may be paid as consideration for allowing a person to do an act on another man's land. Both have several elements in common but it seems to me that the difference between a lease and a license is that in the case of a license there is no interest in immoveable property transferred to the licensee ; while in the case of a lease there is a transfer or carving out of the interest in favour of the person in whose favour the lease is granted. One chief condition is whether there is any right of exclusive possession given."

As observed by Romer L.J., in *Frank Warr & Co. Ltd.* v. *London County Council* (1) 'where a document does not amount to a demise or a parting in respect of any portion of the premises with the possession which the owner has when he executes a document, it would only amount to a license and not a lease.' On a proper construction of the document Exhibit A, it does not appear to us that Fernando has parted with possession of any of the portions of the suit premises allotted by him to Gurbachan Singh. Therefore this case is very similar to that of *Frank Warr & Co. Ltd.* v. *London County Council* (1) cited above where by a contract made between the lessee of a theatre and the plaintiffs it was agreed that the plaintiffs should have the exclusive right for a term of years to supply refreshments in the theatre, and for that purpose should have the necessary use of the refreshment rooms, bars, and wine cellars of the theatre, and that they should have an exclusive right to advertise, and let spaces for advertisements, in certain parts of the theatre, it was held that the contract did not

(1) (1904) K.B. 713 at 720.

confer on the plaintiffs an interest in land which could form the subject of compensation under the Lands Clauses Consolidation Act, 1845. No doubt, it is true that in the case now under consideration Fernando had allotted certain specified spaces in the suit premises to Gurbachan Singh but since, in our opinion, no exclusive possession thereof has been given to him there is no difference in principle between this case and that of *Frank Warr & Co. Ltd.* v. *London County Council* (1).

The learned Advocate for the appellant has referred up to the case of *Secretary of State for India in Council* v. *Bhupalchandra Ray Chaudhuri* (2) and has invited us to hold on the authority of the ruling in that case that the appellant was a sub-lessee of the portion of the suit premises occupied by him. There the learned Judges who decided that case held, following a ruling of the Privy Council in *Glenwood Sumber Co. Ltd.* v. *Phillips* (3) that if the effect of an instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations, or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself. However, this case is distinguishable from the case now under consideration because in our opinion the effect of the document Exhibit A was not to give Gurbachan Singh an exclusive right of occupation of the spaces allotted to him. Moreover, any doubt as to the nature of the transaction evidenced by Exhibit A may be set at rest by the defendant-appellant's own admission that at the time he executed this document he knew that it was not a tenancy agreement.

Lastly, as regards the third point it would appear to us that the defendant-appellant had failed to pay

(1) (1904) K.B. 713 at 720. (2) 57 Cal. 655.
(3) (1904) A.C. p. 405.

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the plaintiff respondent Rs. 500 due as "guaranteed commission" for the five months prior to the date of the suit. No doubt, the defendant-appellant offered to pay this amount if the plaintiff-respondent would give him rent receipts therefor. However, this is not an unconditional offer to pay the "guaranteed commission" due to the plaintiff-respondent and the defendant-appellant had no right to insist that rent receipts should be given in acknowledgment of the payment of the sum due to the plaintiff-respondent. The defendant-appellant had admittedly not only failed to carry out that part of the agreement by which a certain space 4′ × 22″ × 48″ was to be reserved for the show-case belonging to Fernando but also committed a breach of the agreement by occupying much more space than was actually allotted to him. In his evidence he said, "From the beginning up till now I am in occupation of practically half the portion of the whole premises." Apart from these breaches of conditions it is clear that according to Condition 3 of the agreement Exhibit A, the defendant-appellant could only occupy the portion of the suit premises allotted to him for so long as Fernando himself carried on his business at the suit premises and there is credible evidence on record to show that Fernando had entered into a partnership with Mr. O. Hindle in a concern known as Manufacturers Representative Business and had also entered into an agreement Exhibit F, whereby all the goodwill, furniture, fittings and stock belonging to him lying in the suit premises were to be sold to Mr. O. Hindle for a sum of Rs. 20,000 so as to enable Mr. Hindle to form a limited liability company in which he would be a shareholder to the extent of Rs. 5,000. Fernando's evidence on this point is corroborated by that of Mr. O. Hindle and we see no sufficient reason for

differing from the learned trial Judge's finding that the transaction evidenced by the agreement Exhibit F, was a genuine one.

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For these reasons we hold that the learned 3rd Judge of the City Civil Court was right in passing a decree for possession of the portion of the suit premises occupied by the defendant-appellant and for the payment of Rs. 500 as "guaranteed commission." In the result, the appeal fails and must be dismissed with costs. Advocate's fee five gold mohurs.

U THEIN MAUNG, C.J.—I agree.

## APPELLATE CIVIL.

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

H.C. 1950

*Jan. 17.*

# UNION GOVERNMENT OF BURMA (APPLICANT)

*v.*

# QUAH CHUN BEE (RESPONDENT).*

*Union Citizenship Election Act, 1948, s. 8 (2)—Reference to High Court by Minister—"Residence" meaning of in s. 3—Limitation.*

Respondent was born at Tavoy on 27th December 1923 where he resided till 1935 and went to Penang for further study. He used to come back to Tavoy for one month every half year upto 1941 and was out of Burma from 1941 till the 23rd of June 1946. He applied for Citizenship under the Union Citizenship Election Act, 1948. This was allowed by the Officer on 1st July 1949 but the Minister on behalf of the Union referred the application to Court on 20th November 1949.

*Held:* S. 8 (2) of the Act, under which the reference was made, did not prescribe any period of limitation within which the Minister must refer the application to Court. Such omission is deliberate. Therefore there is no period of limitation for reference by the Minister.

The meaning of the word "resides" has to be gathered from the intention of the legislature in s. 3. Such intention is obtained by interpreting the language according to its obvious meaning.

The same word need not necessarily have the same meaning in different enactments, not even in different sections in the same enactment, and therefore rulings under s. 20 of the Code of Civil Procedure and other statutes are not applicable.

*Ramachandra Sakha'ram* v. *Keshav Durga'ji*, (1882) I.L.R. 6 Bom. 100 at 101; *Parish Council of the City of Parish of Edinburgh* v. *Local Government Board for Scotland*, (1915) A.C. 717 at 722, referred to.

As a matter of fact the context and subject matter indicate that the natural meaning must be given to the word "reside." The Legislature has chosen this word instead of the word "domicile." S. 3 of the Act is only a reproduction of the s. 11 (iv) of the Constitution of Burma. The Legislature clearly regarded the Citizenship as a matter of the utmost importance as it involves rights and duties on the part of the Citizen and the State. The phrase "has resided for a period of not less than 8 years" must mean actual residence. This view is further strengthened by the fact that the Legislature has allowed the choice of two different periods as also a margin of two years out of 10 for absence from Burma. Judged in this way the Respondent was not entitled to a Citizenship Certificate.

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*Civil Reference No. 11 of 1949 being reference made by the Attorney-General on behalf of the Union Government of Burma under sub-section 2 of section 8 of the Union Citizenship (Election) Act, 1948.

*Srimati Anilabala Chandhurani* v. *Dhirendra Nath Saha and another*, A.I.R. (1921) Cal. 309 at 313, followed.

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*Tin Maung* (Government Advocate) for the applicant.

*Teh Wan Hock* for the respondent.

U THEIN MAUNG, C.J.—This is a reference under section 8 (*2*) of the Union Citizenship (Election) Act, 1948.

The application, the correctness of the decision on which is doubted by the Minister, is that of the present respondent Quah Chun Bee.

He was born in Tavoy on the 27th December 1923. He resided in Tavoy till 1935 when he went to Penang for further study. He used to come back to Tavoy for one month every half year up to 1941 ; but he was out of Burma altogether since the outbreak of the war in 1941 up to the 23rd June 1946 as he dared not return to Burma earlier. The Citizenship Election Officer has found as a matter of fact that " the period of stay of the applicant actually in Tavoy was, during the last ten years immediately preceding the 1st January 1942, a little over four years " ; and section 3 of the Act requires an applicant for a certificate of citizenship to have " resided in any of the territories included in the Union for a period of *not less than eight years* in the ten years immediately preceding either the first day of January 1942, or the fourth day of January 1948." However, the Citizenship Election Officer has ultimately held that the respondent is entitled to a citizenship certificate as his stay (in Penang) should, under the circumstances, be considered to have been in Burma.

His decision is dated the 17th January 1949, and the Minister referred the application to this Court only on the 20th November 1949. So the learned Advocate

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for the respondent has taken the preliminary objection that the reference is time barred. However, he is unable to point out under what provision of law the reference is time barred. Section 7 (1) of the Act provides :

" If the officer decides that the applicant has established his right to elect for citizenship of the Union, he shall forthwith transmit to the Minister a certified copy of his decision together with the application for the certificate and the affidavit annexed thereto."

And section 8 (2) thereof under which the reference has been made, provides :

" If the Minister is in doubt of the correctness of the decision of the officer, he may refer the application to the High Court on the Appellate Side. To such a reference by the Minister or the application under section 7(2) the provisions of Order XLI of the Civil Procedure Code shall apply."

Section 8 (2) does not prescribe any period within which the Minister must refer the application to this Court. This omission must have been deliberate since in sub-section (2) of the previous section the Legislature has expressly enacted :

" If the officer decides that the applicant is not entitled to so elect, the applicant may file an application in revision against the order in the High Court within sixty days from the date of the order."

We accordingly overrule the preliminary objection. At the same time we abstain from discussing the question as to whether Article 181 of the Limitation Act applies to such a reference as it is no body's case that it does.

The learned Advocate for the respondent has cited several rulings under section 20 of the Code of Civil Procedure, the Guardian and Wards Act and the Succession Act and on the meaning of the word

"resides." However, as has been pointed out by Melvill J. in *Ramchandra Sakha'ram* v. *Keshav Durga'ji* (1):

> "The word 'resident' in legislative enactments must be construed according to what may be supposed to have been the intention of the Legislature in using the term. The word need not necessarily have the same meaning in different enactments, nor even in different sections of the same enactment."

So we must, in the words of Lord Kinnear in *Parish Council of the City Parish of Edinburgh* v. *Local Government Board for Scotland* (2), gather the intention of the Legislature in using the term by taking the whole of section 3 of the Act together and "interpreting its language according to the obvious meaning to be specialized only by a reference to the context and to the subject-matter." The word "reside" ordinarily means "to dwell permanently or for a length of time" and there is nothing in the context or the subject-matter of the section to "specialize" it.

As a matter of fact the context and the subject-matter are such as to indicate that its natural meaning must be given to the word "reside." The Legislature has chosen to use the word "reside" instead of the word "domicile"; and as has been pointed out by Mookerjee C.J., in *Srimati Anilabala Chandhurani* v. *Dhirendra Nath Saha and another* (3) "the question (of residence) is entirely distinct from that of domicile which is often wholly independent of actual residence." Section 3 of the Act is only a reproduction of section 11 (iv) of the Constitution of the Union of Burma and the section 11 (iv) appears in the Chapter relating to Fundamental Rights. So the Legislature clearly regarded citizenship of the Union to have been a matter of utmost importance inasmuch as it involves

(1) (1882) I.L.R. 6 Bom. 100 at p. 101. (2) (1915) A.C. 717 at p. 722.
(3) A.I.R. (1921) Cal. 309 at p. 313.

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rights and duties both on the part of the citizen and on the part of the state ; and the presumption is that the Legislature would not let any one have the right of citizenship lightly and that it would require the prescribed conditions to be fulfilled strictly. According to this view the phrase " has resided in any of the territories included within the Union for a period of not less than eight years " must mean actual residence. This view is strengthened by the fact that the Legislature has allowed not only the choice of two different periods but also a margin of two years out of ten for absence from the said territories.

Even in a case under the Poor Law, the House of Lords has held that the word " resided " did not import intelligent residence but applied to the bodily presence of a pauper lunatic in the particular parish (See *Parish Council of the City Parish of Edinburgh* v. *Local Government Board for Scotland* (1) ; and the rights and duties under the Poor Law are only a small fraction of the rights and duties of citizenship.

We accordingly hold that the ordinary meaning must be given to the word " reside " in section 3 of the Act and that the respondent is not entitled to a certificate of citizenship as he has not actually resided, *i.e.* as he has not been bodily present, in any of the territories included within the Union for a period of not less than eight years immediately preceding the first day of January 1942, or the fourth day of January 1948.

The decision of the Citizenship Election Officer is set aside and the respondent's application is dismissed.

The respondent must bear the costs of this reference. Advocate's fee five gold mohurs.

U SAN MAUNG, J.—I agree.

(1) (1915) A.C., 717 at p. 722.

# CIVIL REVISION.

*Before U Thein Maung, Chief Justice.*

## R. K. DASS (APPLICANT)

*v.*

## K.N.R.M.N.R. NAGAPPA CHETTYAR (RESPONDENT).*

H.C. 1949

*Feb. 16.*

*Civil Procedure Code, s. 47, Order 21, Rule 95—Decree-holder auction purchaser —Delivery of possession to—Whether relates to execution, discharge or satisfaction of decree—Remedy—Agreement after execution—Whether adjustment—Whether revision lies.*

The Respondent having purchased a house at a court auction in execution of his own decree applied for delivery of possession under Order 21, Rule 95 of the Code of Civil Procedure. Later parties filed a joint petition that applicant was to deliver vacant possession after removal of buildings before 10th January 1948 and upon failure the court should act in accordance with the original application. Upon a further application by the Respondent the court ordered execution as first prayed for. On appeal the District Court held that no appeal lay. It was contended for the appellant that the Respondent is a party to the suit, that the question of delivery of possession relates to execution, discharge or satisfaction of the decree within s. 47 of the Code of Civil Procedure.

*Held :* The question whether applicant had or had not failed to give vacant possession after removing the buildings before the 10th of January 1948 arose out of the agreement and the agreement itself was not an adjustment of the decree.

*Held further :* That the auction purchaser's right to possession against the judgment-debtor is not a question relating to execution, discharge or satisfaction of the decree.

*Held :* That the question whether there has been a breach of a condition in any agreement is a pure question of fact which the Trial Court had jurisdiction to decide and there is no ground for revision of the order of the Trial Court.

*J. A. Martin* v. *S. M. Hashim and others*, (1930) I.L.R. 8 Ran. 162, followed.

*Semabi* v. *Ganapatrao Yadorao Pande*, A.I.R. (1938) Nag. 212 ; *Kashinatha Ayyar* v. *Uthumansa Rowthan*, (1902) 25 Mad. 529=12 M.L.J. 1 ; *Kattayat Pathumay* v. *Raman Menon*, (1903) 26 Mad. 740=13 M.L.J. 237 ; *Sandhu Taraganar* v. *Hussain Sahib*, (1905) 28 Mad. 87=14 M.L.J. 474 ; *Veerindramuthu Pillai* v. *Maya Nadan*, (1920) 7 A.I.R. Mad. 324=54 I.C. 209, =48 M.L.J. 32 (F.B.) ; *Kailash Chandra Tarpadar* v. *Gopal Chandra Poddar*,

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* Civil Revision No. 92 of 1948 against the order of the District Court of Bassein in Civil Misc. Appeal No. 5 of 1948 arising out of the order of the Second Subordinate Judge, Bassein in Civil Execution No. 52 of 1946.

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(1926) 13 A.I.R. Cal. 798=95 I.C. 494=53 Cal. 781=30 C.W.N. 649=43 C.L.J. 345 (F.B.) ; *Kalipada Mukherji* v. *Basantakumar Dutta*, (1932) 19 A.I.R. Cal. 126=138 I.C. 177=59 Cal. 117=35 C.W.N. 877 ; *Bhagwati* v. *Banwari Lal*, (1909) 31 All. 82=1 I.C. 416=6 A.L.J. 71 (F.B.) ; *Mohsin Raza Khan* v. *Haidar Bakhsh*, (1928) 15 A.I.R. All. 368=115 I.C. 869=50 All. 670=26 A.L.J. 498 ; *Kedar Nath* v. *Arun Chandra Sinha*, (1937) 24 A.I.R. All. 742=172 I.C. 57=(1937) A.L.J. 889=I.L.R. (1937) All. 921 (F.B.) ; *Triveni Prasad Singh* v. *Ramasray Prasad Chaudhuri*, (1931) 18 A.I.R. Pat. 241=133 I.C. 337=10 Pat. 670=12 P.L.T. 423 (F.B.) ; *Hargovind Fulchand* v. *Bhudar Raoji*, (1924) 11 A.I.R. Bom. 429=83 I.C. 932=48 Bom. 550=26 Bom. L.R. 601 (F.B.) ; *Hira Lal Mohan Lal* v. *Ramachandra*, (1930) 17 A.I.R. Bom. 375=125 I.C. 705=54 Bom. 479=32 Bom. L.R. 619 ; *Brij Lal* v. *Durga*, (1920) 7 A.I.R. Lah. 159=56 I.C. 254=1 Lah. 134=132 P.L.R. (1920) ; *Gaya Bakhsh Singh* v. *Rajendra Bahadur Singh*, (1928) 15 A.I.R. Oudh. 199=110 I.C. 83 =3 Luck. 182=5 O.W.N. 108 (F.B.) ; *Prosunno Kumar Sanyal* v. *Kali Das Sanyal*, 19 Cal. 683 ; *Korton Bibi* v. *V.M.R.P. Chettyar*, (1941) R.L.R. 767 ; *Haji Dada* v. *Pannalal*, 169 I.C. 99, considered.

*H. Subramaniam* for the applicant.

*P. B. Sen* for the respondent.

U THEIN MAUNG, C.J.—The respondent having purchased Holding No. 169 of 1935-36 measuring ·069 of an acre in Daga Railway Akwet No. 4, Daga village, Bassein East Township with a wooden house, outhouses, etc., standing thereon at a court sale in execution of his own decree against the applicant applied for delivery of possession of the said property under Order 21, Rule 95 of the Civil Procedure Code. While the application was pending the respondent and the applicant filed a joint application asking the Court to act and pass orders in accordance with an agreement between them. The agreement is to the effect that the applicant was to deliver vacant possession of the northern half of the said holding after removing all the building on that half before the 10th January, 1948, and that the Court should "act" in accordance with the respondent's original application (for delivery of possession) if the applicant failed to do so. Subsequently the Court found, after

inquiry on further application by the respondent, that the applicant has failed to give possession of the said half and ordered "that the applicant (*i.e.*, the respondent) shall have the right to execute his decree as first prayed for."

The applicant then appealed from the said order to the District Court, Bassein mainly on the ground that he had "satisfied the terms of the compromise as much as possible under the law"; but the appeal was dismissed on the ground that it did not lie in view of the ruling in *J. A. Martin* v. *S. M. Hashim and others* (1).

According to the said ruling—

> "The right of a decree-holder, as auction purchaser, to possession as against the judgment-debtor is not a matter that comes within the scope of section 47 of the Code of Civil Procedure. The question as to delivery of possession is not one relating to the 'execution, discharge or satisfaction' of the decree. If he fails to obtain possession under an application under Order 21, Rule 95 of the Code, his remedy is to file a suit and not to appeal against the order."

The learned Advocate for the applicant has contended that the said ruling is wrong, that the respondent is "a party to the suit" even though he claims delivery of possession not as a decree-holder but as an auction purchaser, that the question as to delivery of possession is a question relating to the execution, discharge or satisfaction of a decree and that the order of the Court of first instance is an order under section 47 of the Code of Civil Procedure.

There has been a considerable conflict of opinion in the decided cases on this question; and the position has been summarized by the Nagpur High Court in

(1) (1930) I.L.R. 8 Ran. 162.

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*Mr. Semabi* v. *Ganpatrao Yadorao Pande* (1) as follows :

"The decision of the dispute raised in this case is not free from difficulty. High Courts in India have taken different views. Sir Dinshah Mulla in his Civil Procedure Code, Edn. 10, pages 179 and 180, refers to the controversy on the subject. According to the view taken by the High Court of Madras and by a Full Bench of the High Court of Calcutta, the decree-holder retains his character of a party to the suit though he is also the purchaser, and the question as to delivery of possession is a question relating to the execution, discharge or satisfaction of the decree within the meaning of section 47, Civil Procedure Code. The two conditions laid down by the section are therefore satisfied and a separate suit for possession is barred under section 47: *Kashinatha Ayyar* v. *Uthumansa Rowthan* (2), *Kattayat Pathumay* v. *Raman Menon* (3), *Sandhu Taraganar* v. *Hussain Sahib* (4) *Vevindramuthu Pillai* v. *Maya Nadan* (5), *Kailash Chandra Tarapdar* v. *Gopal Chandra Poddar* (6), and *Kalipada Mukherji* v. *Basantakumar Dutta* (7). According to the other veiw, which is the view taken by a Full Bench of each of the High Courts of Allahabad, Patna, Bombay, Lahore, Rangoon and the Chief Court of Oudh, a decree-holder purchaser stands on the same footing as a purchaser who is a stranger so that he may proceed either by an application under Order 21, Rule 95 or by a separate suit for possession. This veiw proceeds on the grounds that section 47 does not apply either because the question as to the delivery of possession is not one relating to execution, discharge or satisfaction of the decree or because a decree-holder after he becomes purchaser of the property can no longer be said to be 'a party to the suit' : *Bhagwati* v. *Banwari Lal* (8), *Mohsin Raza Khan* v.

(1) A.I.R. (1938) Nag. 212.

(2) (1902) 25 Mad. 529 = 12 M.L.J. 1.

(3) (1903) 26 Mad. 740 = 13 M.L.J. 237.

(4) (1905) 28 Mad. 87 = 14 M.L.J. 474.

(5) (1920) 7 A.I.R. Mad. 324 = 54 I.C. 209 = 43 Mad. 107 = 38 M.L.J. 32 (F.B.).

(6) (1926) 13 A.I.R. Cal. 798 = 95 I.C. 494 = 53 Cal. 781 = 30 C.W.N. 649 = 43 C.L.J. 345 (F.B.).

(7) (1932) 19 A.I.R. Cal. 126 = 138 I.C. 177 = 59 Cal. 117 = 35 C.W.N. 877.

(8) (1909) 31 All. 82 = 1 I.C. 416 = 6 A.L.J. 71 (F.B.).

*Haidar Bakhsh* (1), *Kedar Nath* v. *Arun Chandra Sinha* (2), *Tribeni Prasad Singh* v. *Ramasray Prasad Chaudhuri* (3), *Hargovind Fulchand* v. *Bhudar Raoji* (4), *Hira Lal Mohan Lal* v. *Ramchandra* (5), *Brij Lal* v. *Durga* (6), *J. A. Martin* v. *S. N. Hashim* (7) and *Gaya Bakhsh Singh* v. *Rajendra Bahadur Singh* (8). According to the view taken in Calcutta and Madras, the application for delivery of possession falls under section 47 and the order made on the application amounts to a decree, section 2 (*2*), and is appealable as such. According to the other view, section 47 does not apply to the case and the application is entirely one under Order 21, Rule 95 and no appeal lies from an order made upon such application. "

It will be seen from the above extract that the majority of the High Courts hold the same view as the late High Court of Judicature at Rangoon. The Nagpur High Court itself followed the Madras and Calcutta view for the reason (*inter alia*) that their Lordships of the Privy Council had observed in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (9) :

" It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. "

However, the present case does not relate to any objection to the execution sale. It relates only to the question whether the applicant has or has not failed to give vacant possession of half the holding after removing the building thereon before the 10th January,

(1) (1928)15 A.I.R. All. 368 = 115 I.C. 869 = 50 All. 670 = 26 A.L.J. 498.

(2) (1937) 24 A I.R. All. 742 = 172 I.C. 57 = 1937 A.L.J. 889 = I.L.R. (1937) All. 921 (F.B.).

(3) (1931) 18 A.I.R. Pat. 241 = 133 I.C. 337 = 10 Pat. 670 = 12 P.L.T. 423 (F.B.).

(4) (1924) 11 A.I.R. Bom. 429 = 83 I.C. 932 = 48 Bom. 550 = 26 Bom. L.R. 601 (F.B.).

(5) (1930) 17 A.I.R. Bom. 375 = 125 I.C. 703 = 54 Bom. 479 = 32 Bom. L.R. 619.

(6) (1920) 7 A.I.R. Lah. 159 = 56 I.C. 254 = 1 Lah. 134 = 132 P.L.R. 1920.

(7) (1930) 17 A I.R. Ran. 61 = 126 I.C. 209 = 8 Ran. 162.

(8) (1928) 15 A.I.R. Oudh. 199 = 110 I.C. 83 = 3 Luck 182 = 5 O.W.N. 108 (F.B.).

(9) 19 Cal. 683.

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1948, in accordance with the agreement ; and the agreement itself is not an adjustment of the decree between the decree-holder as such and the judgment-debtor as in *Karton Bibi* v. *V.M.R.P. Chettyar* (1).

Besides, there is no unanimity even in the High Courts of Madras, Calcutta and Nagpur. With reference to the question as to whether the decree-holder-auction purchaser's right to recover possession is a question relating to the execution, discharge or satisfaction of the decree, Sir Arnold White C.J. observed in *Sandhu Taraganar and another* v. *Hussain Sahib* (2) " if the matter were *res integra*, I should be disposed to hold that the question is not one " relating to the execution, discharge or satisfaction of the decree. "

Cuming J. has observed in *Kailash Chandra Tarapdar* v. *Gopal Chandra Poddar* (3) :

" The auction-purchaser *qua* auction-purchaser is not a party to the suit, and the fact that he is also the decree-holder does not alter his position in any way, or make him in a matter in which he is concerned in the capacity of auction-purchaser a party to the suit. "

Pollock J. of the Nagpur High Court has observed in *Haji Dada* v. *Pannalal* (4) :

" It is true that in this case the decree-holder is himself the auction-purchaser but that makes no difference in principle . . . . After the sale had been held and the sale price had been set off against the judgment-debt or deposited in Court, subsequent proceedings for confirming the sale are proceedings between the judgment-debtor and the auction-purchaser just as proceedings for the delivery of possession to the auction-purchaser. In these proceedings the decree-holder plays no part and in my opinion these proceedings do not amount to executing

(1) (1941) R.L.R. 767.
(2) (1905) 28 Mad. 87 = M.L.J. 474.
(3) (1926) 13 A.I.R. Cal. 798 = 95 I.C. 494 = 53 Cal. 781 = C.W.N. 649 = 43 C.L.J. 345 (F.B.)
(4) 169 I.C. 99.

a decree so as to fall within the ambit of Proviso to section 21, C.P. Debt Conciliation Act. "

The High Court of Judicature at Rangoon decided that the question of the auction purchaser's right to possession as against the judgment-debtor is not a question relating to the execution, discharge or satisfaction of the decree after due consideration of the conflicting rulings which were then available ; and I am not satisfied, after a careful study of the subsequent rulings to the contrary, that the decision is wrong. On the other hand I find that it is in accordance with the rulings of the majority of the Indian High Courts.

Moreover, in the present case, I am clearly of the opinion (1) that the question which has been decided by the Court of first instance relates only to a condition in an agreement between an auction purchaser and the judgment-debtor, (2) that it does not relate to execution, discharge or satisfaction of the decree and (3) that the learned District Judge is right in holding that the appeal did not lie.

The learned Advocate for the applicant has submitted that the order of the Court of first instance might be revised and set aside, even though the order of the District Court dismissing his appeal be correct and cannot therefore be revised. However, the question as to whether there has been a breach of condition is a pure question of fact which the Court has jurisdiction to decide ; and the decision is supported (*inter alia*) by the evidence of Maung Po Thwe, Revenue Surveyor. So there is no ground for revision of the order of the Court of first instance either.

The application is dismissed with costs ; Advocate's fee three gold mohurs. The interim order for stay is discharged.

## CIVIL REVISION.

*Before U Tun Byu, J.*

H.C. 1950

*Feb. 9th.*

S. S. MOHAMED HANIFA (APPLICANT)

*v.*

K. O. MOHAMED KASIM (RESPONDENT).*

*Rangoon City Civil Court Act, s. 23—"According to law"—Interference in revision on question of fact—When permissible.*

The phrase "according to law" cannot be held to exclude cases in which there has been a grossly erroneous decision on facts. A Judge is not bound to refer in his judgment to each and every item of evidence relied on by the parties. The High Court does not ordinarily interfer on a question of fact but it will interfere only when the decision is perverse or so obviously incorrect in its nature as to amount to an error of law.

*Siva Dass Dey* v. *Ashabi and one*, (1925) 3 Ran. 471 at 473 ; *Abdul Qadir* v. *Narandra Mohan Ghose Chowdhury and one*, (1931) A.I.R. All. 210 ; *Maung Bo Saw* v. *Maung Thwe*, (1927) A.I.R. Ran. 159; *Mohanlal Maganlal* v. *Jivanlal Amratlal*, (1927) 51 Bom. Series 814 at 816 ; *Nathuram Shivnarayan* v. *Dhularam Hariram*, (1920) 45 Bom. 292, referred to.

*Dr. Thein* for the applicant.

*P. K. Basu* for the respondent.

U TUN BYU, J.—The plaintiff-respondent K. O. Mohamed Kasim instituted a suit against the defendant-applicant S. S. Mohamed Hanifa under section 25 of the Rangoon City Civil Court Act for the possession of the eastern portion of a platform which was used as a shop at No. 337, Fraser Street, measuring 6 feet by 3 feet ; and his case was that he allowed the defendant-applicant to occupy the said space of 6 feet by 3 feet temporarily and that he had withdrawn the permission so given ; while the case for the defendant-applicant Mohamed Hanifa was that he was a tenant of the plaintiff-respondent Mohamed Kasim, paying at first a

* Civil Revision No. 60 of 1949 against the decree of 4th Judge, City Civil Court, Rangoon in Civil Regular No. 7 of 1949.

rental of Rs. 3-8-0 per day, which was reduced with effect from the 1st August 1948, under the order of the Rent Controller, to Rs. 2-12-0 per day. The learned 4th Judge of the Rangoon City Civil Court came to the conclusion on the evidence before him that the defendent-applicant Mohamed Hanifa was only a permissive occupant of the premises in question, and not a tenant, and he granted a decree in favour of the plaintiff-respondent Mohamed Kasim.

Evidence has been adduced by both parties in support of their respective versions in this case, and the learned 4th Judge has written a somewhat lengthy judgment dealing with the points that had been raised in the case and the evidence adduced by the parties, giving also his reasons for the conclusion which he had arrived at. In *Siva Dass Dey* v. *Ashabi* and one (1) it was observed :

> " The phrase 'according to law' cannot be held to exclude cases in which there has been a grossly erroneous decision on fact. On the other hand to say that a High Court should interfere where there has been substantial injustice due to an erroneous decision on fact would be practically to make that a High Court a Court of Appeal from the Small Cause Court, since in the majority of cases, erroneous decisions on fact essentially result in substantial injustice. It may be taken therefore that, unless it can be shown that the conclusions on fact were so perverse as to lead to a conclusion that the Judge made no serious attempt to deduce them from the evidence before him or was utterly incapable of making such a deduction, a High Court will not interfere in revision on questions of fact."

The judgment passed by the learned 4th Judge shows that it cannot in this case be said that he made no proper or serious attempt to reproduce the effect of the evidence in relation to the points that had been raised before him, or that he had not made reasonable

(1) (1925) III Ran. p. 471 at p. 473.

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U TUN BYU, J.

deductions from the evidence adduced by the parties in this case. It has been urged that the learned 4th Judge gave undue importance to the evidence of the plaintiff's witness U Saw Hla Pru and undue significance to the Exhibit 'C' document, but it cannot in my opinion be said that the observations, which he made in this respect, was perverse or really unreasonable. It was also urged on behalf of the defendant-applicant that the learned 4th Judge did not refer in the judgment, which he delivered, to certain evidence in the case, and it will be convenient to reproduce in this connection the observations made in *Abdul Qadir* v. *Narendra Mohan Ghose Chowdhury and another* (1) which reads:

> "It cannot be assumed from the mere fact that the Court below has not referred in detail to all the items of documentary evidence produced by the parties, that the said evidence has been ignored or discarded. If the defendant did not, during the progress of the suit, bring certain documents to the notice of the Court the blame rests with the defendant. If any documents were referred to the Court we are entitled to hold that the Court must have considered the nature and scope of these documents before forming a conclusion on the questions in issue. A Judge is not bound to refer in his judgment to each and every item of evidence which is relied on by the parties."

I agree, with respect, with the observation that it is not necessary to refer in the judgment to every item of the evidence which the parties in the case might consider to be material. The case of *Maung Bo Saw* v. *Maung Thwe* (2) was referred to on behalf of the defendant-applicant, where it was observed that the Court would not ordinarily interfere on a question of fact, but that would not absolutely debar it from doing so. This obviously cannot be considered to mean that the Court, on an application for revision under

(1) (1931) A.I.R. All. p. 210. (2) (1927) A.I.R. Ran. p. 159.

section 21 of the Rangoon City Civil Court Act, has power to interfere on question of facts in most of the cases. In the case of *Mohanlal Maganlal* v. *Jivanlal Amratlal* (1) Crump J. observed in connection with the case of *Nathuram Shivnarayan* v. *Dhularam Hariram* (2) as follows:

"But if the judgment in that case be read, it seems to be a clear inference that what the learned Judges meant to decide was that the High Court would only interfere upon a question of fact where the decision was so perverse or so obviously incorrect in its nature as to amount to an error of law."

I am unable to see anything in this case which will indicate that the judgment of the learned 4th Judge of the Rangoon City Civil Court was perverse or obviously incorrect. I am also unable to see anything on the record which will indicate that he had not seriously attempted to discuss the evidence as a whole in connection with the points that have been raised in the present litigation. All that could be urged on behalf of the applicant on the facts of this case has been made by his learned Advocate, but it seems to me to be clear in this case that it cannot be said that the conclusions which the learned 4th Judge had come to were obviously wrong.

The application for revision is therefore dismissed with costs. Advocate's fees three gold mohurs.

(1) (1927) 51 Bom. Ser. p. 814 at p. 816. (2) (1920) 45 Bom. p. 292.

## CIVIL REVISION.

*Before U Tun Byu, J.*

H.C. 1949

*Dec. 7th.*

R. C. S. AGARWAL (*a*) MUNSHI (APPLICANT)

v.

DAHYABHAI (*a*) D. Z. DABUWALLA AND TWO OTHERS (RESPONDENTS).*

*Compromise order—Application to set aside Arbitration Act, 1944, s. 33—Whether application under lies.*

A compromise between the parties provided for challenging or contesting all matters under s. 33 of the Arbitration Act, 1944. The applicant made an independent application under the said section. Upon objection that no independent application lay.

*Held:* That the compromise contained no provision precluding an independent application or restricting the remedy and the intention of the parties is not relevant. The duty of the Court is only to construe the terms of the compromise and so construed an independent application lay.

*Hla Pe* for the applicant.

*Boon* for the respondents.

U TUN BYU, J.—The question which falls for consideration in this revision case is whether the applicant R. C. S. Agarwal *alias* Munshi can, in view of clause (*b*) of the terms of the compromise set out in the order passed in Civil Revision No. 35 of 1948 of this Court, file an independent application under the provisions of section 33 of the Arbitration Act, 1944, for the purposes set out in that section. It will be convenient here to set out at once the provisions of section 33 of the Arbitration Act, 1944, which reads:

"33. Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity

* Civil Revision No. 16 of 1949 against the order of the 1st Assistant Judge's Court of Mandalay in Civil Misc. No. 82 of 1948, dated the 20th January 1949.

of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits."

It will be observed that section 33 allows an application to be made independent of sections 14 to 17 of the Arbitration Act, 1944, where a party to the arbitration desires "to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined."

Clause (*b*) of the terms of the compromise, it is urged on behalf of the respondents, precludes the applicant from making an independent application which could ordinarily be made under section 33 of the Arbitration Act, 1944, and it reads:

"(*b*) That on the aforesaid amendment being made and permitted, the trial Court shall give notice to the respondent (Defendant in the suit) of the filing of the award and the respondent shall be permitted to challenge and or contest all matters pertaining thereto under section 33 and the other provisions of the Arbitration Act, 1944, within thirty days of the date of the service of the notice mentioned above on the respondent of the filing of the award."

The expression "and the respondent shall be permitted to challenge and or contest all matters pertaining thereto under section 33" has been contended on behalf of the respondents to mean that it purported to refrain the applicant from making an independent application under section 33; and it is urged that the applicant could take up all the grounds which he desired to do under section 33 also in the objection which he might file in the proceedings under sections 14 to 17 of the Arbitration Act, 1944. It appears, to me, however, that in the absence of the words "in his objection," or words to that effect in the expression which has been referred to above, the wording of clause (*b*) of the terms of the

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compromise is not sufficiently explicit to restrict the applicant from filing an independent application under section 33. We are not concerned with the intention of any of the parties at the time the compromise was effected. The duty of the Court here is to see whether clause (*b*) of the terms of the compromise can be construed to restrict the applicant from making an independent application, which is allowed to him under section 33, and the answer must, for the reasons already stated, be made in the negative.

The application for revision is allowed with costs; and the first Assistant Judge, Mandalay, is directed to proceed with the application of the applicant made under section 33 of the Arbitration Act, 1944, in accordance with law. Advocate's fee in this Court will be three gold mohurs.

## CIVIL REVISION.

*Before U Tun Byu, J.*

H.C. 1949

*Dec. 13.*

MA TIN NYUNT (APPLICANT)

*v.*

MA KYI KYI AND THREE OTHERS (RESPONDENTS).*

*Transfer of Property Act, s. 54—Minor plaintiffs—Represented in suit by uncle—Interest if adverse—Effect—S. 99 of Code of Civil Procedure.*

*Held:* That under s. 54 of the Transfer of Property Act a transfer of immoveable property of the value of less than Rs. 100 may be made either by Registered Instrument or by delivery of possession. As in this case the claim was based on an unregistered document for Rs. 10 there was no proof of delivery of possession, the applicant had no title to the property covered by the unregistered deed.

*Held further:* Where the next friend was the maternal uncle looking after the minors after their mother's death, the fact that he built a hut on the disputed land, did not show that he attempted to assert any title adverse to the minors. The objection to representation even if sustainable was an irregularity not in any way affecting the decision or merits of the case.

*Hardi Narain Sahu* v. *Ruder Perkash Misser*, I.L.R. 10 Cal. 626 at 634, followed.

*Ba Than* for the applicant.

*Saw Tun Taik* for the respondents.

U TUN BYU, J.—The plaintiff-respondents 1, 2 and 3 are the children of one Daw Pwa Yin, who died in August 1946. Daw Pwa Yin was, at least at one time, the owner of the land at No. 16, Maha Thuka Road, Pazundaung, which she purchased from Ma Thein and her husband Ko Ba Aung under a registered deed which was filed as Exhibit B in the present litigation. Apparently Ma Thein and Ba Aung purchased the land in question, with a hut thereon, from one Ma Mya Kyi who held a lease of the land from the

* Civil Revision No. 46 of 1949 against the decree of the 4th Judge, City Civil Court of Rangoon in Civil Suit No. 1017 of 1948, dated the 17th June 1949.

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U TUN BYU, J.

Rangoon Development Trust. Ko Ba Aung is dead, but his wife Ma Thein was examined as a witness for the plaintiff-respondents. It might be mentioned that the wooden hut at No. 16, Maha Thuka Road was burnt down in the early part of 1942.

The case for the defendant-applicant Ma Tin Nyunt is that she had purchased the land at No. 16, Maha Thuka Road for Rs. 90 from Daw Pwa Yin who died in 1942 after the occupation of the Japanese in Burma, and she said that she purchased it one or two months after the Japanese occupation, that a document of sale was executed and that she had lost it. This document of sale, admittedly, was not registered, and it could not therefore pass any interest in the land at No. 16, Maha Thuka Road, on to Ma Tin Nyunt. She however is in possession of the lease deed of the land in question issued by the Rangoon Development Trust to Ma Mya Kyi who was the original owner of the land. According to U Sein Kyi, next friend of the minor respondents, this lease deed was, after the death of Daw Pwa Yin, found to have been lost. It will be appropriate here to reproduce the relevant portion of section 54 of the Transfer of Property Act, which reads :

"54. * * * *

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

* * * *

It will thus be observed that the sale of land of a value less than Rs. 100 can be effected only by either a registered deed, which does not exist in the present case, or by delivery of possession, which also has not

been proved in the present case. The witnesses for the defendant-applicant Ma Tin Nyunt, although they said they were present at the time the document of sale was said to have been made, did not say anywhere in their evidence that possession of the land in dispute was also given to Ma Tin Nyunt. The only conclusion therefore is that there was no valid sale effected in favour of Ma Tin Nyunt in respect of the land at No. 16, Maha Thuka Road, even if we were to assume that the deceased Daw Pwa Yin had executed an unregistered document of sale in favour of Ma Tin Nyunt.

There is one circumstance in this case which in a way militates against the suggestion that Daw Pwa Yin had sold the land in dispute to Ma Tin Nyunt, namely, that the sale deed Exhibit B, under which Daw Pwa Yin purchased the land in dispute from Ma Thein and her husband Ko Ba Aung, is still in the possession of her children, the minor plaintiff-respondents. If Ma Tin Nyunt had in fact purchased the land in dispute and if a document of sale had been executed as alleged by her, it is very curious that, after the lease deed issued by the Rangoon Development Trust in respect of the land in dispute had been delivered to her, she should not also ask for, or endeavour to obtain, possession of the Exhibit B sale deed under which Daw Pwa Yin purchased the land from its previous owners. It seems to me that it is only reasonable to assume that Ma Tin Nyunt would desire to know how Daw Pwa Yin came to own the land in question, which she was to purchase. If Daw Pwa Yin had said, and there is no evidence on this point, that she had left the sale deed Exhibit B at home, one would have expected Ma Tin Nyunt to have made an attempt to obtain it ; and there is not a title of evidence to show that Ma Tin Nyunt ever went to Daw Pwa Yin's place to demand delivery

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of the sale deed Exhibit B at any time after the alleged sale to her. The finding of the 4th Judge of the Rangoon City Civil Court that Ma Tin Nyunt had not purchased the land from Daw Pwa Yin must therefore be considered to be correct.

There does not appear to be any real substance in the contention that U Sein Kyi ought not to have been allowed to represent the minor plaintiff-respondents in this litigation. He was their uncle, and the fact that he had built huts on the land does not necessarily indicate that he had interest adverse to the minors as he was looking after the minors after their mother's death, and moreover he also does not attempt to assert anywhere that he owns the land in dispute or that the minor plaintiff-respondents did not own the land in dispute. In the case of *Hardi Narain Sahu* v. *Ruder Perkash Misser* (1) Sir Richard Couch in delivering the judgment of their Lordships of the Privy Council also observed :

> " Three questions have been raised before their Lordships in the hearing of this appeal. The first was disposed of in the course of the argument. It was this : that the suit was brought by the manager appointed by the Court of Wards on behalf of the infant plaintiff : and that the manager had no authority to represent the plaintiff in it. Without considering he had authority or not, their Lordships were of opinion that, if the plaintiff had a right to sue, the objection was only a formal one, and could not be allowed to be raised in the present appeal."

The fact that U Sein Kyi appears on the records as the 4th plaintiff-respondent must in the circumstances of this case be considered to be a mere irregularity not in any way affecting the decision or merits of the case. It was probably thought by the Advocate appearing for the minor plaintiff-respondents in the trial Court

(1) 10 Cal, Series, p. 626 at p. 634.

that U Sein Kyi ought to be joined as a plaintiff in that he had built three huts on the land in dispute.

It has also been argued on behalf of the defendant-applicant that since the plaintiff-respondents have asked for possession of the land in their amended plaint a presumption should be raised that the land in dispute is in the possession of the defendant-applicant, and not in the possession of the plaintiff-respondents. I regret that I am unable to accede to this contention. Pleadings in this country are often not well or artistically drafted, and this is one of those instances. In paragraph 8 of the amended plaint as well as in paragraph 8 of the original plaint the plaintiff-respondents alleged that they were in possession of the land in dispute, and it was accordingly superfluous for them to claim possession of the land in dispute in their amended plaint and a prayer for that purpose should in the circumstances of this case be treated as a superfluity. The Rangoon Development Trust which allowed the mutation of name in the lease deed granted to Ma Mya Kyi had not been made a party to the present litigation. The Advocate who appears for the plaintiff-respondents submitted during the argument that his clients would be satisfied, without the relief for the cancellation of the lease issued to the defendant-applicant Ma Tin Nyunt, if it is declared that the minor plaintiff-respondents are the owners of the land in dispute. For the reasons already stated above, it appears to be clear in this case that Ma Tin Nyunt applied for mutation of name to the Rangoon Development Trust without having any right to do so. The minor plaintiff-respondents 1, 2 and 3 will therefore be declared to be the owners of the land in dispute, and the judgment and decree of the Rangoon City Civil Court will be modified in that the order for the cancellation of the lease should be deleted therefrom.

## APPELLATE CRIMINAL.

*Before U Aung Khine, J.*

H.C. 1949

*Nov. 15.*

HTEIN WIN (*a*) TIN SAING (APPELLANT)

*v.*

THE UNION OF BURMA (RESPONDENT).*

*Accused aged 15—S. 19A* (1) (a), *Arms (Temporary Amendment) Act, 1949—Young Offenders Act, s. 15—Proper sentence.*

There was a skirmish between a police party and White PVOs. Three of the skirmishers were left in a paddy field after the skirmish. Appellant one of the three, was found holding a Japanese rifle loaded with two live cartridges. He was convicted and sentenced to transportation for life by the Trial Court. It was found that he was aged only about 15.

*Held :* That under the Young Offenders Act, s. 15 no person under 16 shall be sentenced for death or transportation. However the accused was found fighting against the police with firearms and the offence was a serious one and he must be deemed to be a depraved or unruly character and a sentence of imprisonment sufficiently adequate to prove a deterrent should be passed. Appellant sentenced for two years rigorous imprisonment.

*Choon Foung* (Government Advocate) for the respondent.

U AUNG KHINE, J.—Appellant Htein Win *alias* Tin Saing appeals against his conviction and sentence of transportation for life under section 19A (*i*) (*a*) of the Arms (Temporary Amendment) Act, 1949, passed by the 7th Special Judge, Rangoon, in his Regular Trial No. 2 of 1949. The facts leading to the prosecution of the appellant are briefly these :

Early on the morning of 15th May 1949 there was a brief skirmish between a Police party and a band of White PVOs at Nyaungwaing Kwin, Thingangyun. When the firing ceased after an hour or so most of the PVOs took to their heels and only three men were left

* Criminal Appeal No. 303 of 1949 being appeal from the order of Special Judge of Rangoon, dated the 30th August 1949 passed in Special Regular Trial No. 2 of 1948.

in the paddy field. Two of them were the appellant and another by the name of Maung Zin, a co-accused in the lower Court. The appellant was found holding a Japanese rifle loaded with two live cartridges and he said that the rifle and cartridges belonged to Maung Zin. Maung Zin appears to have admitted the ownership of the rifle and the ammunition found. Both of them were however arrested and sent up for trial under section 19A of the Arms (Temporary Amendment) Act, 1949, for illegal possession of the rifle and the cartridges. For security reasons the trial of the two accused was held inside the Rangoon Central Jail. When the case was called the accused were found absent and they were sent for through the Jailor in charge. They refused to appear in Court and therefore the Court acting under section 3A of the Public Order (Preservation) (Amendment) Act, 1948, proceeded with their trial in their absence. After hearing the prosecution witnesses the appellant alone was charged under section 19A (*i*) (*a*) of the said Act. As he was absent from Court the Court deemed the appellant to have pleaded not guilty to the charge. A list of defence witnesses was subsequently filed by the defence lawyer, but these witnesses who were also the inmates of the jail refused to attend the Court. The Court proceeded to pass judgment and as stated above sentenced the appellant to suffer transportation for life.

In his memorandum of appeal the appellant stated that he is a school boy aged about 15 years only. Acting on this the proceedings were remanded to the lower Court to find out the age of the appellant. The appellant was examined by the Medical Officer Dr. M. L. Sharma of the Insein Central Jail. After the examination of the appellant the doctor was of the opinion that the appellant is a boy between 14 and

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HTEIN WIN (*a*) TIN SAING *v.* UNION OF BURMA.

U AUNG KHINE, J.

15 years of age. Such being the case, it is clear that the appellant cannot be sentenced to transportation for life in view of section 15 of the Young Offenders Act. Section 15 of the Young Offenders Act reads as follows :

"15. (1) Notwithstanding anything contained in any other law, no person under 16 shall be sentenced to death or transportation, and no person under 16 shall be sentenced to imprisonment except by a Court empowered under this Part and on the certificate of the Court that the offence is so serious or the offender is of so unruly or depraved a character that the methods of dealing with him provided by this Part are not suitable.

(2) If any person under 16 is convicted by any Court empowered under this Part of an offence which, by any other law, is punishable with death or transportation only, the Court may, on certificate as aforesaid, sentence him to imprisonment for not more than 10 years."

In my opinion the offence committed by the appellant was rather a serious one and he must be deemed to have a depraved or unruly character. Here in this case before his arrest he was found fighting against the Police force with firearms in the company of the renegade PVOs. However loath I am to sentence a young offender to a term of imprisonment I am constrained in this particular case for the reasons set out above to award a term of imprisonment. A sentence of two years, I should think, will be quite adequate to prove a deterrent. I would therefore while confirming the conviction of the appellant under section 19A (*i*) (*a*) of the Arms (Temporary Amendment) Act, 1949, reduce the sentence passed upon the appellant Htein Win *alias* Tin Saing to two years rigorous imprisonment.

## APPELLATE CIVIL.

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

H.C. 1949

Dec. 22.

THE TAJMAHAL STATIONERY MART (APPELLANT)

*v.*

K. E. MOHAMED EBRAHIM V. S. ALIAR & CO. (RESPONDENTS).*

*Trade mark—Infringement of—Ownership determined according to Common Law—Passing off—Functions of judge—Opinion of witness as to similarity of trade marks.*

*Held* : In Burma there is no system of registration of trade marks, nor for a statutory title to a trade mark. So the rights of parties setting up rival claims to ownership of a trade mark must be determined in accordance with the principles of Common Law.

Cf. *Thomas Somerville* v. *Paolo Schembri and Giovanni Battista Camillert*, (1887) L.R. 12 A.C. 453 at pp. 456-457, referred to and followed.

*Leather Cloth Co. Ltd.* v. *American Leather Cloth Co. Ltd.*, 11 H.C.C. 538; *Wotherspoon* v. *Currie*, L.R. 5 H.L. 508; *Johnston & Co.* v. *Orr Ewing & Co.*, 7 A.C. 219; *Definition by Lord Cranworth*, 11 H.L.C. 533-34, referred to.

At Common Law the use of trade name or mark which has been adopted by another is actionable if it tends to mislead by making it appear that the goods sold under it are the goods of that other.

*Singer Manufacturing Co.* v. *Loog*, L.R. (1880-81) 18 Ch.D. 394 at pp. 412-413; *Powell* v. *Birmingham Vinegar Brewery Co.*, L.R. (1896) 2 Ch.D. 54 at p. 79, referred to.

*T. Barlow and others* v. *Gobrindram and another*, (1897) I.L.R. 24 Cal. 364, *Mohamed Esuf* v. *Rajaratnam Pillai*, (1910) I.L.R. 33 Mad. 402; *A. Batchayi Rowther* v. *P. A. Ramaswami Pillai and another*, (1936) A.I.R. (Mad.) 8; *Heiniger* v. *Drog and another*, (1901) I.L.R. 25 Bom. 433, discussed

It will not make any difference even if the customers do not know the name of the firm which is printed on the front covers of the books immediately below the trade mark. The exclusive right to use a trade mark in respect of exercise books does not give a monopoly of the trade marks in respect of all kinds of stationery.

*Thomas Bear & Sons (India) Ltd.* v. *Prayag Narain another*, I.L.R. (1940) All. 446, followed and applied.

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* Civil 1st Appeal No. 44 of 1949 against decree of the Original Side in Civil Regular Suit No. 124 of 1948, dated the 21st July 1949

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THE TAJMAHAL STATIONERY MART v. K. E. MOHAMED EBRAHIM V. S. ALIAR & Co.

*The National Sewing Thread Co. Ltd.* v. *Messrs. James Chadwick & Bros. Ltd.*, A.I.R. (1948) Mad. 481 at 487; *Mohamed Noordin* v. *Abdul Kareem & Co.*, (1931) 48 R.P.C. 491; *Yorkshire Relish case*, *Edge & Sons Ltd.* v. *Niccolls & Sons Ltd.*, 28 R.P.C. 582; *Dunhill* v. *Bartlett & Bickely*, 39 R.P.C. 426; *Cowasjee* v. *Vera Somabhai Motibhai and one*, (1915-16) 8 B.L.R. 561; *A. M. Malumiar & Co.* v. *Finlay Fleming & Co.*, (1929) I L.R. 7 Ran. 169, referred to.

It is the function of the Judge to say whether trade marks are similar and it is not for the witness to express an opinion on the point.

*The Swadeshi Mills Co. Ltd.* v. *Juggo Lal Kamlapat Cotton Spinning and Weaving Mills Co. Ltd.*, I.L.R. 49 All. 92 at 97 and 111; *Payton & Co. Ltd.* v. *Snelling Lampard & Co. Ltd.*, (1901) A.C. 308 at p. 311; *Seixo* v. *Provezende*, (1865) L.R. 1 Ch. App. 192; *Boord & Son* v. *Bagots, Hutton & Co. Ltd.*, (1916) L.R. 2 A.C. 382; *Adamjee Hajee Dawood & Co. Ltd.* v. *The Swadesh Match Co.*, (1928) I.L.R. 6 Ran. 221 at 234, referred to.

*Mirza Md. Rafi* for the appellant.

*J. K. Munshi* for the respondent.

U THEIN MAUNG, C.J.—This is an appeal from a decree for an injunction and other ancillary reliefs in a suit for passing-off.

The plaintiffs-respondents' case is (1) that they have acquired the exclusive right to the use of the "Chinthay" Trade Mark in any shape or form or in any combination on all articles of stationery, (2) that the defendants-appellants have started selling in Rangoon and other parts of Burma certain articles of stationery such as exercise books and pocket note books under a trade mark which is a fraudulent and colourable imitation of their well-known "Chinthay" Trade Mark, and (3) that the said articles of stationery bearing the defendants-appellants' fraudulent trade mark are likely to be known by the same name and are likely to be passed off as and for their famous "Chinthay" Brand articles of stationery.

The defendants-appellants' defence is (1) that they had no knowledge about the alleged Chinthay Trade Mark of the plaintiffs-respondents, (2) that the latter have not acquired any exclusive right to use the Chinthay Trade Mark "which is a very common mark,

almost used everywhere in Burma," (3) that no one can mistake their mark and design as the mark and design of the latter, and (4) that their goods consequently cannot be passed off as and for the goods of the latter.

The plaintiffs-respondents' case is based on the defendants-appellants' user of the trade marks, Exhibits C and D; and the latter pleaded that they had ceased to use the trade mark Exhibit D long before the institution of the suit. However, the learned Judge on the Original Side has decreed the suit and granted an injunction and ancillary reliefs in respect of both the trade marks Exhibits C and D.

In Burma there is no system of registration of trade-marks, nor is there any provision for a statutory title to a trade mark. So the rights of parties setting up rival claims to the ownership of a trade mark must be determined in accordance with the principles of common law. (*See* Ratanlal's Law of Torts, 10th Edition, page 329); cf. *Thomas Somerville* v. *Paolo Schembri and Giovanni Battista Camilleri* (1), where there Lordships of the Privy Council observed:

"In Malta there is no law or statute establishing the registration of trade marks, and no authority exists from whom an exclusive right to a particular trade mark can be obtained. The rights of the parties to this cause are therefore dependent upon the general principles of the commercial law, some of which are referred to in the judgment of the Court of Commerce. These principles have been very fully illustrated and explained by the House of Lords in the *Leather Cloth Co. Ltd.* v. *American Leather Cloth Co., Ltd.* (2); *Wotherspoon* v. *Currie* (3); *Johnston & Co.* v. *Orr Ewing & Co.* (4), all of which were cases which arose before the passing of the first British Trades Marks Registration Act in the year 1875.

(1) (1887) L.R. 12 A.C. 453 at pp. 456-457.

(2) 11 H.C.C. 538.

(3) Law Rep. 5 H.L. 508.

(4) 7 App. Cas. 219.

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In the first of these cases, the interest which a merchant or manufacturer has in the trade mark which he uses was thus defined by Lord Cranworth (1) : 'The right which a manufacturer has in his trade mark is the exclusive right to use it for the purpose of indicating where, or by whom, or at what manufactory, the article to which it is affixed was manufactured. As soon, therefore, as a trade mark has been so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes, to that extent, the exclusive property of the firm ; and no one else has a right to copy it, or even to appropriate any part of it, if by such appropriation unwary purchasers may be induced to believe that they are getting goods which were made by the firm to whom the trade mark belongs. Had it not been for the views expressed by the Court of Appeal in giving judgment, it would hardly have been necessary for their Lordships to observe that the acquisition of an exclusive right to a mark or name in connection with a particular article of commerce cannot entitle the owner of that right to prohibit the use by others of such mark or name in connection with goods of a totally different character ; and that such use by others can as little interfere with his acquisition of the right."

At common law the use of a trade-name or mark which has been adopted by another is actionable only if it tends to mislead by making it appear that the goods sold under it are the goods of that other. (*See* Underhill's Law or Torts, Fifteen Edition, page 307.)

With reference to the law relating to " passing-off," James L.J. has stated in *Singer Manufacturing Co.* v. *Loog* (2) :

" I have often endeavoured to express what I am going to express now (and probably I have said it in the same words, because it is very difficult to find other words in which to express it)—that is, that no man is entitled to represent his goods as being the goods of another man; and no man is permitted to use any mark, sign or symbol, device or other means, whereby, without making a direct false representation himself to a purchaser who

(1) 11 H.L.C. pp. 533-534. (2) L.R. (1880-81)18 Ch.D. 394 at pp. 412-413.

purchases from him, he enables such purchaser to tell a lie or to make a false representation to somebody else who is the ultimate customer. That being, as it appears to me, a comprehensive statement of what the law is upon the question of trade mark or trade designation, I am of opinion that there is no such thing as a monopoly or a property in the nature of a copyright, or in the nature of a patent, in the use of any name. Whatever name is used to designate goods; any body may use that name to designate goods; always subject to this, that he must not, as I said, make directly, or through the medium of another person, a false representation that his goods are the goods of another person."

It has also been stated in a few propositions by Kay L.J. in *Powell* v. *Birmingham Vinegar Brewery Co.* (1).

The first contention of the learned Advocate for the appellants is that there was no evidence whatever to establish either that the public had grown accustomed to associate the trade mark bearing the figure of a Chinthay with the plaintiffs-respondents as manufacturers or dealers in exercise books. However, there is evidence to show (1) that Chinthay Trade Mark was used in respect of stationery by K. E. Mohamed Ebrahim V. S. Aliar & Co., (2) that when the said partnership was dissolved in October, 1930, the Trade Mark was allotted to the plaintiffs-respondents, (3) that they have continued to use it in respect of stationery manufactured by them, and (4) that the respondents' firm has been known as Chinthay Taik like the old firm.

There is also evidence to show that Chinthay Trade Mark exercise books acquired a reputation in the Burma market both before and after the war and that customers used to ask for them as Chinthay Trade Mark books, *i.e.*, even before the appellants began to use the trade marks in question. (*See* the evidence of Shamshuddin, S. A. Ismail, P. K. Mohamed Gani,

(1) L.R. (1896) 2 Ch.D. 54 at p. 79.

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P. K. P. Mohamed Ebrahim, Kader Mohideen and Abdul Hamid.)

The learned Advocate's argument is (1) that it is not sufficient for the respondents to show that their Chinthay Trade Mark exercise books had acquired a reputation and (2) that they must also establish that the public have associated the trade mark with them as manufacturers of or dealers in the exercise books. He relies on the following cases, *viz. T. Barlow and others* v. *Gobrindram and another* (1); *Mohamed Esuf* v. *Rajaratnam Pillai* (2); and *A. Batchayi Rowther* v. *P. A. Ramaswami Pillai and another* (3). The first case was one in which the plaintiffs alleged that they were entitled to the exclusive use of the number 9000 as a mark for distinguishing a particular variety of cloth and as indicating that the same was of a certain quality and of their importation; but the Court found (1) that the plaintiffs *did not appear to have* for the purpose of distinguishing the particular variety of cloth imported by them, *ever used numbers alone and independently of some object design*, (2) that different numbers and different object designs were frequently used by the plaintiffs to distinguish importations of cloth which were identically the same in quality, kind and measurement and (3) that the purchasers used their own judgment in selecting cloth and certainly did not necessarily buy cloth marked with 9000 merely on the faith or belief that it was the plaintiffs'.

The first case is cited with approval in the second case but the actual decision therein is that the plaintiff is entitled to an injunction as he has succeeded in proving that he was the first man in the market with the name "Albert" for the cigars of his manufacture

(1) (1897) I.L.R. 24 Cal. 364. (2) (1910) I.L.R. 33 Mad. 402.
(3) A.I.R. (1936) Mad. 8.

and that his cigars had acquired a reputation as such before the defendant began to pass off his cigars under the same name.

In the third case the trade mark admittedly belonged to a firm which had been dissolved, there was no assignment of any goodwill or trade name to the plaintiff and there was nothing whatever to indicate that the market associated the goods bearing the mark with any manufacture by or trade of the plaintiff. There is a reference in this case to *Heiniger* v. *Drog and another* (1). That, however, is a case in which it was held that an importer can only protect a trade mark representing his own reputation and the advantage accruing therefrom but not the trade mark of another, a manufacturer or producer. So the first and third cases can easily be distinguished as cases in which the plaintiffs had not established that the marks claimed by them were their trade marks. Besides, the first case has been explained in *The National Sewing Thread Co. Ltd.* v. *Messrs. James Chadwick & Bros. Ltd.* (2), where a Bench of the Madras High Court observed :

"As has been pointed out in *T. Barlow and others* v. *Gobrindram and another* (3), where numbers were used in conjunction with striking object designs and in *Mohamed Noordin* v. *Abdul Kareem & Co.* (4), where a name was used along with a picture, if the plaintiff claims that the goods are dealt with by the number alone or by the name alone divorced from the design or the picture, it is for him to make it out and in the absence of evidence that the design or picture is of no consequence, the legitimate inference should be that it played an important part along with the number or the name as the case may be."

The plaintiffs-respondents' case is similar to the second case as they were first in the field with the

(1) (1901) I.L.R. 25 Bom. 433.
(2) A.I.R. (1948) Mad. 481 at p. 487.
(3) (1897) I.L.R. 24 Cal. 364.
(4) (1931) 48 R.P.C. 491.

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Chinthay Trade Mark and their exercise books were well known as Chinthay Trade Mark books long before the defendants-appellants began to use another Chinthay mark.

Besides, it will not make any difference even if customers did not know the name of the respondents' firm which, by the way, is printed on the front covers of their exercise books immediately below the Chinthay Trade Mark. Venkateswaran has pointed out at page 81 of his Trade and Merchandise Marks in India:

"It is well-settled law that a trade mark need not indicate to the public the actual ownership of the goods in question. A trade mark merely guarantees to the purchaser that the goods on which the mark is applied emanate from the same source of trade as the goods that had hitherto borne the same trade mark. The public need not, therefore, know the specific source of the articles bearing the trade mark in question, and indeed, do not often care to know the name of the particular manufacturer of the goods. It is sufficient if they identify the goods on which the mark is applied with a single source, and are able by means of the mark, to distinguish the goods emanating from this source from goods emanating from other sources. This principle of law is well illustrated by the *Yorkshire Relish case* (1), *Edge & Sons Ltd.* v. *Niccolls & Sons Ltd.* (1) and *Dunhill* v. *Bartlett & Bickley* (2)."

[Cf. *William Wotherspoon and another* v. *John Currie* (3), where the Lord Chancellor observed, "If people have been pleased with an article, it should be recognized at once by the designation of the article although the customers may not know the name of the manufacturer."]

So we hold that the respondents have established their exclusive right to use the Chinthay Trade Mark in respect of their exercise books.

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(1) 28 R.P.C. 582. (2) 39 R.P.C. 426.
(3) At p. 514.

The exclusive right to use it in respect of exercise books, however, does not give them a monopoly of the Chinthay Trade Mark in respect of all kinds of stationery. There can be no monopoly in the use of the trade mark; a Judge cannot properly decide, except on evidence as to the classes or kinds of goods which are protected by a trader's marks, and there is little or no evidence of the respondent's stationery, other than their exercise books, having been well known in the market by the Chinthay Trade Mark, *i.e.*, of association in the market of the trade mark with such other stationery. In *Thomas Bear & Sons (India) Ltd.* v. *Prayag Narain and another* (1), their Lordships of the Privy Council have held that the appellants, who had acquired a proprietary right in respect of their elephant trade mark with reference to their cigarettes and smoking tobacco, were not entitled to an injunction to prevent the respondents from selling their *chewing* tobacco with the elephant trade mark. [*See* also the above extract from *Thomas Somerville* v. *Paolo Schembri and Giovanni Battista Camilleri* (2).]

So we hold that the respondents have acquired a proprietary right in respect of their Chinthay Trade Mark with reference to their exercise books only.

The next contention of the learned Advocate for the appellants is that their trade marks cannot be mistaken for the respondents' trade mark and that their exercise books cannot therefore be passed off as and for the respondents' exercise books. With reference to this contention we must deal with the appellants' trade marks Exhibits C and D separately.

The respondents' trade mark is a Chinthay standing with one front leg raised and it is somewhat like what is popularly known among the Burmese people as

(1) I.L.R. (1940) All. 446. (2) (1887) L.R. 12 A.C. 453 at pp. 456-457.

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Toe-Naya ; the appellants' first trade mark is a sitting Chinthay and such as is usually seen near Pagodas ; the only difference between them is as regards their posture ; and the proper test is whether the trade mark on the appellants' goods is likely to deceive a purchaser *who is acquainted with the respondents' trade mark but who trusts to his memory.* (See *Byramjee Cowasjee* v. *Vera Somabhai Motibhai and another* (1) and *A. M. Malumiar & Co.* v. *Finlay Fleming & Co.* (2), and compare the *National Sewing Thread Co. Ltd.* v. *Messrs. James Chadwick & Bros. Ltd.* (3), in which Govindarajachari J. observed that the test in all these cases is "whether the general impression left in the mind of a customer who had previously bought the plaintiff's goods is such that he is likely to accept the defendant's goods, when they are offered to him, in the belief that they are the plaintiff's."

It is the function of the Judge to say whether the trade marks are similar ; and it is not for a witness to express an opinion on the point. [See *The Swadeshi Mills Co. Ltd.* v. *Juggo Lal Kamplapat Cotton Spinning and Weaving Mills Co. Ltd.* (4)]; so the Judge, looking at the exhibits before him, must not surrender his own independent judgment to any witness. [See *Paylon & Co. Ltd.* v. *Snelling Lampard & Co. Ltd.* (5).]

The learned Judge on the Original Side has found, though only by implication in the finding regarding trade mark Exhibit C, that the appellants' trade mark Exhibit D is similar to the respondents' trade mark and that customers are likely to be deceived thereby ; and we agree with him. Customers who have bought the respondents' exercise books may remember that their

(1) (1915-16) 8 L.B.R., 561.
(2) (1929) I.L.R. 7 Ran. 169.
(3) A.I.R. (1948) Mad. 481 at p. 487.
(4) I.L.R. 49 All. 92 at pp. 97 and 111.
(5) (1901) A.C. 308 at p. 311.

trade mark is a Chinthay ; but they may not remember whether it is standing or sitting. With reference to a similar difference Govindarajachari J. observed in *The National Sewing Thread Co. Ltd.* v. *Messrs. James Chadwick & Bros. Ltd.* (1), " The witness refers to a difference in the posture of the birds in the two designs. It is true that there is some difference, but no importance need be attached to this as a purchaser cannot be expected to make a detailed comparison of the two labels before buying." Besides, the respondents' exercise books are well known by their Chinthay trade mark ; and their Lordships of the Privy Council have observed in *Thomas Bear & Sons (India) Ltd.* v. *Prayag Narain and another* (2) :

" Their Lordships think that the test of comparison of the marks side by side is not a sound one, since a purchaser will seldom have the two marks actually before him when he makes his purchase ; and marks with many differences may yet have an element of similarity which will cause deception, more especially if the goods are in practice asked for by a name which denotes the mark or the device on it. This has been settled in England since the case of *Seixo* v. *Provezende* (3), where there will be found some remarks by Lord Cranworth, L.C., very relevant to this matter. He also pointed (at p. 197) that the adoption by a rival trader of a mark which would cause his goods to bear the same name in the market, may be as much a violation of the rights of the first owner as the actual copy of his device. This same view was taken in the case of *Johnston & Co.* v. *Orr Ewing & Co.* (4), a case relating to the use of two elephants on tickets placed upon goods for sale in India."

The appellants' trade mark, Exhibit C, however, stands on different footing. It consists not only of the Chinthay in a sitting posture but also of two dragons—one on each side of the Chinthay. The dragons are copies of the dragons on the City Hall of the Rangoon

(1) A.I.R. (1948) Mad. 481 at 487.
(2) I.L.R. (1940) All 446.
(3) (1865) L.R. 1 Ch. App. 192.
(4) 7 App. Cas. 219.

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Municipal Corporation. They are much larger than the Chinthay itself; they are not by any means less prominent than the Chinthay even though the latter happens to be in the middle; and we are of the opinion that the trade mark containing them, as aforesaid, cannot be mistaken for a trade mark consisting only of a Chinthay. The respondents themselves could not have been sure of their ground in respect of this trade mark Exhibit C, since they wrote in Exhibit E, "We understand that you have been recently manufacturing * * * exercise books * * * with the trade mark of *Chinthay or Dragon on* them;" B. K. Deb, a partner in the respondents' firm and Maung Ba Shwe, the designer of the trade mark, have deposed that they would call it Chinthay and Dragon trade mark, and there is no evidence whatsoever of the appellants' exercise book with the said trade mark having been passed off or referred to as Chinthay Trade Mark books at all. As a matter of fact the addition of two different symbols, *viz.*, the dragons, is so conspicuous and the total dissimilarity of the general combination of marks is such that to any one at all acquainted with the respondents' trade mark, we can hardly think that even on the most cursory glance there could be any deception. [Cf. the remarks of Lord Cranworth in *The Leather Cloth Co. Ltd.* v. *The American Leather Cloth Co. Ltd.* (1) and the remarks of Sale J., in *T. Barlow and others* v. *Gobrindram and another* (2).] This case is somewhat similar to *Boord & Son* v. *Bagots, Hutton & Co. Ltd.* (3), where the rivalry was between a cat in sitting posture got up as a puss in boots and a cat standing on a barrel. There it was held:

"That the applicants' mark was not calculated to deceive, there being no resemblance between the two marks, and that the

(1) 11 H.C.C. 538. (2) (1897) I.L.R. 24 Cal. 364.
(3) (1916) L.R. 2 A.C. 382.

mere possibility of confusion arising from the insufficient description of the opponents' mark by ignorant people in foreign markets was not a ground for refusing registration."

[Cf. *Adamjee Hajee Dawood & Co. Ltd.* v. *The Swedish Match Co.* (1)], in which a Bench of the late High Court of Judicature at Rangoon observed:

"We are of opinion that the plaintiffs have established sufficient user of 'Three Star' and 'J.W.T. Star' label as would justify us in restraining any other competitor in Burma from a colourable imitation of either of these marks, but they have not, in our opinion established a right to restrain all and sundry from using a design for matches in which any number of stars is a distinctive mark."

We accordingly hold that the respondents are not entitled to any relief in respect of Exhibit C.

The appellants say that they registered the trade mark Exhibit D on the 17th March, 1948, and discarded it in June, 1948, *i.e.*, about six months before the institution of the suit, when they adopted the trade mark Exhibit C instead thereof. However, the respondents are entitled to an injunction to prevent them from using the trade mark Exhibit D again and also to ancillary reliefs for the use of the trade mark in respect of exercise books only during the said period. At the same time the learned Advocate for the respondents has had to admit that the wording of the decree under appeal is too wide.

So the decree under appeal is set aside. Instead thereof let there be a decree for (1) an injunction restraining the appellants and their agents from importing into or selling in Burma exercise books bearing the Chinthay Trade Mark Exhibit D or any mark whatsoever which might be a colourable imitation of the respondents' Chinthay Trade Mark, Exhibits A and B, (2) an order directing the appellants to deliver up

(1) (1928) I.L.R. 6 Ran. 221 at p. 234.

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all exercise books bearing the said offending trade mark Exhibit D in their possession or control, (3) an order that the Official Referee of this Court do take accounts of the exercise books sold by the appellants under the said offending trade mark and do submit his report in due course.

The parties must bear their own costs in both Courts up to this stage.

U SAN MAUNG, J.— I agree.

## APPELLATE CIVIL.

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

MA KIN KYI (APPELLANT)

*v.*

MA THAN TIN (RESPONDENT). *

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*Jan. 23.*

*Burmese Buddhist Law—Estate of deceased step-grandparent—Rival claims of daughter of* Kilitha *daughter and* Apatiltha *daughter—Justice, equity and good conscience—*Kilitha, *if illegitimate.*

***Held*** : That in a contest to the estate of a deceased step-grandparent governed by Burmese Buddhist Law, as between the child of a *Kilitha* daughter and the daughter of an *Apatittha* son, both are entitled to inherit. A *Kilitha* child is not an illegitimate child but only inferior to children born of parents who live openly together.

*U E Maung*'s Buddhist Law, p. 194/195, referred to.

*Ma Sein Hla* v. *Maung Sein Hnan*, (1903-04) 11 L.B.R. 54, distinguished.

*Digest, 1*, 17, referred to.

The status of an *Apatittha* son cannot be higher than that of a *Kilitha* son.

*Manukye*, Vol. X, s. 51, referred to.

*Kinwun Mingyi*'s *Digest*, Vol. I, s. 301, referred to.

A *Kilitha* child will, unlike an *Apatittha* child, exclude other relations from inheritance.

*U E Maung*'s Buddhist Law, p. 225, referred to.

The peculiar circumstances in the case did not fit in with the contingencies in the case law nor provided for in the *Dhammathats* and in accordance with the principles of justice, equity and good conscience, each claimant was held entitled to half.

*Ba Than* for the appellant.

U THEIN MAUNG, C.J.—U Shwe Din and his first wife Daw Dwe adopted Tun Pe as their *apatittha* son. After Daw Dwe's death without any natural issue U Shwe Din had some intimacy with Ma Mya Lay without living openly with her. Ma Mya Lay gave birth to Ma Thein Shwe as a result of the said intimacy.

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* Special Civil Appeal No. 3 of 1949 against the Decree of the High Court, Rangoon, on the Appellate Side in Civil 2nd Appeal No. 92 of 1948, dated the 27th January 1949.

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When Ma Thein Shwe was a few years old, her mother Ma Mya Lay left U Shwe Din's protection and lived with another man. U Shwe Din then took Ma Thein Shwe into his household and brought her up in his house. Subsequently U Shwe Din married Daw Shin.

Ma Khin Kyi is a daughter of Tun Pe. She was born in U Shwe Din's house after the death of Daw Dwe while Tun Pe was living with U Shwe Din. Tun Pe lived with U Shwe Din up to the time of his death, and even after Tun Pe's death Ma Khin Kyi continued to live with U Shwe Din for about 7 years. Then her mother married again and took her away from U Shwe Din's house. However, she returned to his house after some interval and lived there till she got married to Ko Kyaw. Ko Kyaw died in 1942 and thereafter she lived with Daw Shin up to the time of Daw Shin's death in or about the year 1945.

Ma Thein Shwe married Maung Tun Naing while she was living with Daw Shin ; and after the marriage she and her husband lived with Daw Shin up to the time of her death. Ma Thein Shwe gave birth to Ma Than Tin in the house of Daw Shin ; and after her death her husband went back to his parent's house, leaving Ma Than Tin with Daw Shin. So Ma Than Tin was living with Daw Shin from the date of her birth up to the time of Daw Shin's death.

Now, Ma Khin Kyi and Ma Than Tin are rival claimants under the Buddhist Law to the estate of Daw Shin. The learned Assistant Judge held that Ma Than Tin is not entitled to any share in Daw Shin's estate, as her mother Ma Thein Shwe was an illegitimate child of U Shwe Din and an illegitimate child is entitled to inherit only in the absence of a legitimate or adopted child. On appeal the learned District Judge held that the *kilitha* child stands on an equal footing in the matter of inheritance with the *apatiltha*

child in the absence of superior heirs, that the *kilitha* step-grandchild therefore stands on an equal footing with an *apatiltha* step-grandchild as regards the right to inherit the estate of the step-grandparent, and that Ma Khin Kyi and Ma Than Tin are entitled to equal shares in the estate of Daw Shin. The decision of the learned District Judge has been confirmed by Mr. Justice Aung Than Gyaw on second appeal, and his Lordship has observed in the course of his judgment therein :

" In this case, however, the contending claims have been made not to the estate of the deceased parent but to the estate of the deceased step-grandparent, and in view of the fact that both the child born of the *kilitha* daughter and the daughter born of the *apatiltha* son had been brought up together in the household of the step-grandparent—circumstances which do not fit in with the contingencies met with in the case law or provided for in the *Dhammathats*—the rule of justice, equity and good conscience followed by the lower Appellate Court would appear to commend itself as the best means of arriving at a just decision in this case."

This is an appeal under section 20 of the Union Judiciary Act, 1948, from the judgment and decree in the said second appeal.

The principal grounds of appeal are (1) that it has already been laid down in *Ma Sein Hla* v. *Maung Sein Hnan* (1) that an illegitimate child is entitled to inherit the estate of his deceased parents only in the absence of a legitimate *or adopted child*, and (2) that the judgment in the second appeal, which is based on the rule of equity, justice and good conscience, is contrary to the law laid down in the said ruling.

Before dealing with the said grounds of appeal, we must clear the ground by getting rid of the underlying idea that a *kilitha* child is an illegitimate child. U E Maung, now Acting Chief Justice of the Union,

(1) (1903-04) 11 L.B.R. 54.

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has observed at pages 194-195 of his Burmese Buddhist Law :

" The *kilitha* has been described in the *dammathats* (1) either as, a child ' begotten while in pursuit of amorous pleasure ' or a child, male or female, begotten by man and woman in pleasure by mutual consent but who do not live openly together.' Such a child is not an illegitimate child ; he is not without rights of succession in the parental estate ; but his rights are inferior to those of children born of parents ' who live openly together.' Hence in *Ma Hnya* v. *Ma On Bwin* (2), the term ' casually begotten child ' was suggested as more accurately descriptive of the *kilitha* child."

And we are in respectful agreement with him.

*Ma Sein Hla* v. *Maung Sein Hnan* (3) is not an authority for the contention that an illegitimate child is entitled to inherit the estate of his deceased parent only in the absence of legitimate *and adopted children.* It merely decided that " in the absence of legitimate children or step children, a step son though illegitimate may inherit from a stepmother to the exclusion of collateral heirs." It does not contain any express reference to adopted children. Even though it may be contended that *keittima* children, who have the same rights as children borne in lawful wedlock, also come under the category of legitimate children, the status of an *apatittha* child is much inferior to that of a *keittima* child. When there are natural or *keittima* children, an *apatittha* child is not entitled to share in the estate of the adoptive parents. [See *Maung Mya Maung* v. *Ma Mya Sein* (4)]. Even in the absence of natural and *keittima* children an *apatittha* child is entitled to only one half of the estate of the adoptive parent and other relatives of the adoptive parent are entitled to the

(1) Digest, I, 17.
(2) 9 L.B.R. 1.
(3) (1903-04) 11 L.B.R. 54.
(4) A.I.R. (1936) Ran. 518.

other half. [See *Maung Gyi and one* v. *Maung Aung Pyo* (1) ; and *Ma Than Nyun* v. *Daw Shwe Thit* (2).] The status of an *apatittha* child cannot by any means be higher than that of a *kilitha* son, since section 51 of *Manukye*, Volume X, provides :

" The law by which property is divided, or not, between a child begotten in youthful wantonness, without marriage, and the relations of the deceased father and mother, is this : if a husband and wife have property, given to them by their parents, from whom they are living separate, and have a son, begotten in wantonness before marriage, and shall die, leaving no legitimate offspring, the relations of the deceased shall not say this is not the child of a marriage sanctioned of the parents, he is a child of their own desires, we will take the property ; they shall not have it, let the child of the deceased have the whole.

In another case ; if the deceased were in reach of their parents' inheritance, though the son claim it, he shall not have it, his parents not abiding by the commands of their parents have in the gratification of their passions begotten him, being careless of the honour of their family. Though his parents die after his grandparents, he shall not share in the grandparents' property ; let the relations of his parents only divide his parents' share."

Section 301 of Kinwunmingyi's Digest, Volume I, is to the same effect. So a *kilitha* child will, unlike an *apatittha* child, exclude the other relations as regards properties which were in the possession of the parents at the time of their death ; and U E Maung has actually stated at page 225 of his Burmese Buddhist Law :

" Though the *dhammathats* are silent as regards the rights of an *apatittha* child as against a *kilitha* child, it seems reasonably clear, from the fact that the *kilitha* child excludes collaterals of the deceased parent, that a *kilitha* child will exclude an *apatittha* child."

And U Aung Tha Gyaw J. himself has observed in the course of his judgment in the second appeal " on

(1) (1924) I.L.R. 11 Ran. 661. (2) (1936-37) I.L.R. 14 Ran. 557.

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the principles laid down in the *Dhammathats* a case might possibly be found for the postponement of the *apatittha*'s claim to that of the *kilitha* child in the property of their deceased parent." However, his Lordship abstained from going into the question further, as (1) Ma Than Tin had not appealed from the decree of the District Court, (2) the claim is not in respect of U Shwe Din's estate, and (3) both Ma Khin Kyi, the daughter of the *apatittha* son, and Ma Than Tin, the daughter of the *kilitha* daughter, had been brought up together in the household of the step-grandparent Daw Shin.

So we hold that the decree under appeal is not contrary to the ruling in *Ma Sein Hla* v. *Maung Sein Hnan* (1) and that having regard to the peculiar circumstances, which in the words of U Aung Tha Gyaw J. " do not fit in with the contingencies met in the case law or provided for in the *Dhammathats*, " it really is in accordance with justice, equity and good conscience.

The appeal is dismissed. There is no order as to the costs of this appeal as it has been heard *ex-parte* in the absence of the learned Advocate for the respondent.

U SAN MAUNG, J.—I agree.

(1) (1903-04) II L.B.R. 54.

## APPELLATE CIVIL.

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

H.C. 1950

*Jan. 27.*

# HAJEE L. A. M. NAGOOR MEERA & SONS (APPLICANT)

*v.*

# BEHARILAL CHOTMAL (RESPONDENT).*

*Union Judiciary Act, s. 5—Certificate—Substantial question of law—Must be one open to argument.*

*Held :* Though the subject-matter of the dispute in the court of the first instance and still in dispute in appeal is not less than Rs. 10,000 no certificate under s. 5 of the Union Judiciary Act can be granted unless the appeal involves some substantial question of law. This condition is satisfied even if the question of law is one between the parties and not of general importance. However the question of law involved must fairly open to argument. Where the principles of law are well settled their application to a particular set of facts is not a substantial question of law.

*Raghunath Prasad Singh and one* v. *Deputy Commissioner of Partabgarh and others*, 54 I.A. 126 ; *M. C. Patail and one* v. *H. G. Ariff and others*, (1935) I.L.R. 13 Ran. 744 ; *Mathura Kurmi* v. *Jadgeo Singh and others*, (1928), I.L.R. 50 All. 208 ; *Mussammat Umrao Bibi and others* v. *Ram Kishen and others*, (1932) I.L.R. 13 Lah. 251, referred to.

*Dwarka Nath Pai Mohan Chaudhuri* v. *Rivers Steam Navigation Co. Ltd.*, (1917) A.I.R. (P.C.) 173 ; *The Rivers Steam Navigation Co.*, v. *Choutmull Doogar and others*, (1899) I.L.R. 26 Cal. 398, discussed.

*P. K. Basu* for the applicant.

*E. C. V. Foucar* for the respondent.

U THEIN MAUNG, C.J.—These are applications under section 5 of the Union Judiciary Act, 1948, for certificates which are necessary for the purposes of appeals to the Supreme Court of the Union of Burma.

The subject-matter of the dispute in the Court of First Instance and still in dispute on appeal is not less

* Civil Misc. Application Nos. 27 and 28 of 1949 for leave under section 5 of the Union Judiciary Act to appeal to the Supreme Court against the judgments and decrees in Civil 1st Appeal Nos. 15 and 16 of 1949.

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than Rs. 10,000 in each case. However, the judgments and decrees from which it is proposed to appeal to the Supreme Court affirm the decisions on the Original Side of this Court. So the appeals cannot be filed under section 5 of the Act without a certificate of this Court to the effect that they involve some substantial question of law.

Mr. P. K. Basu, learned Advocate for the applicants, relies on *Raghunath Prasad Singh and another* v. *Deputy Commissioner of Partabgarh and others* (1), where there Lordships of the Privy Council have held, with reference to a similar condition in section 110 of the Code of Civil Procedure, that the condition is satisfied if there is a substantial question of law between the parties, even though that question be not of general importance. However, as has been held in *M. C. Patail and another* v. *H. G. Ariff and others* (2), the question of law that is involved must be fairly open to argument. Where the principles of law on a point are well settled, the application of those principles to a particular set of facts cannot be said to be a substantial question of law within the meaning of section 110 of the Code. [See *Mathura Kurmi* v. *Jagdeo Singh and others* (3), which has been followed in *Mussammat Umrao Bibi and others* v. *Ram Kishen and others* (4).]

Mr. Basu has contended that *Dwarka Nath Pai Mohan Chaudhuri* v. *Rivers Steam Navigation Company Limited* (5), which was relied upon by us as an authority on the question of the burden of proof, has not been reported in the authorized Reports, that it must therefore be deemed to have been of doubtful authority, and that the law as to the burden of proof

(1) 54 Indian Appeals, 126. (3) (1928) I.L.R. 50 All. 208.
(2) (1935) I.L.R. 14 Ran. 744. (4) (1932) I.L.R. 13 Lah. 251.
(5) (1917) A.I.R. Privy Council, 173.

cannot be taken to have been settled by it. However, even though it may not have been published in the authorized series, the fact remains that it is a ruling of their Lordships of the Privy Council. It does not appear to have been dissented from, or even doubted, since its publication as long ago as 1947 ; and it has been discussed by Pollock and Mulla in their work on the Indian Contract and Specific Relief Acts without any adverse comment whatsoever.

Mr. Basu has further contended that their Lordships of the Privy Council must be deemed to have "spoken with two voices" on the same question in view of their decision in *The Rivers Steam Navigation Co.* v. *Choutmull Doogar and others* (1). However, that was a case under section 9 of the Carriers' Act, 1865, which reads :

> "In any suit brought against a common carrier for the loss, damage, or non-delivery of goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss or damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants, or agents."

As has been pointed out by Pollock and Mulla in their work on the Indian Contract and Specific Relief Acts, 7th Edition at page 496, as regards goods delivered to a common carrier he is liable even if there be no negligence on his part except in certain cases, and under section 9 of the said Act the burden of proof lies on him to disprove negligence. The third paragraph of the head-note to that ruling also shows "there were facts showing that no adequate means had been provided by the defendants for extinguishing a fire on board, and that the watch was inefficient," and that the defendants were accordingly held to have failed to exonerate themselves.

(1) (1899) I.L.R. 26 Cal. 398.

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So we cannot certify that any substantial question of law is involved in the proposed appeals to the Supreme Court. The applications are dismissed, Advocate's fee for each application three gold mohurs.

U SAN MAUNG, J.—I agree.

## APPELLATE CIVIL.

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

MRS. CONSTANCE M. WRITER (APPLICANT)

*v.*

A. M. KHAN (RESPONDENT).*

H.C. 1950

*Feb 3.*

*Union Judiciary Act, s. 5 (c)—"Involves directly or indirectly"—Meaning of.*

*Held :* S. 5 (c) of the Union Judiciary Act, 1948 like the second paragraph of s. 110 of the Code of Civil Procedure requires that the judgment, decree or final order must involve directly or indirectly some claim or question respecting property of the value of not less than Rs. 10,000. It is the extent to which the decree or order has operated to the prejudice of the Applicant that determines the value of the appeal whatever may be the value of the property.

If the appeal involves nothing beyond the subject matter of the appeal the first paragraph of s. 110 of the Code applies. The second paragraph of the said section applies only when the appeal involves some claim or question to or respecting property *additional to* the actual subject matter in dispute in appeal.

Where there was no dispute about the ownership of a house, and the dispute related only to the question whether the tenancy could be split and the respondent ejected from the house, and the suit for ejectment was valued at Rs. 1,500 for jurisdiction the decree did not involve directly or indirectly some claim or question respecting property of the value of Rs. 10,000 or more under s. 5 (c) of the Union Judiciary Act, even though the value was Rs. 40,000

*N. C. Galliara* v. *A.M.M. Murugappa Chetty*, (1934) I.L.R. 12 Ran. 355; *M. E. Moolla & Sons Ltd.* v. *Leon Shain Sway*, (1926) I.L.R. 4 Ran. 92; *Gnanamanikkam Ammal* v. *S. R. Samson*, (1931) I L.R. 9 Ran. 52; *P.L.M.C.T.M. Kasiviswanathan Chettyar* v. *P.L.M.C.T.K. Krishnappa Chettyar*, (Civil Misc. Appln No. 10 of 1949 High Court, Rgn.), referred to.

*Dhanna Mal and others* v. *Rai Sahib Lal Moti Sagar*, 75 I.C. 654; *A. V. Subramania Ayyar* v. *Sellammal*, (1916) I.L.R. 39 Mad. 843; *Maharaja Kesho Prasad Singh* v. *Shiva Saran Lal*, 3 Patna L.J. 317 at 321, referred to.

*V. S. Venkatram* for the applicant.

*Dr. Thein* for the respondent.

U THEIN MAUNG, C.J.—This is an application for a certificate under section 5 (*c*) of the Union Judiciary Act, 1948. The certificate is required for the purpose

* Civil Misc. Application No. 26 of 1949.

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of an appeal from the decree in Civil First Appeal No. 17 of 1949 in this Court setting aside the decree of the Rangoon City Civil Court and dismissing the present applicant's suit for ejectment from the upper floor of her house of the present respondent who is her tenant in respect of the whole house.

The suit and the first appeal were valued for the purpose of jurisdiction at Rs. 1,500 only; but the learned Advocate for the applicant now contends that the whole house is worth about Rs. 40,000 and that he is entitled to a certificate under section 5 (*c*) of the Act as the said decree "involves directly or indirectly some claim or question respecting property" worth not less than Rs. 10,000.

There never has been any dispute between the parties as to the applicant's ownership of the whole house and the respondent's being her tenant in respect of the whole house. The only question in dispute was as to whether the applicant could, under the circumstances of the case, split the tenancy and eject the respondent from a part only of the house.

Section 5 (*c*) of the Union Judiciary Act, 1948 like the second paragraph of section 110 of the Code of Civil Procedure requires that the judgment, decree or final order must involve directly or indirectly some claim or question respecting property the value of which is not less than ten thousand rupees; and so far as the said paragraph is concerned it has been held in *N. C. Galliara* v. *A.M.M. Murugappa Chetty* (1) that it is the extent to which the decree or order has operated to the prejudice of the applicant that determines whether the decree or order is subject to appeal or not, and whatever may be the value of the property in respect of which a claim or question is involved in

(1) (1934) I.L.R. 12 Ran. 355.

the appeal, no appeal lies under section 110 unless the value of the loss or detriment which the applicant has suffered by the passing of the decree or order, and from which he seeks to be relieved by His Majesty in Council, is Rs. 10,000 or upwards. [*See* also *M. E. Moolla and Sons Ltd.* v. *Leon Shain Sway* (1) *Gnanamanikkam Ammal* v. *S. R. Samson* (2) and *P.L.M.C.T.M. Kasiviswanathan Chettyar* v. *P.L.M.C. T.K. Krishnappa Chettyar* (3). Cp. *Dhanna Mal and others* v. *Rai Sahib Lala Moti Sagar* (4).]

Besides, the High Court of Madras has held in *A. V. Subramania Ayyar* v. *Sellammal* (5) that the second paragraph of section 110 of the Code of Civil Procedure applies only to cases which involve some claim or question to or respecting property *additional to the actual subject-matter in dispute in the appeal* and that first paragraph of the section alone applies *if nothing beyond the actual subject-matter in dispute is involved.* [*See* pp. 846 and 849 of the Reports. *See* also *Maharaja Kesho Prasad Singh* v. *Shiva Saran Lal* (6).]

In the present case nothing beyond the actual subject-matter in dispute is involved and the value of loss or detriment which the applicant has sufferred by the passing of the decree, *i.e.*, by the dismissal of her suit for ejectment is much less than Rs. 10,000.

So we cannot grant a certificate under section 5 (*c*) of the Union Judiciary Act, 1948.

The application is dismissed with costs ; Advocate's fee three gold mohurs.

U SAN MAUNG, J.—I agree.

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(1) (1926) I.L.R. 4 Ran. 92.
(2) (1931) I.L.R. 9 Ran. 52.
(3) Civil Misc. Appl. No. 10 of 1949 in this Court.
(4) 75 I.C. 654.
(5) (1916) I.L.R. 39 Mad. 843.
(6) 3 Pat. L.J. 317 at 321

## CRIMINAL REVISION.

*Before U Tun Byu, J.*

H.C. 1950

*Jan. 26.*

MAUNG MYA MAUNG AND ONE (APPLICANTS)

*v.*

THE UNION OF BURMA (RESPONDENT).*

*Arms (Emergency Punishment) (Temporary) Act, 1949, s. 2 (1) (d).*

*Held:* That Arms (Emergency Punishment) (Temporary) Act, 1949 has been enacted for certain special purpose. Where it is in conflict with the Arms Act it must be held to supersede the more general provisions of the Arms Act.

*Khin Maung* for the applicants.

*Choon Foung* (Government Advocate) for the respondent.

U TUN BYU, J.—The applicants Maung Mya Maung and his wife Daisy Mya were sent up for trial apparently under section 2 (1) (*d*) of the Arms (Emergency Punishment) (Temporary) Act, 1949. It appears that Daisy Mya has been granted bail, but the bail for the 1st accused Mya Maung was refused on the ground that at present it is not possible to say that there are no reasonable grounds for thinking that the offence for which the 1st accused Mya Maung was sent up would not fall under section 2 (1) (*d*) of the Arms (Emergency Punishment) (Temporary) Act, 1949.

The applicants Mya Maung and his wife Daisy Mya thereafter applied to this Court (1) to quash the proceeding pending against them in the Court of the 5th Special Judge, Rangoon, and Mya Maung also

* Criminal Revision No. 1-B of 1950 being review of the order of the 5th Special Judge of Rangoon, dated 22nd December 1949 passed in Criminal Regular Trial No. 58 of 1949.

applied that bail might be granted to him pending the hearing of the case in the Court of the 5th Special Judge, Rangoon. It has been urged that the evidence of U Maung Gyi, P.S.O. (P.W. 1), does not show that the revolver, which had been seized, was, in fact, delivered to the accused Mya Maung. However, it appears that the prosecution has at least two more witnesses to be examined, and in that circumstance it could not be said that this is a case where there is no evidence on which it could be said that the revolver which had been seized was a revolver which belonged to the Government and which had been delivered to Mya Maung. The application to quash the proceeding appears to me to be premature. At present there does not appear to be any evidence against the 2nd accused Daisy Mya. She is, however, on bail and as the prosecution has at least two more witnesses to examine only, I think it will be well to wait and see what is the nature of the evidence adduced by those two witnesses. The learned Special Judge will no doubt discharge the 2nd accused Daisy Mya, if he finds at the conclusion of the evidence adduced by the prosecution that no charge could reasonably be framed against her. It has also been argued strenuously on behalf of the accused Mya Maung that the case of the prosecution against him does not fall under the Arms (Emergency Punishment) (Temporary) Act, 1949, but that to put it at its worst the case against Mya Maung would fall merely under section 22 of the Arms Act. The Arms (Emergency Punishment) (Temporary) Act, 1949, has been enacted for certain special purposes, and where it is in conflict with the Arms Act, it must, in law, be held to supersede the more general provisions of the Arms Act. It is not possible at present to say definitely that when the evidence for the prosecution is concluded the case against the 1st accused

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Mya Maung would not fall under the provisions of clause (*d*) of section 2 (1) of the Arms (Emergency Punishment) (Temporary) Act, 1949. It must accordingly be held that the 5th Special Judge, Rangoon, was correct in refusing the bail of the applicant Mya Maung in his order, dated the 22nd December, 1949.

This application for revision is dismissed.

## APPELLATE CIVIL.

*Before U Tun Byu and U Aung Khine, JJ.*

MAUNG MAW AND ONE (APPELLANTS).

*v.*

U BA THWE AND ONE (RESPONDENTS).*

H.C. 1949

*Dec. 23.*

*Instrument of lease—Ss. 105 and 107 of Transfer of Property Act.*

*Held:* That a lease is defined in s. 105 of the Transfer of Property Act. Under s. 107 a lease of immoveable property from year to year for any term exceeding one year can be made only by a registered instrument and all other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

A lease implies that there should be two parties the Lessor and the Lessee and the instrument of lease contains covenants that both the Lessor and the Lessee agree to. Therefore a lease cannot be effected unless the Lessor is a party to the instrument of lease. As Exhibit A in the case was signed by one party only it can in effect be no more than an agreement to lease.

*Observations in U Tha Nyo* v. *Mg. Kyaw Tha by Carr J.*, (1925) 3 Ran. 379 at 380, followed.

*Mt. Nasiban* v. *Mohammad Sayal*, (1936) A.I.R. Nag. 174, distinguished.

*San Thein* for the appellants.

*Ze ya* for the respondents.

U TUN BYU, J.—The plaintiffs-respondents U Ba Thwe and Daw Sein Nyo are husband and wife, and Daw Sein Nyo is a daughter of one U Po Khant through the latter's first wife Daw Pan On, who are both dead. The defendants-appellants Maung Maw and Ma Kyi are also husband and wife, and Maung Maw is a son of U Po Khant through his subsequent wife Ma Pwa Toke, who is still alive. The case for the plaintiffs-respondents is that they, in or about the month of January, 1946, permitted the

* Civil First Appeal No. 47 of 1949 against decree of 2nd Judge, Rangoon City Civil Court in Civil Regular Suit No. 2533 of 1947, dated 14th July 1949.

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U TUN BYU, J.

defendants-appellants to occupy and use a room on the top-floor of a house at No. 23-25-27, Phongyi Street, Rangoon, and that on the 5th February, 1946, they also leased out a room on the ground floor of the same house to the defendants-appellants, who however deny that they went into occupation of the said rooms in the circumstances alleged by the plaintiffs-respondents. The case for the defendants-appellants is that the house No. 23-25-27, Phongyi Street was a property which was acquired by U Po Khant during his coverture with the subsequent wife Ma Pwa Toke, mother of the first defendant-appellant, and that they went into occupation of the said rooms in their own right as co-heirs in the said house.

The first question to be determined is whether it has, in this case, been proved that the defendants-appellants are tenants of the plaintiffs-respondents in respect of the room on the ground floor. It has been contended on behalf of the defendants-appellants that Exhibit A which the plaintiffs-respondents had designated in the plaint as a lease bond, is not admissible in evidence in view of the provisions of section 107 of the Transfer of Property Act, the relevant portion of which reads as follows :

"107. A lease of immoveable property from year to year or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

All other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

Where a lease of immoveable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee :"

It will be necessary in this connection to consider whether the Exhibit A constitutes in law an instrument

of lease, and a lease is defined in section 105 of the Transfer of Property Act, and the relevant portion reads :

"105. A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms."

Thus, a lease implies a transfer of a right to enjoy any property, and it implies also that there should be two parties, *viz*: the lessor and the lessee, in that an instrument of lease contains covenants by both the lessor and the lessee. It is difficult to apprehend how a transfer of a right in an immoveable property can be affected unless the lessor was a party to the instrument of lease. It cannot be disputed that in the present case the Exhibit A was signed by the defendants-appellants only, and not by the plaintiffs-respondents. It must accordingly be considered to be, in effect, nothing more than an agreement to lease.

In the case of *U Tha Nyo* v. *Maung Kyaw Tha* (1) Carr J., after reciting the provisions of the first part of section 105 of the Transfer of Property Act, observed as follows :

"It is quite clear that the document now in question is not a lease within this definition. It is not executed by the lessor, the land-owner, and, consequently, it cannot transfer any right to the property. It is, in fact, merely an agreement to cultivate and pay rent. The document, therefore, does not come within the provisions of the Transfer of Property Act at all, and it is unnecessary to consider those provisions further."

Those observations apply properly to the circumstances of the present case, the difference being

(1) (1925), 3 Ran. 379 at 380.

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that in the present appeal the subject-matter relates to a house while in the other case it relates to a paddy land. The Exhibit A in the case now under consideration was not only executed by the defendants-appellants alone but it also contains the words "ဝတ်ဆာခွန်", which also tend to suggest that the document was in reality in the form of an agreement to lease the room mentioned therein.

The case of *Mt. Nasiban* v. *Mohammad Sayed* (1) was referred to on behalf of the defendants-respondents, but it does not appear that the question whether the rent note is a lease within the meaning of section 105 of the Transfer of Property Act was discussed at all in that case. The finding of the Second Judge of the Rangoon City Civil Court that the defendants-appellants are tenants of the plaintiffs-respondents in respect of the room on the ground floor must therefore be considered to be correct.

The next question is whether there is evidence to prove that the defendants-appellants occupied the room on the top floor under the lease and licence of the plaintiffs-respondents. It is difficult to appreciate that if the defendants-appellants went into occupation of the room at the top-floor of their own accord and in the exercise of their own right as co-heirs in the said house, why they should have executed the tenancy agreement, Exhibit A, for the lease of the room in the ground floor; and it might be mentioned that this tenancy agreement was executed about one month after the defendants-respondents had occupied the room on the top-floor free of rent as alleged by them. If the defendants-appellants are co-heirs in respect of the top floor, they obviously were also co-heirs in respect of the other part of the house. It appears that some of the rooms in the Phongyi Street were in the

(1) (1936), A.I.R. Nag. 174.

occupation of other persons at the time, and it does not appear that Maung Maw and his mother ever obtained any share in the rents of any of the rooms in the house in question. There is also nothing on the record to suggest that either Maung Maw or his mother ever attempted to exercise or claim any share in the rent of the rooms which were occupied by other persons. It is, therefore, only reasonable and proper that the statement of the plaintiffs-respondents that Maung Maw and his wife occupied the room on the top floor with their consent should be accepted. Moreover, there do not appear anything on the record to suggest that Maung Maw's mother ever lived in any of the rooms in the house in question free of rent and in the exercise of her own right after the death of her husband.

In respect of the question of nuisance U Ba Thwe stated as follows :

" . . . . Some time in September 47 the 1st defendant started abusing me and stated that he would see that I left the house. The defendant abused my wife also stating that she was the lesser wife of U Po Khant, deceased. My wife is U Po Khant's daughter. He also threatened to assault me and started making loud noises and throwing the furniture about.

This took place some time about the 14th or 15th of September 1947. As the conduct of the 1st defendant became intolerable I had to go and get the assistance of the Local P.V.O. organization. When some of the P.V.O.s came and intervened the 1st defendant ceased to make those noises but soon after they left he again started making abuses. On the 22nd of September 1947 I sent a lawyer's notice to the defendant."

The statement of U Ba Yi, Treasury Officer (P.W. 2) also supports the statement of U Ba Thwe and it reads :

"Some time last Thadingyut one evening I heard a commotion from the direction of the defendant's room. Actually I heard

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the defendant shouting out from the ground floor to the effect that this suit house belonged to U Khant and his wife only and he told the plaintiffs to leave the premises within three days. And after that there used to be frequent altercations between them and I used to hear loud noises being made from the room of Maung Maw from upper floor. This continued for about two weeks."

It is clear, therefore, that the nuisance was repeated for some days and that this was not a matter of one day only. According to Daw Thone (P. W. 1.) she also heard the 1st defendant-appellant Maung Maw abuse Daw Sein Nyo, the 2nd plaintiff-respondent. Thus, it is clear that the defendants-appellants can be considered to have committed acts of nuisance as alleged by the plaintiffs-respondents who are their elders. The plaintiffs-respondents are, therefore, entitled to an order of enjectment of the defendants-appellants from both the rooms in the house at No. 23-25-27, Phongyi Street, Rangoon, and to possession of the said rooms.

For the reasons indicated above, the cross-objection is, therefore, allowed with costs and the judgment and decree of the Second Judge of the Rangoon City Civil Court are modified to the extent indicated above ; with the result that the appeal of the defendants-appellants is dismissed with costs.

U AUNG KHINE, J.—I agree.

## CIVIL REVISION.

*Before U Tun Byu, J.*

CHING HONG SEIN (APPLICANT)

*v.*

KHOO HEIN KHOON SOCIETY (RESPONDENT).*

H.C. 1950

*Jan. 27.*

*Urban Rent Control Act, 1948, s. 11 (1) (f), s. 12, s. 13 (1)—Landlord purchasing after the Act—Whether can take advantage of s. 11 (1) (f)—Statute construction general rule.*

*Held:* the Urban Rent Control Act contemplates two distinct classes of persons *viz.*, Tenant and Persons permitted to remain in occupation under s. 12. s. 11 (*1*) of the Act does not apply to a person who has been permitted to remain in occupation as he is not a tenant within the meaning of that section. The section applicable to such a person is s. 13 (*1*).

*I. S. Chahl* for the applicant.

*Hla Pe* for the respondent.

U TUN BYU, J.—The plaintiff-respondent society obtained a decree against the defendant-applicant Ching Hong Sein for possession of the ground floor of a house at No. 125, 20th Street, Rangoon, in Civil Regular Suit No. 674 of 1948 of the Rangoon City Civil Court. It appears that Ching Hong Sein thereafter applied for and obtained a permit under section 12 of the Urban Rent Control Act, 1948, allowing him to continue to be in occupation of the premises in question. It was probably on the strength of this permit that Ching Hong Sein applied under section 14 (1) of the Urban Rent Control Act, 1948, for rescission of the decree which had been passed against him in Civil Regular Suit No. 674 of 1948. The plaintiff-respondent society objected to the said

* Civil Revision No. 77 of 1949 against the order of the 3rd Judge of Rangoon City Civil Court in Civil Regular Suit No. 674 of 1948, dated 7th November 1949.

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U TUN BYU J.

application of the defendant-applicant on the ground that they require the premises in question *bona-fide* for their own use and occupation. The learned 3rd Judge of the Rangoon City Civit Court held that there was evidence before him to indicate that the plaintiff-respondent society required the premises in question *bona-fide* for their own use and occupation. It appears to me that there are sufficient materials before the learned 3rd Judge on which he might properly arrive at the conclusion which he did.

The point, which has been strenuously urged in this Court, is that the learned 3rd Judge erred in law in dismissing the application of the defendand-applicant in view of the explicit provision in the 1st proviso to clause (*f*) of section 11 (*1*) of the Urban Rent Control Act, 1948, which reads :

> " Provided that for the purpose of this clause the term 'owner' shall not include any person except the person who was the owner of the said premises on the 1st day of May 1945, or has after that date become the owner by the devolution of the said premises upon him by inheritance ; "

It is not disputed that the plaintiff-respondent society purchased the premises at No. 125, 20th Street, only on or about the 4th August 1947, that is, after 1st May 1945. It has accordingly been contended on behalf of the defendant-applicant that the plaintiff respondent society could not take advantage of the provisions of clause (*f*) of section 11 (*1*) or those of clause (*c*) of section 13 (*1*) of the Urban Rent Control Act, 1948.

The question, which arises, is whether the provisions of section 11(*1*) (*f*) can be said to be applicable in the present case. It is clear that section 13 (*1*) makes provisions for persons who had been allowed to continue to be in possession of the premises which

they occupy, while section 11 (*1*) relates to cases against tenants. Thus, two distinct classes have been created, namely, (1) tenants and, (2) persons who have been permitted to remain in occupation under section 12; and it follows that the provisions which will apply to persons who have been permitted to remain in occupation under section 12 are the provisions which have been enacted in section 13 (*1*). It has, however, been contended on behalf of the defendant-applicant that a person who has been permitted to remain in occupation under section 12 is also a tenant within the meaning of section 11 (*1*) of the Urban Rent Control Act, 1948. However, as section 13 (*1*) has been specially enacted for persons who have been allowed to continue to be in occupation under section 12, it must be held that it is section 13 (*1*), and not section 11 (*1*) which will apply to persons who have been permitted to remain in occupation under section 12, the general rule of construction of a statute being that a special provision of an Act will override the more general provision in that Act. The 3rd Judge of the Rangoon City Civil Court was therefore correct in his decision.

The application for revision is dismissed, and Advocate's fee will be fixed as 3 (three) gold mohurs.

## APPELLATE CIVIL.

*Before U San Maung, J.*

H.C. 1950

*Jan. 31.*

KO U MAR AND ONE (APPELLANTS).

*v.*

MA SAW MYAING (RESPONDENTS).*

*Transfer of Property Act—Contracts of transfer of immoveable property—Transfer of Property Acts, s. 3, immoveable property—Interest in specific immoveable property, if immoveable property.*

*Held :* Where usufructuary mortgage of immoveable property for Rs. 150 was by an unregistered deed the mortgage is invalid for want of registration but under s. 53A of the Transfer of Property Act where any person contracts to transfer for consideration any immoveable property by writing then though the contract is required to be registered and is not registered the Transferor shall be debarred from enforcing against the Transferee and persons claiming under him any right in respect of the property other than a right expressly provided by the terms of the contract. S. 53A speaks of contracts to transfer immoveable property. Immoveable has not been defined in the Transfer of Property Act but is defined in the General Clauses Act and includes lands, benefits to arise out of land, etc.; a mortgage is a transfer of immoveable property no less than a sale though a sale involves a transfer of ownership as well. S. 53A applies to usufructuary mortgages where the mortgagee in part performance of the contract has taken possession.

*Ma Kyi* v. *Ma Thon*, 13 Ran. p. 274, referred to.

*Gopal Pandey* v. *Parsotam Das*, I L.R. 5 All. p. 123; *Indar Sen and another* v. *Naubat Singh and others*, I.L.R. 7 All. 553, referred to and applied.

*U Hmat and one* v. *Daw Shwe Lok and two others*, Civil 1st Appeal No. 31 of 1946, High Court of judicature at Rangoon, followed.

*Hla Sein* for the appellants.

U SAN MAUNG, J.—In Civil Regular Suit No. 64 of 1947 of the Court of the Second Assistant Judge, Pakôkku, the plaintiff-respondent Ma Saw Myaing sued the defendant-appellants Ko U Mar and Ko Po Tar for possession of the suit land on the ground that about 10 years before the date of the suit she and her husband Ko Po Thaung, now deceased, mortgaged the suit land

* Civil 2nd Appeal No. 104 of 1948 against the decree of District Court of Pakôkku in Civil Appeal No. 10 of 1948, dated 5th August 1948.

with a Chettyar of Nyaung-u for Rs. 150 by a registered deed, that about eight years ago the first appellant Maung U Mar redeemed the land from the Chettyar at their request and that after she herself had redeemed the land from Maung U Mar for Rs. 200 during the Japanese occupation period the appellant Maung U Mar and his son the second appellant Maung Po Tar forcibly ousted her from possession thereof. The two defendant-appellants by their written statement denied that the suit land was mortgaged by the plaintiff-respondent and her husband to the Chettyar of Nyaung-u as alleged or that the first appellant had redeemed it from the Chettyar at the request of the plaintiff-respondent. They contended that the first appellant purchased this land over 20 years ago from the Chettyar of Nyaung-u, who was its owner and that when during the Japanese occupation period the respondent Ma Saw Myaing tried to redeem the land from him for a sum of Rs. 200 he had reported the matter to the District Commissioner who ordered him to return to the respondent the money which he had accepted for fear of the Japanese. In her reply to the written statement the respondent contended that the suit land was in fact mortgaged by her and her deceased husband to Ko Kan Htu, Ma Ngwe Bwint and their son Ko Ba Thein for Rs. 150 by way of usufructuary mortgage invalid for want of a registered document, that these persons in turn mortgaged the land to the Nyaung-u Chettyar without possession, that the appellant Maung U Mar was in possession of the land as tenant of the original mortgagees Ko Kan Htu, Ma Ngwe Bwint and Ko Ba Thein and that on their death Maung U Mar redeemed the land at the request of herself and her deceased husband Ko Po Thaung on the distinct understanding that it would be returned to them on payment of the money paid, namely, Rs. 150.

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The Assistant Judge dismissed the plaintiff-respondent's suit on the ground that it did not belong to her and her deceased husband Ko Po Thaung. On an appeal being preferred to the District Court of Pakôkku by Ma Saw Myaing the learned District Judge remanded the case to the original Court for trial of two issues, namely :

(1) Whether the suit land had been made over by Ma Saw Myaing and Ko Po Thaung to Ko Kan Htu, Ma Ngwe Bwint and Ko Ba Thein by way of security for the loan of Rs. 150 and when did they do so ?

(2) Whether Ko Kan Htu, Ma Ngwe Bwint and Ko Ba Thein had mortgaged the suit land to M. S. Subramanian Chettyar of Nyaung-u ?

The Assistant Judge answered the first issue in the negative, but the District Judge held that the plaintiff-respondent's contentions on these points were correct. He further held that M. S. Subramanian Chettyar of Nyaung-u who had purchased the suit land at a Court auction in 1925 acquired no more than the right title and interest which Ko Kan Htu, Ma Ngwe Bwint and Ko Ba Thein had in the suit land, that is, the right of a person in occupation in whose favour was a usufructuary mortgage which was invalid for want of registration. He further held that the right which the defendant-appellant Maung U Mar had was acquired by purchase from the Chettyar. Thereafter relying on the ruling in the case of *Ma Kyi* v. *Ma Thon* (1) the learned District Judge held that the defendant-appellants were in no position to resist the plaintiff-respondent's claim for possession which was based upon her title. He therefore set aside the judgment and decree of the Assistant Judge and decreed the plaintiff-respondent's suit for possession with costs. Hence this appeal.

(1) 13 Ran. p. 274.

In appeal it has been contended by the learned Advocate for the appellants Ko U Mar and Ko Po Tar that the learned District Judge's findings of fact are erroneous. However, as pointed out by the learned Judge there is no doubt whatsoever that the plaintiff-respondent was the original owner of the suit land in view of the admission made by Ko U Tha (D.W.3) who is no other than the elder brother of the defendant-appellant Maung U Mar. Furthermore, there is strong evidence on record to show that it was mortgaged by Ma Saw Myaing and her deceased husband to Ko Kan Htu and Ma Ngwe Bwint for Rs. 150 by way of usufructuary mortgage invalid for want of registration. Therefore whatever interest the successors-in-title to Ko Kan Htu and Ma Ngwe Bwint might have in the land in suit cannot be higher than that of the original mortgagees. However, as pointed out by the learned Advocate for the appellants, the learned District Judge has overlooked the fact that according to the evidence called by the plaintiff-respondent herself the original mortgage of the suit land to Ko Kan Htu and Ma Ngwe Bwint was not done orally but by an instrument in writing and that this case is therefore distinguishable from that dealt with in *Ma Kyi* v. *Ma Thon* (1). Of course the original deed of mortgage is now no longer traceable, but there is specific evidence relating to its execution and to its contents. Ko Po Sin (P.W. 10) stated :

" I know the land in suit. It originally belonged to Ko Shwe Thein and Mai Laik Yauk. I saw this land later in the possession of Ko Po Thaung. I do not know how he got it. Ko Po Thaung said that he had bought it for Rs. 50 * * * I do not know the boundaries of this land. But Ko Po Thaung had no other land and so I say that it is the land in suit. About 20 years ago one morning Ko Phu Nyo came and called me and I went along

(1) 13 Ran. p. 274.

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with him. At Thugyi's house, Thugyi asked me to write a document on a stamp paper. I do not remember what was the value of the stamp paper. I had to write the boundaries of the land in the document. I do not remember it. I had to write it as the land in Kugyunkwin. Ko Kan Htu and Ma Ngwe Bwint executed it first and then Ko Po Thaung and Ma Saw Myaing executed it. I signed it as a scribe. Ko Phu Nyo, Ko Pyu, Ko Shwe Lu signed. The mortgage was for Rs. 150 "

The evidence of Ko Po Sin is corroborated by that of Ko Phu Nyo (P.W. 9), son of the headman referred to by Ko Po Sin. This witness said that he and Ko Shwe Lu signed the mortgage deed as witnesses but could not remember whether the deed was signed by the mortgagor and the mortgagees. However, the probabilities are that the parties also signed the document as stated by Ko Po Sin as otherwise there was no point in the witnesses signing the document as well.

As the original mortgage of the suit land by Ma Saw Myaing and her deceased husband Ko Po Thaung to Ko Kan Htu and Ma Ngwe Bwint was in writing the learned District Judge in decreeing the suit for possession has overlooked the provisions of section 53A of the Transfer of Property Act; which read :

" 53A. Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registersd, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being

in force, *the transferor or any person claiming under him* shall be debarred from enforcing against the *transferee and persons claiming under him* any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract : "

No doubt whereas section 53A speaks of " contracts to transfer immoveable property," a mortgage as defined in section 58 of the Transfer of Property Act is "the transfer of an interest in specific immoveable property" for the purposes mentioned therein. Immoveable property has not been defined in the Transfer of Property Act as section 3 thereof merely says " ' immoveable property ' does not include standing timber, growing crops or grass." However, immoveable property is defined in the General Clauses Act as including " land, benefits to arise out of land and things attached to the earth, etc." As this definition is not very helpful for the purpose of ascertaining whether an interest in specific immoveable property is " immoveable property " within the meaning of section 53A of the Transfer of Property Act, we shall have to look to the case law bearing on the subject.

In the case of *Gopal Pandey* v. *Parsotam Das* (1) Mahmood J. in speaking of a simple mortgage said at page 139 :

" Jurisprudence recognises it as one of the various species of *jura in re aliena*, or estates carved out of the full ownership of property. It may happen that the right, though not apparently, but in reality, is tantamount to absolute transfer, in its virtual effect. For instance, when land of the value of Rs. 100 is pledged by hypothecation in lieu of a debt amounting to Rs. 101, the mortgagor is simply a nominal owner, and his *nuda proprietas* is worth less than zero. I am, therefore, of opinion that the rights created by hypothecation in this country amount to nothing more or less than a transfer of an estate amounting to a

(1) I.L.R. 5 All. p.123.

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*transfer of immoveable property*, though of course not an absolute transfer. The feature which distinguishes hypothecation from other forms of mortgage consists in the fact that it does not entitle the mortgagee to enjoy the physical qualities of the subject of the mortgage."

The same learned Judge in a later case in *Indar Sen and another* v. *Naubat Singh and others* (1) in dealing with a usufructuary mortgage observed at page 556 :

"In my judgment in the case of *Gopal Pandey* v. *Parsotam Das* (2), I explained what full ownership means, and what its incidents are, and also what the exact nature of occupancy-right is in these Provinces. I there said that a person in full ownership can alienate any one or more of its component elements. The question before the Court in that case related to simple mortgage or hypothecation, but my argument applies also to the case now before us, because I said, adopting another passage from Austin, that the full ownership being composed of these rights 'indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration,' any alienation of these rights would be a mortgage, so long as the object of alienation was security for the payment of a debt in money. I further said, quoting from another jurist, that any 'one or more of the subordinate elements of ownership, such as a right of possession or user, may be granted out while the residuary right of ownership, called by the Romans *nuda proprietas*, remains unimpaired. The elements of the right which may thus be disposed of without interference with the right itself,—in other words, which may be granted to one person over an object of which another continues to be the owner,—are known as *jura in re aliena*.' Such being my views as to the nature of proprietorship, I am unable to hold that the right of the usufructuary mortgagee is a right which can be called a transfer of proprietorship ; and having regard to section 58 of the Transfer of Property Act, and especially clause (*a*), governing the whole section, and clause (*d*), referring in particular to usufructuary mortgage, I cannot agree in holding that the execution of a usufructuary mortgage amounts to a transfer of the proprietary right."

(1) I.L.R. 7 All. p. 553 (2) I.L.R. 5 All. p. 123.

In coming to this conclusion the learned Judge, though differing from the Chief Justice that a usufructuary mortgage involved a temporary transfer of the proprietary rights, nevertheless adhered to his former opinion that a mortgage amounts to a transfer of immoveable property. Therefore a mortgage is a *transfer of immoveable property* no less than is a sale though a sale involves a transfer of ownership of the property as well. Hence section 53A of the Transfer of Property Act also applies to usufructuary mortgages where the mortgagee in part performance of the contract has taken possession of the property. I am fortified in this view by the judgment of a Bench of the late High Court of Judicature at Rangoon in *U Hmat and one* v. *Daw Shwe Lok and two others* (1). There the learned Judges, affirming the views of the District Judge of Myingyan that section 53A of the Transfer of Property Act would stand in the way of a mortgagor who after having executed a deed of mortgage, which was invalid for want of registration, sued the mortgagee for possession of his land without first offering to perform his part of the contract, namely, repayment of the loan, observed :

" It was pointed out by Sir Arthur Page C.J., in *Ma Kyi* v. *Ma Thon and another* (2) that unless a usufructuary mortgage was in writing and the transaction fell within section 53A of the Transfer of Property Act the terms of the mortgage could only be relied upon when they were embodied in a duly registered written instrument. In the case which I have just mentioned the contract was an oral mortgage and its terms could in no way be elicited and the plaintiff should have sued for possession relying upon his title. The defendant could not have resisted such a suit because the oral mortgage could not have been proved and the most that he could get would be a stay in a

(1) Civil 1st Appeal No. 31 of 1946 of the High Court of Judicature at Rangoon.

(2) 13 Ran. p. 274.

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proper case so as to make the plaintiff execute an instrument which could be registered. But here instead of an oral mortgage we have a contract in writing. Unless, of course, there had been part performance the writing could not have been proved because the deed was unregistered, but there was part performance. * * * The learned District Judge was, in my view, right in saying that the suit was not maintainable in its present form because section 53A of the Transfer of Property Act was a complete answer to it."

In the case now under consideration the document is now no longer available but its terms can be gathered with reasonable certainty from the evidence of Ko Po Sin (P.W. 10), a witness called by the plaintiff-respondent herself. The suit land was mortgaged for Rs. 150 and the necessary inference is that it was liable to be returned only on repayment of the money lent. Therefore the plaintiff-respondent was not entitled to sue for possession without first paying the money to the defendant-appellants and getting from them a refusal to deliver the land on such payment.

In the result the appeal succeeds. The judgment and decree of the District Court of Pakôkku in Civil Appeal No. 10 of 1948 are set aside and the plaintiff-respondent's suit is dismissed. As the appellants succeed on a point of law which was not taken either in the Court of first instance or in the Court of the District Judge, Pakôkku, I would direct that each party bear its own costs throughout.

## APPELLATE CIVIL.

*Before U Tun Byu, J.*

U AUNG KHA AND ANOTHER (APPELLANTS)

*v.*

DAW MI (RESPONDENT).*

H.C. 1949

*Dec. 13.*

***Limitation Act**, ss. 4 and 14—Courts Emergency Provisions Act, 1947.*

An application for execution was filed in 1944 but closed on 2nd February 1945 and the decree-holder made a fresh application for execution within the meaning of s. 4 of Limitation Act—on 20th May 1948 claiming that as the Court was closed up to the 31st March 1947 under the provision of Courts Emergency Provisions Act, the period during which the Court was closed should be excluded.

*Held*: That the application was barred by limitation. S. 4 of the Limitation Act does not extend the period of limitation and time during which the Court was closed could not be excluded in computing the period of limitation. S. 4 is distinct from s. 14 of the Limitation Act and the language employed in s. 4 has nothing to do with computing the prescribed period or altering it.

*Maqbul Ahmad* v. *Pratap Narain Singh*, I.L.R. (1935) 57 All. 242 at 248, referred to and followed.

*Tun On* for *Kyaw Thaung* for the appellants.

*K. R. Venkatram* for *A. N. Basu* for the respondent.

U TUN BYU, J.—The respondent Daw Mi obtained a decree in Civil Regular Suit No. 20 of 1944 in the then Subdivisional Court, Meiktila, during the Japanese occupation of Burma, and she applied for the execution of the said decree in Civil Execution Case No. 3 of 1944. The appellants also appealed against the decree passed against them in Civil Regular Suit No. 20 of 1944, and their appeal was known as Civil Appeal No. 38 of 1944 of the Court of the then Additional Divisional Judge, Meiktila, sitting at Mahlaing. The records of Civil Appeal No. 38 of 1944 and those of

* Civil 2nd Appeal No. 118 of 1948 against the decree of the District Court of Meiktila in Civil Misc. Appeal No 14 of 1948, dated the 16th August 1948.

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Civil Execution Case No. 3 of 1944 are said to have been lost now, probably because of the trouble which occurred at Meiktila recently. The Assistant Judge, Meiktila, before whom the respondent Daw Mi, the decree-holder, filed a fresh application for execution, namely, Civil Execution No. 11 of 1948, observed at page 1 of the judgment, dated the 27th May, 1948, as follows :

> " An appeal was presented against the decree in question on 12th December 1944 in Civil Appeal No. 38 of 1944 of the Court of the Additional Divisional Judge, Meiktila (sitting at Mahlaing). The record of this appeal shows that the appeal had never been dealt with by the Judge himself when the Court ceased to function sometime in February 1945. There are three entries in the diary of proceedings of that case. The first two entries were signed by somebody on behalf of the Judge (presumably the Bench Clerk of the Court although it was not the same individual who signed the second entry). The third entry (dated 2nd February 1945) was not signed by anybody at all. "

It thus appears to be more or less clear that the Assistant Judge must have seen the record of Civil Appeal No. 38 of 1944 when he made the statement which has been reproduced above. Moreover, it is clear from the copy of the diary orders filed at page 10 of Civil Execution Case No. 11 of 1948 that the Assistant Judge could not have made the above statement merely by looking at the copy of the diary orders filed in the proceeding before him because there was nothing in the copy of the diary orders so filed to show what took place on the two earlier dates.

The District Judge in the judgment passed by him observed that Civil Execution Case No. 3 of 1944 was closed on 2nd February, 1945. It appears to me that the learned District Judge must also have had the records of Civil Execution Case No. 3 of 1944 with him at the time he wrote the judgment, as the records

were existing then. It must, in the circumstances, be presumed that his observation was based on what he saw in the records at the time he wrote the judgment. In any case, it is now too belated to allow the respondent Daw Mi to convert her application for execution into an application to revive the old execution proceeding which she filed in 1944. Daw Mi has herself only to blame for the mistake, if any, in making a fresh application for execution in May, 1948. She apparently knew best as to what occurred to her execution application filed in Civil Execution Case No. 3 of 1944, and her conduct in filing a fresh application for execution in May, 1948, instead of trying to revive the old Execution Case No. 3 of 1944 also suggests that her execution case of 1944 must have been allowed to be closed on the 2nd February, 1945, as observed by the learned District Judge in his judgment passed on the 16th August, 1948.

The learned District Judge was, however, wrong in holding that the application for execution filed in the Civil Execution Case No. 11 of 1948 was in time. Section 4 of the Limitation Act provides that :

" Where the period of limitation expires on a day when the Court is closed the proceeding can be filed on the day that Court re-opens. "

Section 4, is thus distinct from the provisions of section 14 of the Limitation Act, and it makes provision for a different circumstance.

In the case of *Maqbul Ahmed* v. *Pratap Narain Singh* (1), Lord Tomlin in delivering the judgment of Their Lordships of the Privy Council stated :

" It is to be noted that there is a marked distinction in form between section 4 and section 14. The language employed in section 4 indicates that it has nothing to do with computing the

(1) I.L.R. (1935).Vol. 57 All. p. 242 at 248.

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prescribed period. What the section provides is that, where the period prescribed expires on a day when the Court is closed, notwithstanding that fact the application may be made on the day that the Court re-opens: so that there is nothing in the section which alters the length of the prescribed period.

Thus, the application for execution filed in Civil Execution Case No. 11 of 1948, which was filed only on 20th May 1948, must be considered to have been time barred in view of the provisions of the Court (Emergency Provisions) (Repeal) Act, 1947, under which Civil Courts in Burma were considered for the purpose of section 4 of the Limitation Act to be closed only up to 31st March 1947.

The appeal is therefore allowed with costs. Advocate's fee three gold mohurs; and the judgment and decree of the District Court will be set aside, while the judgment and decree of the Court of the Assistant Judge, Meiktila, will be restored.

## APPELLATE CIVIL.

*Before U Tun Byu, J.*

DR. MISS A. G. D'NETTO (APPELLANT)

*v.*

MA AIN YU AND OTHERS (RESPONDENTS).*

H.C. 1949

*Dec. 24.*

*Code of Civil Procedure, Order 41, Rule 27, —Recording of evidence of witnesses—Waived in the Trial Court—Second Appeal—Erroneous finding of fact—When can be questioned—Legal effect from facts—Question of law.*

*Held* : That when a witness had been waived deliberately by the party, no opportunity should be given under Order 41, Rule 27, Code of Civil Procedure in appeal.

The proper legal effect of a proved fact is essentially a question of law.

*Nafar Chandra Pal* v. *Shukur and others*, *45 I.A. 183 at 187* ; *Ram Gopal and another* v. *Shamskhaton and others*, *14 I.A. 228 at 232-33*, referred to and applied.

Where the Lower Courts had not attempted to consider what was the legal effect of certain facts proved in the case and gave undue consideration to be absence of a witness there is sufficient ground for interference under s. 100, Code of Civil Procedure.

*P. B. Sen* for the appellant.

*Leong* for the respondent No. 1.

Respondents 2, 3 and 4 absent.

U TUN BYU, J.—The plaintiff-appellant Dr. Miss A. G. D'Netto, on 2nd December, 1940, purchased two pieces of land, one being a garden land and the other a paddy land, from one Tan Wain Si and his wife Ma Mya Yee and children, including the first defendant-respondent Ma Ain Yu. Tan Wain Si died in 1942 after the Japanese occupation of Burma and Ma Mya Yee is also dead. Ma Thoung Yin, Maung Sein Tun and

* Civil 2nd Appeal No. 30 of 1949 against the decree of District Court of Amherst in Civil Appeal No. 27 of 1948, dated the 23rd April 1949

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Ma Tin Shwe, the remaining defendant-respondents, are Ma Mya Yee's legal representatives. On the same day the parties also executed an agreement whereby the plaintiff-appellant agreed to resell the lands back to the vendors within three years on repayment of the purchase price of Rs. 2,000 and on the condition that the vendors also pay regularly the annual rental of those two pieces of land, which came to about Rs. 240 per annum and also pay the land revenue due thereon. The vendors, as required under the said agreement to repurchase, paid the annual rental of Rs. 240 to Dr. Miss D'Netto and they also paid the land revenue for the first year. In the second year they only paid Rs. 100 towards the rental due by them, and they also did not pay the land revenue for the second year. No payment was made by them either towards the annual rental due by them or for the land revenue for the third year. Both the lower Courts found that the vendors had not conformed to the conditions of the agreement to resell the lands in dispute to them and that the vendors had thereby lost their right to repurchase those lands under the agreement to resell, and I fully agree with their finding in this respect.

The Advocate for the plaintiff-appellant has submitted that this case ought to be remanded for further evidence to be recorded in view of the provisions of Order 41, Rule 27 of the Code of Civil Procedure. It has been urged that the discretion allowed under Order 41, Rule 27, of the Code of Civil Procedure ought to be exercised where the ends of justice require it. It appears that U Tun Tin, a Police Officer, whose evidence is now sought to be recorded, was subpoenaed in the Original Court to appear as a witness on 8th December, 1947, but he was unable to attend Court on that day. Subsequently the plaintiff-appellant filed two fresh lists of witnesses, namely, on

20th March, 1948 and 21st April, 1948, but the name U Tun Tin was omitted from the lists of witnesses so filed. There is also nothing in the diary orders of the case to suggest that any attempt had been made by the plaintiff-appellant to seek the help of the Court in obtaining the attendance of U Tun Tin. The plaintiff-appellant must therefore be considered to have deliberately waived the attendance of U Tun Tin as a witness, and in the circumstances she could not be considered to have suffered any injustice if the case were decided against her for want of U Tun Tin's evidence, in that she deliberately took the risk of proceeding with the trial of her case without the evidence of U Tun Tin; and she accordingly has herself only to blame. She obviously ought not to be given a second opportunity of adducing evidence where that evidence had been deliberately abandoned.

The next question is, whether, on the evidence produced in this case, it has been proved that Dr. Miss D'Netto executed the deed of reconveyance in November, 1943, under coercion and fear. It has been urged, however, on behalf of the defendant-respondents that no second appeal lies on the ground of erroneous finding of facts, which is of course a well established prosposition of law. In the case of *Nafar Chandra Pal* v. *Shukur and others* (1) Lord Buckmaster in delivering the judgment of their Lordships observed :

"Questions of law and of fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is esssentially a question of law, so also is the question of admissibility of evidence and the question of whether any evidence has been offered on one side or the other; but the question whether the fact has been proved, when evidence for and against has been properly admitted, is necessarily a pure question of fact."

(1) 45 I.A. 183 at 187.

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Sir Richard Couch also observed in the case of *Ram Gopal and another* v. *Shamskhaton and others* (1) as follows :

"The facts found need not be questioned. It is the soundness of the conclusions from them that is in question, and this is a matter of law."

Thus it can be said that a second appeal will lie if the Court below has approached the question from a wrong angle and the evidence on the record is such that it indicates that the Court below should have obviously, on the facts so proved, arrived at a converse answer. It will therefore be necessary to examine what are the proved facts in this case, and they can be stated to be as follows :—

(1) that the plaintiff-appellant Dr. Miss D'Netto was under no legal obligation to reconvey the lands to Ma Mya Yee and Ma Ain Yu in April, 1943 ;

(2) that the consideration of a sum of Rs. 2,000 which the plaintiff-appellant paid for the purchase of the lands was in British currency ;

(3) that the defendant- respondents paid for the reconveyance of the lands in November 1943 in Japanese currency, which had then depreciated in value, *vide* the Schedule of section 3 of the JapaneseCurrency (Evaluation) Act, 1947 ;

(4) that a Police Officer visited the plaintiff-appellant some time before the reconveyance in favour of the defendant-respondents was executed, and in consequence of which visit she sent one Mr. Menon to go and see

(1) 17 I.A. p. 228 at 232-33.

her Advocate Mr. Eusoof, a well-known member of the local Bar ;

(5) Mr. Eusoof, to use his own words, advised Mr. Menon as follows :

"I told Mr. Menon that the plaintiff (Dr.) was a lady and nobody knew what the Jap Kimpetai would stoop to do and that it was best to see that the transfer was made so that there might not be any harassment. This was my final advice. I saw this Chinaman (witness pointing out at Ah Yin) but I could not say whether his visits to my house and his meeting with me was before or after the "final advice" I had given. I myself was frightened to act in this matter, that is to say, dared not give professional advice freely lest I might be harassed by the Japanese Kimpetai."

(6) and there is also nothing on the record to prove that the plaintiff-appellant was in need of money towards the end of 1943 while on the other hand she had already sent a reply, Exhibit B. to the lawyer's notice sent on behalf of Ma Mya Yee that she could not comply with Ma Mya Yee's request for reconveyance of the lands sold to her.

Do not these facts, if they are considered together, lead to one inference only, namely, that Dr. Miss D'Netto would not have resold the lands back to Ma Mya Yee unless she was in fear and under some sort of threat or coercion ? There can, in my opinion, be only one answer, and that is in the affirmative. It is clear that Dr. Miss D'Netto was, at least, at first reluctant to resell the lands to Ma Mya Yee in view of the reply which her lawyer sent in reply to the notice sent by the lawyer who was acting on behalf of Ma Mya Yee. There does not appear to be anything on

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the record which will clearly indicate why the statement of Dr. Miss D'Netto ought not to be believed when she said that the Police Officer came and questioned her about her demand of payment in British notes. The Exhibit C, lawyer's notice, dated 10th September 1943, sent on behalf of Ma Mye Yee on the other hand also suggests that such visit was likely to have been made, because in that letter it was alleged that Dr. Miss D'Netto had insisted on payment in British notes. It must be considered to be a serious matter to accuse a person during the Japanese occupation of Burma of insisting on payment in British currency as it is wellknown to all who had lived in Burma during the Japanese occupation that the Japanese looked suspiciously upon all persons demanding payments in British currency and that they were inclined to deal harshly, if not cruelly, with such persons.

A perusal of the judgments of the lower Courts shows that both the lower Courts have not attempted to consider what was the legal effect of certain facts which have been proved in this case. Both the lower Courts appear to have omitted to consider the effect of those facts, and instead they appear to have given undue consideration to the absence of U Tun Tin as a witness for the plaintiff-appellant. The fact that U Tun Tin was not called does not necessarily raise a presumption that his evidence, if adduced, would not be favourable to the party waiving him. Other circumstances of the case should also be considered before any such presumption is raised.

The appeal is accordingly allowed, and the judgments and decrees of both the lower Courts will be set aside, with costs in all three Courts. The plaintiff-appellant Dr. Miss D'Netto will be entitled to the cancellation of the deed of sale dated 1st November, 1943, and also for possession of the lands mentioned

therein on payment into Court of a sum of Rs. 1,500 in existing currency, less the amount payable to her as costs.

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## CIVIL REVISION.

*Before U Tun Byu, J.*

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*Aug. 21.*

E. S. COHEN (APPLICANT)

*v.*

V.E.RM.AR. CHETTYAR FIRM (RESPONDENT). *

*Revision of order granting application under Order IX, Rule 13, Code of Civil Procedure—Interlocutory order.*

*Held :* That where an application under Order IX, Rule 13 of the Code of Civil Procedure for setting aside an *ex parte* decree was granted by the Trial Court a revision lies to the High Court.

The High Court will not interfere in revision against an Interlocutory order unless some grave injustice or hardship would result on failure to do so.

*Radha Mohan Dati v. Abbas Ali Biswas and others*, (1931) 53 All. 612 at 617-18 ; *U Ba U* v. *U Ywei*, (1948) B.L.R. 172 ; *L.P.R. Chettyar Firm* v. *R. K. Banerji*, (*O.R.*) (1931) 9 Ran. 71, applied.

It is difficult to see how grave injustice or real hardship could be said to be sustained by the plaintiff if an *ex parte* decree in his favour is set aside and he is compensated in costs therefor.

*Hla Sein* for the applicant.

*K. R. Venkatram* for the respondent.

U TUN BYU, J.—The plaintiff-applicant E. S. Cohen filed a suit in 1941 for the recovery of a sum of Rs. 1,327-8, which was said to be the amount of brokerage due to him by the defendant-respondent V.E.RM.AR. Chettyar Firm in respect of the sale of certain immoveable properties which the defendant-respondent firm sold to one C. Twa Sein and Daw Khin Wan for a sum of Rs. 43,500 and which suit was known as Civil Regular No. 4075 of 1941 of the late Rangoon Small Causes Court. The records of this case were lost during the Japanese occupation

* Civil Revision No. 62 of 1949 against the Order of the 3rd Judge, City Civil Court of Rangoon, in Civil Suit No. 241 of 1949, dated the 23rd August 1949.

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of Burma. In 1948 E. S. Cohen applied for the reconstruction of this case, and his application for the reconstruction was allowed.

It appears that Nachiappa Chettyar first appeared on behalf of the defendant-respondent firm in the Civil Miscellaneous case No. 155 of 1948, that is, the case in which E. S. Cohen applied for the reconstruction of the Civil Regular Suit No. 4075 of 1941. He however failed to put in further appearance on behalf of the Chettyar firm after 10th October, 1948, and as he was in Rangoon up till 14th December, 1948, it must be assumed that his absence from Court on subsequent dates was deliberate.

The order for the reconstruction of Civil Regular Suit No. 4075 of 1941 was passed on 4th April, 1949. It is not disputed in this case that Nachiappa Chettyar, agent of the defendant-respondent firm, left for India on 14th December, 1948, and that no arrangement was made for some months for someone to be appointed in the place of Nachiappa Chettyar until 17th June, 1949, when S.K.T. Sathappa Chettyar, the present agent of the defendant-respondent firm, was appointed, with the result that the suit, which was pending in the Rangoon Small Causes Court in 1941 and which after the reconstruction became known as Civil Regular Suit No. 241 of 1949 of the Rangoon City Civil Court, was heard *ex parte* against the defendant-respondent firm, and a decree was passed in favour of E. S. Cohen with costs on 27th May, 1949.

S.K.T. Sathappa Chettyar, the new agent of the defendant-respondent firm, applied on 27th June, 1949, to set aside the *ex parte* decree passed against the defendant-respondent firm on 27th May, 1949, and his application was allowed with the result that the *ex parte* decree was set aside on 23rd August, 1949. The learned 3rd Judge of the Rangoon City Civil Court

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however ordered the defendant-respondent firm to furnish security in the sum of Rs. 1,500 as security for costs and the claim made by E. S. Cohen. It is not disputed in this case that the defendant-respondent firm owned certain properties in this country, that it continues to maintain an office even at present at the same old address at No. 114, Mogul Street, that S.K.T. Sathappa Chettyar collected rents, after the departure of Nachiappa Chettyar, from the tenants of the defendant-respondent, that he also paid taxes on behalf of the defendant-respondent firm and that S.K.T. Sathappa Chettyar also transacted a sale of a house on behalf of the defendant-respondent firm on 23rd March, 1949, under a special power of attorney, apparently sent to him from India. It will thus be observed that the defendant-respondent firm had not ceased to function after the departure of Nachiappa Chettyar for India in December, 1948, and that in fact S.K.T. Sathappa Chettyar was doing what was necessary for the defendant-respondent firm in respect of their properties in this country. It seems to be obvious that the defendant-respondent firm must have known after the departure of Nachiappa Chettyar for India in December, 1948, that the suit which was filed against them in the Rangoon Small Causes Court in 1941 would be reconstructed and that after the reconstruction the hearing would be proceeded with against them *ex parte* as Nachiappa Chettyar had left for India without leaving anyone to represent the firm after his departure to India. The inactivity of the defendant-respondent firm in this respect appears to me to be deliberate, especially when they had appointed S.K.T. Sathappa Chettyar to look after their property in Rangoon and when they were even able to send him a special power of attorney for the purpose of effecting a sale of a house in Rangoon in March,

1949 ; and Sathappa Chettyar in his evidence stated as follows :

" I collected the rents from the tenants for the firm in question after Nachiappa had left. * * * I also paid taxes on behalf of the firm. After giving the taxes, I used to send the surplus money to India. I gave statement of accounts in my letter. I sent the money to Ramanathan Chettyar. "

The substituted service made upon the defendant-respondent firm at No. 114, Mogul Street, must therefore be considered to have been good and effective.

The real question which is to be considered is, whether an application for revision lies in the circumstances of the present case. In the case of *Radha Mohan Datt* v. *Abbas Ali Biswas and others* (1) it was observed :

" An order granting an application under Order IX, Rule 13 of the Code of Civil Procedure is not a decree within the meaning of section 2 (2) of the Code and is not appealable as such. Certain interlocutory orders are appealable under section 104 and Order XLIII of the Code of Civil Procedure, but this is not one of them. But a right of appeal has been expressly provided from an order refusing to set aside an *ex parte* decree. This provision was in the old Code. This provision is to be found in the Civil Procedure Code now in force. Now this could never have been a mere freak on the part of the legislature to provide for an appeal in the one case and not to provide for an appeal in the other case, nor could this matter be regarded as a *casus omissus*. We have every reason to believe that the act of the legislature was deliberate and there was an undoubted intention to give a finality to an order setting aside an *ex parte* decree under Order IX, Rule 13, of the Code of Civil Procedure. It may not be useful to probe into and discuss the policy underlying the text, but it is obvious that the legislature has a marked leaning for a procedure promotive of the decision of a case upon the merits, and, therefore, it is natural that express provisions should have been made to ensure the attainment of that end. "

(1) (1931) 53 All. Series 612 at 617-18.

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Thus it will be necessary for the plaintiff-applicant E. S. Cohen to show that the present application falls strictly within the provisions of section 115 of the Code of Civil Procedure. The last paragraph of the head-note in the case of *U Ba U* v. *U Ywet* (1) reads :

" 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."

The same observation was made in the earlier case of *L.P.R. Chettyar Firm* v. *R. K. Banerji (O.R.)* (2).

It is difficult to see in this case how grave injustice or real hardship could be said to have fallen upon the plaintiff-applicant by reason of the order setting aside the *ex parte* decree which had been made in his favour except that he lost the benefit of the *ex parte* decree. He could in any case be compensated in costs.

The learned 3rd Judge of the Rangoon City Civil Court was apparently aware of the entire circumstances under which the *ex parte* decree was passed in that it was passed by the same Judge who set aside the *ex parte* decree ; and in any case he appeared to have had materials before him on which he might arrive at the conclusion which he came to. However, as I have observed earlier, it appears to me that the defendant-respondent firm should have appointed another person in the place of Nachiappa Chettyar to look after the case which had been instituted against them as far back as 1941. The defendant-respondent firm will be directed, besides furnishing the security as ordered by the learned 3rd Judge of the Rangoon City Civil Court, also to pay the costs incurred by the plaintiff-applicant in connection with the application to set aside the *ex parte* decree. The respondent will also pay the costs incurred by the plaintiff-applicant in the

(1) (1948) B.L.R. 172. (2) (1931) 9 Ran. Series 71.

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reconstruction proceeding, that is, in Civil Miscellaneous case No. 155 of 1948. There will be no costs in this Court. The costs in other matters will be left to be decided at the conclusion of the hearing by the Court which will hear this case subsequently. The order of the 3rd Judge, Rangoon City Civil Court, is modified in the sense indicated above.

## CRIMINAL REVISION.

*Before U Tun Byu, J.*

H.C. 1950

*Jan. 13.*

THE UNION OF BURMA (APPLICANT)

*v.*

KYAW HLA AUNG AND OTHERS (RESPONDENTS).*

*Code of Criminal Procedure—S. 528 (4) and (5)—Transfer of cases from one Court to another—Reasons for—To be recorded—Functions judicial—Personal knowledge of Judge.*

*Held:* S. 528 (5) of the Code of Criminal Procedure provides that a Magistrate making an order shall record in writing his reasons for so doing A transfer of a case at the whim or caprice of the Magistrate seriously interferes with the working of Courts and shakes the confidence of the public. Transfer of a case is a judicial function and must be exercised with due observance of the procedure and formalities which have to be followed.

*Sugnomal Tahilram* v. *Phatandas Relumal*, A.I.R. (1936) Sind 237 at 240; *Gowardhandas Kapur* v. *Abbas Ali*, A.I.R. (1930) Lah. 168 at 169, applied.

It is a fundamental of the due administration of justice that Judges and Magistrates should not only be fair and impartial but should also appear to reasonable persons to be fair and impartial.

*Vellu Thevar and another* v. *King-Emperor*, 10 Ran. 180, followed.

*Mya Thein* (Government Advocate) for the applicant.

U TUN BYU, J.—It appears to me that a common judgment can properly be passed in respect of Criminal Revision Nos. 55B and 56B of 1949 in that they arose from the orders of the same Special District Magistrate, Akyab, and that the irregularities which appeared to have been committed appear to be the same or almost the same in both cases.

The diary order of the Special District Magistrate, Akyab, dated the 16th May 1949, which was recorded in

* Criminal Revisions Nos. 55B and 56B of 1949. Review of the order of the Special District Magistrate of Akyab, dated the 7th February 1949 passed in Criminal Regular Trial No. 85 of 1948 and 30 of 1949 of the Court of the Sub-divisional Magistrate, Akyab, on the recommendation of the Sessions Judge, Arakan, dated the 3rd September 1949 in Criminal Revision Nos. 96 and 100 of 1949.

Criminal Regular Trial No. 85 of 1948 of the Court of the Subdivisional Magistrate, Akyab, reads as follows:

"Order passed.

Case withdrawn under section 528 (*4*) of Criminal Procedure Code.

Accused discharged.

Case returned to S.D.M."

This diary order appeared to have recorded about three months after the Special District Magistrate had passed his order of 7th February 1949, where he ordered the proceeding in Criminal Regular Trial No. 85 of 1948 to be closed and directed the accused in that case to be released. A perusal of the order of the Special District Magistrate, dated 7th February 1949, shows that he has not anywhere stated in that order his reasons for transfering the case which was pending in the Court of the Subdivisional Magistrate, Akyab, to be dealt with by himself. Moreover, the diary order recorded by the Special District Magistrate on 16th May 1949, does not also show for what reason the Special District Magistrate purported to transfer the case to be dealt with by himself under section 528 of the Code of Criminal Procedure. No application for transfer appeared to have been made by the parties in connection with this case, and this appears to me to afford greater reason why the Special District Magistrate should set out the reasons which impelled him to transfer the case and to deal with it himself.

The diary order dated the 1st July 1949, which was recorded by Special District Magistrate, Akyab, in the record of Criminal Regular Trial No. 30 of 1949 of the Court of the Subdivisional Magistrate, Akyab, is as follows:

"Case is withdrawn and returned to S.D.M., Akyab. All accused discharged."

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The learned Special District Magistrate's order in this connection is at page 21 of the proceeding. In this case too no application for transfer was filed ; nor was any reason recorded by the Special District Magistrate to indicate why he considered it was necessary in the interests of justice that the case should be taken over to his file and dealt with by him.

It might be mentioned at once that no notice was issued by the Special District Magistrate to the opposite party in both the cases before he passed the orders which have been referred to above. The Special District Magistrate had also not opened separate proceedings for the purpose of taking action under section 528 of the Code of Criminal Procedure, and it will accordingly be necessary to reproduce the provisions of section 528 (5) of the Code of Criminal Procedure, which read :

" 528 (5). A Magistrate making an order under this section shall record in writing his reasons for making the same."

It is thus clear that the law requires that the reasons for the transfer of a case should be recorded, and the reason for this provision appears to be that a transfer ought not to be made lightly. In the case of *Sugnomal Tahilram* v. *Phatandas Relumal* (1) it was observed :

" We hope that this learned Magistrate will in future consider and understand the scope and purpose of section 526, Criminal Procedure Code, for a Magistrate to transfer a case from one Court to another at his whim and caprice would be seriously to interfere with the working of the Courts and would shake the confidence of the public in those Courts."

Again in *Gowardhandhas Kapur* v. *Abbas Ali* (2) it was also observed—

" . . . . . the functions of the District Magistrate under section 528, Criminal Procedure Code, which empowers him to

(1) A.I.R. (1936) Sind, p. 237 at 240.
(2) A.I.R. (1930) Lah., p. 168 at 169.

transfer cases from the Courts of the Magistrates subordinate to him, are judicial functions and must consequently be exercised with due observance of the procedure and formalities which have to be followed in all other judicial matters."

I must say that I fully agree with the observations in the two cases quoted above.

The order of the Special District Magistrate, Akyab, also shows clearly that he was importing his own knowledge in considering that case. In *Vellu Thevar and another* v. *King-Emperor* (1) the second paragraph of the headnote reads :

"It is a fundamental of the due administration of justice that Judges and Magistrates should not only be fair and impartial, but also should appear to reasonable persons to be fair and impartial, and that neither accused persons nor litigants should have any reasonable ground for supposing that the Judge or Magistrate who is trying a case in which they are concerned is biassed either in their favour or against them."

It is thus clear that the Special District Magistrate, Akyab, should have, if he had personal knowledge in the case before him, transferred it over to another Magistrate for the latter to consider whether the trial should proceed or not, after having taken action under section 528 of the Code of Criminal Procedure. It will moreover be observed from what has been briefly stated above that serious irregularities have been committed by the Special District Magistrate, Akyab, in respect of the two cases, namely, Criminal Regular Trial No. 85 of 1948 and Criminal Regular Trial No. 30 of 1949. The orders of the Special District Magistrate passed in connection with those two cases, whereby he purported to transfer those cases to be dealt with by himself and under which the accused in those two cases were released, will be set aside. The proceedings in Criminal Regular Trial No. 85 of 1948 and in Criminal

(1) 10 Kan. p. 180.

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U TUN BYU, J.

Regular Trial No. 30 of 1949 will be returned to the Court of Subdivisional Magistrate, Akyab, for him to deal with the cases from the stage he had left off before the Special District Magistrate passed his order referred to earlier in this judgment.

If the accused in any of these cases feel that they have a case for transfer it is for them to move the superior Court in a regular way, or if they feel that there is no case against them, it will be open to them also to move the higher Court to quash the proceedings against them, but it is difficult to conceive how this can properly be done until the evidence for the prosecution has been recorded. The proceedings of the trial Court will be returned to the Court of the Subdivisional Magistrate, Akyab, with a copy of the order passed by this Court.

## APPELLATE CIVIL.

*Before U San Maung, J.*

MA SHU HWAY AND TWO OTHERS (APPELLANTS)

*v.*

DAW KYAY HMYIN (RESPONDENT).*

H.C. 1949

*Dec. 12.*

*Sino-Burman Buddhist—Governed by Burmese Buddhist law—Family Arrangement—Reduced to document—Immoveable property effected worth more than Rs. 100—The effect of non-registration.*

Where certain immoveable properties are acquired by a Sino-Burman Buddhist during his coverture with the Respondent, a Burmese Buddhist, and the property (valued at more than Rs. 100) was claimed under a family arrangement under an unregistered document.

*Held* : That the law applicable to the case was Burmese Buddhist Law.

*Tan Ma Shwe Zin and others* v. *Koo Soo Chong and others*, (1939) R.L.R. 548, followed.

The property on the death of the husband, became the property of the wife. The Family Arrangement relied on, involved properties worth more than Rs. 100 and was reduced to the form of a document, therefore registration was necessary under s. 17 of the Registration Act. No oral evidence regarding the Family Arrangement is therefore admissible in law.

*Ram Gopal* v. *Tulshi Ram and another*, 51 All. 79 (F.B.).

*Tin Hla* for the appellants.

*N. C. Sen* for the respondent.

U SAN MAUNG, J.—This is an appeal against the judgment and decree of the District Court of Moulmein affirming the judgment and decree of the 1st Assistant Judge, Moulmein, in Civil Suit No. 147 of 1947 for the eviction of the defendant-appellants Ma Shu Hway, L. Hoke Lyan and L. Hoke Kin from the garden lands, in suit. It is common ground that the original holding which was later sub-divided into the two pieces of land in suit was acquired by the late U Saung during his coverture with the plaintiff-respondent

* Civil 2nd Appeal No. 25 of 1949 against the decree of District Court of Moulmein in Civil Appeal No. 29 of 1948, dated the 26th March 1949.

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MA SHU HWAY AND TWO OTHERS v. DAW KYAY HMYIN.

U SAN MAUNG, J.

Daw Kyay Hmyin. U Saung was an *eindaungyi* having some children by his first wife.

Among his children by Daw Kyay Hmyin was one Kyee Shain, now deceased, the husband of the 1st defendant-appellant Ma Shu Hway and the father of the 2nd and 3rd defendant-appellants. Kyee Shain predeceased his father U Saung who himself died about eleven years before the date of the suit. After the death of U Saung the lands in suit were in the possession of the defendant-appellants who, according to Daw Kyay Hmyin, were in possession thereof with her permission. The defendant-appellants, on the other hand, alleged that U Saung had before his death made a family arrangement whereby the lands in suit were allotted to the 2nd and 3rd defendant-appellants and that this arrangement was binding upon Daw Kyay Hmyin who had acquiesced in it. It was claimed that U Saung was a Chinese Confucian, but this claim was later abandoned in view of the overwhelming evidence on record that he was a Chinese Buddhist. In fact there is credible evidence on record to show that U Saung was a Sino-Burmese Buddhist. In any event in view of the ruling of the Privy Council in *Tan Ma Shwe Zin and others* v. *Koo Soo Chong and others* (1) the law applicable to this case is Burmese Buddhist Law. The learned Judge who tried this case has held that even if there had been such an arrangement as that alleged by the defendant-appellants, it would not amount to a family arrangement which is binding in law in view of the fact that under the Burmese Buddhist Law on the death of U Saung his wife Daw Kyay Hmyin, and not the defendant-appellants L. Hoke Lyan and L. Hoke Kin, was the heir to U Saung's estate. The learned District Judge on appeal by the defendant-appellants held that although the evidence disclosed that there was

(1) (1939) R.L.R. p. 548.

some sort of an arrangement as that deposed to by U Ba Than (D.W. 4), the transaction having been reduced to writing was invalid for want of registration and evidence relating to the terms of the agreement inadmissible in law. After having given most anxious consideration as to whether or not the alleged arrangement would or would not be binding upon Ma Shu Hway if she had really consented to it in view of the fact that at the time it took place the parties were acting in the belief that Chinese Customary Law was applicable to the matter relating to the succession to the estate of U Saung on his death, I have come to the conclusion that a decision on this point will not be necessary in view of the fact that no evidence relating to the transaction would be admissible in law. According to U Ba Than, the arrangement in which all the parties concerned acquiesced was embodied in a document which was executed by Maung Kyi, son of U Saung by his first wife, Daw Kyay Hmyin, her son Kyi Lun and her daughters while Ma Shu Hway affixed her signature as the *de facto* guardian of her minor children the 2nd and 3rd defendant-appellants. The land in suit which was worth more than Rs. 100 was entrusted to Kyi Lun for the benefit of the 2nd and 3rd defendant-appellants. Kyi Lun himself obtained a garden and a house situated thereon while Kyi Maung obtained a garden at Thayetgon and a paddy land at Gwegon. Daw Kyay Hmyin and her daughters received no properties, but they were to be maintained by Kyi Lun until such time as they married.

Now, if a family arrangement is in fact reduced to the form of a document registration (when the value of immovable property involved is Rs. 100 or upwards) is necessary by section 17 of the Registration Act, and the absence of registration makes the document inadmissible in evidence, under section 49 of the

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U SAN MAUNG, J.

Registration Act, in proof of the arrangement, and under section 91 of the evidence Act no other proof thereof can be given. See *Ram Gopal* v. *Tulshi Ram and another* (1). Therefore no oral evidence regarding the alleged family arrangement is admissible in law. On the death of U Saung, Daw Kyay Hmyin became the owner of the garden lands in suit and as the defendant-appellants cannot claim to be in adverse possession thereof for the statutory period of twelve years necessary to give them a prescriptive right thereto, they are liable to be evicted therefrom.

In the result the appeal fails and must be dismissed with costs, Advocate's fees three gold mohurs.

(1) 51 All. p. 79 (F.B.).

## CIVIL REVISION.

*Before U Aung Tha Gyaw, J.*

MAUNG THEIN NGWE (APPLICANT)

*v.*

U MAUNG MAUNG (RESPONDENT).*

H.C. 1949

*Dec. 6.*

*Order 21, Rule 89* (1) (b) *Code of Civil Procedure—Person handing such property or holding interest acquired before sale—Revision.*

Where a decree-holder purchased property in public auction and deposited 25 per cent on the date of the sale but prior to confirmation applied under Order 21, Rule 89 of the Code of Civil Procedure to set aside the sale stating that the judgment-debtor had sold the house to him long before the court sale explained the circumstances under which he had to bid, and asked that the sum deposited by him be taken to be the 5 per cent for payment to the Purchaser.

*Held:* That his failure to deposit in Court the amount specified in the sale proclamation as that for the recovery of which the sale was ordered was a mere technical error. The executing Court was wrong in holding that the applicant was not competent to present an application under Order 21, Rule 89 of the Code of Civil Procedure. This error on the part of the Court resulted in its failure to exercise a jurisdiction vested in it by law.

The execution sale is complete after the bid has been accepted and the deposit paid under Rule 84.

*Mahomed Yacoob* v. *P.L.R.M. Firm and others*, (1931) 9 Ran. 608, followed.

*Soe* for the applicant.

*Thein Moung* for the respondent.

U AUNG THA GYAW, J.—The applicant in this case successfully bid at a Court auction held in Civil Execution No. 88 of 1948 of the Court of the subordinate Judge, Bassein, in respect of the house belonging to the judgment-debtor, Maung Chit. The property was knocked down for Rs. 495 and a quarter of this sum, amounting to Rs. 124 was deposited in Court by the applicant on 5th January 1949, the date on

* Civil Revision No. 53 of 1949 against the order of the District Court of Bassein in Civil Misc. Appeal No. 8 of 1949, dated the 30th May 1949.

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U AUNG THIN GYAW, J.

which the sale took place. On the 21st January 1949, the applicant filed an application under Order 21, Rule 89 (1) (*b*) of the Civil Procedure Code for setting aside the sale describing the circumstances in which he became the highest bidder for the property and agreeing to deposit in Court the amount specified in the sale proclamation for the recovery of which the sale was ordered. In respect of the deposit of 5 per cent required of him under Order 21, Rule 89 (1) (*a*), he pleaded for exemption on the ground that he himself was the purchaser.

The executing Court on the objection raised on the respondent's behalf held that the applicant had no *lucus standi* to enable him to present an application of this nature under Order 21, Rule 89 of the Code, as by the failure to deposit the balance of the purchase money within fifteen days from the date of the sale, the sale in fact had not been completed and that the only course open to the Court, under the circumstances, was to set aside the sale and conduct a fresh one. The deposit made by the applicant in Court was also ordered to be forfeited. An appeal laid before the District Court met with no success as the learned District Judge was of the same opinion that the sale not having been completed, the applicant had no right to make his application under Order 21, Rule 89 of the Code.

On the date on which the applicant made his application under Order 21, Rule 89, the Court had received no information as to the applicant's default in respect of the deposit of the balance of the purchase money. The applicant had complied with the provision of Rule 84 by depositing 25 per cent of this purchase money in Court and under Rule 85, the full amount of the purchase money became payable before the Court closes on the 15th day from the date of the sale of the property. Under Rule 86, where a default

had occurred, the Court may forfeit a deposit and the property shall then be resold. At the time the applicant made his application under Order 21, Rule 89 for setting aside the sale, the Court had not been informed of the applicant's default regarding the payment of the full purchase money and no orders had been passed as to the forfeiture of this deposit and the resale of the property. There was no question whatsoever that the sale had not been completed. The applicant's liability to pay the balance of the purchase money and the consequences of non-payment are matters of mere procedure following the actual sale completed by the acceptance of the bid and the payment of the deposit of 25 per cent of the amount of purchase money. An execution sale is completed after the bid has been accepted and the deposit paid under Rule 84. [See *Mahomed Yacoob* v. *P.L.R.M. Firm and others* (1).] There was therefore no justifiable ground in this case for treating the sale which the applicant was applying to set aside as still incomplete.

Under Order 21, Rule 89, any person, "either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in Court—

(*a*) for payment to the purchaser, a sum equal to 5 per cent of the purchase money, and

(*b*) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, etc.

The applicant stated in his application that he was such a transferee as described in this rule, the judgment-debtor having sold the house to him long

(1) (1931) 9. Ran. 608.

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before the Court sale took place. In regard to the deposit of 5 per cent of the purchase money, a sum of Rs. 124 belonging to him was already in deposit and he was quite justified in his plea that he might be exempted from complying with this rule. In his prayer he asked for the Court's direction to set aside the sale on his depositing in Court the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered. This undoubtedly was a mere technical error which if pointed out by the Court, could easily have been rectified by the applicant. As matters then stood, the applicant need only deposit fifty odd rupees or more to comply with this condition before his application could be entertained by the Court. This being the case, the executing Court was evidently wrong in holding that the applicant was not competent to present an application under Order 21, Rule 89 and that the conditions set out in the said rule had not been satisfied. This error on the part of the Court resulted in its failure to exercise a jurisdiction vested in it by law.

The order of the executing Court will be set aside with the direction that the applicant's application brought under Order 21, Rule 89, be disposed of according to law. Costs—three gold mohurs.

## APPELLATE CIVIL

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

DAW YIN (APPELLANT)

*v.*

U SEIN KYU AND THREE OTHERS (RESPONDENTS).*

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*Feb. 9.*

***Transfer of Property Act, s. 54—Sale of immoveable property worth less than Rs. 100 by unregistered sale deed—Whether passes title.***

Where the plaintiffs claimed purchase of an immoveable property worth less than Rs. 100 by an unregistered Deed of Sale and it was neither pleaded nor proved that there was oral sale followed by delivery of possession.

*Held :* That the sale was invalid and did not pass any title to the purchaser. It was essential either that the possession should change or that there must be a Registered Deed.

*Maung Mya Maung* v. *Ma Khine and others*, A.I.R. (1936) Ran. 497, distinguished ; *Muthukaruppan Samban and others* v. *Muthu Samban*, (1915) I.L.R. 38 Mad. 1158 ; *Kuppuswami Goundan* v. *Chinnaswami Goundan and others*, A.I.R. (1928) Mad. 546 at 548 ; *Sohan Lal and others* v. *Mohan Lal and others*, (1928) I.L.R. 50 All. 986 at 990 ; *Tribhovan Hargovan* v. *Shanker Desai* ; (1943) Bom. 653, followed.

*S. T. Leong* for the appellant.

*Kyaw* (Government Advocate) for the respondent No. 2.

U THEIN MAUNG, C.J.—The plaintiff-appellant Daw Yin sued the defendants-respondents for possession of a piece of leasehold land and for a mandatory injunction to demolish their building on it alleging that "Khoo Soo Ee, who was a purchaser of the suit land at a revenue sale for arrears of land revenue, resold the same to the plaintiff for Rs. 75 by sale deed dated the 12th February, 1937 ;" and the main issue which has been framed by the Court of first instance

* Civil 1st Appeal No. 56 of 1949 against the decree of the 3rd Judge, City Civil Court, Rangoon in Civil Regular No. 71 of 1949

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as suggested by the learned Advocates for the plaintiff-appellant is "whether Khoo Soo Ee (since deceased) who bought the suit land at the revenue sale retransferred the same to the plaintiff by an instrument dated the 12th February, 1937 ?"

In the course of her evidence she merely stated "He executed a sale deed in my favour. It is the sale deed. He also gave me the certificate which he received from the Rangoon Development Trust at the time of the auction. *I continued to live on the suit land* after having purchased the suit land from Khoo Soo Ee." Her case was very definitely that Khoo Soo Ee resold the property to her *by a sale deed.*

She never suggested in her pleadings, at the time of settlement of issues or in the course of her evidence that the sale was *by delivery of possession.* However, her suit having been dismissed on the ground, *inter alia*, that the sale deed is not admissible in evidence for want of registration, her learned Advocate has contended that the sale was also by delivery of possession.

She and her mother Daw Kyaw got a lease of the land from the Rangoon Development Trust on the 7th July, 1920; but the leasehold and the building, which they had erected on it, were sold by the said Trust and purchased by Khoo Soo Ee in Rent Recovery Proceedings on the 18th January, 1937.

According to her, she continued to live on the suit land after purchasing it from Khoo Soo Ee till Rangoon was occupied by the Japanese (*i.e.* till March, 1942) when she shifted to Mandalay without leaving anyone in charge of it. On her return to Rangoon in 1948 she found that her house had been destroyed during the Japanese occupation of Rangoon and that the third and fourth respondents had been living in a hut thereon as tenants of the first and second respondents.

Incidentally, the leasehold stands in the name of the second respondent as mutation of names in her favour was sanctioned by competent authority on the 1st September, 1948, *i.e.* before the institution of the plaintiff-appellant's suit.

As Spargo J. has pointed out in *Maung Mya Maung* v. *Ma Khine and others* (1), "it is not intended (by the Legislature in enacting section 54 of the Transfer of Property Act) that, when actual physical delivery is impossible because the vendee is already in possession, it should be necessary that the sale should be by registered instrument."

However, it has also been held in *Muthukaruppan Samban and others* v. *Muthu Samban* (2) :

"A sale of tangible immoveable property of the value of less than Rs. 100 effected by an unregistered instrument (without any prior oral sale) followed by delivery of possession is invalid and inoperative to pass the title to the property under section 54, Transfer of Property Act (IV of 1882).

A document which affects immoveable property, and which is required by law to be registered is, if it is not registered, inadmissible in evidence to prove the nature of possession of the person claiming under it, such as, the adverse character of the possession."

Besides, Srinivasa Aiyanger J. has observed in the course of his judgment in *Kuppuswami Goundan* v. *Chinnaswami Goundan and others* (3) :

"The expression 'sale by delivery of property' should properly be construed only as referring to and comprising a case where the parties agree that the transaction of sale should be effected by delivery of property and only in that way and cannot possibly be construed as to include a case where the parties agree to reduce to the form of a document the terms of the sale. The moment the parties for some reason consider that it is not

(1) A.I.R. (1936) Ran. 497. (2) (1915) I.L.R. 38 Mad. 1158.
(3) A.I.R. (1928) Mad. 546 at 548.

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sufficient to effect the transaction of sale by mere delivery of property, but require that as evidence of such transaction there should be a deed or document, the transaction can scarcely be correctly described as one effected by mere delivery of property. Further in the case of what are called sales effected by delivery of property, there is presumably a reference to the terms having been settled by and between the parties by parole and then the transaction effected and carried out by delivery. But the moment the parties reduce the terms to writing, it is the writing that thereafter must be regarded as containing and setting out the terms of the contract, and it would not be an apt or correct description of the transaction to call it a sale by delivery of property."

In the present case, there is no allegation in the pleadings or the evidence of the sale having been made by delivery of possession at all. The plaintiff-appellant clearly based her claim on *a sale by deed.* It was only when the sale deed was found to be inadmissible in evidence for want of registration that her learned Advocates argued that the sale was by delivery of possession also; and there is no evidence whatsoever of the property having been actually delivered by Khoo Soo Ee to her. In this connection it must be noted that Mukerji J. has observed in *Sohan Lal and others* v. *Mohan Lal and others* (1):

"If we look into the reason of the rule we shall see at once that, for the publicity of the fact that title has passed, it was essential that possession should change. It was this change in possession that was accepted as a criterion of transfer. It must, therefore, be taken that, when the legislature said that a transfer of tangible immoveable property of the value of less than Rs. 100 could be made by delivery of the property, it meant actual delivery and not a constructive delivery."

Under the circumstances of the case the question did not even arise as to whether the plaintiff-appellant was entitled, in spite of section 91 of the Evidence Act and section 49 of the Registration Act as amended by

(1) (1928) I.L.R. 50 All. 986 at 990.

section 10 of the Transfer of Property (Amended) Supplementary Act, 1929, to show that she had purchased the property "by delivery," *i.e.* by the seller *placing her in possession* though there was a sale-deed which was unregistered and therefore inoperative. [Cf. *Tribhovan Hargovan* v. *Shanker Desai* (1).]

The lower Court is right in holding that the plaintiff-appellant has failed to prove her title to the leasehold and in dismissing her suit.

The appeal is dismissed with costs.

U SAN MAUNG, J.—I agree.

(1) (1943) Bom. 653.

## APPELLATE CIVIL.

*Before U Tun Byu, Chief Justice, and U Ou Pe, J.*

H.C. 1950

*Feb. 24*

M. M. SHERAZEE (APPELLANT)

*v.*

DAW KHIN SAN (RESPONDENT).*

*Upper Burma Land and Revenue Regulation, s. 45—Sale for arrears of Revenue—S. 41 (1) (d)—Rules 170 and 171.*

*Held:* Under the Upper Burma Land and Revenue Regulation s 45 read with s. 171 a sale of immoveable property by Assistant Collector will have to be confirmed by the Collector, and only when the sale becomes absolute the title does pass. But when the sale is confirmed, it takes effect from the date of the sale.

*P. K. Basu* for the appellant.

U TUN BYU, C.J.—The plaintiff-appellant M. M. Sherazee was originally the owner of the lands at Yebok *Kwin* No. 575, Amarapura Township, measuring about 600 acres, and these lands were sold on or about the 7th December 1943 for Rs. 800, for the recovery of arrear of land revenue to the defendant-respondent Daw Khin San. A dispute arose between M. M. Sherazee and Daw Khin San as to who was the actual owner of those lands, and on the 4th February, 1946, U Tun Pe, Registrar of the District Court, Mandalay, was appointed by them to collect and receive the rents due on those lands. M. M. Sherazee next instituted a suit known as Civil Regular Suit No. 41 of 1947 of the Court of the 1st Assistant Judge, Mandalay, for a declaration that he was entitled to receive the sum of Rs. 1,066-8-0 which was in the hands of U Tun Pe, being apparently the amount which remained from the rents received by him.

* Special Civil Appeal No. 4 of 1949 against the decree of the High Court on the Appellate Side in Civil 2nd Appeal No. 78 of 1948, dated 11th December 1948.

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The case for the defendant-respondent Daw Khin San is that she is the owner of the lands in question in that she had purchased them at a revenue sale when those lands were sold to her by the Revenue Officer U Soe Ya for the recovery of arrear of land revenue, that those lands were subsequently mutated in her name, and that the revenue receipts in respect of those lands, were issued in her name for the years 1945-46 and 1946-47. M. M. Sherazee, on the other hand, also alleged that he applied to the Additional District Commissioner to have the revenue sale of the lands in dispute set aside and that the sale was set aside, which was however denied by Daw Khin San. The suit of the plaintiff-appellant was dissmised with costs. His appeal against the judgment and decree of the Court of the Assistant Judge was also dismissed, with costs in Civil Regular Appeal No. 6 of 1948 of the District Court of Mandalay. The appeal of the plaintiff-appellant against the judgment and decree of the District Court was also dismissed by the High Court, with costs, in Civil Second Appeal No. 78 of 1948.

It has been submitted on behalf of the plaintiff-appellant in this Special Appeal that there is no evidence to indicate that the revenue sale was, in fact, confirmed by the District Commissioner or Collector and that in the circumstances no title in the lands in question could have passed to the defendant-respondent Daw Khin San. It will be necessary, therefore, to consider carefully what is the real effect of the Upper Burma Land and Revenue Regulation and the relevant rules made under it. Clause (*d*) of section 41 (*1*) of the Regulation allows the arrear due for the land revenue to be recovered by means of attachment and sale of any immoveable property belonging to the defaulter, who is, for the purpose of this case, M. M. Sherazee. A sale, it is obvious, may

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be in the nature of the absolute sale or a provisional sale, depending on the circumstances of each case, and thus clause (*d*) of section 41 (*1*) of the Regulation does not afford any help in solving the question under consideration. Under section 42 (*1*) of the Upper Burma Land and Revenue Regulation, the purchaser of an immoveable property which has been sold for the recovery of arrear of land revenue takes it free from all encumbrances or burden, and it is difficult to appreciate how the consequences contemplated in section 42 (*1*) can ensue until the sale becomes an absolute sale. Thus, section 42 also does not afford us any real assistance.

Section 45 of the Upper Burma Land and Revenue Regulation certainly appears to be material and relevant, and it will be convenient to reproduce it here :

"45. (1) *When a sale* of any property under this chapter for the recovery of an arrear *has become absolute* the proceeds thereof shall be applied, in the first place, to the payment of the arrear, and, in the second place, to the payment of any other arrear, or of any sum recoverable as an arrear under this chapter, which may be due to the Government from the defaulter.

(2) Any balance of the proceeds of the sale which may remain after satisfaction of the claims of the Government under sub-section (*1*) shall, subject to the directions of any Court with respect to the application thereof, be paid to the defaulters."

The words "*When a sale . . . has become absolute*" in sub-section (*1*) have been underlined by me. It will be observed that section 45 (*1*) shows clearly that payment of the arrear of land revenue from the proceeds of the sale made under section 41 (*1*) (*d*) is to be made only after the sale has become absolute, and it might properly be said that the sale made under section 41 (*1*) (*d*) becomes effective only after it has been made absolute under section 45. It will also be

only proper, in this connection, to consider the relevant rules made under the Upper Burma Land and Revenue Regulation in order to ascertain when the sale made by the Revenue Officer U Soe Ya can be considered to become absolute. Rule 170 prescribes the procedure which is to be followed in conducting a sale for the purpose of section 41 (*1*) (*d*) of the Regulation. Rule 171 (*1*), which appears to be more relevant to the question now under consideration reads :

"171. (1) A sale of immoveable property by an Assistant Collector under Rule 170 shall be subject to confirmation by the Collector."

It is clear that Rule 171 (*1*) shows that the revenue sale made under Rule 170 must be confirmed by higher Revenue Authority before the sale can become an absolute sale, and that this is so has also been made clear in sub-rule (3) of Rule 171, which is as follows :

"(3) On confirmation by the Collector, the sale shall become absolute subject to any orders passed on appeal or revision. When the sale has become absolute, a certificate of sale shall be given to the purchaser in the prescribed form on payment of stamp duty, and if the property is not situated in an area under supplementary survey, a plan of the land concerned shall be attached to the certificate."

Thus, sub-rule (3) of Rule 171 also shows that the sale certificate in respect of the revenue sale conducted by U Soe Ya under Rule 170 will be issued only after the sale has become absolute, and not before. It follows that when sub-rules (1) and (3) of Rule 171 are read together, the sale made under Rule 170 requires an order of confirmation before that sale can be considered to be an absolute sale, or in other words, the sale made by the Revenue Officer U Soe Ya cannot be considered to be an absolute sale until it is confirmed by higher

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Revenue Authority. Sub-rule (2) of Rule 171 also lends support to the view expressed above, and it reads :

"(2) A sale shall not be confirmed until a period of 75 days from the date on which revenue fell due and also a period of one month from the date of the sale have elapsed. At any time before such periods have elapsed the sale shall, and at any time before confirmation the sale may, be set aside by the Collector if the defaulter himself pays, or any person whose interest in the land has been established to the satisfaction of the Collector pays on behalf of the defaulter, the amount of the arrear and costs, together with 10 per cent of the purchase price to be paid as compensation to the auction purchaser, provided that where the payment of the arrear and costs is for any reason accepted more than one month after the date of the sale the Collector may, for reasons to be recorded, require a payment up to 25 per cent of the purchase price as compensation.

If the property has been bought in for Government the purchase price for the purpose of calculating the compensation shall be taken to be the amount of the arrear and costs."

It will be observed that sub-rule (2) gives power to the Collector before the sale is confirmed to set aside a sale made under Rule 170, a power which he might or might not exercise after a lapse of 75 days or more, and thus sub-rule (2) could also be said to indicate that the sale made by a Revenue Officer under Rule 170 is only a provisional sale, and not an absolute sale.

The commentary in Mulla's Code of Civil Procedure, 11th Edition, at page 264, under the heading "Vesting of property in auction-purchaser" reads as follows :

". . . In the case, however, of a Court sale, the property does not vest in the purchaser immediately on the sale thereof. The reason is that a compulsory sale does not become absolute until some time after the sale. A period of at least thirty days must expire from the date of sale before the sale can become absolute. During that period the sale is liable to be set aside at the instance of the judgment-debtor on the ground of irregularity

in publishing or conducting the sale, or on deposit by him in Court of the amount specified in the sale proclamation together with a percentage on the purchase money by way of compensation to the purchaser. The application by the judgment-debtor to set aside the sale in either of these two cases must be made within 30 days from the date of sale. Where no such application is made, the Court must make an order confirming the sale, and it is upon such confirmation that the sale becomes absolute."

With respect to the learned Judge who heard the Civil Second Appeal No. 78 of 1948, the above passage quoted from Mulla's Code of Civil Procedure appears to us to apply generally, for the reasons already set out above, to the sale of immoveable property which had been sold for the recovery of arrear of land revenue under the Upper Burma Land and Revenue Regulation and the rules made under that Regulation. The fact that the sale, after it is confirmed, might be considered to have taken effect from the date of the sale made by the revenue officer under Rule 170 does not, and cannot, in our opinion, mean that the title in the property sold under Rule 170 vested in the purchaser before the sale becomes absolute. The sale made by U Soe Ya does not, therefore, vest the title in the lands in dispute in Daw Khin San unless that sale has been confirmed as required under Rule 171 (*1*).

We must say that we are unable to see that there is any evidence on the record under which it might be presumed that the revenue sale made by U Soe Ya must have been confirmed. The defendant-respondent Daw Khin San, on the other hand, stated in her cross-examination as follows :

"I did not apply for issue of sale certificate because I was not aware of my necessity to do so."

The sale certificate would be issued in view of Rule 171 (*3*) only after the sale has been confirmed

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under sub-rule (1) of Rule 171. It appears to us that a person who applies for the confirmation of the sale made under Rule 171 will obviously ask for a sale certificate to be issued to him or her, as the case might be. It is therefore only reasonable in the circumstances to conclude that the revenue sale made by U Soe Ya has not been confirmed as required under Rule 171 (*1*).

We must, however, observe that it is difficult to see how the plaintiff-appellant M. M. Sherazee can be said to have any claim to the money which is in the hands of U Tun Pe, the Registrar of the District Court of Mandalay, unless the revenue sale has been set aside because once the sale is confirmed it will be the purchaser who will be entitled to the money in the hands of U Tun Pe, as it might be said that the title of the purchaser after the sale is confirmed relates back to the date of the sale made by the Revenue Officer under Rule 171 ; and the finding of the Courts in connection with the allegation that the revenue sale has been set aside is against him, and we must say that this finding appears to us to be correct. This special appeal must, therefore, be dismissed but we do not think it is necessary, in so far as this special appeal is concerned, to award any costs against him.

U ON PE, J.—I agree.

## APPELLATE CRIMINAL.

*Before U On Pe and U San Maung, JJ.*

BA MAUNG (APPELLANT)

*v.*

THE UNION OF BURMA (RESPONDENT).*

H.C. 1950

*Mar. 9.*

*High Treason Act—S. 3 (1)—Offence under High Treason Act—When committed.*

*Held* : Under s. 3 of the High Treason Act in order to constitute an offence under the High Treason Act the purpose and intention must be of a general public nature as contradistinct from a private one such as theft or robbery.

*R. v Gordon*, (1781) 21 State Trials, 486 at 644, 645 ; *R.* v. *Hardie*, (1820) 1 State Trials (N.S.) at 765, followed.

In a criminal case it is *not* incumbent for an accused to show what was the object and the meaning of the acts done, but for the prosecution to make these out against the accused. The onus is upon the prosecution to show that the object of the multitude which rise and assemble to attain the same by force and violence is of a general public nature as distinguished from a merely private one.

*O. S. Woon*, for the appellant.

*L. Chgon Foung* (Government Advocate) for the respondent.

The judgment of the Bench was delivered by

U SAN MAUNG, J.—At about 4 a.m. on the morning of the 11th September, 1948, a large party of men numbering about 500 attacked Kungyangon, a Township Headquarters in Hanthawaddy District, from several sides. Some of the men raided the houses inside the town and took whatever property they could lay their hands on. Some of the men concentrated their attack on the police station area and looted

* Criminal Appeal No. 61 of 1950—Appeal from the order of 1st Special Judge of Hanthawaddy, dated the 25th January 1950, in Criminal Regular Trial No. 2 of 1949.

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firearms from the houses of police officers who lived either inside the police station compound or in the houses near by. The police station itself was attacked but the attackers were held at bay by the incessant Bren-gun fire from that place. At about 6 a.m., the attackers found themselves attacked by a Government reinforcement of military policemen and levies. Thereupon they fled from Kungyangon and were chased to near-by villages such as Kamakasai, etc. At a spot about 500 yards away from Kungyangon, the appellant Ba Maung was found hiding in a paddy field. On the approach of Government forces, Ba Maung surrendered himself. He was unarmed at that time and told his captors that he had to follow the Red-flag Communists for fear of them. The leader, the Red-flag Communist Bo Myint Aung, was also arrested that morning by the military but he was not sent up for trial as he was killed subsequently for making an attempt to escape. On the 29th October 1948, about 50 days after his arrest the appellant Ba Maung gave a confession which has been admitted in evidence as Exhibit B. On the strength of this confession and from the fact that the Guard-writer U Chit Tun was killed at the time of the incident, apparently by the attackers, the appellant was sent up for trial under section 396 of the Penal Code by Kungyangon police. However, after the evidence of the witnesses for the prosecution was heard by the learned Special Judge, Hanthawaddy, who tried the case, the learned Judge framed a charge under section 3 (1) of the High Treason Act, 1948 (Burma Act, No. XIV of 1948). The defence was to the effect that the confession Exhibit B was not a voluntary one and that in any event the appellant had to follow the men who went to attack Kungyangon for fear of them and that therefore he was entitled to the

benefit of section 94 of the Penal Code. The learned trial judge, however, held that the confession was voluntary, that it amounted to admission of participation in the attack upon Kungyangon by a group of rebels and that since the offence committed was one committed against the State and punishable with death, section 94 of the Penal Code was irrelevant. He accordingly convicted the appellant under section 3 (1) of the High Treason Act, 1948, and sentenced him to death. Hence this appeal.

In this appeal, it has been strenuously urged by the learned Advocate for the appellant that if any offence was committed by the appellant, it was one punishable under section 395 of the Penal Code and that there was also sufficient evidence on record to show that he was compelled to join the dacoits by threats which reasonably cause him to apprehend that death would be the consequence if he had refused.

It is therefore necessary to consider carefully whether the offence committed by the appellant was punishable under section 395 of the Penal Code or under section 3 (1) of the High Treason Act, 1948, assuming of course that he was not entitled in any event to the benefit of section 94 of the Penal Code. Now as observed by Mansfield C.J., in *R.* v. *Gordon* (1) : ,

" . . . The question always is, whether the intent is, by force and violence, to attain an object of a general and public nature, by any instruments, or by dint of their numbers. Whoever incites, advises, encourages or is any way aiding to such a multitude so assembled with such intent, though he does not personally appear among them, or with his own hands commit any violence whatsoever, yet he is equally a principal with those who act, and guilty of high treason."

(1) (1781) 21 State Trials 486 at pp. 644, 645.

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In the words of Lord President Hope in *R.* v. *Hardie* (1):

"To prove such levying of war it is the purpose and intention, the object which they have in view, which congregates and assembles them together, which gives them the impulse in their arming and in their rising; it is that which constitutes treason, and distinguishes the crime from that of riot, or any other rising for any private purpose that can be imagined;"

These observations by Mansfield C.J., and Lord President Hope were quoted with approval by a Bench of the late High Court of Judicature at Rangoon in *Aung Hla and others* v. *King-Emperor* (2) where it was held that when a multitude rises and assembles to attain by force and violence any object of a general public nature, it amounts to levying war against the King, and that it is not the number or the force, but the purpose and intention, that constitute the offence and distinguish it from riot or any other rising for a private purpose. Although this ruling was in respect of an offence under section 121 of the Penal Code, now repealed, it is not inapposite for a case under the High Treason Act, 1948, as section 2 thereof which defines an offence punishable under that Act reads:

"2. Whoever wages war against the Union or any Constituent Unit thereof, or assists any States or person or incites or conspires with any person within or without the Union to wage war against the Union or any Constituent Unit thereof, or attempts or otherwise prepares by force of arms or other violent means to overthrow the organs of the Union or of its Constituent Units established by the Constitution, or takes part or is concerned in or incites or conspires with any person within or without the Union to make or to take part or be concerned in any such attempt shall be guilty of the offence of High Treason."

(1) (1820) 1 State Trials (N.S.) at p. 765. (2) 9 Ran. 404.

From this section it is clear that in order to constitute an offence under the High Treason Act, 1948, the purpose and intention must be of a general public nature as contradistinct from a private one such as theft or robbery. On the other hand, the essence of an offence of dacoity is the commission of the offence of robbery by five or more persons jointly. *See* section 391 of the Penal Code.

In a criminal case it is not incumbent for an accused to show what was the object and the meaning of the acts done, but it is the duty of the prosecutors to make out their case as against the accused. Therefore, in a case under the High Treason Act, 1948, the onus is upon the prosecution to show that the object of the multitude which rises and assembles to attain the same by force and violence is of a general public nature as distinguished from a merely private one. Hence it is necessary to analyse the evidence of the case now under appeal to see whether the prosecution has succeeded in establishing that the object of the men who attacked Kungyangon on the morning of the 11th September, 1948, was of a general public nature. In this connection, it is interesting to note that whereas the prosecution has set out to prove from the very outset that the men who had attacked Kungyangon had committed dacoity, it was the learned Special Judge, who on the evidence before him, considered that the offence committed was one under the High Treason Act, 1948. According to Maung Thein Maung (P.W. 1), a Guard-writer of Kungyangon Police Station, who resided in a house inside the police station compound, he saw the *lusoes* go up the house of Maung Chit Tun and bring him down from the house as a captive. The *lusoes* demanded Maung Chit Tun's sten-gun and was told by Maung Chit Tun that it was deposited at the police station. The *lusoes*

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thereupon searched Maung Chit Tun's house and on finding the sten-gun there, took Maung Chit Tun away threatening to kill him because he had told them a lie. Maung Chit Tun was subsequently found dead a short distance away from the police station with a gun-shot wound. While the *lusoes* were attacking the police station compound shots were heard from the town area as well.

According to Maung Tin Shwe (P.W. 2), a clerk of the Co-operative Stores which was situated about two furlongs to the east of Kungyangon police station, the *lusoes* who attacked the town from four directions, also attacked the Co-operative Stores and took away clothings and groceries to the value of Rs. 4,500. According to Maung Tun Hla (P.W. 3), a teashop keeper residing about one furlong to the east of the police station, the *lusoes* attacked the whole town including his own shop which was looted of properties to the value of Rs. 35. According to Maung San Win (P.W. 5) who lived about 2 or 3 furlongs to the south-east of the police station, about 30 or 40 *lusoes* attacked his house and took away Rs. 160 in cash and jewellery to the value of Rs. 100. According to Maung Kyi Han (P.W. 7), a Special Police Constable residing in the police station compound, while they were defending against a group of *lusoes* who approached the police station area saying " Policemen, surrender your arms !", another group of *lusoes* came from the rear and disarmed them. The police station itself held out against the *lusoes* by incessant Bren-gun fire. Maung Nyun Shwe (P.W. 8) and Maung Ba Pu (P.W. 9), other Police Constables who lived inside the police station compound also spoke about a large party of men attacking the police station compound shouting out to the policemen to lay down their arms and about their being dispossessed of their firearms by the *lusoes*.

The appellant Ba Maung, when questioned by U Ba Tun (P.W. 13), Township Magistrate, Kungyangon, in order to ascertain whether he wished to confess of his own free will, said, " I have come to give a confession about the fact that I was one of those who came along when Kungyangon was attacked by rebels (ဝုန်း) on the 8th *lazan of Tawthalin.*" However, in the body of his confession, he is entirely silent as to what was the object of the so called rebels in attacking Kungyangon. He spoke of the fact that he was on his way back from a *pongyikyaung* where he was keeping sabbath when one Po Sai, a villager of Banbwegon came and called him away to meet Bo Myint Aung on the road to the east of Tawkhayanlay village. There Bo Myint Aung asked him whether it was true that the police station officer had asked his help in the arrest of Mya Lwin and Aung Pe. Next, he went along with Bo Myint Aung and party to U Pa U pagoda at Kamakalun village, where they arrived at 8 p.m. There they found four groups of men each numbering about 80 or 100. Some of the men were armed with guns and others with pointed bamboos, etc. Then at about 3 a.m., Bo Myint Aung gave orders for an advance on Kungyangon. On arrival near Kungyangon, the men advanced saying "Yebaws, let us advance." On arrival at a spot about 500 fathoms from Kungyangon there was firing. When sound of gun-fire was heard all the men took shelter by lying down in the paddy fields. Thereafter, some of the men advanced, some continued to lie on the ground while others ran away from the scene. When the sound of gun-fire ceased, he got up to find military-policemen in the vicinity. He thereupon surrendered himself. He was unarmed at that time and, in fact, he never had any arms from the very beginning.

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Although the appellant tried to say that his confession was not voluntary, he more or less adhered to it when he was examined under section 364 (2) of the Criminal Procedure Code. (He did not elect to give evidence on behalf of his own defence.) He stated that at the time Kungyangon was attacked by the rebels, he was brought to Kungyangon by them while he was on his way back from monastery and that he surrendered to the police as soon as he could. Of the defence witnesses cited by him, Hla Maung (D.W. 4) who was a military policeman at the time of occurrence and who is now a private citizen in Rangoon, stated that he was one of those who arrested the appellant Ba Maung and that Ba Maung surrendered saying, "We are good men." Hla Aung (D.W. 5), who was also in the military police stated that at the time of Ba Maung's surrender, Ba Maung said that he had to come with the attackers for fear of them and that one of his nephews had been killed for not joining the insurgents. Ma Sein Tin (D.W. 6), sister of Ba Maung stated that Ba Maung was called away by the Red-flag Communist Po Sai after being beaten and that one of her sons, who had been called away by the Reg-flag Communists one month before the attack on Kungyangon, had been killed by them.

From the above *resume* of the evidence adduced in the case it is clear that there is no direct evidence on record to show what was the object of the men who attacked Kungyangon on the morning of the 11th September, 1948. Therefore, regard must be had to the circumstances appearing in evidence in order to come to a finding on this point and it is settled law that when a fact has to be proved by circumstantial evidence, the circumstantial evidence on record must be conclusive. In this connection, the observations of their Lordships of the Privy Council in the case of

*Mahbub Shah* v. *King-Emperor* (1) are not inapposite. There, their Lordships, in dealing with section 34 of the Penal Code, said that it is difficult, if not impossible, to procure direct evidence to prove the intention of an individual, that in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case, and that when circumstantial evidence has to be relied upon " the inference of common intention within the meaning of the term in section 34 should never be reached unless it is *a necessary* inference deducible for the circumstances of the case." In *Maung Myint* v. *The Union of Burma* (2) a Bench of this Court pointed out that in this connotation " necessary inference " must mean the only reasonable inference possible not merely the " probable inference."

Now from the facts and circumstances appearing in this case we are not prepared to hold that the only reasonable inference possible is that the men attacking Kungyangon on the morning of the 11th September, 1948, had as their common object the attainment by force of an object of a general public nature. No doubt, the appellant in giving his confession about 50 days after the occurrence dubbed them as rebels and some of the witnesses for the prosecution as well as for the defence referred to the incident as an attack upon Kungyangon by rebels. However, it is not what a group of persons are called that make rebels but the nature of their common object in assembling themselves. The overt acts of the men who attacked Kungyangon are not inconsistent with the view that their sole object was to ransack the town for the purpose of obtaining arms and valuable properties. They, indiscriminately, attacked private houses as well as the houses of police officers. They looted private property as well as

(1) (1944-45) 72 I.A. 148. (2) (1948) B.L.R. 379.

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firearms belonging to the police. They no doubt asked the policemen to surrender their arms but this may be with a view to avoid unnecessary bloodshed. In fact, they only killed the Guard-writer Chit Tun (assuming that they are really responsible for his death) because he told them a lie as regards the Sten-gun which he was asked to give up. Therefore on the circumstantial evidence on record it is at least open to doubt whether the object of the men who attacked Kungyangon was of a general public nature such as for example, the disruption of Government or the undermining of the morale of the police force. The appellant is entitled to the benefit of doubt on this point.

Now it is a matter for consideration what offence, if any, has been committed by the appellant Ba Maung. In this connection we have no hesitation in coming to the conclusion that the confession Exhibt B given by him was voluntary although some days elapsed before he gave his confession. The whole tenor of the confession was to the effect that he had no prior knowledge of the object of Bo Myint Aung and his men, that he was more or less compelled to go along with them. These are circumstances which can be taken into consideration in his favour. His confession is full of circumstantial details of which he alone could be aware. It is corroborated by the fact that he was arrested about 500 yards away from Kungyangon as stated therein, that the leader of the attackers was, in fact, Bo Myint Aung and that the attackers, who numbered about 500 or 600, attacked Kungyangon from all sides. It is also corroborated by his own statement in Court. There is, therefore, sufficient evidence on record to show that the appellant was one of a large gang of dacoits, who attacked Kungyangon on the morning of the 11th September, 1948. The question now for consideration is whether he should be given the benefit

of section 94 of the Penal Code the relevant portion of which reads :

"94. Except murder, and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that *instant death to that person will otherwise be the consequence*."

Neither in his confession nor in his statement before the Court did the appellant contend that the threat was of such a nature as to reasonably cause him apprehension of instant death. He did not also give evidence on oath as to the circumstances which led him to apprehend that instant death would be the result if he did not join the dacoits. His own sister Ma Sein Tin (D.W.6) merely stated that he was beaten, a fact not even stated by the appellant himself. The fact that about a month before the occurrence, the appellant's nephew was taken by the Red-flag Communist and killed was not sufficient to make the appellant to apprehend that instant death would be the result if he had refused to join the dacoits. For these reasons, we consider that appellant is not entitled to the benefit of section 94 of the Penal Code and that he has committed an offence punishable under section 395 of the Penal Code.

Now, the question arises as to whether in this appeal we can alter the conviction of the appellant under section 3 (1) of the High Treason Act, 1948, to one punishable under section 395 of the Penal Code. As held by a Bench of the Calcutta High Court in the case of *Lala Ojha* v. *Queen Empress* (1) which was quoted with approval in *Maung Myint* v. *The Union of Burma* (2), if the prosecution establishes certain acts constituting an offence and the Court misapplies the

(1) 26 Cal. 863. (2) (1948) B.L.R. 379.

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law by charging and convicting an accused person for an offence other than that for 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 these acts properly constitute, provided the accused be not prejudiced by the alteration in the finding. In ***Ohn Maung*** v. *The Union of Burma* (1), a Bench of this Court altered the conviction of Ohn Maung under section 3 (1) of the High Treason Act to one under section 302/34 of the Penal Code on the ground that the facts established an offence under section 302/34 of the Penal Code and that the accused was not prejudiced by the alteration of the finding.

In this case also we find that the appellant had by his defence endeavoured to meet the accusation of the commission of the acts which constituted an offence punishable under section 395 of the Penal Code although he had been wrongly charged by the trial Court under section 3 (1) of the High Treason Act, 1948. Therefore, he will not be prejudiced in any way by the alteration of the finding to one under section 395 of the Penal Code. (We refrain from considering whether the appellant would be prejudiced if the finding is altered to one under section 396 of the Penal Code as and our judgment there is at least an element of doubt as to whether the offence committed is really one under section 396 and also because the punishments for the offences under sections 395 and 396 are the same.)

For these reasons, we would set aside the conviction and sentence of the appellant under section 3 (1) of the High Treason Act, 1948, and instead convict him for

(1) (1949) B.L.R. 139.

an offence punishable under section 395 of the Penal Code. As regards the sentence, regard being had to the very minor part taken by the appellant in the incident, that he might have been led by some form of compulsion to join the dacoits, that he surrendered as early as he could and that he was convicted on the strength of his own confession, we consider that the appellant should be awarded the lesser penalty provided by the law. We therefore direct that he do suffer transportation for life for the offence under section 395 of the Penal Code.

## CRIMINAL REVISION.

*Before U Tun Byu, J.*

H.C. 1950

*Feb. 18.*

AROKIYAM (APPLICANT)

*v.*

SAVARI MUTHU (RESPONDENT).*

*Criminal Procedure Code, s. 350—Evidence partly heard by one Judge and continued by another—Whether valid—Waiver by accused—Effect.*

Where one Magistrate heard a case under summary procedure and his successor continued the hearing from the point left off and convicted the accused.

*Held:* Under s. 263 of the Code a Magistrate need not record evidence in a summary trial. But if he does record the evidence, that evidence does not form part of the record for according to s. 263 the judgment recording the substance of the evidence "shall be the only record." Therefore in a summary trial, one Magistrate cannot use the evidence recorded by his predecessor under s. 350 of the Code. Conviction based on such evidence is illegal for the error committed by the magistrate affects his jurisdiction.

*Emperor* v. *Hemandas Devansingh and others*, (1936) A.I.R. Sind 4 .; *Nannier* v. *Desalier*, 55 Mad. 795 at 799, referred to.

*Myint Toon* for the applicant.

U TUN BYU, J.—The respondent Savari Muthu filed on 27th April, 1949, a complaint under section 500 of the Penal Code against the applicant Arokiyam, which became known as Criminal Summary Trial No. 171 of 1949 of the Court of the Second Additional Magistrate, Rangoon. U Ba Thaik, the then Second Additional Magistrate, heard the case partly till 15th September, 1949, and U Hla Maung, who succeeded him as Second Additional Magistrate, Rangoon, continued the hearing of that case from 19th October, 1949, from the point left off by his predecessor U Ba Thaik. On 22nd October, 1949, U Hla Maung

* Criminal Revision No. 75-B of 1949 being review of the order of 2nd Additional Magistrate of Rangoon, dated 22nd October 1949 passed in Criminal Summary Trial No. 171 of 1949.

found the applicant Arokiyam guilty under section 504 of the Penal Code, and he sentenced the applicant to pay a fine of Rs. 40 or in default of payment to suffer 40 days' rigorous imprisonment. Rs. 15 out of the fine, if realized, was to be paid to the complainant Savari Muthu. The applicant was also ordered to pay Rs. 7-12-as costs to the complainant or in default of payment to undergo seven days simple imprisonment.

The question which arises is whether the subsequent trial by U Hla Maung, who succeeded U Ba Thaik after the case had been partly heard, is illegal. In *Emperor* v. *Hemandas Devansingh and others* (1) it was observed as follows :

"Section 263 does not prevent a Magistrate who tried a case in a summary way from recording evidence ; it merely says that he need not but if he does it cannot, we think, by reason of section 264 form part of the record. Reference may be made to the case of *Nanner* v. *Desalier* (2). We therefore do not think evidence so recorded comes within the meaning of section 350."

I respectfully agree with the above observation, and it follows that section 350 of the Criminal Procedure Code does not give the Magistrate jurisdiction to continue in a case left off by his predecessor as is done in Criminal Summary Trial No. 171 of 1949. The error committed can, in my opinion, be said to be an error which affects the jurisdiction of the learned Second Additional Magistrate who succeeded U Ba Thaik because he purported to give himself jurisdiction to continue the trial from the stage left off by his predecessor in a case which is not covered by section 350 of the Criminal Procedure Code. A waiver by the accused does not give jurisdiction to a Magistrate to try a case in a way which is not sanctioned by law as is done in the present case.

(1) (1936) A.I.R., Sind p. 40. (2) 55 Mad. p. 795 at p. 799.

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The conviction and sentence passed upon the applicant Savari Muthu in Criminal Summary Trial No. 171 of 1949 will be set aside, and the fine, if paid, will be refunded to Savari Muthu. The record of the Court of the Second Additional Magistrate, Rangoon, will be returned to the District Magistrate, Rangoon, for retrial by another Magistrate whom he thinks fit to direct.

# CRIMINAL REVISION.

*Before U Tun Byu, C.J.*

U NYO (APPLICANT)

*v.*

U KO KO GYI (RESPONDENT).*

H.C. 1950

*Feb. 22.*

*Rule of interpretation of documents—Trade Disputes (Amendment) Act, 1948—S. 7 (5).*

***Held*** : That an instrument must receive a construction according to the plain meaning of the words and sentences therein contained. One must look at the whole instrument, and inasmuch as there may be inaccuracy and inconsistency, one must, if one can, ascertain what is the meaning of the instrument taken as a whole in order to give effect, if it be possible to do so, to the intention of the framer of it. It appears to be arguing in a vicious circle to begin by assuming an intention apart from the language of the instrument itself, and having made that fallacious assumption to bend the language in favour of the assumption so made. But where from the imperfection of the language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what the object, was appearing from these circumstances, which the person using them had in view ; for the meaning of words varies according to the circumstances with respect to which they are used.

*Charles Robert Leader and Henrietta Leader* v. *George F. Duffey and Amyatt Edmond Ray*, (1888) 13 A.C. 294 at 301 ; *The River Wear Commissioners* v. *William Adamson and others*, (1876-7), II Appeal Cases, 743 at 763, followed.

Under s. 7 of the Trade Disputes (Amendment) Act if an agreement is arrived at in a dispute as a result of negotiations conducted by either a Board or a Conciliation Officer, such an agreement, duly signed by the accredited representatives of both parties, shall be legally binding upon both parties to the dispute and failure on the part of either party to comply with it will be punishable.

Therefore, where a person entered into a contract to employ only members of the Earth Diggers' Association, but afterwards failed to give the work to the members of that Association, he committed an offence under the Act.

*Dr. Thein* for the applicant.

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* Criminal Revision No. 72-B of 1949—Review of Order of the Eastern Subdivisional Magistrate of Rangoon, dated 5th October 1949 passed in Criminal Summary Trial No. 449 of 1948.

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U TUN BYU, C.J.

*Tin Maung* (Government Advocate) for the respondent.

U TUN BYU, C.J.—It appears that the applicant U Nyo obtained a contract, which included earth digging work, from the Rangoon Development Trust and that a dispute arose between him and the labourers, who were members of the Earth Diggers' Association, Rangoon, and whom he had employed in connection with the contract obtained from the Rangoon Development Trust. The Earth Diggers' Association selected nine members to represent the Association in settling the dispute, and whose names were mentioned in Exhibit H. On 28th October, 1948 an agreement was concluded as embodied in Exhibit B, which was signed by U Nyo, the applicant, and Maung Ngwe Than and Maung Khin Maung, who signed the agreement as representatives of the Earth Diggers' Association.

200 or 250 labourers belonging to the Earth Diggers' Association attended work on 29th October, 1948 at U Nyo's premises, and it is clear from the statement of reasons set out by the Eastern Sub-divisional Magistrate that U Nyo and his son Bo Thein were not willing to provide work for all the labourers of the Earth Diggers' Association on the 29th October, 1948, that there was work for only 200 coolies on that day, that U Nyo insisted that the work for that day should be divided between 100 labourers from the Earth Diggers' Association and 100 labourers from the men who were at the disposal of U Nyo, and that the labourers of the Earth Diggers' Association declined to work because all the labourers of their Association were not employed on that day. According to U Nyo, what took place was that the labourers of the Earth Diggers' Association wanted to monopolise the work of

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loading and unloading the earth on the day concerned and that he asked them to share that work on 50-50 basis with his labourers, which the labourers of the Earth Diggers' Association declined to do.

The Eastern Subdivisional Magistrate found that U Nyo had committed a breach of both items 2 and 4 of the agreement Exhibit B, and he sentenced U Nyo under sub-section (5) of section 7 of the Trade Disputes Act, as amended subsequently by the Trade Disputes (Amendment) Act, 1948, which reads:

"(5) If an agreement in a dispute is arrived at between the parties thereto, as a result of the negotiations conducted by either a Board or a Conciliation Officer, such an agreement duly signed by the accredited representatives of both parties shall be legally binding upon both parties to the dispute and failure on the part of either party to comply with or carry out any of the terms of such agreement shall be punishable with simple imprisonment which may extend to three months, or with fine which may extend to two hundred rupees or with both."

Item 2 of the Exhibit B agreement shows that the control and allotment of the labourers belonging to the Earth Diggers' Association were assigned to the Association. Item 3 of the agreement provides that the terms and conditions under which the labourers are to perform their work were left to U Nyo to be decided by him, while item 4 of the agreement shows that it has been agreed that the labourers of the Earth Diggers' Association, who had already been employed by U Nyo, should continue to be employed by him until the contract work, which U Nyo had obtained, was completed. The contention made on behalf of U Nyo is that item 2 of the agreement refers to allocation of labourers of the Earth Diggers' Association *inter se* for the work to be allotted to them from day to day by U Nyo, and that item 2 of the agreement did not invest the Earth Diggers' Association with

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power to allocate its labourers for the different kinds of work which might be required to be performed. It has also been contended that the power to decide as to how many labourers from the Earth Diggers' Association will be required to perform a particular kind of work is assigned under item 3 of the agreement to U Nyo and that U Nyo has power, under item 3, to decide how many of his labourers, who did not belong to the Earth Diggers' Association, should join with the labourers of the Earth Diggers' Association in performing a particular kind of work required under the contract which U Nyo had obtained from the Rangoon Development Trust.

Lord Halsbury, in the case of *Charles Robert Leader and Henrietta Ada Leader* v. *George F. Duffey and Amyatt Edmond Ray* (1) observed as follows :

"All these refinements and nice distinctions of words appear to me to be inconsistent with the modern view—which is I think in accordance with reason and common sense—that, whatever the instrument, it must receive a construction according to the plain meaning of the words and sentences therein contained. But I agree that you must look at the whole instrument, and inasmuch as there may be inaccuracy and inconsistency, you must, if you can, ascertain what is the meaning of the instrument taken as a whole in order to give effect, if it be possible to do so, to the intention of the framer of it. But it appears to me to be arguing in a vicious circle to begin by assuming an intention apart from the language of the instrument itself, and having made that fallacious assumption to bend the language in favour of the assumption so made."

In *The River Wear Commissioners* v. *William Adamson and others* (2), Lord Blackburn observed as follows :

"In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of

(1) (1888) 13 A.C. 294 at 301. (2) (1876-7), II Appeal Cases, 743 at 763.

language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used."

Thus, in order to ascertain the true meaning of items 2 and 3 of the agreement, Exhibit B, it is only proper to read them in the light of other items of the agreement, bearing also in mind the background which gave rise to that agreement and the purport for which the agreement was intended to secure for the labourers of the Earth Diggers' Association.

It appears to me that if item 2 of the agreement is read in the circumstances set out above, the meaning of item 2 becomes clear and unmistakable. U Nyo first paid the labourers at the rate of Rs. 3-4-0 per sadram, and when he found that the labourers were not willing to work at that rate and were demanding for an increase, a negotiation followed between him and the representatives of the Earth Diggers' Association which resulted in the agreement Exhibit B, which was signed by U Nyo, and by Ngwe Than and Khin Maung as representatives of the Earth Diggers' Association. The fact that there was a dispute between the labourers of the Earth Diggers' Association and U Nyo before the agreement was signed must necessarily suggest to the representatives of the Earth Diggers' Association that provisions ought also to be made in the agreement so that the concession which they had obtained for the labourers from U Nyo would not be rendered nugatory subsequently, and this must have been the reason which gave rise to the insertion of item 4 of the agreement, the effect of which was that U Nyo should continue to employ all

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the labourers of the Earth Diggers' Association. There can be no doubt as to what item 4 means.

It is clear that there was work for 200 workers only on 29th October, 1948; and under item 4 of the agreement the labourers of the Earth Diggers' Association, who numbered at least 200, should have been employed by U Nyo on that day. It is therefore clear that U Nyo committed a breach of item 4 of the agreement on 29th October, 1948 in attempting to allot half of the work available for that day to his labourers who did not belong to the Earth Diggers' Association. It has, however, been argued on behalf of U Nyo that the offence which he was alleged to have committed was only in respect of item 2 of the agreement, and it will accordingly be necessary to consider whether U Nyo's conduct on the 29th October, 1948 amounted to a breach of item 2 of the agreement. It seems to me to be clear, even if we accede to the contention, which has been put forward on behalf of U Nyo, that he had power to decide under item 3 of the agreement how many labourers belonging to the Earth Diggers' Association should be allotted to a particular kind of work to be performed on the 29th October, 1948, the fact that there was work only for 200 labourers on the 29th October, 1948 would give the Earth Diggers' Association, and not U Nyo, power to allocate labourers for the earth digging work to be performed on the 29th October, 1948, because item 2 must be read with item 4 of the agreement. In other words, even if we give item 3 its widest construction, it was not possible for U Nyo to take shelter under that item in view of the fact that the work which was available for the 29th October, 1948 was one which must all be allotted to the labourers of the Earth Diggers' Association in view of item 4 of the agreement. Thus, so far as the work on the 29th October, 1948 is concerned, it was

for the Earth Diggers' Association to decide which out of their labourers should be allotted for the earth digging work available for that day. The attempt on the part of U Nyo to allot half of the work to his labourers, who did not belong to the Earth Diggers' Association was contrary to the provisions of item 2 of the agreement, which should obviously be read with item 4.

Another point which was urged on behalf of U Nyo was that the Exhibit B agreement had no binding force in that it was signed by only two out of nine persons who were nominated by the Earth Diggers' Association, *vide* Exhibit H, and it was consequently argued that the principle of the maxim "*delegatus non potest delegare*" applies to the present case. No case or authority has been cited for this contention, and I am unable to see any force in this argument. This is not a case where persons, who have been delegated with certain powers under a statute or a rule made under a statue, have attempted to further delegate the powers so received by them to some other persons. There is also nothing in Exhibit H to indicate that nine persons must all act together or that there should be a quorum of a specified number for the action of the persons who had been nominated to be effective or binding upon the Earth Diggers' Association. The Exhibit B agreement shows that Ngwe Than and Khin Maung signed it as representatives of the Earth Diggers' Association only on the 28th October, 1948 after Ngwe Than and Khin Maung had also signed in Exhibit K2 as representatives of the Earth Diggers' Association on 23rd October, 1948, where U Nyo also signed. It might be mentioned that Ngwe Than was the Secretary of the Earth Diggers' Association while Khin Maung was its Organising Officer. The fact that the

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labourers attended work at the premises of U Nyo on the next day after the agreement was signed also indicates that the Earth Diggers' Association had approved of the agreement Exhibit B. In the absence of anything in Exhibit H or in the record of the case to show that Ngwe Than and Khin Maung had no power to sign an agreement on behalf of the Earth Diggers' Association, it must in the circumstances of this case be held that they did not exceed their powers in signing the agreement Exhibit B and that they were accredited representatives of the Association.

There is also the contention that Ngwe Than and Khin Maung acted beyond their powers in view of Exhibit A to enter into an agreement of the nature indicated in Exhibit B. I also do not think that there is any substance in this contention. Items 2 and 4 of the agreement were items which were inserted obviously to protect the interests of the labourers belonging to the Earth Diggers' Association. Items 2 and 4 do not in any way deal with any matter which might be said to affect the right of the labourers of the Earth Diggers' Association which existed prior to the 28th October, 1948, and the question that items 2 and 4 of the agreement are *ultra vires* of the powers of the representatives of the labourers belonging to the Earth Diggers' Association does not therefore arise. It is obvious that items 2 and 4 were necessary to enable the labourers of the Earth Diggers' Association to enjoy fully the concession which had been made to them under item 1 of the agreement.

It is possible, however, that U Nyo might not have fully appreciated the meaning of item 2 in Exhibit B agreement when he persisted in giving out half of the work available on the 29th October, 1948 to his labourers who did not belong to the Earth Diggers' Association, but this will not afford him any defence

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to the prosecution under section 7 (5) of the Trade Disputes Act as subsequently amended in 1948, although it might be said to be a circumstance indicating that U Nyo was not acting maliciously towards labourers of the Earth Diggers' Association on the 29th October, 1948.

The fine of Rs. 100 imposed upon U Nyo does not appear to be excessive, and the application for revision is therefore dismissed.

## APPELLATE CIVIL.

*Before U San Maung, J.*

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*Feb. 2.*

KO MAUNG GYI (APPELLANT)

*v.*

MAUNG NYI NGE AND ONE (RESPONDENTS). *

*Appeal—Non-joinder of necessary party—Effect of.*

Where the plaintiff filed a suit for the recovery of possession of a piece of land from the 1st defendant and added his own vendor as a party to the suit and the Court held that the vendor was the owner of the land and conveyed good title to the Plaintiff and decreed the suit; the defendant preferred an appeal but did not make the vendor a party to the appeal. The District Court dismissed the appeal on the ground that the appeal was incompetent for the failure of the defendant-appellant to add the vendor as a party.

*Held:* That as the vendor was a necessary party to the suit and it having been found that the vendor was the owner and the decision as to his ownership has become final, the principle laid down in *V.P.R.V. Chokalingam Chetty and one* v. *Seethai Achi and others*, I.L.R. 6 Ran. 29 P.C. applied, and the appeal was rightly dismissed as incompetent.

The finding that the vendor was the owner has become *res judicata* between the vendor and the defendant.

*V.P.R.V. Chokalingam Chetty and one* v. *Seethi Achi and others*, 2 Ran. p. 541; *Sundara Ramanujam Naidu* v. *Sivalingam Pillai and another* 47 Mad. p. 150; *Serajul Huq Khan* v. *Abdul Rahman*, 29 Cal. p. 257; *Munni Bibi* v. *Tirloki Nath and others*, 58 I.A. p. 158, followed.

*Ma On Thin* v. *Ma Ngwe Yin and another*, 7 Ran. 398; *Lakhajee and another* v. *Sein Dass and another*, A.I.R. (1940) Ran. 97; *Arulayi and others* v. *Rakka Kudumban*, A.I.R. (1938) Mad. 501, distinguished

*S. R. Choudhury* for the appellant.

*Po Aye* for the respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 110 of 1947 of the First Subordinate Judge, Yamèthin, the plaintiff-respondents Maung Nyi Nge and Rabiya sued

* Civil 2nd Appeal No. 20 of 1949 against the decree of the District Court of Yamèthin in Civil Appeal No. 12 of 1948, dated 4th December 1948

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the defendant-appellant Ko Maung Gyi and one other, M.R.M.M. Miyappa Chettyar by his agent Paramar Sivan, for possession of the suit land which he had purchased from M.R.M.M. Miyappa Chettyar. The land was actually in the possession of the appellant Ko Maung Gyi, who alone contested the suit on the ground that he was in possession of it as its owner, having purchased it from one Muthuviru, a former agent of M.R.M.M. Miyappa Chettyar. Muthuviru was not added as a party defendant but he figured as a witness for the defence. As for the defendant M.R.M.M. Miyappa Chettyar, however, he filed a written statement admitting the plaintiff-respondents' claim. The suit was decreed with costs as against the defendant-appellant and on appeal to the District Court of Yamèthin the learned District Judge by his judgment in Civil Regular Appeal No. 12 of 1948 dismissed the appeal on the ground that it was incompetent for failure to add M.R.M.M. Chettyar as a party respondent. Hence this appeal to this court by the defendant-appellant Ko Maung Gyi.

In coming to the conclusion that the defendant-appellant's appeal was incompetent the learned District Judge relied upon the ruling of the Privy Council in *V.P.R.V. Chokalingam Chetty and one* v. *Seethai Achi and others* (1), in which their Lordships affirmed the judgment of the late High Court in a case between the same parties (2). The cases relied upon by the learned District Judge are of course converse of the present. There it was held that where in an action against several defendants the trial Court dismissed the suit and on the plaintiff preferring an appeal against only one of the defendants omitting to join the other defendants from whom the respondent received his title, the

(1) 6 Ran. p. 29. (2) 2 Ran. 541.

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plaintiff could not attack the title of the respondent in appeal.

However, in my opinion the learned District Judge was right in holding that the principle underlying the decision in *V.P.R.V. Chokalingam Chetty*'s case (1) is applicable to the present case.

Now, when a person sells a piece of immoveable property to another, it is his duty to give possession of the property to the buyer and not to leave the buyer to get possession for himself. The implied contract to give possession contained in every sale of immoveable property, may be enforced by the buyer by a suit for specific performance. See *Sundara Ramanujam Naidu* v. *Sivalingam Pillai and another* (2). Order I, Rule 3 of the Civil Procedure Code provides that "all persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise." Here the plaintiff-respondents' right to possession of the suit land arose out of the sale of the land to them by M.R.M.M. Chettyar and if separate suits were to be filed by them as against M.R.M.M. Chettyar, who was under a duty to give them possession, and against the defendant-appellant Ko Maung Gyi, who was actually in possession of the suit land, the same question of fact would arise, namely, whether or not M.R.M.M. Chettyar was the owner of the suit land at the time of its sale to the plaintiff-respondents. Further more, the relief which the plaintiff-respondent claimed against M.R.M.M. Chettyar must be deemed to be in the alternative to the relief which they claimed

(1) 6 Ran. p. 29. (2) 47 Mad. p. 150.

as against the defendant-appellant Ko Maung Gyi. Hence M.R.M.M. Chettyar was a proper party in the suit by the plaintiff-respondents for the possession of the land in dispute.

In *Serajul Huq Khan* v. *Abdul Rahman* (1) the plaintiff sued for recovery of possession of land against defendant No. 1 (the person by whom the plaintiff was dispossessed), after a declaration of his right as purchaser from the defendant No. 2, for an order for the registration of the plaintiff's name under the Land Registration Act, for mesne profits and also for a refund of the purchase money from the defendant No. 2 in case the plaintiff's claim against the defendant No. 1 failed. The defence was that the suit was bad for misjoinder of parties and causes of action, and the learned Judges of the Calcutta High Court observed at page 259—

> "*Then, it is clear that the defendant No. 2 is a necessary party to the suit : for the plaintiff is bound to bring in the defendant No. 2 in any suit which he brings against the defendant No. 1 for recovery of possession of the land.* Similarly, when he sues the defendant No. 2 for a refund of the money, he is bound to bring in the defendant No. 1, so that he may have it decided in the presence of both parties that the defendant No. 2 had no right to sell him the land."

In the present case although it is true that the plaintiff-respondents have not claimed as against M.R.M.M. Chettyar a refund of the money the observation just quoted is not inapposite as it was held therein that the plaintiff was bound to bring in the defendant No. 2 in any suit which he brought against the defendant No. 1 for recovery of possession of the land.

Having been joined as a party defendant in Civil Regular Suit No. 110 of 1947 M.R.M.M. Chettyar had acquired an interest in the result of the suit although

(1) 29 Cal. p. 257.

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no decree was passed against him. The decision in that suit as well as that in any appeal arising therefrom would operate as *res judicata* as between M.R.M.M. Chettyar and Ko Maung Gyi who were co-defendants in the suit as (1) there was a conflict of interest between them, (2) it was necessary to decide that conflict in order to give the plaintiff the relief which he claimed and (3) the question between them was finally decided. See *Munni Bibi* v. *Tirloki Nath and others* (1). The question which had to be decided was whether or not the suit land belonged to M.R.M.M. Chettyar or to Ko Maung Gyi at the time of its sale to the plaintiff-respondents.

The case of *Ma On Thin* v. *Ma Ngwe Yin and another* (2) cited by the learned Advocate for the defendant-appellant is distinguishable inasmuch as in that case the respondent in the appeal did not derive his interest through the party who was not joined as a party respondent in the appeal. The case of *Lakhajee and another* v. *Sein Dass and another* (3) is also distinguishable in that in the suit giving rise to the appeal in that case the suit was dismissed as against the first defendant so that this defendant could not be deemed to be interested in the result of the appeal at the time when the period of limitation for an appeal against him had expired and therefore his joinder as a respondent to the appeal by the second defendant was not necessary. In *Arulayi and others* v. *Rakka Kudumban* (4), which was strongly relied upon by the the learned Advocate for the appellant, a suit was brought by **A** against **B** and **C** in which he claimed certain plot of land. **C** claimed it as vendee from **A** and the trial Court held that **A** was the owner and **B** was not. An appeal was filed by **C** in which **A**

(1) 58 I.A. p. 158.
(2) I.L.R. 7 Ran. 398.
(3) A.I.R. (1940) Ran. 97.
(4) A.I.R. (1938) Mad. 501.

alone was impleaded as the respondent with the result that **B** was not a party on the record in the appeal. It was contended that the trial Court's decree negativing **B**'s title became final in the absence of an appeal by **B** and operated as a bar to **C**'s attempt to reopen that decision and it was held by Venkatasubba Rao and Abdur Rahman JJ. that the trial Court's finding negativing **B**'s title did not operate as *res judicata* against **C** who claimed through **B.** In coming to this decision the learned Judges distinguished the case dealt with by them from the case of *Chokalingam Chetty* v. *Seethai Achi* (1) in the following words :

" In short, the basis of the Privy Council decision is the fact that there was a finding in favour of defendant 1, there, who was not impleaded. Here, as already shown, the position is the exact opposite; the person who is not impleaded is the one against whom there is a finding. The difference may be thus illustrated. In the Privy Council the finding in favour of defendant 1 became final. Supposing the plaintiff shoud succeed in his appeal, what would be the effect? There would be a finding against the remaining defendants that they obtained no valid title. That would be inconsistent with the other finding in favour of defendant 1, which had been allowed to become final. On the finding of the Appellate Court, the other defendants would have a right of action against defendant 1 for breach of covenant of title; but, on the finding of the first Court, defendant 1 had and conveyed a valid title—the resulting position being inconsistent and incongruous. In the present case, by defendant 1 succeeding in the appeal (which in fact has happened) the absent party suffers no prejudice, but on the contrary gets a benefit."

*Arulayi*'s case (2) is distinguishable from the present inasmuch as in the event of the defendant-appellant Ko Maung Gyi succeeding in his appeal the absent party, namely, M.R.M.M. Chettyar, would get no benefit, but on the contrary suffer a prejudice. For these reasons I hold that M.R.M.M. Chettyar was a necessary party in the appeal by the appellant Ko Maung Gyi against

(1) I.L.R. 6 Ran. p. 29. (2) A.I.R. (1938) Mad. 501.

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the judgment and decree in Civil Regular Suit No. 110 of 1947 of the Court of First Subordinate Judge, Yamèthin.

In the result the appeal fails and must be dismissed with costs, Advocate's fees two gold mohurs.

## APPELLATE CIVIL.

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

ESOOF GOLAM MOHAMED PIPERDI (APPELLANT)

*v.*

ARIFF MOHAMED BHAM AND ONE (RESPONDENTS).*

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*Dec. 5.*

*Appeal—Points of law—When can be raised for the first time—Estoppel—What constitutes estoppel—Sale by one of the executors.*

When a question of law is raised for the first time in an appeal upon the construction of a document or upon facts admitted or proved beyond controversy, in the interest of justice, the plea should be entertained. But the course ought not in any case to be followed, unless the court is satisfied, that the evidence upon which the court is asked to decide, establishes beyond doubt that the facts, if investigated would have supported the new plea. The evidence given on one point cannot be interpreted or treated as evidence of another point not raised by the parties in the trial court, where evidence is necessary, or is not complete, permission to raise a new point will not be granted.

*Connecticut Fire Insurance Co.* v. *Kavanagh*, (1892) A.C. 473 ; *Ram Kinker Rai and another* v. *Tufani Ahir and others*, A.I.R. (1931) All. 35 (F.B.) ; *A.R.M.N.A. Chettyar Firm* v. *R.M.V.S. Chettyar and others*, (1938) R.L.R. 256 ; *M. E. Moolla Sons, Ltd.* v. *Burjorjee*, (1932) I.L.R. 10 Ran. 242, followed.

If a person by word or conduct has intimated that he consents to an act which had been done or that he will not offer opposition, he cannot then question the legality of the act, afterwards.

*Cairncross* v. *Lorimer*, (1860) 3 Macq. 827 at 829, followed.

Where there are several executors, and one of them only proves the Will and is granted Probate then he is the only person who can deal with the estate, where the power of management was given to executors jointly and severally, one of the executors who proved the Will can sell the properties of deceased.

*Dr. Ba Han* for the appellant.

*Dr. Thein* for the respondents.

U THEIN MAUNG, C.J.—This is an appeal from the decree dismissing the appellant's suit for declaration that the deed of sale by which he sold certain

* Civil First Appeal No. 41 of 1949 against the decree of the District Court of Amherst in Civil Suit No. 6 of 1946, dated the 3rd May 1949.

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immoveable property to the 2nd Respondent was null and void and for recovery of possession of the said property from her.

The property in suit is a $\frac{7}{10}$ share in what may conveniently be referred to as House No. 69, Lower Main Road, Moulmein. It originally belonged to M. S. Mitchella, two of whose children are Aisha Bee Bee, 2nd Respondent and Adjim Mitchella, Witness No. 3 for the defendants. It was sold at a public auction sale held on the 11th January, 1940 to C. M. Bham who is a son of the 2nd respondent for a sum of Rs. 19,000 only. Subsequently, C. M. Bham agreed with his brother Ariff Mohamed Bham, the 1st respondent, that the latter should pay for and take the property. However, the 1st respondent was unable to pay the sum of Rs. 19,000 then. So he asked M. C. Jeewa to pay the said amount and purchase the property in M. C. Jeewa's name and also to pay him Rs. 500 in cash to meet the expenses. M. C. Jeewa is a brother-in-law of Adjim Mitchella as the latter had married his sister, Ameena Bee Bee. So he agreed to purchase the property as requested and thereby help Aisha Bee Bee, the 2nd respondent. (*See* the evidence of M. C. Jeewa's elder sister, Hawa Bee Bee, Witness No. 1 for the Plaintiff). Thereafter, M. C. Jeewa, C. M. Bham and the 1st respondent entered into the agreement, Exhibit A, dated the 28th February, 1940. The said agreement contains a clause to the effect that the 1st respondent might purchase the said property from M. C. Jeewa for Rs. 19,000 within 5 years from the date thereof. It also contains another clause to the effect that the 1st respondent must repay the sum of Rs. 500 "during the period of this agreement or when it becomes null and void."

M. C. Jeewa purchased the property in pursuance of the said agreement and got it transferred to him by

the Receivers who sold the property at the public auction as per Exhibit 1, dated the 27th March 1940.

M. C. Jeewa died on the 12th November, 1943, leaving a Will, Exhibit B, dated the 28th August, 1943. In that Will he appointed the appellant and Haji Momin Bee Bee, who is his own sister and the mother of the appellant, to be the "executor and executrix respectively and trustees of this my Will." He also wrote therein, "my said executor and executrix shall look after and manage my estate properties either jointly or severally for the benefit of my estate."

Thereafter, the appellant in his capacity as executor to the Will of M. C. Jeewa sold the said property for Rs. 19,500 only to the second respondent by the sale deed dated the 1st July, 1944, Exhibit 2, which contains recitals to the effect that it was being sold in accordance with the agreement, Exhibit A, and that the transfer was being made to the second respondent not only with the consent but also at the request of the 1st respondent. This transfer was during the period of the Japanese occupation and the sum of Rs. 19,500 was paid in Japanese currency; and the suit, out of which the present appeal has arisen, is one for declaration that the sale by Exhibit 2 is null and void on the ground that the plaintiff-appellant "never freely consented to the execution thereof." The grounds for such declaration as set out in the amended plaint are as follows :

"6. That subsequent to the death of the said deceased, the 1st defendant with the help and connivance of the 2nd defendant and others used to threaten the plaintiff as Executor of the estate of the said deceased as well as the member of his family to the effect that unless the plaintiff reconveyed the suit properties to the 1st defendant or his nominee, he, the 1st defendant, would report

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to the Japanese Military Police that they were pro-British and had in their possession large sums of British currency.

* * *

11. The plaintiff contends and submits that he as Executor of the estate of the said deceased is not bound by the Deed of Conveyance dated the 1st day of July, 1944, as he had never freely consented to the execution thereof. On the contrary, he submits that the defendants and others at their instigation exercised coercion and undue influence over him, and forced him to execute the said Deed."

With reference to paragraph 6 of the amended plaint the plaintiff-appellant has filed particulars, paragraph 2 of which reads :

"The others who used to threaten the plaintiff are Arjim Mohamed Salay Mitchella and Khatiza Bibi who are the brother and sister of the 2nd defendant."

The defence which was common to both the respondents is that the plaintiff-appellant accepted the purchase money and conveyed the property of his own free will.

The main issues for decision in the trial Court were Issues Nos. 2, 3 and 4 which are as follows :

"2. Was the deed of sale on the 1st April 1944 executed under coercion, threat and undue influence as alleged in paragraph 6 of the Plaint ?

OR

3. Was the deed of sale effected by his own free will ?

4. What is the legal effect of the sale ? Is it valid or void in law ?"

The trial Court has decided all these issues in favour of the respondents and dismissed the suit ; hence this appeal.

The first contention of the learned Advocate for the appellant is that the learned District Judge should have held that the deed of sale was executed under

coercion, threat and undue influence as alleged in paragraph 6 of the plaint. However, after a careful examination of the evidence, circumstances and probabilities, we have come to the conclusion that the learned District Judge is right in holding that the appellant executed the sale deed of his own free will.

In his examination-in-chief the appellant improved upon his statement in paragraph 6 of the amended plaint and deposed :

" Mitchella and Bham said that if we did not accept Japanese currency they would report the matter to the three authorities that were then in power, namely, the Japanese Administration, the Burmese Government and the I.N.A."

He has also added—

" When my mother and aunt learned then that the matter would be reported to the authorities if we did not accept Japanese currency, they said ' we have no option but to accept Japanese currency.' I then went and consulted a lawyer Mr. Jabbar who told me that I would have to accept the Japanese currency. Accordingly the suit property was conveyed to the second defendant under a Registered Deed which was drawn up by Mr. Jabbar."

His allegation about the threat to report to the three authorities is not supported by his witnesses Mogul Ahmed and Abdul Khaliq (P.Ws. 1 and 2). Mogul Ahmed, in whose house the appellant, Momin Bibi and Hawa Bibi lived, merely deposed " Ariff Md. Bham then brought with him some Japanese currency. He sent for the plaintiff and said ' I have brought money for payment.' The plaintiff promptly replied ' I don't agree. I am not going to accept the Japanese money.' Ariff Md. Bham then said to him ' You cannot refuse to accept. If you do so I am going to report the matter *to the officer.*' After that ' the two visitors and the plaintiff went off to see

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Mr. Jabbar.' Abdul Khaliq, whose house was built by M. C. Jeewa, deposed 'Piperdi asked them what money they had brought. Ariff Bham said that they had brought Japanese currency. Piperdi said to him 'I had to pay English money and I cannot accept Japanese money. If you are unable to pay British money now, do not pay now. You can make payment only when you are able to pay the price in British currency.' Upon that Ariff Md. Bham said 'I have brought money. You must accept it and if you refuse I will bring the matter to Japanese M.P.' When he made that threat Mogul Ahmed and I were present. One Burmese goldsmith also was present. Upon that threat, Piperdi went off saying that he would consult his mother and elderly relatives. In a short time he came back, and together with the two visitors he went off in the direction of Chaungzon."

On the other hand the appellant's own mother Momin Bibi has deposed "They did not bring then Japanese currency but they brought on the third occasion and on this occasion only the first defendant said that if the Japanese currency is not accepted, report will be made to the authorities concerned. This time I had direct talk with first defendant but with Azim Mitchella from behind the screen. Both of them told that they would pay through proper authorities, *viz., through Court.* At that time my elder brother Hazim Cassim Jeewa, my nephew Hashim Mitchella, house owner Mogul Ahmed, Khalik and others were present. On that occasion only plaintiff accepted the Japanese currency, after the first defendant stated that he would pay through proper authorities. Then they all went to Mr. Jabbar and the money was paid there."

According to the above extract, the first respondent and his father-in-law Adjim Mitchella, who is her own

brother-in-law, merely said that "they would pay through proper authorities *viz.*, through Court." They said it in the presence of several others including her elder brother and nephew and the two witnesses Mogul Ahmed and Khaliq ; and she does not even refer to what they said as a threat. She also says that they all then went to Mr. Jabbar and that the money was paid there, *i.e.*, before Mr. Jabbar.

Mr. Jabbar is a Higher Grade Pleader who had prepared and attested the Will Exhibit B ; and the appellant's own allegation "I then went and consulted a lawyer Mr. Jabbar who told me that I would have to accept the Japanese currency" tends to show that the threat, if any, was just to pay through Court as stated by his mother Momin Bibi. Besides it is quite clear from the appellant's own statement "Accordingly the suit property was conveyed to the second defendant under a registered deed drawn up by Mr. Jabbar," that in transferring the property he was acting on the legal advice given by Mr. Jabbar.

Mr. Jabbar (D.W. 2) has denied that the appellant ever came to him for opinion as to whether Japanese money should be accepted or not ; but he has also stated "The plaintiff Piperdi executed the document of his own free will and accord and accepted the consideration of his own free will."

As regards the surrounding circumstances, the option of purchase was to be exercised within five years from the date of Exhibit A, *i.e.*, within five years from the 28th February, 1940 ; and the purchase in exercise of the option is by Exhibit II which is dated the 1st July, 1944. So the option was exercised just about eight months before the expiry of the prescribed period. The first respondent's case is that the appellant himself reminded him to repurchase the property, that the appellant even visited Peinnegon with him to see his

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mother about the matter and that his mother had to sell her jewellery for the purpose of repurchasing the property. The appellant admits "one day, during the rains in 1944, before the repurchase of the property the first defendant took me to Peinnegon to his mother in connection with the same property"; and E. A. Mitchella (D.W. 4) has given evidence of his having sold her jewellery for Rs. 21,500 as she was in need of money to repurchase the property.

Having regard to the relationship between the parties and having regard to the fact that the testator M. C. Jeewa had bought the property in his name just to help the second respondent, the probabilities are that the appellant reminded her and her son as alleged.

Having regard to the relationship of the parties and having regard also to the fact that the first respondent's wife Halima Bibi was then living with the appellant, who is her cousin, and Momin Bibi, who is her aunt, it is highly improbable that they would have been threatened as alleged in paragraph 6 of the amended plaint or at all. In fact there might not have been any necessity for any such threat at all inasmuch as (1) the appellant's mother had admittedly redeemed a mortgage of the same property with Japanese currency although the mortgage was effected before the war and therefore on a loan of British currency, (2) the appellant himself had admittedly bought a house and some paddy lands in 1944 paying for them in Japanese currency and (3) the appellant has stated "During the Japanese occupation all sales and purchases were made with Japanese currency."

We must add (1) that the appellant has not made any attempt to prove that Khatiza Bibi threatened him at all although according to his particulars she was one of those who used to threaten him, (2) that there is no

evidence whatsoever of the relations between the parties and their relatives having been strained in any way after the alleged threat or coercion and the resale, (3) that the lawyer's notice for cancellation of the sale-deed for coercion and undue influence over the appellant, without reference to coercion or undue influence over any other person, is dated the 23rd September, 1946 (*see* Exhibit 3) although Moulmein was admittedly reoccupied by the British on or about the 1st October, 1945 and (4) that the notice was given about two months after the Japanese Currency (Evaluation) Act, 1947 had come into force.

The case for the appellant in the lower Court was that the sale deed was voidable on account of threat, coercion and undue influence, the particulars of which were set out in paragraphs 6 and 11 of the Amended Plaint and in subsequent Particulars. He also stated in paragraph 15 of the Amended Plaint, "The cause of action arose during June and July, 1944 when the defendants exercised coercion and undue influence against the plaintiff as explained in the foregoing paragraphs hereof." However, the learned Advocate for the appellant has asked for permission to raise a question, which was not raised in the District Court at all, as to whether the sale deed Exhibit 2 is not void or voidable for the reason that the appellant alone could not sell the property. He has referred us to *Connecticut Fire Insurance Company* v. *Kavanagh* (1); *Ram Kinker Rai and another* v. *Tufani Ahir and others* (2); and *A.R.M.N.A. Chettyar Firm* v. *R.M.V.S. Chettyar and others* (3) as authorities for the view that such a question can be raised on appeal.

The first case was one in which their Lordships of the Privy Council held that the appellants, whose

(1) (1892) A.C. 473. (2) A.I.R. (1931) All. 35 (F.B.).
(3) (1938) R.L.R. 256.

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charges of fraud and deceit had failed, could not be allowed in final appeal to contend for the first time that the pleadings and evidence disclosed such negligence or breach of duty by the respondent as their agent as was in law sufficient to make him liable. Their Lordships did observe therein :

" 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."

But their Lordships have carefully added :

" 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. To accept the proof adduced by a defendant in order to clear himself of a charge of fraud, as representing all the levidence which he could have brought forward in order to rebut a charge of negligence, might be attended with the risk of doing injustice."

The second case was one in which the Full Bench refused permission to raise a new question and dismissed the appeal. There the appellants' case originally was that defendant No. 3, Mt. Batasi had no right to grant the lease as her husband died as a member of the joint family ; and they were not allowed by the Full Bench to raise the alternative question that, even if her husband was separate from the plaintiffs, she could not grant the lease.

However, the case has been cited as the Full Bench observed in the course of its judgment therein :

"A point not taken in the Court below, whether the omission was by the appellant in that Court or whether the respondent failed to support his decree by taking the point, will not be permitted to be raised, except *possibly* :

I. Where the point may be described as involving a question of public policy *e.g.*,

(1) involving jurisdiction ;

(2) involving the principle of *res judicata* ;

(3) where the decision of the point would prevent future litigation.

In the above instances the point will be allowed to be argued *only if it can be decided upon the materials before the Court* and does not involve the taking of further evidence, or the sending of the case, or any issue, back to the lower Court, or a decision of a question of fact.

II. Where the plaint discloses no cause of action, or the written statement, no ground of defence, it is not a ground for permitting a new point to be argued, merely :

(1) that it was omitted by oversight in the Court below ; or

(2) that the materials are all on the record and that the answer to the point is plain."

In the third case the appellant was not permitted to raise the question of law as to whether the security bond executed by a guardian-ad-litem of minors was not void on the ground that the guardian had no authority to dispose of their property as (1) the appellant's suit "was based upon allegations tending to show the fraudulent and collusive nature of the transaction culminating in the execution of the security bond" and (2) "the question as to the validity or otherwise of the security bond depends upon certain state of facts which the materials on the record are insufficient to enable us to determine one

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way or the other." Mya Bu J. observed in the course of his judgment therein :

" The principle therefore is that a question of law raised for the first time in a court of last resort should receive consideration only if it is based upon facts either admitted or proved beyond controversy."

In the last case there is a reference to *M. E. Moola Sons, Limited* v. *Burjorjee* (1). In that case a claim was made against a company in liquidation for damages for breach of contract to purchase immoveable property. The only question in issue in the Courts in India was whether the purchaser named in the written agreement contracted on his own behalf or as agent for the company. Upon an appeal to the Privy Council by the liquidator he contended for the first time that the agreement was inoperative as it was unregistered. The facts before the Board indicated, but were insufficient to determine definitely, that there had been a course of conduct, or an agreement, by the liquidator precluding him from raising any point except that dealt with in India. In the circumstances above stated their Lordships of the Privy Council refused to consider the contention as to non-registration.

In the present case, there are facts and circumstances which indicate that, if the appellant had raised the question as to the validity of the sale deed on the ground of his having had no right nor authority to sell the property by himself, the respondents might have been able to plead and prove estoppel under section 115 of the Evidence Act which and the illustration to which read :

" 115. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he

(1) (1932) I.L.R. 10 Ran. 242.

nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

*Illustration.*

A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induced B to buy and pay for it:

The land afterwards becomes the property, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title."

In fact the evidence and the circumstances indicate that the respondents might be entitled to the benefit of protection by section 41 of the Transfer of Property Act, even if the validity of the sale were questioned by the appellant's mother Momin Bibi. The section is a statutory application of the law of estoppel, the general principle of which is thus stated by the House of Lords in *Cairncross* v. *Lorimer* (1) :

"If a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they might have abstained—he cannot question the legality of the act he had so sanctioned—to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct."

Besides, the learned Advocate for the respondents has mentioned that the appellant alone has proved the Will, Exhibit B, on the 4th July 1949 and got probate thereof on the 10th August 1949, *i.e.* after the decision of the suit and during the pendency of the appeal, in Civil Miscellaneous No. 14 of 1949 in the District Court of Amherst ; and this statement of fact is not denied by the learned Advocate for the appellant. As a result of probate having been applied for and obtained by the appellant alone, his mother

(1) (1860) 3 Macq. 827 at 829.

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Momin Bibi is no longer entitled, as a joint executrix, to question the validity of the sale ; the title, which has vested in the appellant alone, may feed the estoppel under section 43 of the Transfer of Property Act : and section 227 of the Succession Act read with section 311 thereof may have the same effect.

So permission to raise the new question must be refused even according to the principles which have been laid down in the rulings cited by the learned Advocate for the appellant. To accept the proof adduced by the respondents in order to clear themselves of the charge of threat, coercion and undue influence as representing all the evidence which they could have brought forward in order to meet the new plea might, in the words of their Lordships of the Privy Council, be attended with the risk of doing injustice. We are not at all satisfied that the evidence before us " establishes beyond doubt that the facts, if fully investigated, would have supported the new plea." The question being allowed to be raised at this stage will necessarily involve not only the taking of further evidence or the sending of the case, or at least some issues, back to the lower Court but also decision of new questions of fact.

We do not think that there is any risk of injustice in refusing permission to raise the new question at all inasmuch as clause 2 of the Will, Exhibit B, provides " That my said Executor and Executrix shall look after and *manage my estate properties either jointly or severally* for the benefit of my estate." The appellant himself has maintained in his evidence-in-chief " I was appointed Executor and my mother Executrix ; and according to the terms of the will we could act either jointly or severally."

The learned Advocate for the appellant has referred us to sections 65A and 76 (*a*) of the Transfer of

Property Act in connection with the meaning of "management." However, these sections relate to the mortgagor's power to lease and the liabilities of a mortgagee in possession ; and there is no reason why the power of management of an executor should be so limited as that of a mortgagor or a mortgagee. On the other hand we are of the opinion that an executor can in the course of his management of the estate of the testator sell any property in the said estate in accordance with an agreement for sale thereof which was entered into by the testator himself.

We accordingly refuse permission to raise the new question and dismiss the appeal with costs.

U SAN MAUNG, J.—I agree.

## APPELLATE CRIMINAL.

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

H.C. 1950.

*Jan. 21.*

BA PE AND ONE (APPELLANTS)

*v.*

THE UNION OF BURMA (RESPONDENT).*

*Evidence Act, ss. 30, 101 and 133—Confession of a co-accused and testimony of an approver—Distinction—Criminal Procedure Code, s. 342 (1) (2)—Statement and evidence of a co-accused how far can be used against another.*

*Held:* That the confession of a co-accused is not on the same footing as testimony of an approver which is substantive evidence in the sense that conviction can be based on it alone under s. 133 of Evidence Act. If there be no prima facie evidence against an accused person, confession of a co-accused should be excluded It cannot be used to fill up the gap in the evidence of the prosecution.

*Khaw Tun and one* v. *The Union of Burma*, (1948) B.L.R. 310, followed.

Similarly evidence given by a co-accused under s. 342 (1) as amended, of the Code of Criminal Procedure *may* be used as against a co-accused when the co-accused had opportunity to cross-examine and of calling evidence in rebuttal.

*U Saw and nine others* v. *The Union of Burma*, (1948) B.L.R. 217, followed.

*Po Han and Tun Ei* v. *The King*, (1947) R.L.R. 319, distinguished.

But it is a fundamental principle that in a criminal trial the burden of proof lies on the prosecution to establish the charge beyond reasonable doubt and this principle has been recognized in s. 101 and illustration (*a*) to that section together with definition of 'proved' in s. 3 of Evidence Act. Where an accused person should have been discharged for want of prima facie evidence against him, the court should not use the evidence of a co-accused given under s. 342 (1) of the Code of Criminal Procedure to fill up the gaps in the prosecution. The word used in s. 342 (1) is *may* and not 'shall.'

*King-Emperor* v. *U Damapala*, 14 I.L.R. Ran. 666 (F.B.) 681, followed.

*L. Choon Fong* (Government Advocate) for the respondent.

U SAN MAUNG, J.—The two appellants Ba Pe and Khin Maung and their co-accused Maung Pay, who

* Criminal Appeal No. 294 of 1949 being appeal from order of Additional Special Judge of Mônywa, dated 25th July 1949 passed in Criminal Regular Trial No. 80 of 1948.

has not appealed, were sent up for trial under section 302/34/394 of the Penal Code in Criminal Regular Trial No. 80 of 1948 of the Additional Special Judge, Mônywa, but they were each convicted under section 394 only and were sentenced to various terms of imprisonment. However, since the alleged offence under section 394 took place on the 11th June, 1948, while the Penal Code and Criminal Procedure (Temporary) Amendment Act, 1947 (Burma Act No. LXII of 1947) was still in force so far as section 394 was concerned, the sentences were illegal. Accordingly the two appellants and Maung Pay were asked to show cause why their sentences should not be enhanced to death or transportation for life, *vide* Criminal Revision No. 163A of 1949.

The facts of this case, which lie within a narrow compass, are as follows : On the 6th lasan of Waso last (11-6-48) the deceased Paw Tin, son of Ma Shwe Mi (P.W. 2), a resident of Kudaw, went for a visit to a neighbouring village of Kyabaing never to return alive. His body was found on the road between Minywa and Kudaw with more than a dozen dah cut wounds. Minywa is a village situated about a call distance to the north of Kudaw. The matter was reported by U Ba La (P.W. 1), Headman of Minywa, to Mônywa Police who at once started investigating the case. On the 15th June, 1944, U Ba U (P.W. 9), Sub-Inspector of Police, Mônywa, arrested the appellant Khin Maung on suspicion, and on the next day he arrested the appellant Ba Pe and their co-accused Maung Pay. On the 17th June, 1948, both Ba Pe and Maung Pay offered to point out to the Police the places where some of the properties exhibited in the case were hidden. Accordingly Ba Pe and Maung Pay took the Police and the search witnesses U Ba La (P.W. 1) and U Taw (P.W. 6) to the several spots where Exhibits 1, 2,

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3, 4, 5 and 6 were discovered. Except for Exhibit 6 (a blood stained dashe), which was found in a dirt heap about a call distance to the north of Maung Pay's house, the exhibits, namely, the blood stained currency notes (Exhibit 1), the blood stained gold ring (Exhibit 2), the blood stained wristlet watch with leather strap (Exhibit 3), the handkerchief (Exhibit 4) and the dagger (Exhibit 5) were found at the places actually pointed out by Maung Pay although the appellant Ba Pe was with Maung Pay at the time the latter pointed out the places where these exhibits were hidden. The blood stained currency notes were discovered in a ditch about 20 cubits to the west of Maung Pay's house. The blood stained gold ring and wristlet watch were also found there wrapped up in the handkerchief. The dagger was found in a hedge to the north-east of Maung Pay's house. As for the blood stained dashe (Exhibit 6) it would appear that after Maung Pay and Ba Pe had taken the search party to the dirt heap about a call distance to the north of Maung Pay's house the actual spot where this dashe was found was pointed out by Ba Pe himself. On the 18th June, 1948, Maung Pay's confession (Exhibit G) was recorded by U Win Maung (P.W. 10), Subdivisional Magistrate, Mônywa. In that confession Maung Pay implicated the appellants Ba Pe and Khin Maung for the robbery of the exhibit ring and the wristlet watch belonging to the deceased Paw Tin and Ba Pe for the actual murder of the deceased. On the 19th June, 1948, these properties were identified by Ma Shwe Mi (P.W. 2), the mother of Paw Tin, and Ma Myi Yi (P.W. 3), his sister, as those belonging to him at an identification of properties held under the supervision of U Tun Shein (P.W. 7), Myothugyi of Mônywa. On the 28th June, 1948, the dashe (Exhibit 6) was sent by U Ba U (P.W. 9)

to the Chemical Examiner for the chemical analysis of the blood stain detected on the dah. Unfortunately, the reply from the Chemical Examiner to the effect that blood was detected on the dashe but that the amount of blood was not sufficient for futher examination was filed not as an exhibit, as it should have been done, but among the papers in the process file. On the 29th June, 1948, the case against the appellants and Maung Pay was sent up for trial with the result mentioned above.

In the confession, Exhibit G, Maung Pay mentioned how about 4 or 5 days before the occurrence of this case the appellant Ba Pe had proposed to him and the appellant Khin Maung that they should waylay and rob Paw Tin of his properties, how their attempt to waylay him on the night of the conspiracy was in vain, how on the night this case occurred they verified from Ma Shwe Mi, mother of Paw Tin, that Paw Tin had not yet returned, how they went and waited at a spot on the west of Kudaw village, how Khin Maung went into Kudaw to verify whether Paw Tin was still there, how on Khin Maung's return with the message that Paw Tin was coming out of Kudaw Ba Pe ordered that Khin Maung should precede Paw Tin while Maung Pe and he (Ba Pe) would follow Paw Tin from behind, how Maung Pay being afraid did not follow Paw Tin but was near enough to see Ba Pe go up to Paw Tin and cut him several times with dah, how subsequently Ba Pe came with a wristlet watch, a ring and Rs. 7 in cash saying that these were the properties which he had robbed from Paw Tin, how at Ba Pe's request he had hidden them in a ditch near his house in the presence of Ba Pe and how the dagger and the dashe were hidden respectively in the hedge near his house and in the dirt heap some distance away from his house.

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This confession was more or less adhered to by Maung Pay in giving evidence on behalf of his own defence. However, as pointed by us in *Khaw Taw and one* v. *The Union of Burma* (1), the confession of a co-accused is not on the same footing as the testimony of an approver, which is substantive evidence in the sense that a conviction can be based on it alone, *vide* section 133 of the Evidence Act. If there is no evidence against an accused person or if the other evidence on record is insufficient to establish a prima facie case against him the confession of a co-accused must be excluded altogether as it cannot be used to fill gaps in the prosecution evidence or to supplement evidence which is otherwise insufficient. Therefore in this case it is necessary to see whether, apart from the confession of the co-accused Maung Pay, the evidence adduced by the prosecution as against the appellants Ba Pe and Khin Maung is sufficient to establish prima facie that they have committed offences punishable under section 394 of the Penal Code or any other offence punishable under that Code, and it seems clear to us that there is no evidence on record sufficient to establish such a prima facie case as against the appellant Khin Maung. There is, no doubt, the evidence of Ma Shwe Mi (P.W. 2), mother of the deceased Paw Tin, that the appellant Khin Maung came with a watch on the evening of the day of occurrence to enquire if Paw Tin was at home as he wished to send the watch for repair and was told that Paw Tin was away at Kyabaing. Khin Maung again came with Maung Pay at about lamp lighting time and again at child sleeping time to enquire if Paw Tin had arrived and on both these occasions Ba Pe was seen on the road. There is also the evidence of Maung Nyan Sein (P.W. 4) to show that

(1) (1948) B.L.R., p. 310.

while he and Paw Tin were drinking liquor at the house of Ma Kan Shi of Kudaw at about lamp lighting time of the day of occurrence Khin Maung came and had a cup of liquor and at that time he had a dashe with him. However, the facts disclosed in the evidence of Ma Kan Shi and Maung Nyan Sein as regards Khin Maung are not in themselves sufficient to establish prima facie that Khin Maung had anything to do with the robbery and the murder committed on Paw Tin. Unless the confession of Khin Maung's co-accused Maung Pay is made use of in the same way as the testimony of an approver—which is not permissible in law—there is nothing to connect Khin Maung with the offence with which he has been charged. Therefore Khin Maung should have been discharged from the case at the time charges were framed against Ba Pe and Maung Pay.

The case as against Ba Pe, however, stands on a different footing. Even excluding the confession of Maung Pay in so far as it has implicated him, there is sufficient evidence to connect Ba Pe with the crime which was committed on the night of the 11th June, 1948. Only five days after that date both Ba Pe and Maung Pay offered to produce the properties exhibited in the case and in fact both of them went together to show the spots where Exhibits 1, 2, 3, 4 and 5 were found although the actual pointing out of these spots was made by Maung Pay. As regards the blood stained dashe (Exhibit 6), it was found at the spot pointed out by Ba Pe himself and although the nature of the blood stain on the dah has not been determined there is ample evidence on record to show that the dashe was stained with blood. The ring (Exhibit 2) and the watch (Exhibit 3) have been satisfactorily identified by Ma Shwe Mi (P.W. 2) and Ma Mya Yi to be those belonging to the deceased Paw Tin, and there

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is the evidence of Ma Shwe Mi that when Paw Tin left the house on the day of occurrence he was wearing the ring and the wrist watch which he used to wear daily. By saying this Ma Shwe Mi undoubtedly meant to refer to the exhibit ring and the wrist watch as those usually worn by her son. That the exhibit ring belonged to the deceased Paw Tin finds support in the evidence of Ba La (P.W. 1), Headman of Minywa, who had himself purchased it for Paw Tin from one Ko Kyin, a goldsmith of Mônywa, about a year before the evacuation of the British. The evidence of the Investigating Officer U Ba U (P.W. 9) that the appellant Ba Pe was one of those who had offered to produce the exhibit properties is corroborated by the fact that in the search list Exhibit B relating to the finding of the exhibit watch and ring there are entries to the effect that these properties were produced by Maung Pay and Ba Pe, and this search list was signed not only by Maung Pay but also by the appellant Ba Pe. From these circumstances it may be presumed that the appellant Ba Pe was one of those concerned in the robbery as otherwise he would not have been a party to the production from their hiding places of the exhibit stolen properties and the exhibit blood stained dah. Section 114 of the Evidence Act provides that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, etc., in their relation to the facts of the particular case ; and the illustrations to that section though affording valuable guidance in the matter, are not meant to be exhaustive.

After charges have been framed against the two appellants and their co-accused Maung Pay under section 394 of the Penal Code, Maung Pay offered to give evidence on oath on behalf of his own defence,

while the two appellants did not elect to do so. They were accordingly examined under section 342 (2) of the Criminal Procedure Code and they denied *in toto* all the allegations made against them by the prosecution. Both the appellants stated that they had been falsely implicated by their co-accused Maung Pay because of an old grudge. The appellant Ba Pe denied having offered to produce the stolen properties or having pointed out the spot where the blood stained dashe was found.

The accused Maung Pay in giving evidence on behalf of his own defence more or less adhered to the statements made by him in his confession except that he denied that he was a party to the conspiracy to rob the deceased Paw Tin. He alleged that he came to know of Ba Pe's intention to rob Paw Tin only when the latter was seen coming out of Kudaw village and that he was a more or less unwilling spectator to the robbery and the murder of Paw Tin. He admitted that he hid the stolen properties in a ditch near his house in the presence of the appellant Ba Pe but contended that he only did so for fear of Ba Pe.

Now, as has been held by a Special Bench of this Court in *U Saw and nine others* v. *The Union of Burma* (1) evidence given on oath by an accused person under section 342 (1) of the Criminal Procedure Code, as amended, may be used against the co-accused in the case although the weight to be given to such evidence will depend on the circumstances of each case. The case of *Po Han and Tun Ei* v. *The King* (2) cited by the learned Advocate for the appellants in support of his contention that Maung Pay's evidence should be left out of consideration not only as against the appellant Khin Maung but also as against the appellant Ba Pe is distinguishable inasmuch as in

(1) (1948) B.L.R., p. 217. (2) (1947) R.L.R., p. 319.

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the present case the appellants not only had an opportunity of cross-examining Maung Pay but had actually done so through their Pleader U Tin Saw. They also had an opportunity of rebutting the evidence of Maung Pay by citing witnesses to show that they were not on good terms with him.

Therefore we see no reason why the evidence of Maung Pay should not be taken into consideration as against the appellant Ba Pe against whom the prosecution has established a prima facie case. As regards the appellant Khin Maung however the case against him stands upon a different footing. Although the learned Additional Special Judge framed a charge against him under section 394 of the Penal Code at the end of the case for the prosecution, there was on record no sufficient evidence to warrant such a charge being framed against him. Therefore, it will be altogether opposed to the generally accepted principle regarding the burden of proof in criminal cases so to use the evidence which his co-accused Maung Pay has given under section 342 (*1*) of the Criminal Procedure Code to fill gaps in the prosecution case against him. For, as observed by Dunkley J. in *King-Emperor* v. U *Damapala* (1) " It is a fundamental principle that in a criminal trial the burden of proof lies upon the prosecution to establish the charge against the accused beyond reasonable doubt. This principle is enacted in section 101 and illustration (*a*) to that section, read with the definition of ' proved ' in section 3 of the Act. * * * In a criminal trial the burden of proving everything essential to the establishment of the charge against the accused lies upon the prosecution, and that burden never changes." Therefore in a criminal case where an accused person, who should have been discharged for want of evidence sufficient to establish

(1) 14 Ran., p. 666 (F.B.) at 681.

prima facie a criminal charge against him, has been wrongly charged by the trial Court, the Court should not use the evidence of a co-accused given under section 342 (*1*) of the Criminal Procedure Code to fill the gaps in the prosecution case. As pointed out by Wright J. in *Po Han and Tun Ei* v. *The King* (1) what section 342 (*1*) enacts is that the evidence of an accused person "may" be used against any person tried jointly with him and not "shall" be so used. It will be entirely in consonance with the generally accepted judicial principle for the Court to use a wise discretion in disregarding the evidence of a co-accused in so far as it implicates an accused person against whom the prosecution itself has failed to establish a prima facie case. For these reasons we would disregard the evidence of Maung Pay in so far as it implicates the appellant Khin Maung. We would also remark that even if Maung Pay's evidence is taken into consideration as against Khin Maung it is doubtful whether the conviction of Khin Maung under section 394 of the Penal Code can be upheld. The conviction and sentence on Khin Maung will therefore be set aside and this appellant acquitted and released so far as this case is concerned.

As regards the appellant Ba Pe however, the evidence of Maung Pay affords strong corroboration to the prosecution case that the properties surrendered by both Ba Pe and Maung Pay were in fact those obtained by robbing the deceased Paw Tin. It also tends to show that Ba Pe was one of the assailants—if not the assailant—of the deceased Paw Tin. The only evidence adduced by Ba Pe in his defence is that of Maung Shein (D.W. 2) and Maung Tha Lun (D.W. 5). According to Maung Shein, he witnessed an altercation between Maung Pay and Ba Pe at the rail line near

(1) (1947) R.L.R., p. 319.

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Minywa about 4 or 5 days before the Burmese Thingyan, but he did not know the origin of the altercation or the final result of it. According to Maung Tha Lun however, the altercation between Maung Pay and Ba Pe took place about 4 or 5 days before Paw Tin's death. It is not known whether Maung Tha Lun and Maung Shein were referring to the same occasion. If they were doing so, they were entirely discrepant as regards the probable date of the event deposed to by them. Besides, evidence such as that given by Maung Shein and Maung Tha Lun can be easily concoted and it is well known that in a criminal case friends and relatives of an accused person usually rally round to his aid in an attempt to save him. We therefore consider that the learned trial Judge who has had an opportunity of seeing these witnesses and appraising their credibility was right in rejecting their evidence.

For these reasons we would confirm the conviction of the appellant Ba Pe under section 394 of the Penal Code. As regards the sentence we have already mentioned in the earlier part of this judgment steps have been taken so to enhance the sentence as to be in compliance with the law.

U THEIN MAUNG, C.J.—I agree.

## ORIGINAL CIVIL.

*Before U Aung Tha Gyaw, J.*

AZAM KHAN (PLAINTIFF)

*v.*

DAW KHIN AND OTHERS (DEFENDANTS).*

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*Mar. 23.*

*Evidence Act—Ss. 32, 43, 65 and 70—Previous deposition in Criminal case whether admissible—Judgment of Criminal Court if relevant in Civil case—Copy of deposition not bearing seal—Secondary evidence admissibility of*—res judicata—*Judgment by District Court under s. 42, Specific Relief Act—Whether the District Court legally competent to issue negative declaration—Nature of such jurisdiction—Change of religion right to inheritance if affected—Caste Disabilities Removal Act, 1850.*

Plaintiff who was 62 years old, brought a suit for administration and partition claiming that he was the eldest surviving son of the deceased by his first wife. The suit was resisted by the widow and others *inter alia* on the ground that the Plaintiff was not a son of the deceased but was the son of his first wife by her previous marriage, and that issue was *res judicata* by reason of a prior decision on admission in a suit brought by the deceased as Plaintiff in the District Court of Myaungmya against the present Plaintiff as defendant for a declaration that the present Plaintiff was not his son but was his step son. The Plaintiff by way of reply contended that the District Court had no jurisdiction to grant a negative declaration under s. 42 of the Specific Relief Act and that therefore the previous proceedings could not be *res judicata* in a subsequent suit. Defendants also relied on evidence given by the deceased in a Criminal case between the deceased and the present Plaintiff in which the deceased stated that the present Plaintiff was his step son, and also relied on the judgment in the Criminal case.

*Held:* That the Plaintiff was admittedly at a disadvantage when he has to prove incidents which took place 63 or 64 years ago, but it is Plaintiff's duty to give convincing evidence regarding his claim of paternity.

*Khwaja Ahmed Khan* v. *Mt. Harmusi Khanam and others,* (1921) A.I.R. Oudh, p. 81, referred to.

The statement by the deceased relating to the relationship by marriage between the present plaintiff and the deceased in a Criminal case is admissible under s. 32 (5) of the Evidence Act.

A copy of the judgment in the Criminal case, however, is irrelevant under s. 43 of the Evidence Act as the existence of such a judgment was not relevant for any purpose.

*Muhamdi Begum* v. *Durga Prasad and another*, 40 I.C. 452 ; *Pedda Venkatapathi* v. *Ganagunta Balappa and others*, A.I.R. (1933) Mad. 429 ;

* Civil Regular Suit No. 110 of 1948.

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*L. Sri Ram and others* v. *Mohamed Abdul Rahim Khan and another*, A.I.R. (1938) Oudh, 69, referred to.

As the proceedings in the Criminal case had been lost or destroyed, the defendant was entitled to give secondary evidence of the contents of the relevant document filed in the criminal case. The objection that the copies did not bear the Seal of the Court and therefore, could not be considered as certified copies of public documents is untenable.

*Sri Ram and others* v. *Muhammad Abdul Rahim Khan and others*, 172 I.C. 882 ; *K. O. Kalandan* v. *V. P. Kunhunni Kidavu and others*, 6 Mad. 80 ; *In the matter of Collision between "Ava" and "Brenhilda,"* (1880) 5 Cal. 568 ; *C. P. Narain Singh* v. *B. P. Narain Singh*, 5 Patna 777, referred to.

Copyists who prepared the copies having sworn to the genuineness of the copies and the signatures appearing thereon there is a presumption that the acts of the Court have been regularly carried out.

*Bijnath and another* v. *Sri Bhagwan and others*, A.I.R. (1926) All. 691, followed.

Copy of the judgment in the Civil Suit in the District Court of Myaungmya between the deceased and the plaintiff is admissible as the issue now raised had been concluded by the decision of a competent Court in a previous suit.

*Maroti Laxman Koshti and others* v. *Jagannathon Lachmandas Gadewal and another*, A.I.R. (1939) Nag. 72, referred to.

The question whether the plaintiff was son or step son had been finally raised and determined in the previous suit and was therefore, *res judicata*.

The application of the principles of *res judicata* dealt with by s. 11, C.P.C. should not be influenced by technical consideration but by matter of substance within the limits allowed by law.

*Kalipada De and others* v. *Devijapada Das and others*, (1930) I.A. 57, followed and applied.

The District Court of Myaungmya had jurisdiction to entertain the previous dispute. Jurisdiction may be divided into three heads with reference to (*a*) the subject matter, (*b*) the parties or (*c*) the particular question which calls for decision ; where the Court possesses inherent jurisdiction and merely assumes or exercises it in an irregular or illegal manner the judgment is not a nullity.

*Sukh Lal Sheik* v. *Tara Chand Ta*, 33 Cal. 68 ; *Ashutosh Sikdar* v. *Behari Lal Kirtania*, I.L.R. 35 Cal. 61 ; *H. N. Roy* v. *R. C. Barua Sarma*, (1921) I.L.R. 48 Cal. 138, referred to.

In entertaining the previous suit brought by the deceased for a declaration that the present Plaintiff was a step son, the District Court was acting within its competence.

*B. S. Vakluba* v. *T. A. Raisinghji and others*, (1910) 34 Bom. 676 ; *Chinnasami Mudalier and another* v. *A. Mudaliar*, 29 Mad. 48, referred to.

*Daw Pon* v. *Ma Hnin May*, A.I.R. (1941) Ran. 220 ; *Mahmud Shah* v *Pir Shah*, A.I.R. (1936) Lah. 858 ; *Maung Aung Thein* v. *Maung Ba Maung*, (1940) Ran. 54, distinguished.

Plaintiff's contention that all the parties claimed through the deceased and therefore the plea of *res judicata* was not available is not legally sustainable because plaintiff is not claiming under the deceased.

*Syed Ashgar Reza Khan* v. *Syed Mohamed Mehdi Hossein Khan and others*, 30 I.A. 71 ; *Muppanar and others* v. *Vijayathammal*, 6 Mad. 43, distinguished.

Under the Caste Disabilities Removal Act, 1850, the rule of Mohammedan Law by which a non-Muslim is excluded from succession to a Muslim has been abrogated and Plaintiff had not lost his right of inheritance by apostacy.

*Rupa and others* v. *Sarder Mirza and others*, A.I.R. (1920) Lah. 276 ; *C.V.N.T. Chidambaram Chetty.ir* v. *Ma Nyein May and others*, 6 Ran. 243, followed.

*J. N. Dutt*, *Mr. Nair*, *Mr. Jaganathan* } for the plaintiff.

*Dr. Ba Han*, *S. R. Chowdry*, *M. E. Dawoodjee* } for the defendants.

U AUNG THA GYAW, J.—This is a suit brought by the plaintiff Azam Khan, *in forma pauperis*, for administration and partition of the estate of the late Rahim Khan Rasool Khan (*a*) U Po Sin alleging that he was the eldest surviving son of the deceased R. R. Khan by his Burmese wife named Ma Ngwe Bwint. The estate left behind by the deceased is said to be of considerable value being estimated at 36 lakhs and the plaintiff has made his claim for his share permissible under the Mohammedan law valued at Rs. 7 lakhs.

The 1st defendant Daw Khin is the surviving widow of the deceased and the 2nd defendant Majid Khan Rahim Khan is a son of the deceased by the said Daw Khin. The 3rd defendant, Hamid Khan Rahim Khan is a son of the deceased born of his Indian wife

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Asha Bibi long since deceased. The 4th, 5th and 6th defendants are the daughters of the deceased R. R. Khan (*a*) U Po Sin by his deceased Burmese wife Daw Ngwe Bwint. These defendants were therefore born of the same mother as the plaintiff. They are not, however, prepared to admit the plaintiff's claim that he was the deceased's son. The 1st, 2nd and 3rd defendants also deny that the plaintiff is a son of the deceased. They have alleged that the plaintiff is the deceased's step-son and was begotten by deceased Daw Ngwe Bwint with her previous husband named Maung Po Su.

These defendants have further pleaded that the plaintiff's present suit is barred by the principle of *res judicata* by reason of the fact that the question of the plaintiff's status as a son of the deceased was already raised and decided in Civil Regular Suit No. 19 of 1915 of the District Court of Myaungmya. They also rely on an admission said to have been made by the plaintiff in his statement made before the 1st Additional Magistrate of Moulmeingyun in his Criminal Regular Trial No. 81 of 1913 in the course of his examination as an accused person to the effect that he was a son of U Po Su. Certain documentary exhibits, the admissibility of which in evidence is disputed, have been relied upon in respect of these defences set up on the defendants' behalf.

It has also been contended on behalf of the 3rd defendant that the plaintiff, having embraced the Buddhist faith and committed apostacy thereby, has rendered himself incompetent to claim a share in the estate of a deceased Mohamedan.

The plaintiff has in his reply denied all knowledge of the bringing of Civil Suit No. 19 of 1915 in the District Court of Myaungmya and of the judgment passed in the said suit and has also contended that the

said proceedings were fraudulent and collusive and are therefore of no legal force or effect. He also denies that he made the admission attributed to him in the criminal case brought before the 1st Additional Magistrate of Moulmeingyun. At the trial an additional legal plea has been advanced on the plaintiff's behalf to the effect that the District Court of Myaungmya was not competent to pass the decree it did in Civil Regular Suit No. 19 of 1915.

The following issues therefore arose for decision in this case :

1. Whether the plaintiff is a son of R. R. Khan (*a*) U Po Sin, deceased ?

2. Whether the suit is barred by the principle of *res judicata* in view of the decree passed in Civil Regular No. 19 of 1915 of the District Court of Myaungmya ?

3. Whether Civil Regular No. 19 of 1915 of the District Court of Myaungmya was a fraudulent and collusive suit and of no legal force or effect ?

4. Whether the plaintiff has no right of inheritance to any share in the estate of R. R. Khan (*a*) U Po Sin by reason of his apostacy ?

5. To what relief, if any, is the plaintiff entitled ?

The plaintiff has described his age as 62 years when he gave his evidence before this Court on the 9th November 1949 and for almost the whole of his life he lived in the village of Kyawzan in Myaungmya district where he eked out his existence plying his sampan and doing petty trade. Before proceeding to examine the evidence adduced by him in proof of his paternity, it is necessary to take into account in the first place the admitted facts which would seem to furnish a background to this litigation.

Although Khan Bahadur R R. Khan died in affluent circumstances, the evidence given in the case

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traces the origin of his wealth to a small retail cloth business which he set up more than half a century ago in the remote village of Pagandaung lying somewhere to the east of Kyawzan village in Myaungmya township. Accompanied by another Muslim trader named Maung Gyi, R. R. Khan who was also called Po Sin periodically visited Daizat, said to be a day's journey away from Pagandaung to sell his cloth. In the lower Daizat village there then lived the Burmese family of U Hla Baw and Daw Hmwe Bon with whose daughter Ma Ngwe Bwint, the deceased fell in love and contracted a marriage under Mohamedan rites. It was of this marriage that the plaintiff Azam Khan is alleged to be born sixty two years ago. Admittedly, two daughters were born to the marriage before the family moved to the more busy trading station of Kyawzan.

Several years later when the plaintiff was about 11 years of age, he was sent to the village of Atodra in Surat District, India, the home of the deceased R. R. Khan's parents where he was formally converted into the Muslim faith by having his circumcision performed some six months after his arrival. Shortly after this, Daw Ngwe Bwint and her daughters were brought to the same place to take up their permanent residence. The plaintiff was given his schooling in the village and was made to learn Gujerati, Urdu and Arabic languages. Having absorbed this Indian culture in the home of the deceased's parents, the plaintiff returned to Burma to the deceased at Kyawzan when he was about 17 or 18 years of age.

When he was about 19 and while living with the deceased, he fell in love with a young widow with two children named Ma Thai Ngwe, a couple of years his senior and described also as a servant of the deceased. Against the wishes of the deceased, he contracted a marriage with this girl and left the Muslim faith. The

mother Ma Ngwe Bwint was temporarily sent for from India in order, perhaps, to persuade the plaintiff to give up his Burmese wife and to return with her to India. Parental counsel proving of no avail, plaintiff and the deceased parted company and thereafter he took up his residence in the house of his parents-in-law and took to the trade of plying a sampan for a living.

It was in this condition that deceased one day found the plaintiff and apparently sympathising with him for the hardship caused by his previous neglect, offered to make an advance of a sum of Rs. 300 to the plaintiff to buy paddy and supply the same at the deceased's rice mill with a small margin of profit for his use. This gesture evidently met with a willing response on the part of the plaintiff, but before long, the conduct of the plaintiff in the manner in which he spent the advance paid out to him led to the prosecution of the plaintiff in the criminal Court at Moulmeingyun for an offence of criminal breach of trust. He was convicted and sentenced to imprisonment for a term of one year, a rather harsh sentence judged by present standards considering the admitted youth of the accused person and the fact that it was his first offence.

A few years after his release from prison the plaintiff at the age of 23, was sent to visit his mother in India whence he returned after a stay of a few months. Then according to the defendants, the deceased, in about 1915, brought a suit in the District Court of Myaungmya for a declaration that the plaintiff, then known as Maung Ngwe Ya (*a*) Bama Azam, was not his real son but was a son of his wife born of her marriage with her previous husband named Maung Po Su. It is alleged that in this suit the plaintiff had filed a written admission with the result that a consent decree in terms prayed for in the suit was passed

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without costs. Thereafter no incidents of any importance appear to have taken place between the plaintiff and his alleged father, the deceased R. R. Khan, except that on a number of occasions when he was appealed to for monetary help, the deceased had made ungrudging payments of petty sums according to the defendants but fairly substantial sums according to the plaintiff.

The deceased R. R. Khan died in January 1948 and as usual a Rangoon Burmese daily called 'Thamadi,' an extract from which is in evidence as Exhibit (A), treated the matter as worthy of its news column. This publication is said to have found its way to the plaintiff's village and on coming to know the fact of the deceased's death, the plaintiff duly arrived in Rangoon and placed himself under the guidance of his friend Ko Po Aye, a clerk employed in the legal firm of Surridge and Beecheno. The usual lawyer's notices were exchanged and the present suit was filed *in forma pauperis*.

In proof of his paternity the plaintiff has adduced the evidence of two old ladies aged 74 and 75 respectively belonging to lower Daizat, the village where the deceased R. R Khan is alleged to have contracted his marriage with Daw Ngwe Bwint. This village is no longer in existence as owing to the erosion of the river, the villagers had moved to the Daizat North village lying on the opposite bank. This village is now in charge of U Kyar Nyun who is married to Ma Ngwe Thin described as a cousin of the plaintiff. When the plaintiff was faced with the necessity of producing evidence to support his claim made in the suit, it was but natural that his cousin sister and her husband should interest themselves in the matter of obtaining the necessary testimony. According to the plaintiff himself, his cousin made a search for old Daizat

villagers of about the same age as his mother Daw Ngwe Bwint and as a result she found these two witnesses Daw Sein and Daw Sein Bwint. The plaintiff is now 62 years of age and if, as the witnesses said, he was born a year and a half or two, after his mother's marriage with the deceased R. R. Khan, no less than 63 or 64 years have elapsed since the incident recalled to the memory of these witness, took place in their village. Both the witnesses have spoken with remarkable clarity and consistency about the business activities of the deceased R. R. Khan, of his periodical visits paid to lower Daizat village to sell his cloth, of his falling in love with Daw Ngwe Bwint, of one Ma Shwe Thwin acting as go-between, of the elopement, of the usual restoration of the bride to her parents ending with the celebration of the formal wedding in the presence of necessary and elderly witnesses.

The usual recital from the Koran made by the Moulvi and repeated by the bride also finds its place in the accounts of the incident given by these witnesses. The parents of both these witnesses were said to have been present on the occasion and one name, not mentioned by Daw Sein, has been added by Daw Sein Bwint to the list of the guests invited to the wedding. According to Daw Sein, the bride-groom's party was fed that day by the bride's people, an incident not mentioned by Daw Sein Bwint. If it really took place, it was rather unusual for the Muslim bride-groom and his four or five friends including the Moulvi to regale themselves with food and drink in the house of an unbeliever. Daw Sein Bwint further recalls the fact that when the plaintiff was brought into this world it was her aunt Ma Tu Za who assisted as midwife.

Now, it is said that these two witnesses and a few others including one Daw Shwe Thin who had been

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summoned but had returned to her village owing to sudden illness, were present on the occasion at the invitation of the bride's parents, because of the fact that they were growing spinsters very near the age of the plaintiff's mother Daw Ngwe Bwint whom they described as seventeen or eighteen years of age at that time.

As was noticed in the case of *Khwaja Ahmed Khan* v. *Mt. Harmuzi Khanam and others* (1) where a similar claim was made, the plaintiff is admittedly placed at a disadvantage in having to prove the happening of an incident which took place 63 or 64 years ago in his remote village of lower Daizat which had ceased to exist for a long number of years owing to the erosion of the river. If his mother's marriage with the deceased R. R. Khan was witnessed by the village elders, most of them must have died by now and it is not in the least surprising that Daw Sein and Daw Sein Bwint by reason of their old age, have been produced to speak of the one important fact on which the plaintiff's whole claim is based.

[The court discussed the evidence in detail and proceeded.]

Apart from these considerations some documents Exhibits I, VI and VII have been produced from the proper custody of witness Malim to show that the plaintiff was prosecuted for criminal breach of trust by his alleged father before the 1st Additional Magistrate, Moulmeingyun, in Criminal Regular Trial No. 81 of 1913 and that the plaintiff when examined as an accused person, had made the damaging admission that his name was Maung Ngwe Ya (*a*) Azam and that his father's name was Maung Po Su. Exhibit I is said to be a copy of the plaintiff's statement made in the said

(1) (1921) A.I.R. Oudh, p. 81.

criminal Court. There is no question that an admission of this character is admissible in evidence in this case. A copy of deposition of the complainant Rahim Khan (*a*) Maung Po Sin son of Rasool Khan made in the said proceedings has also been filed in the case as Exhibit VI. In this deposition the plaintiff has been described as the witness's step-son. Such a statement relating to the existence of relationship by marriage between the deponent and the present plaintiff is clearly admissible in evidence under section 32 (5) of the Evidence Act. A copy of the judgment of the criminal Court, Exhibit VII, has also been produced in evidence in support of the defence. As to the admissibility of this document in evidence the provision of section 43 of the Evidence Act is clearly a bar as under the said section, judgments, orders, or decrees, are irrelevant unless the existence of such judgment, order or decree is a fact in issue or is relevant under some other provision of this Act. The plaintiff has admitted that he was prosecuted by his alleged father and was convicted and sentenced to a year's imprisonment and in view of this admission, Exhibit VII, a copy of the judgment in the criminal case cannot be taken into consideration in this case. *Muhamdi Begum* v. *Durga Prasad and another* (1) and *Pedda Venkatapathi* v. *Ganagunta Balappa and others* (2) contain authorities in support of this view.

As to the admissibility of the document Exhibit I, it has been urged that this part of the accused's statement was not made on oath and that not being bound to tell the truth the statement contained therein cannot be accepted as an admission made against the interests of the accused. There is no authority for this view and the plaintiff himself has admitted rather guardedly that what he stated in the criminal Court as

(1) 40 I.C. 452. (2) A.I.R. (1933) Mad. 429.

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set out in Exhibit I is true except that he had not given his name and his father's name in the manner set out therein. There is no explanation why the whole statement should not be accepted as having been made by the plaintiff before the criminal Court. A statement by an accused person in the course of his examination under section 342 of the Criminal Procedure Code is not in the nature of a deposition and the authority cited on the plaintiff's behalf that descriptions given in headings of depositions do not form part of the witness's evidence and are of no probative value is of no relevance whatsoever.

As regards the copy of the deposition of the deceased R. R. Khan (*a*) U Po Sin made in Exhibit VI, the only objection to its admissibility is the fact that the copy made by witness Maung Ba Thein does not bear the seal of the Court. In view of Maung Ba Thein's evidence that he had himself made the copy from the relevant proceedings, this technical objection is of little consequence. Ba Thein explains that the Judicial Record Keeper whose signature he now identifies, did not use a seal in those days. The Record Keeper of the District Court was the Authorized Officer who could deliver certified copies and had custody of the public documents for the purpose of section 76 of the Evidence Act and this is prescribed in paragraph 983 of the Lower Burma Courts Manual.

Exhibits X and XI are applications in original presented by Gulam Mohamed Malim in the District Court of Myaungmya for copies of the abovenamed documents. This application was returned to him with an endorsement that the proceedings in question had been lost or destroyed. Under section 65 (*c*) and (*e*) of the Evidence Act, the defendants are therefore entitled to adduce secondary evidence of the contents of the said documents in the manner they have now done in

this case and the objection that these copies do not bear the seal of the Court and cannot be considered as certified copies of public documents as provided in section 76 of the Evidence Act is accordingly of no validity. [See *L. Sri Ram and others* v. *Mohamed Abdul Rahim Khan and another* (1). See also *Sri Ram and others* v. *Muhammad Abdul Rahim Khan and others* (2) where the document admitted was a Sanad, the keeper of which was not authorized to make use of a seal]. Moreover where the original public records have been lost or destroyed, the law does not require a copy of the document sought to be admitted to be duly certified as is required under section 65 (*e*) and (*f*) of the Evidence Act. In such cases the general rule of evidence given in clause (*c*) of the said section that secondary evidence may be given when the original has been destroyed or lost is applicable. [See *K. O. Kalandan* v. *V. P. Kunhunni Kidavu and others* (3). See also *In the Matter of Collision between "Ava" and "Brenhilda"* (4) and *C. P. Narain Singh* v. *B. P. Narain Singh* (5)]. Since Ba Thein, the Copyist himself has appeared and sworn to the genuineness of the copies and the signatures appearing thereon, the presumption asked to be drawn under section 90 of the Evidence Act need not be taken into account. Nevertheless, unless the contrary is shown there is a presumption that the acts of a Court have been regularly carried out [See *Bijnath and another* v. *Sri Bhagwan and others* (6)] and it cannot but be conceded that the copies now filed by the defendants are genuine and correct.

The statement contained in the documents Exhibits I and VI, the one an admission made by the plaintiff himself and the other, a fact sworn to by the deceased

(1) A.I.R. (1938) Oudh, 69.
(2) 172. I.C. 882.
(3) 6 Mad. 80.
(4) (1880) 5. Cal. 568.
(5) 5 Pat. 777.
(6) A.I.R. (1926) All. 691.

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are admittedly of serious consequence to the plaintiff's cause in this suit. They appear to fully contradict his present claim and as statements made at a time when the present dispute was not even dreamed of, the greatest weight must be attached to them. The truth of the admission made by the plaintiff and the statement made by the deceased is fully consistent with the long course of their mutual conduct and would seem to explain away the state of neglect in which the plaintiff was left for these many years before the death of the deceased. The deceased's anxiety shown on the occasion of the plaintiff's marriage to a widow of another faith is not inconsistent with the concern shown by a step-father who has for the sake of wife living in India, given his best attention to the spiritual and material welfare of his step-son. The will left by the deceased, Exhibit IX, the proper execution of which is deposed to by the plaintiff's witness U Po Sin, makes no mention of the plaintiff as being in any way entitled to inherit in the deceased's estate.

This being the effect of the evidence given in the case in respect of the first issue relating to the paternity of the plaintiff, the answer to the said issue must be in the negative.

Although the finding arrived at in the first issue is sufficient to defeat the plaintiff's claim, certain legal defences have also been raised in the suit on behalf of both the parties and will require to be dealt with to completely dispose of the suit. Roughly about a year after the plaintiff's release from prison after his conviction for the offence of criminal breach of trust, R. R. Khan (*a*) U Po Sin appears to have brought the Civil Suit, Civil Regular No. 19 of 1915 in the District Court of Myaungmya evidently under section 42 of the Specific Relief Act for a declaration that the plaintiff

then described as Maung Hla (*a*) Maung Ngwe Ya (*a*) Bama Azam, was not his son but was the son of his wife Daw Ngwe Bwint and her previous husband Maung Po Su. The plaintiff's mother Daw Ngwe Bwint (*a*) Halima Bibi and her two daughters Miriam Khartoon and Bibi Khartoon then living in India, were cited as *pro forma* defendants in the said suit. The plaintiff is said to have filed a written admission to the plaint and a decree in the suit was passed in terms set out in the judgment, a copy of which is filed in the case as Exhibit II. Besides the copy of the judgment, copies of the plaint, Exhibit III, and written statement, Exhibit IV, have also been filed as evidence of this litigation between the parties. There is no question that these documents are ordinarily admissible in evidence under section 65 (*c*) of the Evidence Act. Moreover, the copy of the judgment in the Civil Suit, Exhibit II, is also admissible in evidence in view of the contention of the defendant that the issue now raised between the parties had already been concluded by the decision of competent Court of law in a previous suit. [See *Maroti Laxman Koshti and others* v. *Jagannathon Lachmandas Gadeeal and another* (1)]. A certified copy of the entries made in Civil Register No. 1 in respect of the said Civil Suit No. 19 of 1915, is also filed in the case as Exhibit V. On the strength of this body of documentary evidence it is claimed on behalf of the defendants that the present suit brought by the plaintiff is barred by the principle of *res judicata*. This plea of the defendants is countered by the allegation that the said suit, Civil Regular No. 19 of 1915 of the District Court of Myaungmya, was a fraudulent and collusive proceeding and was of no legal force or effect and further that the District Court of Myaungmya

(1) A.I.R. (1939) Nag. 72.

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was incompetent to either entertain the suit or pass a decree thereon.

As regards the plea that the decree obtained in the Civil Suit, No. 19 of 1915, of the District Court of Myaungmya was a fraudulent and collusive one, no fact or circumstance has been brought out in the evidence in direct support of the same. The plaintiff denies all knowledge of this judicial proceeding in the District Court of Myaungmya but according to Mr. H. C. Banerji, an Advocate of this Court, who practised with good repute in the District Court of Myaungmya for 40 years, the deceased R. R. Khan did bring a suit of this nature in the said Court and that a man said to be the defendant in the suit did file a written admission through his lawyer Mr. P. N. Ghosh. In view of Mr. Banerji's evidence it is hardly worth while to contend that any fraud was practised upon the Court and that the deceased R. R. Khan was guilty of abetting impersonation by bringing forward a stranger to file the written admission to the claim made by him in the said suit. It might be that there was a temporary reconciliation between R. R. Khan and the plaintiff and that the latter was persuaded to attend the Court at Myaungmya to admit his claim in the suit, for, the plaintiff admits that when he was 23 years of age, he was sent by the deceased to India to see his mother. If the lawyer Mr. P. N. Ghosh was in large practice at the time, his appearance on behalf of the defendant was evidence of the *bona fide* nature of the said proceedings before the Court. Mere conjecture or suspicion at this distance of time based on the appearance of some stray facts or circumstances in the judicial proceedings inconsistent with the plaintiff's claim cannot support the plea of fraud or collusion set up on the plaintiff's behalf.

The third issue raised in the suit will accordingly be answered in the negative.

The defendants have pleaded the principle of *res judicata* in bar of the plaintiff's present suit by reason of the fact that in the previous judicial proceeding in suit No. 19 of 1915 of the District Court of Myaungmya, the question whether he was the son or step-son of R. R. Khan had been finally raised and determined. The question as to what has to be considered *res judicata* is dealt with by section 11 of the Civil Procedure Code where are given many examples of circumstances in which this rule of estoppal applies. In *Kalipada De and others* v. *Devijapada Das and others* (1) it was pointed out that the application of this rule by the Court in India should be influenced by no technical consideration but by matter of substance within the limits allowed by law. In the former suit the plaintiff figured as a defendant against whom his alleged father claimed a decree for declaration that he was merely a step-son. He had been representing to others that he was the deceased's son and had acted against the interests of the deceased, and the particulars set out in the deceased's plaint filed in Civil Regular No. 19 of 1915, gave the reason why he found it necessary to bring a suit of that nature against the present plaintiff. The written statement alleged to have been filed by the defendant through his lawyer Mr. P. N. Ghosh admitted his status of a step-son alleged against him and the decree which followed declared this admitted status. In the present suit the plaintiff has to prove the disputed status that he is a son of the deceased, a matter which was substantially in issue between him and the deceased in the previous litigation, and since this matter in issue has been decided against him in the

(1) (1930) I.A. 57.

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previous proceeding, the principle of *res judicata* embodied in section 11 of the Civil Procedure Code will clearly estop him now from making such an inconsistent claim.

Now, it has been contended on the plaintiff's behalf that the District Court of Myaungmya was not legally competent to entertain the previous suit and that a negative decree of the nature set out in Exhibit II will not create an estoppel against the present plaintiff and the case of *Daw Pon* v. *Ma Hnin May* (1) has been relied upon as an authority for this view. In the said case, the plaintiff Daw Pon brought a suit against the defendant under section 42 of the Specific Relief Act for a declaration that the defendant was not the *Keittima* daughter of her and her late husband U Chit Lun and it was held that the plaintiff in the case was seeking a declaration to establish a negative case and that accordingly she had no right of suit under section 42 of the Specific Relief Act and that no decree could be granted in her favour. It was consequently held that the question of the defendant's status remained undecided. The case of *Mahmud Shah* v. *Pir Shah* (2) is also relied upon as supporting the same view point. In that suit a claim was made for a declaration that the plaintiff was the legitimate son of the defendant and it was held that as the plaintiff had no present interest in the property of his father, the suit was not maintainable under section 42 of the Specific Relief Act. The same view of the law was again taken in the case of *Maung Aung Thein* v. *Maung Ba Maung* (3) where it was held that a suit under section 42 of the Specific Relief Act for a declaration, not with respect to an existing right, but with respect to a *spes successionis* did

(1) A.I.R. (1941) Ran. 220. (2) A.I.R. (1936) Lah. 858.
(3) (1940) Ran. 54.

not lie. There, a Burman Buddhist who had no subsisting interest in the property of the parents in their life time, sought a declaration that a certain individual was not the adoptive son of his parents. It was held that this suit was not maintainable.

On the authority of these cases, it has been contended that the District Court of Myaungmya lacked inherent jurisdiction to entertain the suit brought before it by the deceased R. R. Khan for the relief sought under section 42 of the Specific Relief Act and a great deal has been said as to what is meant by the term 'jurisdiction' which a Court exercises in entertaining and deciding a dispute between the parties. The referring judgment of Rampini and Mookerjee JJ. and the Full Bench decision in *Sukh Lal Sheik* v. *Tara Chand Ta* (1) set out the nature of the jurisdiction which a Court exercises in respect of the cause brought before it.

"Jurisdiction may be defined to be the power of a Court to hear and determine a cause, to adjudicate or exercise any judicial power in relation to it. Such jurisdiction naturally divides itself under three broad heads, namely, (1) with reference to the subject-matter, (2) the parties, and (3) the particular question which calls for decision. A Court cannot adjudicate upon a subject-matter which does not fall within its province as defined or limited by law; this jurisdiction may be regarded to be essential for jurisdiction over the subject-matter is a condition precedent to the acquisition of authority over the parties; and if a Court has no jurisdiction over the subject-matter of the controversy, consent of the parties cannot confer such jurisdiction and a judgment made without jurisdiction in such a case is absolutely null and void. * * * As regards jurisdiction in relation to a particular question which a Court assumes jurisdiction to decide, it can pass judgment only upon a matter which has been submitted to its determination and which under the Statute, it has authority to decide."

(1) 33 Cal. 68,

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But, where the Court possesses inherent jurisdiction over the subject-matter and merely assumes or exercises that jurisdiction in an irregular or illegal manner, the judgment rendered cannot be held to be a nullity [See *Ashutosh Sikdar* v. *Behari Lal Kirtanis* (1)]. The same view is expressed in *H. N. Roy* v. *R. C. Barua Sarma* (2).

Now, the questions dealt with in all these cases relied upon by the plaintiff are clearly distinguishable from those met with in Civil Regular Suit No. 19 of 1915 of the District Court of Myaungmya. There, evidently the deceased R. R. Khan was suing for a declaration regarding the status of the present plaintiff as his step-son. It was not certainly a negative decree which the plaintiff in that suit was seeking. Suits relating to a declaration in respect of status would clearly lie under section 42 of the Specific Relief Act against any person who is interested in denying the legal character of the person suing for the relief. The step-son, by his conduct was interested in denying the deceased's status of a step-father and when his title to such legal character was assailed, the suit brought for a declaration in the manner shown in Exhibit III, would clearly seem to be maintainable. That suits in respect of status were usually brought in the Courts is evident from the instructions given in the Courts Manual in respect of the classification of civil records given in paragraph 921 of the Lower Burma Courts Manual. This paragraph prescribes the division of civil judicial proceedings into four classes of which suits in respect of succession to office or to establish or set aside an adoption or otherwise to establish the status of an individual are to be deemed as falling in Class I along with suits in cases affecting immoveable

(1) I.L.R. 35 Cal. 61. (2) (1921) I.L.R. 48 Cal. 138.

property including suits for foreclosure, redemption, etc.

The kind of suit brought in respect of status met with in Civil Suit No. 19 of 1915 of the District Court of Myaungmya is not dissimilar in character to the relief claimed by the plaintiff in the case of *B. S. Vaktuba* v. *T. A. Raisinghji and others* (1), where a suit was brought for a declaration that a certain defendant was not a son and that he was not born of the plaintiff's wife. At page 683 of the Report, occurs this passage :

" It appear to us that having regard to the really serious nature of the question with which the plaintiff was faced as soon as the assertion was made that a son, not admitted by him, had been born to his wife, his contention as to his right under section 42 of the Specific Relief Act is perfectly reasonable and we hold that this suit is a suit which falls within the purview of section 42."

*In Chinnasami Mudalier and another* v. *A. Mudaliar* (2) the setting up of an adoption is held to be an infringement of the plaintiff's rights so as to entitle him to obtain a declaration under the provisions of the Specific Relief Act. There is therefore no question that in entertaining the suit brought by the deceased R. R. Khan in respect of a declaration of his status as the step-father of the present plaintiff, the District Court of Myaungmya was acting within its competence and the defence now brought forward attacking the said suit cannot be considered to have any validity.

One further point raised on behalf of the plaintiff in answer to the plea of *res judicata* is that the present plaintiff and the present defendants are now all claiming through the former plaintiff R. R. Khan and for that reason the plea of *res judicata* should not prevail. The case of *Syed Ashgar Reza Khan* v. *Syed Mohamed Mehdi Hossein Khan and others* (3) and the

(1) (1910) 34 Bom. 676. (2) 29. Mad. 48.
(3) 30 I.A. 71.

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case of *Muppanar and others* v. *Vijayathammal* (1) have been cited as authorities for this view. This contention is, however, not strictly valid or relevant owing to the wrong assumption that the present plaintiff is seeking a claim in the present suit under the title of the party who figured as the plaintiff in the previous suit. The question which was substantially in issue in the previous case was whether the present plaintiff was the step-son of the deceased R. R. Khan the plaintiff in the previous suit. And the same question is substantially in issue in the present suit before this Court and the contention raised on the plaintiff's behalf that he is now claiming a title derived from the former plaintiff R. R. Khan is clearly inadmissible. The defendants' plea of *res judicata* must accordingly prevail.

The next question of law raised on behalf of the 3rd defendant is that by reason of the plaintiff's apostacy he has lost his right of inheritance even if he succeeds in proving that he is a son of the deceased R. R. Khan. This plea is clearly of no avail in view of the existence of the Caste Disabilities Removal Act (1850). This act is considered to have abrogated a rule of Mohamedan law by which a non-Muslim is excluded from succession to a Muslim (See *Rupa and others* v. *Sarder Mirza and others* (2). *See* also the case of *C.V.N.T. Chidambaram Chettyar* v. *Ma Nyein May and others* (3). The issue raised on the point is answered in the negative.

In the result the plaintiff's suit will stand dismissed with costs. He is liable to pay to Government the amount of court fee which but for the permission to sue *in forma pauperis*, he would be required to pay on his plaint.

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(1) 6 Mad. 43. (2) A.I.R (1920) Lah. 276.
(3) 6 Ran. 243.

## APPELLATE CIVIL.

*Before U Tun Byu, Chief Justice, and U San Maung, J.*

## TAN GWAN LYE (APPELLANT)

*v.*

## MA THAN YIN AND SIX OTHERS (RESPONDENTS).*

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*Mar. 16.*

*Order 41, Rule 22, Code of Civil Procedure—Decision in favour of a party—Whether cross-objections necessary—Specific Relief Act, s. 42—Bare declaration—When party entitled to partition—Maintainability.*

Where a suit had been dismissed by the trial Court on merits, but the trial Court at the same time held that the suit for bare declaration that plaintiff was an *orasa* son, without asking for partition, was sustainable against the defendants—

*Held :* That notwithstanding the fact that no cross-objections had been filed under Order 41, Rule 22, Code of Civil Procedure the respondents could support the judgment in their favour upon an issue decided against them. It was not necessary to file cross-objections in the circumstances of the case, as the defendants had no right of appeal against a judgment in their favour.

*Abinashchandra Ghosh* v. *Narahari Methar*, (1930) I.L.R. 57 Cal. 289 ; *Tausukh Rai* v. *Gopal Mahton*, (1929) I.L.R. 8 Pat. 617 ; *Midnapur Zamindar Company Limited* v. *Naresh Chandra Roy*, (1921) I.L.R. 48 Cal. 460 (P.C.) referred to.

*A. Caspersz* v *Kishori Lal Roy and others*, (1896) I.L.R. 23 Cal. 922 at 929, distinguished.

*Held also :* That the proviso to s. 42, Specific Relief Act, prohibits the court from granting a decree for bare declaration, where the plaintiff, being able to ask further relief, omits to do so. In the present case, the plaintiff could and should have asked for partition ; as he had persisted even in appeal that the suit was properly filed he could not be allowed to amend the plaint at that stage of appeal.

*Suryanarayanamurti and another* v. *Tammanna and another*, (1902) I.L.R. 25 Mad. 504 at 506 ; *Purans and others* v. *T. Ammal and others*, A.I.R. (1937) Ran. 427 at 428, referred to and followed.

*Natesa Ayyar* v. *Mangalathammal*, A.I.R. (1933) Mad. 503 ; *Vedanayaga Mudaliar* v. *Vedammal*, (1904) I.L.R. 27 Mad. 591, distinguished.

Purpose for which letters are issued and the object for which an Administration suit is filed cannot be said to be the same.

*Maung Ye Gyan* v. *Ma Hmi and three others*, (1900—02) 1 L.B.R. 155 at 157, referred to.

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* Civil 1st Appeal No. 75 of 1948 against decree of Original Side, High Court, Rangoon in Civil Regular Suit No. 20 of 1948, dated the 27th August 1948.

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TAN GWAN LYE v. MA THAN YIN AND SIX OTHERS.

*Kyaw Din* for the appellant.

*G. N. Bannerji* for the respondents.

U TUN BYU, C.J.—The plaintiff-appellant Tan Gwan Lye instituted a suit, which is known as Civil Regular No. 20 of 1948 of the Original Side, against the defendants-respondents Ma Than Yin, Ma Saw Hla, Ma Tin, Ma Thein Shin, Ma Kyin Mae, Ma Kyin Nyun and Ma Kyin U for declaration that he was an *orasa* son of the deceased Tan Shu Yon through one Ma Kalama, who was said to be the first wife of the deceased, and that he was entitled, as an *orasa* son, to one-fourth share in the estate of Tan Shu Yon, without adding in his plaint a prayer for partition or possession of his share. Ma Than Yin is a daughter of Tan Shu Yon through his wife Ma Ngwe Hlaing who predeceased her husband, and she denied in her written statement that Tan Gwan Lye was a legitimate son of Tan Shu Yon who appeared to have had five other children through his other wives; and one of the children was said to be a posthumous child. Ma Thein Shin, Ma Kyin Mae, Ma Kyin Nyun and Ma Kyin U were wives of Tan Shu Yon, and they also denied that Tan Gwan Lye was a legitimate son of Tan Shu Yon who died in Rangoon on or about 24th December 1946. Ma Saw Hla and Ma Tin were Tan Shu Yon's wives also.

Tan Shu Yon's father was a Chinaman, and his mother was a Burmese lady named Daw Thein. It appears that Daw Thein's husband predeceased her and that she died some years before Tan Shu Yon. Besides Tan Shu Yon, they also had two other children named Daw Kyin Tee and Tan Shu Swan, both of whom are alive. Tan Shu Yon was a Sino-Burmese Buddhist, and after his demise his daughter

Ma Than Yin applied for letters of administration to his estate in Civil Miscellaneous No. 83 of 1947 of the Original Side. Ma Tin, one of the wives of Tan Shu Yon, also applied for letters of administration to the estate of Tan Shu Yon in Civil Miscellaneous No. 496 of 1947. It might be mentioned here that Ma Than Yin was, at first, appointed administrator *pendente lite* to the estate of Tan Shu Yon. Subsequently her appointment as administrator *pendente lite* was cancelled, and the Official Receiver was appointed Receiver to the estate of the deceased Tan Shu Yon.

Tan Shu Yon was an amorous man, and he died leaving several wives surviving him. It is not disputed in this case that Ma Ngwe Hlaing, Ma Saw Hla, Ma Tin, Ma Thein Shin, Ma Kyin Mae, Ma Kyin Nyun and Ma Kyin U were all wives of the deceased Tan Shu Yon. It appears that Ma Kyin Mae and Ma Kyin Nyun are sisters and that Ma Kyin U is their niece. One Ma Yi, who lived in Rangoon, was also said to be a wife of Tan Shu Yon, and she is said to be dead. The learned Judge before whom the case was heard held in a separate order, dated 9th July 1948, that the suit was maintainable in the form in which it was instituted. He also held subsequently, after all the evidence had been recorded, that Tan Gwan Lye was not a legitimate son of Tan Shu Yon and, as such, was not entitled to any share in the estate of Tan Shu Yon.

The first question which falls to be considered in this appeal is whether the defendant-respondents could be allowed, in view of the provisions of Rule 22 of Order 41 of the Code of Civil Procedure, to raise the preliminary legal issue, which they raised on the Original Side, when they have not filed any cross-objection to the decree ; and the answer must, in our opinion, be in the affirmative. The last paragraph of

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the headnote in the case of *Abinashchandra Ghosh* v. *Narahari Methar* (1) reads as follows:

"A respondent can, under Order 41, Rule 22 of the Civil Procedure Code, 1908, support the decree at the hearing of the appeal by attacking the findings of the original Court on issues decided against him, although he did not file a cross objection, the decree being in his favour."

The headnote in the case of *Tausukh Rai* v. *Gopal Mahton* (2) also reads as follows:

"Where a suit was dismissed against a defendant, but the trial Court had come to a certain finding adverse to the defendant the suit having been dismissed in spite of that finding.

*Held:* That the defendant had no right of appeal against that."

The decision of the Privy Council in the case of *Midnapur Zamindari Company Limited* v. *Naresh Chandra Roy* (3) was also referred to in the above Patna case, where the Judicial Committee observed as follows:

"The widow has not appealed against the decree, nor could she because it is in her favour, but she has appealed against the finding that the brothers were joint in estate. It may be supposed that her advisers were apprehensive lest the finding should be hereafter held conclusive against her, but this could not be so, inasmuch as the decree was not based upon it, but was made in spite of it."

It is thus clear that it is open to a party to a suit to support the decree at the hearing of the appeal on the point that had been decided against that party without filing any cross-objection, where the decree was entirely in it's favour and where that party had no right of appeal against such decision, as in the case now under appeal.

(1) (1930. 57 Cal. p. 289. (2) (1929) 8 Pat. p 617.
(3) (1921) I.L.R. 48 Cal. p. 460 (P.C.).

Rule 22 (*1*) of Order 41 of the Code of Civil Procedure requires a cross-objection to be filed only by a party who had a right to appeal against the decree, but who had failed to do so. There does not appear to be anything in the decree passed in the case now under appeal, against which any of the defendant-respondents could have appealed as the decree was entirely in their favour and as the decision on the preliminary issue was merely to pave the way for the Court to proceed with the trial of the suit. The decision on the preliminary issue does not, and cannot, affect any right, claim or interest of any of the defendant-respondents in the estate of the deceased Tan Shu Yon. The case of *A. Caspersz* v. *Kishori Lal Roy and others* (1), which was cited on behalf of the plaintiff-appellant, is not inconsistent with the cases that have been referred to above, and Lord Hobhouse, at page 929, observed :

"Defendant 4, being invited here, avails himself of the invitation to get the decree varied in his favour. He must, however, fall under the usual rule that the respondents cannot be heard except to support the decree, and can alter it by means of a cross-appeal."

The defendant-respondents Ma Than Yin and others have no desire to alter or vary the decree passed on the Original Side, which was entirely in their favour, and what they purport to do, in raising the preliminary objection here, is to support the decree also on the ground that had been decided against them.

The next question, which arises, is whether the plaintiff-appellant's suit for a bare declaration can, in view of the proviso to section 42 (1) of the Specific Relief Act, be entertained in the circumstances obtaining in the present case.

(1) (1896) 23 Cal. p. 922 at 929.

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In *Suryanarayanamurti and another* v. *Tammanna and another* (1) it was observed as follows :

"The proviso to section 42, Specific Relief Act, prohibits the Court from granting a declaration like that asked for in this suit 'where the plaintiff being able to seek further relief than a mere declaration of title omits to do so.' Here it was open to the plaintiff to have sued for partition of his share in the joint family property, if it was joint family property, as alleged by plaintiff. That was a further relief of a very substantial character, and even if the land were in possession of tenants entitled to continue in occupation it would be no bar to a partition of the property among the members of the family, the tenant's right of occupation, if any, not being affected by such partition."

The above observation applies, in our opinion, with equal force to the case now under appeal. The plaint in the present case shows that Tan Gwan Lye, even if he is a legitimate son of the deceased Tan Shu Yon, would have been entitled to only a portion of the estate of Tan Shu Yon as there are other heirs, who are also entitled to share in the estate of Tan Shu Yon. This is accordingly a case where Tan Gwan Lye could have also asked for partition of his share, and he could therefore be said to be entitled to claim a further relief than a mere declaration. He decided, however, to proceed with the case without claiming a further relief, which he was in the circumstances of this case entitled to do, and, in doing so, brought himself within the prohibition contemplated in the proviso to section 42 of the Specific Relief Act.

In *Purans and others* v. *T. Ammal and others* (2) Baguley J., observed :

"We agree that a suit for a bare declaration ought not be filed in the circumstances of the present case. If the plaintiffs are correct in what they assert in their plaint, the position was

(1) (1902) 25 Mad. p. 504 at 506. (2) A.I.R. (1937) Ran. p. 427 at 428.

that they were joint owners of the house and house-site in question with the firm. They were in possession, but were not entitled to outright ownership, and it is clear that the matter in controversy between the parties cannot be settled finally until the joint property is partitioned between the parties, * * * and no Court should grant a declaration which is merely a part settlement of the dispute in question, and is obtained solely to give the party getting it a tactical advantage in future litigation."

We respectfully agree with the above observation, which appears to us to apply also to the case now under appeal, because, even if Tan Gwan Lye had succeeded in obtaining a declaration in his favour, it is obvious that he must also subsequently institute a suit for partition or possession of his share in the estate of the deceased Tan Shu Yon, and what his share would exactly be will have to be determined in another suit. Admittedly, no suit has yet been filed for the administration of the estate of Tan Shu Yon.

The case of *Natesa Ayyar* v. *Mangalathammal* (1) must of course be read in the light of the special circumstances existing in that case. Certain money was realised, in that case, after the decree had been passed ; and the money was brought into Court for the purpose of realising the decree. It was held there that the custody of the Court was in reality on behalf of the decree-holder only, and for no other owner. In the case now under consideration the Official Receiver could not strictly be said to be holding the estate of Tan Shu Yon for distribution among the heirs of Tan Shu Yon in the absence of a suit for the administration of the estate of Tan Shu Yon or for partition of the estate, and particularly when only application for letters of administration had been filed in Court. The real purpose of granting letters of administration is, it seems

(1) A.I.R. (1933) Mad. p. 503.

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to us, to bestow a representative character to the applicant in respect of the estate left by a deceased person; and in hearing the application for the grant of letters of administration the Court should not be required to enter into the more complicated question of title or to determine the shares of each of the heirs, as those are matters which ought to be decided in a regular suit. The object of an administration suit is not quite the same as the purpose for which a letter of administration is granted as the real object of an administration suit is to have the estate of the deceased administered under a decree of the Court. Thus the purpose for which letters are issued and the object for which an administration suit is filed cannot be said to be the same. In *Maung Ye Gyan* v. *Ma Hmi and three others* (1) Fox J. as he then was, observed:

> "The question of what the estate consisted of and whether the property which the applicant alleged to be the estate did in fact belong to the deceased at the time of her death, and the fact that the property was in the objector's possession were not matters which should have been gone into in a proceeding the object of which was to determine whether the applicant had the first claim to be clothed with the right to represent the deceased."

The case of *Vedanayaga Mudaliar* v. *Vedammal* (2) was a case which was relied upon on behalf of the plaintiff-appellant to indicate that he could properly file his suit in the form which he did for a bare declaration only. That case will have to be read in the special circumstances which existed there; and that was a case where nothing more was required to be done for the purpose of securing to the plaintiff all the rights that he possessed in the property left by the deceased minor; whereas in the case now under appeal it is necessary for the plaintiff to claim partition

(1) (1900—1902) 1 L.B.R. p. 155 at 157. (2) (1904) 27 Mad. p. 591.

or for possession of his share in the estate left by his deceased father before his share in the estate can be made effective to him. There are admittedly a number of claimants with diverse interest in the estate left by Tan Shu Yon, besides the plaintiff-appellant.

It is in any case clear in the case now under appeal that the plaintiff-appellant could have asked for a further relief, that is for partition, and that he omitted to do so. For the reasons that have been already set out the preliminary issue must clearly be answered against the plaintiff-appellant; and, if the preliminary issue had been answered against the plaintiff-appellant, it is obvious that he could not have proceeded with the trial of his suit without at least amending his plaint. We, however, do not consider that we ought to allow him to amend his plaint at the present stage, in view of the fact that he had persisted, even in the appeal, in contending that he could properly file the plaint in the form which he did. It will not however be necessary for us to decide on the second issue because the appeal will have to be dismissed in view of the decision which we have arrived at on the preliminary issue.

The appeal is dismissed with costs.

U SAN MAUNG, J.—I agree.

## APPELLATE CIVIL.

*Before U Tun Byu, Chief Justice, and U San Maung, J.*

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*Mar. 16.*

U MAUNG GALE (APPELLANT)

*v.*

V.V.K.R.V.S. VELAYUTHAN CHETTIAR (RESPONDENT).*

*Liabilities (War-Time Adjustment) Act, 1945, ss. 3 and 5—Limitation Act, Schedule I, Article 181—Execution—Meaning of.*

Where a decree-holder obtained a decree for money on 12th July 1946 and applied for execution on the 11th July 1949 without obtaining leave to execute, but on 5th August 1949 he applied for leave under s. 3 of the Liabilities (War-Time Adjustment) Act, 1947, and the application was granted by the High Court.

*Held:* That Article 181, First Schedule, Limitation Act, does not apply to an application for leave under s. 3 of the Liabilities (War-Time Adjustment) Act. There is nothing in the said section to indicate when the period of limitation for an application is to commence, and nowhere else in the Act has any such period been fixed. S. 3 must be read strictly as it encroaches on the ordinary right of a person to execute a decree or order. Execution means carrying out the judgment or order of a court into effect and must be so read in s. 3. The decree cannot be said to have been made effective unless something has been done to make it so. Order 21, Rule 17, sub-rules (1), (3) and (4), also indicate the meaning in the same sense. It is therefore sufficient if the leave of the court under s. 3 is filed in the execution proceedings before the executing Court passes an order allowing execution.

An application for leave to execute and an application to execute are different applications and question to be decided in these applications are different. An application for execution might be rejected for formal or technical difficulties. In an application for leave to execute, s. 5 of the Liabilities (War-Time Adjustment) Act, 1945, describes the matters to be considered. It is not necessary to consider in such application whether the execution application is barred by limitation. This must be considered in the execution proceedings itself.

*N. K. Bhattacharyya* for the appellant.

*G. Joseph* for the respondent.

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* Civil Misc. Application No. 129 of 1949 against the decree of the High Court on the Original Side in Civil Misc. No. 195 of 1949, dated the 11th November 1949.

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U TUN BYU, C.J.—The respondent V.V.K.R.V.S. Velayuthan Chettiar obtained, on 12th July 1946, a decree for Rs. 994, for arrears of house rent, against the appellant U Maung Gale in Civil Regular Suit No. 293 of 1946, of the Rangoon City Civil Court. On 11th July 1949 the respondent applied in Civil Execution Case No. 384 of 1949 for the execution of the said decree, without obtaining the leave of the Court under section 3 of the Liabilities (War-Time Adjustment) Act, 1945. On 5th August 1949 he applied for leave to execute the decree which he obtained in Civil Regular Suit No. 293 of 1946, as required under the provisions of section 3 of the Liabilities (War-Time Adjustment) Act, 1945, and his application for leave to execute the decree was granted in Civil Miscellaneous No. 195 of 1949 of the Original Side.

The question is, can the respondent Chettiar apply for leave to execute the decree he had obtained after the expiration of three years, where he has already applied for the execution of that decree in a separate proceeding within three years as required in Article 182 of the First Schedule to the Limitation Act. It has not been disputed that the application for the execution of the decree, which the respondent Chettiar filed in Civil Execution Case No. 384 of 1949 was made within three years of the date of the decree. It might be mentioned that no period of limitation has been prescribed under the Liabilities (War-Time Adjustment) Act, 1945, for an application for leave to execute a decree. It has been urged on behalf of the appellant U Maung Gale, who is the judgment-debtor in Civil Regular Suit No. 293 of 1948, that the provisions of Article 181 of the First Schedule to the Limitation Act apply to an application for leave to execute a decree made under section 3 of the Liabilities (War-Time

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Adjustment) Act, 1945, on the ground that Article 181 is an Article which ought to be applied generally to all proceedings and applications for which no period of limitation has been prescribed, either in the Limitation Act or in any other law. We are unable, so far as the present case is concerned, to see any real force in this contention; and the observation which the learned Judge on the Original Side made appears to us to be apposite, which reads as follows:

"If what Mr. Bhattacharryya says be true, then the limitation period for applications under section 3 of the Liabilities (War-Time Adjustment) Act for permission to execute the decree and the time limit within which action should be taken to execute the decree are identical so far as the lower Courts are concerned. But in the case of decrees of the High Court, the limitation period for purposes of execution is twelve years, *vide* Article 183 of the Limitation Act. Applying the arguments of Mr. Bhattacharryya, it would appear that even though Article 183 allows a decree-holder twelve years within which to decide on execution or otherwise, yet in view of section 3 of the Liabilities (War-Time Adjustment) Act, read with Article 181, this period is reduced to three years as the decree-holder must necessarily apply for permission to execute the decree before the expiry of three years. Obviously the period of limitation mentioned in Article 183 cannot possibly be curtailed or reduced by Article 181."

Moreover, there is nothing in section 3 of the Liabilities (War-Time Adjustment) Act, 1945, to indicate when the period of limitation for the purpose of an application under section 3 is to commence. It is likely, in certain cases at least, that the judgment-debtors would not be in a position, owing to war circumstances, to pay anything towards the decrees at the time they were passed; and the necessity for applying for leave will not arise until the judgment-debtor is in a position to pay, at least, something towards the decree.

The relevant portion of section 3 of the Liabilities (War-Time Adjustment) Act, 1945, reads :

"3. Save as provided by this Act, no person shall be entitled except with the leave of the Court, execute or otherwise enforce any decree or order of any Court (whether made before or after the commencement of this Act) for the payment or recovery of money :

*Provided that*, nothing in this section shall apply to—

* * * *."

Section 3 thus leaves the question of limitation untouched, and nowhere in the Act has any period of limitation been placed on an application for leave to execute a decree. It has, however, been contended that section 3, in effect, prohibits an application for execution of decree being filed in any Court without first obtaining the leave of the Court, and that, where the application for the leave of the Court is made more than three years after the decree was passed as in the case now under appeal, the application for execution should be considered to have been time-barred, although an application for execution had been filed within three years. Section 3 will have to be read strictly in that it encroaches on the ordinary right of a person to execute or enforce a decree or order for payment of money, which a Court has passed in his favour.

It has been said that "execution, *executio* signifieth in law the obtaining of actual possession of anything acquired by judgment of law or by a fine executory levied whether it be by the sheriff or by the entry of the party." 1) In *Wharton*'s Law Lexicon, "execution" has been said to mean "the last state of a suit whereby possession is obtained of anything recovered by a judgment."

Thus the expression "execute" conveys the idea of carrying out the judgment or a final order of a Court

(1) Co. Litt. 154d.

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into effect; and it appears to us that the word "execute" in section 3 of the Liabilities (War-Time Adjustment) Act, 1945, ought to be read in that sense. If it is read in that sense, it is difficult to conceive how the decree can be said to have been made effective at all unless something has been done which had the effect of making the decree effective, at least partially. It is obvious that the decree cannot be considered to have been made effective, at last, until the executing Court passes an order which will enable the decree-holder to recover something towards his decree.

The wordings of sub-rules (1), (2) and (4) of Rule 17 of Order XXI of the Code of Civil Procedure also indicate that the decree ought not to be considered to have been executed until the executing Court passes an order allowing the decree to be executed. It is therefore only reasonable to conclude that it will be sufficient for the purpose of the executing Court, if the leave of the Court contemplated in section 3 of the Liabilities (War-Time Adjustment) Act, 1945, is filed in the execution proceeding before the executing Court passes any order allowing the decree to be executed. An application for the leave of the Court to execute a decree under section 3 of the Liabilities (War-Time Adjustment) Act, 1945, and an application, for execution appear to us to be clearly distinct applications, and that the questions which fall to be decided in these two applications are different. It is clear that when an application for the execution of a decree is filed in Court it does not necessarily follow that the Court will allow execution to be made. It is possible that the application for execution might be rejected because of some formal or technical defects in the application or that the Court might require the application for execution to be amended before it hears such application and orders execution to be made.

The matter which is to be considered in an application for leave to execute a decree under section 3 of the Liabilities (War-Time Adjustment) Act, 1945, has been set out in section 5, which reads :

" 5. If, on an application for such leave as is required under section 3 or section 4 for the exercise of any of the right and remedies mentioned in those sections, the Court is of opinion that the person liable to satisfy the decree or order is unable immediately to do so by reason of war circumstances, the Court may refuse leave for the exercise of that right or remedy or give leave therefor subject to such terms, restrictions and conditions as the Court thinks fit."

It is clear therefore that it is not necessary in an application for leave to execute a decree to consider whether the execution application, which will be proceeded with after the leave is obtained, is barred by limitation of time or not. The question of limitation of time should ordinarily be raised in the execution proceeding unless it was obvious on the face of the record or the admission of the parties that the application for execution in the executing Court had been barred by limitation of time. This is not such a case, and we do not therefore propose to express any opinion on the question of limitation, but will leave this question to be dealth with, if necessary, in the executing Court.

The appeal is dismissed with costs, and Advocate's fee three gold mohurs.

U SAN MAUNG, J.—I agree.

## APPELLATE CIVIL.

*Before U Tun Byu, Chief Justice, and U San Maung, J.*

H.C. 1950

*Mar. 28.*

U TUN MYINE AND ONE (APPLICANTS)

*v.*

KO AYE MAUNG (RESPONDENT).*

*Code of Civil Procedure, s. 110, paragraph 2—S. 5 (c), Union Judiciary Act, 1948—Value of subject-matter of the appeal—Mortgage decree—Value of debt or of property given as security.*

For the purposes of granting a certificate under s. 5 (c) of the Union Judiciary Act, as under s. 110 (2) of the Code of Civil Procedure, the judgment must involve directly or indirectly some question respecting the property, the value of which is not less than Rs. 10,000.

In a suit on a mortgage, the Mortgagee cannot obtain more than the amount claimed under the decree, which, in this case, was less than Rs. 10,000. It is not the value of the property that is the test.

*M. E. Moolla & Sons, Ltd.* v. *Leon Shain Sway*, (1926) 4 Ran., 92 at p. 94; *De Silva* v. *De Silva*, (1904) 6 Bombay Law Reporter 403 at p. 406; *N. C. Galliara* v. *A.M.M. Murugappa Chetty*, (1934) 12 Ran. 355 at pp. 363 and 364; *Mrs. Constance M. Writer* v. *A. M. Khan*, Civil Misc. Application No. 26 of 1949 of the High Court referred to and followed.

*Nadir Hussain and others* v. *Municipal Board, Agra*, (1937) All. 405 at p. 410; *Ishwari Prasad Singh and others* v. *Sir Kameshwar Singh Bahadur and others*, (1941) A.I.R. Pat. p 288, distinguished.

*Hla Tun Pru* for the applicants.

*Ba Nyunt* for the respondent.

U TUN BYU, C.J.—The plaintiffs-applicants U Tun Myine and Ma Than obtained, on 3rd May 1949, a preliminary mortgage decree for a sum of Rs. 1,890 against the respondent Ko Aye Maung, who was the 1st defendant in Civil Regular Suit No. 936 of 1948 of the City Civil Court, Rangoon, but their claim as

* Civil Misc. Application No. 1 of 1950 for Leave to appeal to the Supreme Court of the Union of Burma against the Judgment and Decree in Civil First Appeal No. 32 of 1949, dated the 23rd November 1949.

against Ma Aye Khin, wife of Ko Aye Maung, and Maung Han, who were the 2nd and 3rd defendants in the said suit, was dismissed. Ko Aye Maung appealed against the decree which was passed against him in Civil Regular Suit No. 936 of 1948, and he was successful in the appeal, which was known as Civil First Appeal No. 32 of 1949.

The plaintiffs-applicants U Tun Myine and Ma Than now apply under section 5 of the Union Judiciary Act, 1948, for a certificate to appeal to the Supreme Court on the ground that the case is one which falls within clause (*c*) of section 5, which is, in effect, the same as the second paragraph of section 110 of the Code of Civil Procedure. It has been submitted on behalf of the plaintiffs-applicants that as the mortgaged property is worth more than Rs. 10,000 in value, a matter which is, however, not admitted by the defendant-respondent, a preliminary mortgage decree should be considered to be a decree which involves some claim or question respecting property of over Rs. 10,000 in value. It has been argued that as a mortgage constitutes an interest in an immovable property, the preliminary mortgage decree should be considered to be a decree which involves the consideration of a question respecting the immovable property which, so far as the present case is concerned, is for more than Rs. 10,000 in value.

The question which arises is, whether the present case can be considered to fall within the meaning of clause (*c*) of section 5 of the Union Judiciary Act, 1948, and, in our opinion, this question will have to be answered in the negative. In *M. E. Moolla & Sons, Ltd.* v. *Leon Shain Sway* (1), it was observed, in connection with the second paragraph of section 110 of the Code of Civil Procedure, which is equivalent to

(1) (1926) 4 Ran. p. 92 at 94.

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clause (*c*) of section 5 of the Union Judiciary Act, 1948, as follows :

" We consider that the law on this question has been accurately laid down by Sir Lawrence Jenkins C J. in the case of *De Silva* v. *De Silva* (1) 'To entitle the plaintiff to appeal he must show that the conditions as to value prescribed by section 596 of the Civil Procedure Code are satisfied, and for this purpose the decree is to be looked at as it affects the interests of the party who is prejudiced by it, and who seeks to relieve himself from it by appeal.' The principle in that case has been followed by a Bench of the Patna High Court in (1919) 4 Patna Law Journal, page 415. "

The interpretation of paragraph 2 of section 110 of the Code of Civil Procedure was again considered in *N. C. Galliara* v. *A.M.M. Murugappa Chetty* (2), and Page C.J. before whom most of the earlier cases were canvassed, observed as follows :

" . . . . . I am firmly of opinion that a certificate granting leave to appeal to His Majesty in Council must be refused. What loss or detriment have the applicants or any other alleged creditors of the respondent suffered by reason of the decree or order of the High Court dismissing this petition? The value of the petitioning-creditors ' debts is not in controversy at this stage of the proceedings, and is not the criterion to be applied, nor is the value of the respondents' estate as a whole. The question that falls for determination, in my opinion is, have the applicants been able to satisfy the Court that they or any of them have suffered loss or detriment of the value of Rs. 10,000 by reason of the decree or order from which they seek to obtain leave to appeal? In my opinion they have not. "

Thus, it has been held by the High Court of Judicature at Rangoon that it is the detriment or loss to applicant which is to be considered in an application for leave to appeal to the Privy Council under the second paragraph of section 110 of the Code of Civil Procedure.

(1) (1904) 6 Bombay Law Reporter, p. 403 at 406.
(2) (1934) 12 Ran. p. 355 at 363 and 364.

In *P.L.M.C.T.M. Kasiviswanathan Chettyar* v. *P.L.M.C.T.K. Krishnappa Chettyar* (1) this High Court followed the decision made in the case of *N. C. Galliara* v. *A.M.M.Murugappa Chetty* (2), where it was observed as follows :

"Section 5 (*c*) of the Union Judiciary Act, 1948, like the second paragraph of section 110 of the Code of Civil Procedure requires that the judgment, decree or final order must involve directly or indirectly some claim or question respecting property the value of which is not less than ten thousand rupees; and so far as the said paragraph is concerned it has been held in *N. C. Galliara* v. *A.M.M. Murugappa Chetty* (2) that it is the extent to which the decree or order has operated to the prejudice of the applicant that determines whether the decree or order is subject to appeal or not, and whatever may be the value of the property in respect of which a claim or question is involved in the appeal, no appeal lies under section 110 unless the value of the loss or detriment which the applicant has suffered by the passing of the decree or order, and from which he seeks to be relieved by His Majesty in Council, is Rs. 10,000 or upwards."

A similar view was held in a subsequent case of *Mrs. Constance M. Writer* v. *A. M. Khan* (3).

It has been contended, however, on behalf of the plaintiffs-applicants that the decision made in *Nadir Husain and others* v. *Municipal Board, Agra* (4) lays down the correct law in respect of the interpretation of the second paragraph of section 110 of the Code of Civil Procedure, and that it ought to be accepted as giving a correct interpretation to the second paragraph of section 110 of the Code of Civil Procedure. There it was observed :

"Looking at the reliefs claimed in the plaint there is no doubt that the plaintiff wants a decree for sale of the entire mortgaged property which is owned by the defendants, for the realisation of

(1) Civil Misc. Application No. 10 of 1949 of the High Court.
(2) (1934) 12 Ran. p. 355 at 363 and 364.
(3) Civil Misc. Application No. 26 of 1949 of the High Court.
(4) (1937) All., p. 405 at 410.

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Rs. 7,625. The plaintiff claims that that sum is a charge on the entire mortgaged property and it is open to the plaintiff to select any part of the mortgaged property at his option and put it up for sale at auction first, or he may put up the whole property for sale, particularly as the properties consist of house properties and it may be very inconvenient to put up fractional shares for sale only. The question in dispute was as to the interpretation of the hypothecation bond, namely whether it created a charge on the entire property for amounts which had accrued subsequent to the date of the document. We find it very difficult to hold that the High Court's decree does not direc ly or indirectly involve some claim or question to or respecting property of the value of Rs. 10,000."

The above Allahabad case is, of course, similar to the present case, and it was also followed in *Ishwari Prasad Singh and others* v. *Sir Kameshwar Singh Bahadur and others* (1), where it was observed:

"It is plain that if the plaintiffs do not succeed in this litigation the property which they have purchased in execution of their mortgage decree will be liable to be sold, and that property is worth much more than Rs. 10,000. That being so, it is difficult to hold that the decree which is sought to be appealed from does not involve indirectly a question respecting property more than Rs. 10,000."

The facts in the case of *Ishwari Prasad Singh and others* v. *Sir Kameshwar Singh Bahadur and others* (1) are not really quite the same as in the present case, in that in the Patna case the mortgagee had already purchased the property in question, and it could thus be considered, in that case, that the interest of the mortgagee, who had already purchased the property in question, should be considered to extend to the full value of the property purchased by him. In the case at present under consideration the plaintiffs-applicants, who were the mortgagees, have not yet purchased the property under mortgage. It

(1) (1941) A.I.R. Pat. p. 288.

appears to us that, even if they succeed in the present litigation, they cannot obtain more than the amount which they would be entitled to under the mortgage decree, which admittedly was very much less than Rs. 10,000. Even if they had been able to buy over the property under mortgage, it seems to us that it could not strictly be said that they obtained the property through or by means of the mortgage decree, in that other persons who had no interest whatever in the mortgage decree could, if they so desired, have also purchased the mortgaged property, although they were not parties to the mortgage decree.

The decision in the case of *Nadir Husain and others* v. *Municipal Board, Agra* (1) was discussed in *Sm. Sati Bala Dasi* v. *Chota Nagpur Banking Association Limited and another* (2), and it was expressly dissented from, where it was observed, with reference to the case of *Nadir Husain* v. *Municipal Board, Agra* (1), as follows :

"As the decree directed the sale of property of a greater value than Rs. 10,000 it was held that the conditions required by the second clause of s. 110 were satisfied. With very great respect, I am unable to agree with the reasoning in that case. In a mortgage suit the property which is given as security for the loan is not the property in dispute in the suit, nor is a decision that the mortgagee is entitled to recover the money which he advanced one involving either a claim to or question respecting the security. The only property in dispute in a mortgage suit is the loan advanced by the mortgagor to the mortgagee. The mere fact that, if this loan is not repaid in the time fixed by the decree, the mortgaged property will be sold does not, in my opinion, raise any question affecting the security."

We respectfully agree with the above observation. It appears to us to be only proper and reasonable that the decree for which leave to appeal to the Supreme

(1) (1937) All., p. 405 at 410. (2) (36) A.I.R. (1949) Pat., p. 448.

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Court is sought should be looked at from the effect which the decree had on the parties seeking to appeal, and looking at it in that light, the value of the mortgaged property becomes immaterial for the purpose of the present application, as the plaintiffs-applicants, who were the mortgagees, cannot, even if they succeed in this litigation, be said to have any interest or claim in the mortgaged property in excess of the amount due under the mortgage, at least until they had acquired the mortgaged property by purchase at an auction sale or otherwise.

It will, we think, be convenient to also reproduce here the observation of the Privy Council in the case of *Andrew Macfarlane and another* v. *Francois Leclaire and Jean Leclaire* (1), which reads:

> "In determining the question of the value of the matter in dispute upon which the right to appeal depends, their Lordships consider the correct course to adopt is to look at the judgment as it affects the interests of the parties who are prejudiced by it, and who seek to relieve themselves from it by an appeal. If their liability upon the judgment is of an amount sufficient to entitle them to appeal, they cannot be deprived of their right because the matter in dispute happens not to be of equal value to both parties; and, therefore, if the judgment had been in their favour, their adversary might possibly have had no power to question it by an appeal."

Thus it had been observed by the Privy Council, as far back as 1862, that what ought to be considered in ascertaining the value of the appeal was to examine the decree and ascertain to what extent it affected the interests of the party who sought to obtain leave to appeal.

The application for a certificate for leave to appeal to the Supreme Court under clause (c) of

(1) (1862) 15 P.C.C. 181.

section 5 of the Union Judiciary Act, 1948, is therefore dismissed with costs, Advocate's fee three gold mohurs.

U SAN MAUNG, J.—I agree.

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## APPELLATE CIVIL.

*Before U Tun Byu, Chief Justice, and U San Maung, J.*

H.C. 1950

*Apl. 3.*

THE OFFICIAL RECEIVER (APPELLANT)

*v.*

MANIKRAM BALABUX BAJAJ (RESPONDENT).*

*Evidence Act, s. 35—Admissions contained in a judgment—Admissibility —Order 41, Rule 23, Code of Civil Procedure—Preliminary point.*

*Held:* A previous judgment containing an admission made by a party against whom the judment was sought to be used is relevant under s. 35 of the Evidence Act. Where a court acted upon an oral admission and recorded it in its judgment it constitutes the only official record and is admissible as such admission.

*Krishnasami Ayyangar* v. *Rajagopala Ayyangar and others*, 18 Mad. 73; *Gujju Lall* v. *Fatteh Lall*, I.L.R. 6 Cal. 171 ; *Byathamma* v. *Ayulla*, I.L.R. 15 Mad. 19 at 23 ; *Parbutty Dassi* v. *Purno Chunder Singh*, I.L.R. 9 Cal. 586 ; *Thama* v. *Kondan*, I.L.R. 15 Mad. 378 ; *V.E.R. Subbaraya Chettiar and others* v. *Sellamuthu Asari*, A.I.R. (1933) Mad. 184, referred to.

*Collector of Gorakhpur* v. *Ram Sundar Mal and others*, A.I.R. (1934) P.C. 157 at 165, followed.

The expression " preliminary point " occurring in Order 41, Rule 23 of the Code of Civil Procedure is not confined to such a legal point only as may be pleaded in bar of a suit but comprehends the necessity for determining other points or issues.

*Ramachandra Joishi* v. *Hazi Kassim*, 16 Mad. 207; *Malayath Veetil Raman Nayar and others* v. *Krishnan Nambudripad*, 45 Mad. 900 ; *Mata Din and others* v. *Jamna Das and another*, 27 All. 691 ; *Meghan Dube and another* v. *Prasan Singh and others*, 30 All. 63 ; *Kamta and others* v. *Parbhu Dayal and another*, 39 All. 165, referred to.

*P. B. Sen* for the appellant.

*J. B. Sanyal* for the respondent.

U SAN MAUNG, J.—In the suits out of which these appeals have arisen the Official Receiver, High Court, Rangoon, who had been appointed Receiver of the

* Civil First Appeals Nos. 59 and 60 of 1949 against the decrees of the Chief Judge, City Civil Court, Rangoon in Civil Regular Nos. 40 and 41 of 1949, dated the 6th September 1949.

properties in Civil Regular Suit No. 27 of 1941 of the High Court, sued Manikram Balabux Bajaj, the only defendant in the aforesaid suit, for the recovery of arrears of rent in respect of room No. 3 on the ground floor of house No. 653/659, Merchant Street, Rangoon, and two rooms on the second floor of house No. 71/75 in 30th Street, Rangoon, on the ground that Manikram Balabux Bajaj was in occupation of these rooms as his tenant. He also asked for the ejectment of Manikram Balabux Bajaj from these rooms. The defendant Manikram Balabux Bajaj who is the respondent in these appeals admitted that he was in occupation of the rooms in question but denied that he was a tenant of the Official Receiver. He contended that he was in occupation of these rooms as owner of the houses in which they were situate. The two suits were tried together by the learned Chief Judge of the City Civil Court, who framed one set of issues for both. These issues are as follows :

(1) Is the defendant a tenant of the plaintiff in respect of the premises described in both the suits ?

(2) If so, has he been in default of payment of rents in respect of the said premises and is he liable to be ejected from them ?

(3) Are the notices duly served on the defendant and are they valid in law ?

(4) Is the plaintiff entitled to the balance of rents now sued for ?

(5) To what relief is the plaintiff entitled in both the suits ?

Only one witness was examined in the case he being Mr. S. M. Basu, Bailiff of the Official Receiver's Department of the High Court. The rest of the evidence adduced on behalf of the plaintiff consisted of correspondence which was said to have passed between him and the defendant Manikram Balabux

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Bajaj in respect of the premises in suit and in order dated the 12th February, 1948, passed by U Thein Maung, the then Chief Justice of the High Court, in Civil Regular Suit No. 27 of 1948. No evidence whatsoever was led on behalf of the defendant, the application of his agent C. C. Ram to have him examined on commission at Fatehpur in the State of Jaipur having been dismissed by the learned trial Judge. The learned Judge however dismissed the plaintiff's suits on the ground that there was no proof of the fact that the letters alleged to be written by the defendant Manikram Balabux Bajaj were in fact written by him, that the order of the then Chief Justice in Civil Regular Suit No. 27 of 1941 was inadmissible for the purpose of proving the admission alleged to have been made by the defendant and that the only witness cited by the plaintiff had no personal knowledge of the fact that the defendant had attorned to the plaintiff. Hence these appeals by the plaintiff.

In our opinion the learned trial Judge was wrong in having rejected the correspondence which was alleged to have passed between the Official Receiver (plaintiff) and the defendant Manikram Balabux Bajaj as inadmissible in evidence. These are the letters which have been proved by the evidence of Mr. S. M. Basu, Bailiff of the Official Receiver, as having been sent to Manikram Balabux Bajaj at Fatehpur in Jaipur State and as having been received from Manikram Balabux Bajaj whose address was given as Fatehpur in Jaipur State. In the first letter (Exhibit C), dated the 9th May, 1946, the Official Receiver informed Manikram Balabux Bajaj that since he was in occupation of the top floor (namely the second floor) of house No. 71/75 in 30th Street, this floor would be reserved for him on his paying rent as from the 1st February, 1946, but that if no reply was received by the 27th of May, 1946,

it would be rented out to others. No letter was sent by Manikram Balabux Bajaj in reply to this letter so that the Official Receiver again wrote to M. B. Bajaj on the 31st July, 1946. In that letter (Exhibit E) the Official Receiver referred to his previous letter and stated that on the 22nd of May, 1946, a telegram was received from M. B. Bajaj in code words which could not be deciphered and that since no further intimation was received from M. B. Bajaj, the second floor of house No. 71/75 in 30th Street except two rooms therein and the kitchen on the roof had been leased out to others and that the two rooms and the kitchen had been kept in reserve for him. To this letter (Exhibit E) and to the previous letter (Exhibit C) Manikram Balabux Bajaj sent a consolidated reply (Exhibit D). Therein he referred to his previous telegram in code and explained that the code used was Bentley's. He also spoke of a letter having been sent to the Official Receiver on the 20th August, 1945, which was returned to him on the 29th August with the remark "No Service." He asked for the whole of the second floor of house No. 71/75 in 30th Street to be reserved for the use of himself and his family and requested that the first floor and the ground floor be leased out to a good Marwari or Gujrati family except M. Hanumanbax Bajaj (one of the plaintiffs in Civil Regular Suit No. 27 of 1941). This letter was dated 25th June, 1946 and was apparently received in the Official Receiver's Office on the 16th July, 1946. Thereafter, according to Mr. S. M. Basu, on the 27th January, 1947, the defendant's man came and showed the Official Receiver a telegram (Exhibit F) purported to have been sent by one Sawal Ram of Calcutta to Lihla of Rangoon to the effect that Balabux had started for Rangoon and in pursuance thereof two keys were handed over to the defendant's man. The next

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day he submitted a report (Exhibit G) to the Official Receiver, which reads :

" Estate M. H. Bajaj *v.* M. B. Bajaj.

The defendant arrived in Rangoon on 28th January, 1947.

One room on the 2nd floor and the room on terrace of house No. 71/75, 30th Street, Rangoon were reserved for him. He has occupied these rooms with effect from 28th January, 1947."

On the 22nd April, 1947, the Official Receiver wrote the letter (Exhibit H) to M. B. Bajaj at No. 71/75, 30th Street, Rangoon, that the rent for the two rooms occupied by him in that house had been fixed at Rs. 30 per mensem and that claim for rent would be made with effect from the date on which he had occupied these rooms. To this a reply purported to have been sent by M. B. Bajaj with address at 71/75, 30th Street, Rangoon, was received. The relevant portion of this reply (Exhibit J) which is dated 1st May 1947 reads :

" Dear Sir,—I have never paid any rent before for the room in my personal occupation of the house No. 71/74, 30th Street, Rangoon. However, if the payment of the rent is insisted on now, am prepared to pay the usual rent."

In respect of the house in Merchant Street there is a letter purported to have been sent by Manikram Balabux Bajaj with address at No. 71/75 in 30th Street, Rangoon, to the Official Receiver, Rangoon, on the 12th of April, 1947. This letter reads as follows :

" Dear Sir,—Herewith I am sending Rs. 200 as advance for the room No. 3, house No. 653/659, Merchant Street, Rangoon rented to me through my durwan Chandradeo Dube.

Please acknowledge the receipt of it and hand over the key of the said room to him. The lock and key will be returned to you. The receipt may be granted in the name of . . . . . "

According to Mr. S. M. Basu, the money was received by him as Bailiff on the same date, namely 12th April, 1947, and he gave a receipt to the

defendant. He has not been cross-examined with a view to establish the fact that the receipt could not have been given to the defendant as the letter and the money were said to have been brought by the defendant's durwan Chandradeo Dube. Therefore, as the receipt thereof was given by Mr. S. M. Basu to the defendant personally, the identity of the person who sent the letter (Exhibit N) has been established; otherwise there was no point in the defendant taking the receipt for the money sent by some other person as, for instance, one of his opponents in Civil Regular Suit No. 27 of 1941. The letter (Exhibit N) must be presumed to have been sent by the defendant Manikram Balabux Bajaj and the signature thereon that of the defendant.

We have carefully compared the signature on (Exhibit N) with the signatures on (Exhibit D), which was purported to have been sent by the defendant from Fatehpur, and (Exhibit J) which was purported to have been sent by him from No. 71/75, 30th Street, Rangoon, and we are of the opinion that they are the signatures of one and the same person. Therefore, apart from the internal evidence which goes to suggest that the letters (Exhibits D and J) were sent by the defendant to the Official Receiver in the circumstances recited therein, there is the fact that the signatures on these letters are the same as the signature on the letter (Exhibit N) which has been established by the evidence of Mr. S. M. Basu to be a letter received from the defendant himself.

The letters (Exhibit D and J) therefore strongly support the evidence of Mr. S. M. Basu that the defendant was the tenant of two rooms in house No. 71/75 in 30th Street, Rangoon, a fact which was reported by him to the Official Receiver as early as the 30th of January, 1947.

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As regards room No. 3 on the ground floor of house No. 653/659, Merchant Street, Rangoon, the plaintiff's case that the defendant is the tenant of this room is amply borne out by the letter (Exhibit N) and the true copy of the receipt (Exhibit O), which was issued in pursuance thereof. It is quite inconceivable that as early as April 1947, the opponents of the defendant Manikram Balabux Bajaj in Civil Regular Suit No. 27 of 1941 would, in collusion with some one in the Office of the Official Receiver, Rangoon, have brought about the existence of a receipt like (Exhibit O) for the purpose of foisting a false case upon the defendant that he was the tenant of room No. 3 in house No. 653/659, Merchant Street, Rangoon, when he was in fact not.

Now, as regards the order of U Thein Maung C.J., dated 12th February, 1948, in Civil Regular Suit No. 27 of 1941, we are of the opinion that the learned trial Judge was wrong in having rejected it as inadmissible in evidence. This order which will be quoted *in extenso* runs as follows :

**Civil Regular No. 27 of 1941**

SARASWATI AND TWO OTHERS *v.* M. B. BAJAJ.

For plaintiff—*Chakravarty.*

For defendant—*A. N. Basu.*

ORDER.

The first two prayers of the defendant must be refused as (1) it is not at all clear that he was in occupation of the whole of the second floor before the war, (2) he admits that he has not paid rents for the two rooms on that floor although he has occupied them since the 28th January 1947 as a tenant of the Official Receiver, (3) the Official Receiver has already granted a lease—though it is from month to month only—to Sagarmal who appears to have paid rents regularly since June or July 1946 under circumstances set out in paragraphs 4 and 5 of his Report, dated the 11th December 1947, (4) I am not satisfied that

Sagarmal has sublet the rooms and (5) there is no reason to interfere with the discretion of the Official Receiver in the matter.

The third prayer also must be refused as it is not necessary to fetter the discretion of the Official Receiver as suggested or at all. It really does not matter whether he gets the rents from the occupants of the first floor or from Sagarmal so long as he gets them regularly. With reference to the defendant's contention that the rents for the first floor are too low, the Official Receiver has stated in his Report that Sagarmal, who has applied for extension of the lease, is prepared to pay rents at enhanced rate.

The application is dismissed. However, the Official Receiver should see that he gets rents which are reasonable having regard to standard rents under the Urban Rent Control Act, 1948, both for the second floor of House No. 71/75 in 30th Street, Rangoon, and the first floor of House No. 653/659, Merchant Street, Rangoon.

(Sd.) THEIN MAUNG,
*Chief Justice.*

* * * *

Copy of the above order forwarded to the Official Receiver of this Court for information with reference to his report, dated the 11th December 1947.

(Sd.) MAUNG KHA,
*Deputy Registrar,*
*Original Side.*

There is no dispute regarding the fact that in that suit Saraswati and two others were the plaintiffs and Manikram Balabux Bajaj was the only defendant. There is also no dispute regarding the fact that the Official Receiver of the High Court was in charge of the properties involved in that suit. From the order dated 12th February, 1948, it is clear that whereas the Official Receiver had rented the whole of the second floor of house No. 71/75 in 30th Street, Rangoon, except the two rooms on that floor, to one Sagarmal, the defendant. M. B. Bajaj was contending that the whole of the second floor should be given to him as he

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was in occupation thereof before the war and that therefore the Official Receiver's action in leasing part of the second floor to Sagarmal was wrong. In making that contention M. B. Bajaj had to admit *inter alia* that he had not paid rents for the two rooms on the second floor of house No. 71/75 in 30th Street, Rangoon, which he had occupied, since the 28th January, 1947, as a tenant of the Official Receiver, and the then Chief Justice of the High Court after considering the report of the Official Receiver on the points raised by the defendant decided that he saw no reason to interfere with the discretion of the Official Receiver in the matter. Viewed in that sense the order although recorded in a suit in which Saraswati and two others and M. B. Bajaj were the plaintiffs and the defendant respectively was in fact an order which decided a dispute between the Official Receiver and the defendant Manikram Balabux Bajaj.

Now, in the case of *Krishnasami Ayyangar* v. *Rajagopala Ayyangar and others* (1) a Bench of the Madras High Court held that a previous judgment containing an admission made by the predecessor-in-title of the party against whom the judgment was sought to be used was relevant under section 35 of the Evidence Act. In distinguishing the case under their consideration from the case of *Gujju Lall* v. *Fatteh Lall* (2) the learned Judges observed at page 77 :

"As pointed out by this Court in *Byathamma* v. *Ayulla* (3), the sole object for which it was sought to use the former judgment in *Gujju Lall* v. *Fatteh Lall* (2) was to show that in another suit against another defendant the plaintiff had obtained an adjudication in his favour on the same right : and it was held that the opinion expressed in the former judgment was not a relevant fact within the meaning of the Evidence Act. The case

(1) 18 Mad. 73. (2) I.L.R. 6 Cal. 171.
(3) I.L.R. 15 Mad. 19 at 23.

is clearly different where the previous judgment is produced not in order to prove an adjudication between third parties, but in order to prove a statement made by a predecessor in title of the party against whom the document is sought to be used; *Cf. Parbutty Dassi* v. *Purno Chunder Singh* (1) and *Thama* v. *Kondan* (2). Such is the case here and we have no doubt that the judgments in question are relevant under section 35 of the Evidence Act."

These observations were approved by their Lordships of the Privy Council in *Collector of Gorakhpur* v. *Ram Sunder Mal and others* (3) in these words:

"In *Krishnasami Ayyangar* v. *Rajagopala Ayyangar* (4) a statement amounting to an admission which was contained in a judgment was received in evidence under section 35 as an entry in a record made by a public servant in the course of his duty. There is much to be said for this view of section 35. In India judgments have to be in writing and signed by the Judge and the original judgments and decrees are records of the Court and retained in the record room, the parties being supplied with certified copies only."

*See* also the case of *V.E.R. Subbaraya Chettiar and others* v. *Sellamuthu Asari* (5) where it was held that where the Court had acted upon an oral admission and recorded it in its judgment which constitutes the only official record of it, it is admissible in evidence under section 35 of the Evidence Act. Therefore, the admission made by the defendant in Civil Regular Suit No. 27 of 1941 that he was the tenant of the Official Receiver in respect of the two rooms on the second floor of house No. 71/75 in 30th Street, Rangoon, since the 28th of January, 1947, is admissible in evidence and it is in strong corroboration of the plaintiff's case in regard to house No. 71/75 in 30th Street, Rangoon. On the evidence adduced on behalf of the plaintiff a strong

(1) I.L.R. 9 Cal. 586.
(2) I.L.R. 15 Mad. 378.
(3) A.I.R. (1934) (P.C.) p. 157 at 165.
(4) 18 Mad. 73.
(5) A.I.R. (1933) Mad. 184.

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*prima facie* case has been made out to show that the defendant was his tenant in respect of the two rooms on the second floor of house No. 71/75 in 30th Street, Rangoon, and room No. 3 on the ground floor of house No. 653/659, Merchant Street, Rangoon. No attempt whatsoever was made by the defendant to rebut the plaintiff's case. No doubt the application of his agent C. C. Ram to have him examined on commission at Fatehpur in Jaipur State was unsuccessful. Nevertheless the defendant's agent, if he was really minded to contest the plaintiff's case, could have obtained a reasonable adjournment from the Court to enable the defendant to attend in person in order to be examined as a witness in the case. As it is there is no evidence whatsoever on record to show that the letters alleged to have been written by him were in fact forgeries. Furthermore, although the defendant's agent could have easily obtained witnesses familiar with the handwriting of the defendant to come forward to swear that the signatures on (Exhibits D, J and N) were not those of the defendant—if they were in fact not—no attempt whatsoever was made to characterize them as forgeries. In fact, the defendant's agent himself who must have been perfectly familiar with the defendant's signature had not the courage to enter the witness box to swear that the signatures on the exhibit letters did not appear to be those of his principal Manikram Balabux Bajaj.

For these reasons we hold that the learned Chief Judge of the City Civil Court was wrong in coming to a finding that the defendant was not the tenant of the Official Receiver in respect of the two rooms on the second floor of house No. 71/75 in 30th Street, Rangoon, and room No. 3 on the ground floor of house No. 653/659, Merchant Street, Rangoon. The answer to the first issue must be in the affirmative. Having

answered this issue in the affirmative we consider that this case should be remanded to the City Civil Court under Order XLI, Rule 23 of the Civil Procedure Code for the trial of the rest of the matter in controversy. The expression "preliminary point" occurring in this rule is not confined to such legal points only as may be pleaded in bar of a suit but comprehends all points or issues whether of fact or of law, the determination of which has precluded the necessity for determining other points or issues which have therefore been left undetermined. See *Ramachandra Joishi* v. *Hazi Kassim* (1), *Malayath Veetil Raman Nayar and others* v. *Krishnan Nambudripad* (2), *Mata Din and others* v. *Jamna Das and another* (3), *Meghan Dube and another* v. *Pran Singh and others* (4) and *Kamta and others* v. *Parbhu Dayal and another* (5). Apart from the fact that the learned trial Judge has not discussed the other issues in the case in view of his answer to the first issue, the provisions of sub-section (1) of section 14 of the Urban Rent Control Act, 1948, makes it desirable that the matter relating to the ejectment of the defendant should be dealt with by the learned trial Judge himself.

For these reasons we would set aside the judgments and decrees of the City Civil Court, Rangoon, and direct that the suits be remanded to the City Civil Court under Order XLI, Rule 23 of the Civil Procedure Code for the trial of issues Nos. 2, 3, 4 and 5. The costs of these appeals must abide the final result of the suits. Certificates for the refund of Court fees paid on the memoranda of appeals will be issued to the plaintiff-appellant under section 13 of the Court Fees Act.

U TUN BYU, C.J.—I agree.

(1) 16 Mad. 207.
(2) 45 Mad. 900.
(3) 27 All. 691.
(4) 30 All. 63.
(5) 39 All. 165.

## CIVIL REVISION.

*Before U Thaung Sein, J.*

H.C. 1950

*Mar. 22.*

MAUNG TUN YIN (APPLICANT)

*v.*

MA SEIN LAY (RESPONDENT).*

*Code of Civil Procedure, Order XXXIII, Rules 3 (1) (b), 4 and 5—Leave to sue in forma pauperis—No cause of action disclosed and first application dismissed—Maintainability of subsequent application.*

Where an application to sue *in forma pauperis* was dismissed on the ground that it did not disclose any cause of action, a second application is competent.

*Held:* That a rejection on any of the grounds mentioned in Rule 3 will be a rejection under that rule, and not under Rule 4. The rejection under Rule 4 refers to rejection for the reasons set out therein and is not meant to cover a rejection under Rule 3. The mere fact that a notice is issued before an application is rejected under Rule 3 does not make the rejection one under Rule 4.

*Dr. A. Karim and another* v. *Pandit Lalc Ram and others*, (1939) R.L.R. 263, distinguished.

*Maung Shwe Tha and others* v. *Ma U Kra Zan*, (1932) I.L.R. 10 Ran. 475, referred to.

*Ba On* for the applicant.

U THAUNG SEIN, J.—This is an application for revision of the order of the Assistant Judge of Henzada allowing the respondent Ma Sein Lay to sue the present applicant Maung Tun Yin *in forma pauperis*. It appears that the respondent Ma Sein Lay had on a former occasion applied to the same Assistant Judge for permission to sue as a pauper. Unfortunately for her the plaint, as drafted at that time, did not disclose any cause of action and her application was accordingly dismissed. *See* Civil Miscellaneous Case No. 3 of 1948 of the Assistant Judge, Henzada. This was

* Civil Revision No. 20 of 1949 against the order of the Assistant Judge of Henzada in Civil Misc. No. 5 of 1948, dated the 26th January 1949.

followed by a fresh application in Civil Miscellaneous Application No. 5 of 1948 and the learned Assistant Judge allowed the application and permitted her to sue *in forma pauperis*. It is this order which is now sought to be set aside in revision.

The applicant Maung Tun Yin strenuously contends that a second application to sue as a pauper does not lie and that it should have been dismissed under Order XXXIII, Rule 4 (5) of the Civil Procedure Code. It was further pointed out that though the previous application was rejected as it disclosed no cause of action as laid down in Rule 3 (1) (*b*) of Order XXXIII, notice was in fact issued to the present applicant (who was the respondent in the case) to show cause against the application under Rule 4. Under these circumstances—so says the advocate for the applicant—the rejection of the application must be deemed to have been under Rule 4 (4) and in view of sub-Rule (5) no fresh application should have been entertained. In support of this view reliance is placed on the ruling in *Dr. A. Karim and another* v. *Pandit Laic Ram and others* (1). The headnote of which reads as follows :

"A Court after issue of notice and after hearing the case on the question of pauperism under Order 33, Rule 4 of the Civil Procedure Code, as amended by the High Court, is not precluded from considering the questions as to whether the plaint discloses a cause of action or whether the suit is barred by limitation under Rule 3 (*b*) and (*c*), provided its conclusions are based solely upon the materials in the plaint itself and not upon some extraneous evidence."

I regret I am unable to accept the reasonings of the learned Advocate in this respect as all that the ruling in question lays down is that even if an enquiry has been held into the pauperism or otherwise of the applicant in a pauper suit the Court can still take into

(1) (1939) R.L.R 263.

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consideration the points enumerated in Rule 3 of Order XXXIII. In other words an application to sue *in forma pauperis* must be rejected if the plaint discloses no cause of action or on any of the grounds mentioned in Rule 3 even though an enquiry has been held into the pauperism, *vide* under Rule 4. The rejection of an application for the reasons enumerated in Rule 3 will obviously be a rejection under that Rule and not under Rule 4. It is clearly laid down in sub-Rule (5) of Rule 4 that where a petition is rejected the applicant shall be precluded from filing a fresh application to sue as a pauper on the same cause of action. But this refers to a rejection for the reasons set out in sub-Rule (4). This sub-rule mentions specifically the reasons for which an application may be rejected and is not meant to cover the rejection of an application under Rule 3.

The mere fact that a notice is issued to a respondent before an application is dismissed for any of the reasons set out in Rule 3 does not mean that such a rejection must be deemed to have been under Rule 4. If Rules 3 and 4 are compared, it will be noticed that there is no provision in Rule 3 similar to sub-Rule (5) of Rule 4. To put it in another way, it is no where laid down in Rule 3 that where an application is dismissed under this rule, the applicant shall be debarred from filing a fresh application on the same cause of action. It would be exceedingly hard for a pauper plaintiff if he or she were precluded from filing a fresh application to sue *in forma pauperis* simply because the plaint as originally drafted was imperfect in form and did not disclose any cause of action. Under Order XXXIII as it existed prior to its amendment by the High Court of Judicature at Rangoon in 1932, once an application to sue as a pauper has been rejected, no fresh application would lie. But in or about 1932, the whole of this Order

was redrafted as a result of the remarks by Page C.J. in *Maung Shwe Tha and others* v. *Ma U Kra Zan* (1). The redrafted Order was more liberal in its attitude towards a pauper plaintiff. For instance, under Order XXXIII as redrafted amendments of pauper petition which were not permitted under the previous Order XXXIII, may now be allowed in fit and proper cases. In particular Rule 3 contains no prohibition similar to sub-Rule (5) of Rule 4 and hence there cannot be any bar to a fresh application where a former application has been rejected on the ground that the plaint discloses no cause of action.

The learned Assistant Judge, Henzada, was thus correct in allowing the respondent Ma Sein Lay to sue as a pauper. The present application for revision accordingly fails and is dismissed.

(1) (1932) I.L.R. 10 Ran. 475.

## APPELLATE CIVIL.

*Before U Tun Byu, Chief Justice and U San Maung, J.*

H.C. 1950

*Apl. 27.*

KO HAN TUN AND ONE (APPELLANTS)

*v.*

U BA HLA (RESPONDENT). *

*Purchase of car by agreement and receipt of part consideration—When property passes—Intention of parties—Principles of construction of documents—Delivery of car—Balance price not paid—Award of damages.*

By an agreement dated the 9th April 1949 the Appellants and Respondent entered into a contract for the purchase of a car for a sum of Rs. 14,500 and an advance of Rs. 10,000 was paid. The agreement provided that on failure to pay the balance sum of Rs. 4,500 by the 30th April 1949, the sum advanced, *i.e.*, Rs. 10,000 was to be forfeited and the car must be returned. The appellants failed to pay the balance sum of Rs 4,500 by the due date. The owner sued for recovery of the car and the claim was decreed in the Trial Court.

*Held :* That the question whether the property in the car passed depends on the intention of the parties which has to be gathered from the terms of the contract, the conduct of the parties, and the circumstances of the case. The Sale of Goods Act qualifies the rules by which such intention is to be ascertained. It is the duty of the Court to look at the whole agreement and find out what its substantial effect is.

*In the Parchim*, (1918) A.C. 157 at p. 161 ; *Alexander Knox McEntire and John Arthur Maconchy* v. *Crossley Brothers, Limited*, (1895) A.C. 457 at pp. 462-463, referred to and followed.

It is nowhere stated in the agreement or the receipt for Rs. 10,000 that the property in the car was not to pass until the balance price was paid On the contrary, the wording of the agreement that "*the Purchasers have this day bought*" implies that a sale has been effected and property has passed.

Reading the agreement as a whole it is clear that there was a complete sale by which the property in the car had passed to the appellants, and as there is no provision in the agreement to terminate the contract and/or to cancel the sale on the failure of the appellants to pay the balance price, the respondent is not entitled to get possession of the car.

*Bhimji N. Dalal* v. *The Bombay Trust Corporation, Ltd.*, (1930) 54 Bom. Series 381 at p. 396 ; *The Auto Supply Co. Ltd.* v. *V. Raghunatha Chetty*, (1929) 52 Madras Series p. 829 at pp. 835 and 836 ; *Sardar Param Pal Singh* v *Sardar Budh Singh*, A.I.R. (1938) Lah. 62 ; *Abbas Ali* v. *Kodhusao*, (1929) A.I.R. Nag. p. 30 ; considered.

* Civil 1st Appeal No. 50 of 1949 against the decree of the Chief Judge, City Civil Court of Rangoon in Civil Regular No. 456 of 1949, dated the 9th September 1949.

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*Held also:* That it is a proper case for awarding damages instead of ordering the car to be returned.

*Steedman* v. *Drinkle and others*, (1915) A.I.R. P.C. 94 at 95 ; *Kilmer* v. *British Columbia Orchard Lands, Ltd.*, (1913) A.C. 319 ; *Arya Pradishak Pratinidhi Sabha* v. *Chaudhri Ram Chand and others*, (1924) A.I.R. Lah. 713 at 716 ; *Callianji Harjivan* v. *Narsi Tricum*, (1895) 19 Bom. 764 ; *Kallian Dass* v. *Tulsi Dass*, (1899) 23 Bom. 786 ; *K. H. Skinner* v. *Rose Skinner and others*, (1925) Lah. 132, referred to.

*Dr. Thein* for the appellants

*Thein Maung* for the respondent.

U TUN BYU, C.J.—The case for the plaintiff-repondent U Ba Hla is that he is the owner of an Oldsmobile car, number RD 404, that on 9th April, 1949 the defendants-appellants Ko Han Tun and Ko Kan Nyunt agreed to purchase the Oldsmobile car from him and paid him Rs. 10,000 as advance, that the defendants-appellants agreed to pay the balance sum of Rs. 4,500 on or before 30th April, 1949 and that, if they were to make a default in the payment of Rs. 4,500 the defendants-appellants agreed that the sum of Rs. 10,000, which they had paid as advance, should be forfeited and that the Oldsmobile car, which had been made over to them, should be returned to U Ba Hla. Ko Han Tun and Ko Kan Nyunt however contended that there was an outright sale of the Oldsmobile car to them for Rs. 14,500, that they paid Rs. 10,000 towards the said purchase and that there was only a balance of Rs. 4,500 still payable by them. They pleaded that the term of the agreement about the forfeiture of the sum of Rs. 10,000, which had been paid by them, and for the return of the car to U Ba Hla on their failure to pay the sum of Rs. 4,500 on 30th April, 1949, was in the nature of a penalty and was void and not enforceable in law.

The learned Chief Judge of the City Civil Court of Rangoon held that there was no completed sale and that the term of the agreement for the forfeiture of the

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sum of Rs. 10,000 and for the return of the car to U Ba Hla was not in the nature of a penalty, and he gave a decree for possession of the Oldsmobile car in favour of U Ba Hla.

The question which falls for consideration is whether there has been, in the circumstances of this case, a completed sale, or in other words has the property in the Oldsmobile car passed in the circumstances of this case to the defendants-appellants. Ordinarily, it might be said that a sale of specific goods, which is in a deliverable state, is completed by offer and acceptance, although it has not been delivered to the purchaser, or the price has not been paid by the buyer. It is however the intention of the parties, which has to be ascertained in each case ; and what is the intention of the parties will depend on the terms of the contract, the conduct of the parties and the circumstances of each case. In *the Parchim* (1), Lord Parker of Waddington observed in reference to English Sale of Goods Act, 1893, as follows :

"It embodies the principle that the question whether a contract for the sale of goods does or does not pass the general property in the goods contracted to be sold must in all cases be determined by the intention of the parties to the contract. The Act codifies the rules by which that intention is to be ascertained, but the inferences based on the rules may always be displaced by the terms of the contract itself or the surrounding circumstances, including the conduct of the parties."

The above observation applies, in our opinion, with equal force to the provisions of the Sale of Goods Act in this country. Lord Herschell in *Alexander Knox McEntire and John Arthur Maconchy* v. *Crossley Brothers, Limited* (2) observed :

"The parties cannot, by the insertion of any mere words, defeat the effect of the transaction as appearing from the whole

(1) (1918) A.C. 157 at p. 161. (2) (1895) A.C. 457 at pp. 462-463.

of the agreement into which they have entered. If the words in one part of it point in one direction and the words in another part in another direction, you must look at the agreement as a whole and see what its substantial effect is. But there is no such thing as seems to have been argued here, as looking at the substance, apart from looking at the language which the parties have used. It is only by a study of the whole of the language that the substance can be ascertained."

It cannot be disputed in the present case that the price of the Oldsmobile car had been fixed at Rs. 14,500, that a sum of Rs. 10,000 was paid towards the price of the car, and that the car was delivered, apparently on the same day, after the sum of Rs. 10,000 was paid to U Ba Hla for which the latter gave a receipt, which had been filed as Exhibit 1.

It has been submitted on behalf of the plaintiff-respondent that the property in the Oldsmobile car cannot, in the circumstances of this case, be said to have passed to the defendants-appellants until the sum of Rs. 4,500 was paid in view of Exhibit A agreement, which reads as follows :

"We the undersigned Ko Han Tun and Ko Kan Nyunt of the Youth Trading Company, No. 67, 11th Street, Rangoon have this day the 9th of April 1949, bought from U Ba Hla, Sole Proprietor of Messrs. Khyn Company, No. 218, Creek Street, Rangoon one Oldsmobile car Registered No. RD. 404 for Rs. 14,500 (Rupees Fourteen thousand five hundred only), out of which paying an advance of Rs. 10,000 (Rupees Ten thousand only).

The undersigned have also agreed to accept the transfer of all the necessary documents, sale deeds, insurance policy, etc., only on our final payment of the remaining Rs. 4,500 (Rupees Four thousand five hundred only) on or before the 30th April 1949, failing which we shall forfeit out our advance of Rs. 10,000 (Rupees Ten thousand only) and return the Oldsmobile Car Registered No. RD. 404 to U Ba Hla, Sole Proprietor of Messrs. Khyn Company No. 218, Creek Street Rangoon."

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It is clear in this case that Exhibit A agreement does not stand alone, and that it will be necessary to consider Exhibit A agreement with Exhibit 1 receipt which U Ba Hla made over to the defendants-appellants when the latter paid him the sum of Rs. 10,000. It is only by the study of Exhibit A agreement as well as Exhibit 1 receipt that we can arrive at the real intention of the parties in the present case. It will accordingly be convenient to reproduce here the relevant portion of Exhibit 1 receipt, which reads :

"Received from Ko Kan Nyunt and Ko Han Tun, No. 69, 11th Street, Rangoon, the sum of Rupees Ten thousand only on account of an Oldsmobile Car RD. 404 sold for Rs. 14,500."

It will be observed that the parties have not anywhere stated, either in Exhibit A or Exhibit 1, that the property in the car will not pass to the defendants-appellants unless or until the sum of Rs. 4,500 is paid. Exhibit 1 receipt, on the other hand, shows that U Ba Hla, who signed the receipt, looked upon the transaction at the time the receipt was signed as in the nature of a sale to the defendants-appellants and that the sum of Rs. 10,000 was paid towards the purchase price of the car. That the parties looked upon the transaction which took place when the sum of Rs. 10,000 was paid to U Ba Hla as a sale is supported also by the wording of the first paragraph of Exhibit A ; and the relevant portion of which might, for convenience, be reproduced here, as follows :

"We the undersigned Ko Han Tun and Ko Kan Nyunt . . . . . have this day . . . . bought . . . . one Oldsmobile car . . . for Rs. 14,500 . . out of which paying an advance of Rs. 10,000."

It will be observed that the words used were "have this day . . . . bought", which imply that a sale has been effected.

In *Bhimji N. Dalal* v. *The Bombay Trust Corporation, Ltd.* (1), it was observed :

"The true effect of an instrument depends upon the intention of the parties as gathered from its terms, and in construing the terms it is the duty of the Court to regard the intention rather than the form and to give effect to the whole instrument. Secondly, where the agreement imposes an obligation upon the 'hirer' to buy the chattel mentioned therein from the other party, such obligation attaches on the execution of the agreement, and the agreement is really an agreement of sale, notwithstanding the use of words, such as, hire-purchase agreement, lessor and lessee, hiring, rent, tenancy, etc. Thirdly, such an obligation arises when it is clear from the agreement that the party taking the chattel, called the hirer or lessee, has to pay the full amount of the consideration mentioned in the agreement, even though the payment is by instalments, and that amount is sufficient to cover the purchase price of the chattel ;"

The above observation was made in respect of an agreement called a hire-purchase agreement ; and the last sentence in that observation applies, in our opinion, appropriately to the circumstances existing in the case now under appeal, where the defendants-appellants could be said to have agreed to pay the entire sale price within three weeks of the first payment made by them.

We ought to say at once that we are not able to see anything in Exhibit A agreement to indicate that it is necessary that certain condition has first to be performed before the property in the Oldsmobile car can pass to the defendants-appellants. The expression "all the necessary documents, sale deeds, insurance policy, etc." in the second paragraph of Exhibit A refers, in our opinion, to the documents that had already been executed, or were in existence when Exhibit A was executed. Nowhere is it stated in Exhibit A that unless the documents just referred to had been delivered to the defendants-appellants the property

(1) (1930) 54 Bom. Series 381 at p. 396.

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in the Oldsmobile car was not to be considered to have passed to the defendants-appellants. It has, however, been urged on behalf of U Ba Hla that it was the intention of the parties that the property in the ldsmobile car was not to pass to the defendants-appellants until the documents mentioned in the second paragraph of Exhibit A had been delivered to the defendants-appellants. We do not, however, see any substance in this contention, and it would be wrong to import something into Exhibit A, which the parties have not embodied it there. There is also nothing in Exhibit A to suggest that the parties ever contemplated that a new document should be executed before the property in the Oldsmobile car could be said to pass to the defendants-appellants. It is, in fact, not stated anywhere in Exhibit A that the property in the Oldsmobile car was not to be considered to have passed to the defendants-appellants until the entire price of the car, or until the balance of Rs. 4,500 had been paid. Exhibit A agreement shows, moreover, that there was an obligation on the part of the defendants-appellants to pay the balance sum of Rs. 4,500 on or by 30th April 1949 ; and in any case, Exhibit A shows that the defendants-appellants were not given the option of returning the car, and claiming back part of the sum of Rs. 10,000, a condition which we would expect to appear in Exhibit A if the transaction was merely one of a conditional sale. If U Ba Hla really intended to preserve his right of property in the Oldsmobile car until the balance price of Rs. 4,500 was paid, he could have stated it specifically in Exhibit A, particularly in view of the contents of Exhibit 1 receipt where it was, in effect, mentioned that the car had been sold. It is, of course, necessary to look at the transaction as a whole, and examining the circumstances of the present case in that light, it appears to us to be clear that the

transaction was, in the present case, one of a completed sale, and not merely a conditional sale as has been urged on behalf of U Ba Hla. It might also be mentioned that there is also nothing in Exhibit A agreement to prohibit the defendants-appellants from selling the Oldsmobile car to a third party after they obtained possession of it from U Ba Hla. The error which the learned Chief Judge of the City Civil Court of Rangoon had fallen into is that he omitted to consider the exhibit receipt altogether, which was obviously a very important document.

The case of *The Auto Supply Co. Ltd.* v. *V. Raghunatha Chetty* (1) was referred to on behalf of the plaintiff-respondent for the purpose of showing that the sum of Rs. 10,000, which was paid on 9th April, 1949, could be considered to be in the nature of either a first instalment of the rent for the use or hire of the car, or a premium for allowing the use of or for hiring the car, but that was a case where a motor-bus was made over to the first defendant under an agreement, which was known as a hire-purchase agreement. There is nothing, however, in the case now under appeal to even suggest that the transaction, which took place on 9th April, 1949, was in the nature of a hire-purchase agreement. At pages 835-836 of the report it was observed as follows :

"The first question to be considered is, what is the exact legal nature of the agreement between the parties. It is necessary to distinguish between (1) contracts to buy and pay by instalments, and (2) contracts to hire, the hirer having an option to return goods, with a provision that on payment of certain number of instalments the article should belong absolutely to the hirer. In a contract of sale for a price payable by instalments, the purchaser has no option of terminating the contract and returning the chattel, whereas, in a contract of hire-purchase, the hirer has

(1) (1929) 52 Mad. Series p. 829 at pp. 835 and 836.

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such an option. In the case of a hire-purchase contract, the hirer has got an option to purchase, which he may exercise or not, according to his sweet will and pleasure ; but in the case of a contract of sale, the purchaser has become the owner of the chattel, but the price is by agreement payable by instalments."

No provision has been made in Exhibit A agreement to allow the defendants-appellant an option to terminate the contract to purchase the Oldsmobile car. We are unable to see anything in Exhibit A, which will suggest that the sum of Rs. 10,000, which was paid to U Ba Hla on 9th April, 1949, was paid in the form of earnest money for the purpose of carrying out the transaction to completion. An attempt has been made to suggest that the word "advance" in Exhibit A is sufficiently wide to include earnest money. We do not think that there is any substance in this suggestion in view of what appears in Exhibit 1, where it is mentioned that the sum of Rs. 10,000 was paid as part-payment of the car, which was sold for Rs. 14,500.

The case of *Sardar Param Pal Singh* v. *Sardar Budh Singh* (1) will, of course, have to be read in the special circumstances of that case, which are entirely different from the circumstances obtaining in the case now under appeal. There, the contract of lease was for three years, at the rate of Rs. 5,000 per annum, and initial payment was Rs. 1,000 only, which was considered, in the circumstances of that case, to have been made merely as a guarantee for the due payment of the two subsequent larger payments of Rs. 2,000 on certain appointed dates.

In *Abas Ali* v. *Kodhusao* (2) the agreement was for a sale of a house for Rs. 4,500, and a sum of Rs. 500 was paid as earnest money ; whereas in the case at present under appeal there is no mention anywhere,

(1) A.I.R. (1938) Lah. 62. (2) (1929) A.I.R., Nag. p. 30.

either in Exhibit A or Exhibit 1, that the sum of Rs. 10,000 was paid as earnest money.

In the Privy Council case of *Steedman* v. *Drinkle and others* (1) it was observed as follows :

"The Supreme Court held that the case was governed by the decision of this Board in *Kilmer* v. *British Columbia Orchard Lands, Limited* (2) in which it was held, on a somewhat similar agreement, that the stipulation that payments already made of instalments might, on forfeiture, be retained, was really a stipulation for penalty, and should be relieved against."

Thus the provision in Exhibit A agreement in the present case, whereby the sum of Rs. 10,000, which had been paid towards the price of the car, was to be considered as forfeited on default of the payment of the balance price of Rs. 4,500 within certain specified dates, which was less than one month after the sum of Rs. 10,000 was paid, could be considered to be in the nature of a penalty.

It has been admitted during the arguments that the defendants-appellants failed to pay the sum of Rs. 4,500 to U Ba Hla as agreed upon by them under the agreement, Exhibit A. U Ba Hla could accordingly be said to have a right to sue for the recovery of the Oldsmobile car, No. RD 404. In *Arya Pradishak Pratinidhe Sabha* v. *Chaudhri Ram Chand and others* (3) Shadi Lal, C.J., observed :

"Indeed, it has been often held that the plaintiff is not obliged in a suit for specific performance to pay specifically for damages, and that the Court has always a discretionary power to award damages in a suit for specific performance and ought to exercise that discretion when it is of the opinion that damages should be given *vide inter alia Callianji Harjivan* v. *Narsi Tricum* (4) and *Kallian Dass* v. *Tulsi Dass* (5)."

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(1) (1915) A.I.R. P.C. 94 at 95.
(2) (1913) A.C. 319.
(3) (1924) A.I.R. Lah. 713 at 716.
(4) (1895) 19 Bom. 764.
(5) (1899) 23 Bom. 786

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It will also be convenient to reproduce here the headnote in the case of *K. H. Skinner* v. *Rose Skinner and others* (1), which reads:

"In a suit for specific performance plaintiff is not bound to pay specifically for damages either in addition or in substitution as he has a choice of remedies to apply for and the Court has discretion to allow damages if it finds that damages will be the appropriate remedy."

This appears to us to be a proper case where we ought to award damages instead of ordering the Oldsmobile car to be returned to the plaintiff-respondent as that might lead to further unnecessary litigation between the parties. We accordingly set aside the judgment and decree passed in Civil Regular No. 456 of 1949 of the Rangoon City Civil Court and order the defendants-appellants to pay a sum of Rs. 4,500, with interest to be calculated at the rate of 1½ per cent per mensem from 9th April, 1949, to 7th June, 1949 being the date on which the car was taken out of the possession of the defendants-appellants. We also order that the defendants-appellants will pay all the costs of garage of the car after it was taken away from them on 7th June, 1949 including such other incidental charges as the trial Court might consider to be reasonable. The defendants-appellants will be at liberty to apply to the trial Court for the re-delivery of the Oldsmobile car RD 404 after the aforesaid payments have been made. If those payments are not made by the defendants-appellants within fifteen days of the receipt of the record of Civil Regular No. 456 of 1949 in the City Civil Court of Rangoon, the plaintiff-respondent will be entitled to apply to the trial Court for the possession of the Oldsmobile car RD 404 on payments of the cost of garage and other incidental

(1) (1925) Lah. 132.

charges which the trial Court might consider to be reasonable. The appeal is allowed in the sense indicated above. Each party will bear its own costs, both in this Court as well as in the trial Court.

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U SAN MAUNG, J.—I agree.

## ORIGINAL CIVIL.

*Before U Aung Tha Gyaw, J.*

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*Apl. 19.*

C. M. BROTHERS (PLAINTIFF)

*v.*

A. KUNJALAN AND TWO OTHERS (DEFENDANTS).*

*Trade mark meaning of—Invented name or word—When legal right to exclusive use of trade mark acquired—Limits of such right—Colourable imitation by defendant—Passing for—Infringement of right—Remedy.*

Plaintiff was a manufacturer of beedies, their goods bore rectangular labels in violet colour containing the words " MOULANA BEEDY " with the capital letter " M "enclosed in a ring between the words " Moulana and Beedy." Their goods had been sold in the market for the last 15 or 16 years and they had declared this trade mark to be theirs in 1944 and 1946 which referred to a previous declaration in 1934. The first and second defendant left plaintiff's service and recently joined the 3rd defendant in manufacturing and selling beedies bearing labels of identical colour and size and called " Moulavi Beedy ", the capital letter " M " being enclosed in a ring exactly like the plaintiff's label. The plaintiff's goods were sold at Rs. 16 per thousand and the defendant's at Rs. 12-8. Upon plaintiff claiming a permanent injunction and damages for infringement of their trade mark.

*Held :* A trade mark is a symbol applied or attached to goods offered for sale in the market so as to distinguish them from similar goods and to identify them with a particular owner. The trade mark indicates that is the goods of the proprietor of such trade mark and a mark includes a device, brand, heading, label . . . . . or any combination thereof.

The word " Moulana " in plaintiff's trade mark is an invented name to distinguish plaintiff's goods from other's goods. The test of an invented word is that it must have been substantially new at the date of registration and used only to denote his goods down to the date of registration. Its production need not involve any great ingenuity or invention as in patent one.

*Sirumal* v. *Emperor*, A.I.R. (1932) Sind 94, referred to.

The Registration of the trade name " Moulana Beedy " with the device mentioned was made with a view to its being used by plaintiffs on beedies of their manufacture and they have all along intended to use the label from 1934 to distinguish their goods from those of others. The plaintiffs have built up a fairly large wholesale business and were entitled to protection. The fact that a large number of other makers with other marks with the central circular device and the alphabet by way of imitation and that no action was taken against them is irrelevant as it may not be worthwhile to spend money on every man of straw who violates the plaintiffs' right and cannot deprive the plaintiffs of their right of suit.

* Civil Regular Suit No. 87 of 1948.

*Moolji Sicca & Co.* v. *Ramjan Ali*, A.I R. (1930) Cal. 678, referred to.

A right of property may be acquired in such a trade mark and it is based on the proved association in the market of the device, name, sign, symbol or other means in question with the goods of the plaintiff. The use by defendant on such goods of the trade mark will amount to a false representation that the goods are manufactured by the plaintiffs.

*Thomas Bear & Sons (India), Ltd.* v. *Prayag Narain and another*, A.I.R. (1940) P.C. 86 at 87, referred to and followed.

*Mohamed Esuf* v. *Rajaratham Pillai*, I.L.R. (1933) Mad. 402 ; *William Wotherspoon and another* v. *John Currie*, 5 L.R. (Eng. and Irish. Appeal Case) 508, referred to.

As the beedy put on the market by the defendant was wrapped round with a paper label of the same colour as plaintiffs' and the words 'Moulavi Beedy' printed on it with circular device containing the capital letter 'M' in exactly the same fashion as the plaintiffs' amounts to colourable imitation of plaintiffs' trade mark : no general rule can be laid down as to what is a colourable imitation and this is a question of fact to be decided in each case having regard to the circumstance.

*Payton & Co., Ltd.* v. *Snelling, Lampard & Co., Ltd.* (1901) A.C. (P.C.) 308, followed.

The Court looking at the exhibits and paying due attention to the evidence adduced must come to an independent judgment on this point and not surrender its own independent judgment to any witness.

*Anglo-American Drug & Chemical Co.* v. *Swastik Oil Mill Co., Ltd.* 59 Bom. 373 ; *R. Johnston & Co.* v. *Archibald Orr Ewing & Co.*, (1881-82) 7 A.C. 219 ; *William Dimech* v. *Goffredo Allessandro Chretien and another*, A.I.R. (1931) P.C. 15, referred to and applied.

It is not necessary to give actual proof of deception ; it is sufficient there is probability of deception.

In the circumstances in which the defendants entered the trade, the manner in which they executed the get up of their goods and sold them, they clearly infringed the plaintiffs' right to their trade mark.

*Dr. Ba Han* for the plaintiff.

*J. R. Chowdhury* for the defendants.

U AUNG THA GYAW, J.—This is a suit for injunction and damages for alleged infringement of the plaintiffs' trade-mark described as a rectangular label in violet colour containing the works "Moulana Beedy", with the capital letter 'M' enclosed in a ring between the words "Moulana" and "Beedy" under which beedies of plaintiffs firm's manufacture

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are said to have been sold in the local market for the last 15 or 16 years. The plaintiffs claim that their goods bearing the said trade-mark have acquired a big reputation in the market as denoting beedies of their own manufacture and that they have acquired the sole right to use the said trade-mark in the beedy trade.

It is alleged that the 1st and 2nd defendants, who left the service of the plaintiffs' firm quite recently and the 3rd defendant, have manufactured and sold beedies bearing labels of identical colour and size and most closely resembling the plaintiffs firm's labels with only this slight difference that they call their beedies 'Moulavi' beedy, while using the English capital letter 'M' encloses in a ring exactly in the same way as in the plaintiff firm's labels. Plaintiffs allege that the defendants' use of these labels on their beedies amounts to a gross and palpable infringement of the plaintiff firm's trade-mark and that the defendants' act in selling and passing off beedies with labels closely resembling the plaintiff firm's labels, is calculated to deceive the public and that they have done so with the dishonest intention of enriching themselves at the expense of the plaintiffs' firm and of causing great and irreparable damage to their rights over the said trade-mark and to their reputation and business.

By their written statement, the defendants while admitting the plaintiffs' use of the labels described by them in the plaint on the beedies manufactured by them, claim that such use of these labels would not create any exclusive right to the said mark or labels as it has become the custom in the Beedy trade for makers to put labels of a colour, design and get up similar to those of the plaintiffs' on the beedies manufactured by them. They further deny that the

labels of the type used by the plaintiffs have acquired any distinctiveness or label reputation in the market or that labels have been exclusively identified as the goods of plaintiffs' manufacture and that the use of the defendants' labels amounted to a gross and palpable infringement of the plaintiffs' rights and that they have passed off their beedies as those of the plaintiffs and that their labels are calculated to deceive the smoking public.

On these pleadings the following issues were fixed by consent :—

(1) Do the colour, design and get up including (wording) of the plaintiffs' label as set out in paragraph 3 of their plaint, constitute a trade-mark ?

(2) Has the said trade-mark used by the plaintiffs on their goods acquired a reputation in the market as denoting goods of their own manufacture as alleged in paragraph 4 of the plaint and have the plaintiffs acquired a legal right to the exclusive use of the said trade-mark ?

(3) Is the defendants' label a colourable imitation of the plaintiffs' trade-mark and as such are the defendants' goods likely to be passed off as the goods of the plaintiff ? If so, does the defendants' use of their label constitute an infringement of the plaintiffs' firm's rights to their trade-mark ?

(4) To what relief, if any, are the plaintiffs entitled ?

*Issue No. 1.*—What exactly constitutes a trade-mark has, in the absence of any statutory definition, been laid down in many a reported decision the effect of which has been briefly summarized in S. Venkateswaran's ' Trade and Merchandize Marks in India ', 1937 Edition, pages 34 and 35. A trade-mark is a particular mark or symbol used by a person for the purpose of denoting the article to which it is affixed,

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is sold or manufactured by him or by his authority at a particular place. It must be some visible, concrete device or design affixed to the goods to indicate that they are the manufacture of the person whose property the trade-mark is. A trade-mark is a distinctive mark of authenticity through which products of a particular manufacturer may be distinguished from others and as one's commercial signature to his goods.

In Kerly 'Kerly On Trade-mark,' 6th Edition, at page 24, are definitions of a trade-mark both at common law and under the Registration Acts. A trade-mark is a symbol which is applied or attached to goods offered for sale in the market, so as to distinguish them from similar goods, and identify them with a particular trader or with his successors as the owners of a particular business, as being made, worked upon, imported, selected, certified or sold by him or them, or which has been properly registered under the Acts as the trade-mark of a particular trader. Under the Registration Act of 1905, a trade mark is meant 'a mark used or proposed to be used upon or in connection with goods' for the purpose of indicating that they are the goods of the proprietor of such trade-mark by virtue of manufacture, selection, certification, dealing with or offering for sale and a 'mark' for the purpose of that Act includes 'a device, brand, heading, label, ticket, name, signature, word, letter, numeral or any combination thereof.'

What is now met with in the present case is a rectangular label of violet colour containing the words "Moulana Beedy" with a ring in the centre between the two words inscribed round the capital letter M. The word 'Moulana' according to Moulvi Hasan Shah (P.W. 6) means 'Our Lord' and by itself does not describe the kind, quality or origin of the beedies upon which the name is given. The plaintiff-firm

manufactures beedies of one uniform quality and size and to all these beedies they have given the name of 'Moulana.' It is thus clearly an invented name or word given to distinguish their goods from those of the other makers. The test of an invented word is that it must have been substantially new at the date of registration ; or have been substantially new when first used by the applicant, and have been only used to denote his goods down to the date of registration. It is not necessary that its production should have involved any great ingenuity or anything like invention in the sense in which the term is used in patent law. [See *Sirumal* v. *Emperor* (1).]

This word mark does not stand by itself. It appears in the label combined with the device of a circle inscribed round the capital letter M. This combination in the label, Exhibit E, of the invented word 'Moulana' to the circular device containing the capital letter 'M' has been described by the plaintiffs as their particular trade-mark used and intended to be used by them on the beedies of their own manufacture and a declaration to this effect has twice been made within the last six years as shown in the documents, Exhibits A and B. Exhibit A, was registered on the 1st November 1944 during the time of the Japanese occupation and the second declaration of ownership, Exhibit B, was made in February, 1946. Both these declaration refer to a previous declaration said to have been made in the year 1934. Thus, apart from the particular design and get up of the labels used by the plaintiffs on their beedies, their conduct in respect of their use since 1934, would indicate that they had all along intended to use the label Exhibit E as a particular trade-mark for distinguishing their goods from those of the others.

(1) A.I.R. (1932) Sind. 94.

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The defendants have contended that labels of the same colour containing similar designs and devices have been in common use in the beedy trade and that the mark claimed by the plaintiffs has lost its essentially distinctive character so as to give the plaintiffs any right to their exclusive use of the same as their own trade-mark. Evidence has been given of the appearance in the market of more than half-a-dozen different makes of beedies under various trade names beginning with the English letter M and using the labels containing the circular device round the capital letter M. The plaintiffs who, from the accounts given by the witnesses, have built up a fairly large wholesale business in the sale of their beedies both in Rangoon and Mandalay, have taken fairly prompt legal action against certain of these beedy makers with fairly satisfactory results. Admittedly, they are the first in the field to use an invented word describing beedies of their make together with a central circular device containing the capital letter M and the attempt made by other beedy makers to present their goods to the public in the same manner as those of the plaintiffs' goods, not having been acquiesced in by the latter, cannot have the effect of reducing their own trade-mark into one in common use in the beedy trade. Evidence has been given of other reputable manufacturers of beedy putting their goods on the market with labels of the same colour but with different word marks and distinctive circular devices containing different letter marks. Such for instance are Jina (Exhibit 5), Iqbal (Exhibit4), Nana (Exhibit 2) and Rani Beedies (Exhibit 6).

A large number of other makes using words marks like ' Kutty ', ' Cycle ', ' Zamini ', ' Medina ', ' Azad ', ' Three Stars ', ' Bahadur ', according to the plaintiffs' Manager T. C. Mohamed, do not use the central

circular device and the alphabet. It is therefore fairly clear that the name and the central circular device used by the plaintiffs have not become the common property of the beedy trade.

It might be that a host of petty beedy makers had imitated the plaintiffs' mark with varying degrees of success in order to share the popularity earned by the plaintiffs' goods. But as was pointed out in *Moolji Sicca & Co.*v. *Ramjan Ali* (1), it may not be worthwhile to spend money on every man of straw who violates the plaintiffs' right in the market. The mere fact of his omission to take action against the offenders in the earlier cases would not in any way deprive the plaintiffs of their right of suit. It was also pointed out in this case that although there was no Trade Mark Act in India, a declaration of the description of a trade-mark serves the useful purpose of being some evidence of genuineness of the mark which is the subject matter of it.

Accordingly, the first issue must be answered in the affirmative.

*Issue No. 2.*—It is not seriously disputed that the plaintiffs have been, comparatively, in a large way of business. T. C. Mohamed, the Manager computes the daily output at 500,000 beedies and the labour employed in Rangoon and Mandalay at 500. They advertised their goods by various means wellknown in the trade. Their agents carried prominent posters advertising their goods in public places, their motor-vans went about the town using loud-speakers and they also adopted the novel method of dropping advertisement leaflets from the air. The Manager has given the expenditure on this advertisement account at Rs. 50,000. S. Rajagopal (P.W. 4), Proprietor of the

(1) A.I.R. (1930) Cal. 678.

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New National Electric Press who do the printing work for the plaintiffs has given some idea about the growth of the plaintiffs' goodwill during the last 10 years or so. Whereas before the war the plaintiffs were spending Rs. 200 to 300 a year on the printing work, they are now spending Rs. 3,000. The sale of the plaintiffs' goods runs into about 75 lakhs in a month and last year they paid an income-tax of Rs. 618. Despite this discrepancy in the volume of sales and the profits derived therefrom, the impression which one gets from the evidence given by the witnesses is that the Moulana beedies are having increasing sales in the local market and that their quality and popularity are reflected in the higher price fetched by them. According to the 1st defendant, A. Kunjalam, Moulana beedies cost Rs. 16 per thousand whereas beedies the defendants put on the market cost only Rs. 12-8-0 per thousand, a difference in price of at least 25 per cent. T. C. Mohamed, the plaintiffs' manager, states that the retail price of Moulana beedy is higher than that of other beedies, the difference in price being about Rs. 2 per thousand beedies.

Lalubhai Gopalbhai Patel (P.W. 2) has been in the beedy trade for 20 years and he agrees that after the war Moulana beedies have come to the fore-front in the matter of popularity with the smoking public. G. Rahman (P.W. 3) gives his evidence on this point in the same strain. Mohamed Huniff (P.W. 8) also places Moulana beedies in the front rank of popular brands now in the market. Abdul Razak (P.W. 9) sold Moulana beedies in his shop from 1936 to 1941 until his business was closed by the Japanese bombing of Rangoon about the end of that year. This would show that beedies of the plaintiffs' mark or brand have been on the market for a fairly long number of years.

A number of witnesses, namely, Huniff (P.W. 8) and Seedat (P.W. 11) have given evidence to say that they knew Moulana beedies smoked by them as the manufacture of the plaintiffs' firm and it was to the plaintiffs that they made their complaints regarding their quality and sale in the market. Huniff was asked to promote the sale of the beedies put on the market under the rival name of Moulavi Beedy. He declined and made a report of this incident to the man in charge of the advertising van used by the plaintiffs' firm. Seedat was served with Moulavi beedies by a stall holder and detecting the difference in flavour, he found out the deceit and reported to the manager of the plaintiff-firm T. C. Mohamed. These incidents together with popularity and higher price obtained by the plaintiffs' goods in the market would show that they have an established reputation in the beedy trade and that beedies bearing their mark are well known in the market as goods of their own manufacture.

The question then is whether by reason of the facts set out above the plaintiffs have acquired a legal right to the exclusive use of the said trade-mark on their beedies. That such a right accrues to the plaintiff in the circumstances now met with is implicit in the judgment of the Privy Council in *Thomas Bear & Sons (India), Ltd.* v. *Prayag Narain and another* (1) where it is stated :

> "It is clear that the right of property that may be acquired in such a trade mark is based on the proved association in the market of the device, name, sign, symbol or other means in question with the goods of the plaintiff, so that the use by the defendant on such goods of the trade mark will amount—whether the defendant intends it or knows it or not—to the false representation that the goods are manufactured or put on the market by the plaintiff."

(1) A.I.R. (1940) P.C. 86 at 87.

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But it is further pointed out that there can "obviously be no monopoly in the use of the trade mark. A manufacturer of cigarettes under an undoubted trade mark such as an animal, or any other device cannot legally object to the use of the identical mark on, say, hats or soap ; for the simple reason that purchasers of any of the latter kinds of goods could not reasonably suppose, even if they were well acquainted with the mark as used on cigarettes, that its use on hats or soap denoted that these goods were manufactured or marketed by the cigarette manufacturer."

In a case where the plaintiff's cigars had acquired a wide reputation and the smoking public had came to associate the name of the plaintiff to that particular brand with which they first came into the market to denote cigars of his own manufacture, it was held that the plaintiff had acquired the exclusive right to the use of the said trade-mark. [See *Mohamed Esuf* v. *Rajaratham Pillai* (1).] "The name may become a trade denomination and as such the property of a particular person who first gives it to a particular article of manufacture. The employment of the name by another person for the purpose of describing an imitation of that article is an invasion of the right of the original manufacturer, who is entitled to protection by injunction." [See *William Wotherspoon and another* v. *John Currie* (2).]

Thus, the plaintiffs in this case having succeeded in showing that they have established a reputable beedy manufacturing business by adopting the distinctive mark Moulana Beedy with the central circular device ringed round the capital letter M, they must be held to have acquired a legal right to the exclusive use of the

(1) (1933) I.L.R. Mad. 402.

(2) 5 L.R. (Eng. and Irish Appeal Cases) 508.

said trade-mark and the answer to the second issue is therefore in the affirmative.

*Issue No. 3.*—The first and second defendants were employees of the plaintiffs before they set up a beedy manufacturing business of their own. When the independence of this country was inaugurated in January 1948, the beedy rollers employed in the plaintiff-firm asked for a special bonus. The 2nd defendant as President of the Beedy Workers' Association took a leading part in this agitation with the result that his services were dispensed with by the plaintiffs following a strike of the beedy workers whose demands he unsuccessfully advocated. The plaintiffs have given a different account of the manner in which the 2nd defendant ceased to be their employee. He was said to have been seen attempting to remove some 'Moulana Beedies' from the factory premises and his dismissal had followed the detection of this misconduct. A few months after the two defendants left the plaintiffs' employ, they started a small business of their own and issued to the market beedies with the labels now complained of. Exhibit E is a beedy of their manufacture. It has wrapped round it a paper label of the same colour as that used by the plaintiffs on their beedies and has the words 'Moulavi Beedy' printed on it with a circular device containing the capital letter 'M' in exactly the same fashion as found in the plaintiffs' labels. The only difference in the get up is the use of the word 'Moulavi' instead of 'Moulana.' The remaining pictorial representation of the label device is practically the same as that of the plaintiffs' trade-mark.

In view of this similarity in the label device and get up and the previous record of the defendants' business dealings with the plaintiffs, there is hardly any room for doubt that the labels used by the defendants on their

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beedies were colourable imitations of the plaintiffs' trade-mark. In *Payton & Co., Ltd.* v. *Snelling, Lampard & Co., Ltd.* (1) Lord Macnaghten observed that 'no general rule can be laid down as to what is a colourable imitation or not; you must deal with each case as it arises, and have regard to the circumstances of the particular case.'

Apart from this striking similarity which is noticeable on casual examination of the labels used by the parties, there is on record a considerable body of evidence tending to show that the beedy smokers had in fact been deceived into thinking that the defendants' beedies, bearing those labels were in fact Moulana beedies, the manufacture of the plaintiffs. The evidence of Huniff and Seedat has already been referred to. G. Rahman (P.W. 3) bought two annas worth of Moulana beedies from a store and was served with six Moulavi beedies. Owing to the presence of the letter M inside the ring and the colour of the label used, the deception was not found out until the witness had tried two beedies in succession and found the flavour disagreeable and quite different from Moulana beedies to which he was accustomed. He forthwith complained of this deception to the Inspector of the plaintiffs' firm Abdul Kader (P.W. 10). Ismail (P.W. 5) also a beedy smoker, prefers Moulana beedies to others in the market and identifies them by the sight of the letter M in the circular device contained in the labels wrapped round the beedy. Mohamed Sultan (P.W. 7) a retail dealer in beedies and cigars, speaks of the possibility of smokers being deceived by seeing the label get up of the defendants' Moulavi beedies into thinking that they were beedies of the plaintiffs' manufacture. Abdul Razak speaks of the manner in which he was deceived

(1) (1901) Appeal Cases, P.C. 308.

into smoking Moulavi beedy instead of Moulana beedy to which he was accustomed.

The extreme likelihood of the defendants' goods bearing the mark in dispute being passed off as the goods of the plaintiffs is further shown in the manner in which their beedies have been packed into bundles of 25 and packets of 500. The colour design and get up of these bigger labels also closely resemble those wrappers used by the plaintiffs on their packets and bundles as shown in Exhibits C and D.

The effect of this evidence on the point combined with the result of an actual comparison of the two labels in dispute would clearly justify the finding that the defendants' label is a colourable imitation of the plaintiffs trade-mark, and that the defendants' goods bearing the labels complained of are likely to be passed off as the goods of the plaintiffs. In this connection the dictum of Lord Macnaghten in Payton's case (1) may well be quoted:

> " The Judge, looking at the exhibits before him and also paying due attention to the evidence adduced, must not surrender his own independent judgment to any witness."

The same view was adopted in *Anglo-American Drug & Chemical Co.* v. *Swastik Oil Mill Co., Ltd.* (2) where the Head-Note reads :

> " in ' passing off ' actions it is not necessary to give proof of actual instances of deception, as ' the very life of a trade-mark depends upon the promptitude with which it is indicated. ' Evidence of actual instances may be useful to the Court, but the Court has to exercise its own judgment as to the probability of deception."

The question then, is to consider whether the defendants' use of their label constituted an infringement of the plaintiffs firm's rights to their trade-mark.

(1) (1901) Appeal Cases P.C. 308. (2) 59 Bom. 373.

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It is a well-known principle of law that no man is entitled to sell his goods as the goods of another person and no trader has the right to use that trade-mark so nearly resembling that of another trader as to be calculated to mislead incautious purchasers. [See *R. Johnston & Co.* v. *Archibald Orr Ewing & Co.* (1).]

The Privy Council has again in *William Dimech* v. *Goffredo Allessandro Chretien and another* (2) affirmed the same principle in these words :

"If the use by the defendants of their firm name does in fact necessarily result in their goods being taken for the goods of the plaintiffs, the continued use by the defendants of that firm name would become fraudulent."

The defendants have sought to show and failed in their attempt that the plaintiffs' trade-mark had not acquired a distinctive character to distinguish beedies bearing the said marks as goods of their own manufacture. They have also pleaded that in the plaintiffs' trade-mark the English word Moulana beginning with the letter M and the central circular device enclosing the capital letter M has become so widely used in the beedy trade that the plaintiffs have lost the exclusive right to the use of the said trade-mark.

Exhibit P, a certified copy of the evidence of the 1st defendant Kunjalan given in the connected criminal case would rather show that almost all the beedies bearing the letter M started after the defendant had left Moulana Beedy Company. The defendants, according to them, were in the beedy trade for only a few months and their outturn of trade compared to that of the plaintiff was petty. Nevertheless, in the circumstances in which they entered into the trade,

(1) 7 A.C. (1881-82), 219.

(2) (1931) A.I.R. Journal and Privy Council, 15.

the manner in which they executed the get-up of the goods made and sold by them clearly constituted an infringement of the plaintiffs' firm's right to their trade-mark. The third issue is accordingly answered in the affirmative.

Accordingly, there will be a decree for the plaintiffs with costs for an injunction restraining the defendants jointly and severally, by themselves or by their agents or servants, or any other person acting with the consent or under the direction of the defendants, from selling or offering for sale or manufacturing or keeping or distributing for sale beedies to which are affixed labels any wise resembling the plaintiffs Company's label or labels and directing further that the defendants and all and each of them do deliver up to the plaintiffs all labels, blocks, instruments or other equipment of whatever nature or kind employed or used by the defendants for the purpose of manufacture of such labels and that the Official Referee of this Court do take accounts of the defendants' sale of beedies bearing the labels complained of and do submit his report in due course.

## CRIMINAL REVISION.

*Before U On Pe, J.*

H.C. 1950

*Apl. 21.*

THE UNION OF BURMA (APPLICANT)

*v.*

U CHIT SWE (RESPONDENT).*

*Withdrawal of prosecution—No reasons given—Public policy how far a safe guide—S. 494, Criminal Procedure Code—Order of Magistrate whether judicial.*

Where a magistrate granted permission under s. 494(*b*), Criminal Procedure Code to withdraw a charge on the ground of public policy and no other reasons were given.

***Held on revision :*** That the magistrate had failed to exercise his judicial discretion and his failure to do so by not recording reasons is a sufficient ground for interference in revision. Reasons must always be given by a magistrate to justify such orders.

*In re Sadayan*, (1908) 5 Mad. L.T. 216 ; *Gulli Bhagat* v. *Narain Singh*, 11 Pat. 708 ; *Lakshmi Narain Verma and another* v. *Mohamed Hanif*, A.I.R. 32 Lah. 368 ; *Ratansha Kavasji Medhora* v. *Keki Behramasha Pardiwala and others*, I.L.R. (1945) Bom. 141 ; *Dattatraya Govindrao* v. *Emperor*, (1938) 25 A.I.R. Nag. 76 ; *Kapa Kasi Viswanadham* v. *Bondili Madan Singh and others*, A.I.R. (35) (1948) Mad. 422 ; not followed.

*Abdul Gani* v. *Abdul Kader*, 1 Ran. 756, followed.

*Emperor* v. *Milanmal Hardasmal and another*, A.I.R. (30) 1943 Sind 161 ; *Rajani Kanta Shaha* v. *Idris Thakur*, (1921) 48 Cal. 1105 ; *Umesh Chunder Roy* v. *Satish Chundra Roy and others*, 22 Cal. W.N. 69 ; *Jagat Chandra Roy* v. *Kalimuddi Sardar*, (1922) 26 C.W.N. 880 ; *King* v. *Ba Khin and others*, A.I.R. (1940) Ran. 189 ; *Sher Singh* v. *Jitendranath Sen*, A.I.R. (1931) Cal. 607, referred to.

The High Court must always be in a position to say whether a discretion vested in the court has been properly exercised. Permission to withdraw a prosecution cannot be given as a matter of course nor can it be unreasonably withheld.

It is of considerable public importance that nothing is done in a court which would give rise to suspicions about interference in the course of justice.

*Devendra Kumar Roy* v. *Syed Yar Bakht Chaudhury and others*, A.I.R. (1939) Cal. 220 at 224, referred to and followed.

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* Criminal Revision No. 17A of 1950 being review of the order of the 2nd Additional Magistrate, Rangoon, dated the 28th February 1950 passed in Criminal Regular Trial No. 88 of 1948.

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THE UNION OF BURMA v. U CHIT SWE.

*Mya Thein* (Government Advocate) for the applicant.

*Tun I* for the respondent.

U ON PE, J.—This revision has been opened in exercise of the powers of the revision of this Court to examine the propriety of the order of the Second Additional Magistrate of Rangoon allowing the withdrawal of prosecution under section 494 of the Criminal Procedure Code by the Government Advocate in Criminal Regular Trial No. 88 of 1948. Notices were duly issued to the respondent and the Attorney-General. The order of the Magistrate in question reads :

"28/2/50. Called. U Mya Thein, Government Advocate for Attorney-General, present.

Accused Chit Swe on bail present.

His pleader present.

U Mya Thein, on behalf of the Attorney-General, asks for permission to withdraw the charge against the accused on ground of public policy.

Under section 494 (*b*), Criminal Procedure Code permission to withdraw the charge is granted.

Accused acquitted.

True.

(Sd.) HLA MAUNG,
*2nd Additional Magistrate (S.P.).*"

From the order it will be seen that the Magistrate had given no reason for permitting the withdrawal so that there is no material before the Court now to enable me to judge whether the Magistrate had passed a proper and right order. The only reason given by the learned Government Advocate was the ground on public policy "—a phrase which seems to give very little scope to the trying Magistrate to give such

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reasons as he should ordinarily have done even if he is so minded to do. I can only assume that in this case the Magistrate must have found it difficult to give reasons for consenting to the withdrawal. Nevertheless, he cannot take cover under the special circumstance as when faced, as in this case, with the ground on "public policy" and pass an order without recording his reasons. Without hesitation, I must say that in the present case the Magistrate has failed to exercise his judicial discretion and his failure to do so by not recording reasons, when consenting to the withdrawal, is a sufficient ground for the High Court to interfere and quash the orders of withdrawal and acquittal and direct retrial of the case. That is to say, reasons must always be given by a Magistrate to justify an order permitting the withdrawal of prosecution, as such an order is a judicial order. I have been referred to certain Indian cases by the learned Government Advocate and U Tun I for the respondent in support of the view that the High Court could not set aside an order allowing the withdrawal of the charge under section 494 of the Criminal Procedure Code even though the Magistrate records no reason for the action he takes and the Public Prosecutor offers no reason for the withdrawal. These cases are *In re Sadayan* (1), *Gulli Bhagat* v. *Narain Singh* (2), *Lakshmi Narain Verma and another* v. *Mohamed Hanif* (3), *Ratansha Kavasji Medhora* v. *Keki Behramasha Pardiwala and others* (4), *Daltatraya Govindrao* v. *Emperor* (5), *and Kapa Kasi Viswanadham* v. *Bondili Madan Singh and others* (6).

However, a different view has been taken, amongst others, by the late Rangoon High Court and the

(1) (1908) 5 Mad. L.T. 216.
(2) 11 Pat. 708.
(3) A.I.R. 32 Lah. 368.
(4) I.L.R. (1945) Bom. 141.
(5) (1938) 25 A.I.R. Nag. 76.
(6) A.I.R. (35) (1948) Mad. 422.

Calcutta High Court. Please see *Abdul Gani* v. *Abdul Kader* (1), *Emperor* v. *Milanmal Hardasmal and another* (2), *Rajani Kanta Shaha* v. *Idris Thakur* (3), *Umesh Chunder Roy* v. *Satish Chundra Roy and others* (4) and *Jagat Chandra Roy* v. *Kalimuddi Sardar* (5). The law on the subject has been expounded in *Abdul Gani* v. *Abdul Kader* (1). In that case the view held in *Umesh Chunder Roy* v. *Satish Chundra Roy and others* (4), namely, "when a Court acting under section 494 of the Code gives its consent to a withdrawal from a prosecution it should record its reasons in order that this Court may be in a position to say whether the discretion vested in the Court has been properly exercised," has been accepted with approval. This view was followed in another Rangoon case, *viz.*, *The King* v. *Ba Khin and others* (6) from the judgment of which the following may aptly be quoted :

"The Magistrate must not surrender his authority under section 494 to the District Magistrate, but must act judicially and come to his own independent conclusion . . . . "

The view held by this late High Court is also in accord with that held by the Calcutta High Court in *Sher Singh* v. *Jitendranath Sen* (7) wherein it has been held "that a Magistrate may give consent to withdraw under section 494 of the Criminal Procedure Code if he finds that there are good reasons for doing so and that consent is not to be given as a matter of course neither is it to be unreasonably withheld."

It is hardly necessary for me to say that I am in respectful agreement with the view taken by this late

(1) 1 Ran. 756.
(2) A.I.R. (30) (1943) Sind 161.
(3) (1921) 48 Cal. 1105.
(4) 22 Cal. W.N. 69.
(5) (1922) 26 C.W.N. 880.
(6) A.I.R. (1940) Ran. 189.
(7) A.I.R. (1931) Cal. 607.

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High Court which held that "in according consent the Court is acting in judicial (and not in ministerial) capacity and that it ought to give and record its reasons." This view, in my opinion, is well founded inasmuch as it is the only way which will enable the High Court to judge whether the Magistrate has exercised his discretion rightly or not. If the High Court has got the power to revise the consent the Magistrate has given, which undoubtedly the High Court possesses, it is only natural that there must be placed before the High Court materials to enable it to interfere whenever necessary. In the present case, it is clear that the consent of the trying Magistrate for the withdrawal had not been properly given and it follows that the orders of withdrawal and acquittal have to be quashed.

It will be necessary before parting with this case to say something more on the reason given in this case for withdrawal, namely, the ground on "public policy." This word, though brimful of meanings, might have been quite meaningless to the Magistrate with the result that he might find himself at his wit's end to give reason for his consent, even if he had understood section 494 (*b*) of the Criminal Procedure Code in its proper and right sense. This is where suspicion would arise that interference with the course of justice had taken place. It is of considerable public importance that nothing is done which would give rise to such suspicion. This is one ground—I consider a very important ground—why action taken under section 494 of the Criminal Procedure Code should always be accompanied with reasons in the application for withdrawal as well as in the order granting permission for withdrawal. I cannot do better than quote the remarks of Derbyshire, C.J., of the Calcutta High Court in cautioning against action that would give rise

to suspicion in *Devendra Kumar Roy* v. *Sayed Yar Bakht Chaudhury and others* (1):

"There remains another matter to be dealt with. It has been alleged that some of the accused in this case are related to one of the ministers and although opportunity has been given to deny this, it is not denied. A suspicion arises very strongly that there was an unusual and, as far as I can see, unwarrantable interference with the course of justice and the suspicion is that it was made because some of the accused were related to one of the ministers . . . . The whole affair is unsavoury.

There is one other matter upon which it is my duty to say something: it is the action of the Government in calling for the records of the case from the Magistrate whilst it was still proceeding, and retaining them for six months. It is obvious, if that can be done and is done, the due course of justice is interfered with. There is no provision in the criminal law by which such interference can be made. It was quite illegal and utterly improper. The Magistrate found himself faced, I can see, with a demand such as he had not met before and he sent the papers to the District Magistrate and in course of events they found their way to the Government. That ought not to have been done and ought never to be done again."

With these words he held that the consent given was not properly given and quashed the order of withdrawal and discharge. Those are cogent remarks, observance of which in the interest of administration of justice cannot be over-emphasized.

It is urged before me by the learned counsel for the respondent that, in view of the lapse of time (the trial began on the 22nd March, 1948) and in view of the small value of the articles involved in the case which I am told is about Rs. 60, no further action may be taken against the respondent. I am told that the respondent has incurred considerable expense in trying to clear up the charge against him and, in his words he has been more than sufficiently punished.

(1) A.I.R. (1939) Cal. 220 at 224.

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I do not therefore propose to order retrial of this case. Let these papers be sent back to the Magistrate with these remarks.

## CIVIL REVISION.

*Before U On Pe, J*

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*Apl. 21.*

AH YAR (APPLICANT)

*v.*

U KALA (RESPONDENT).*

*Urban Rent Control Act, s. 19—Decision under—By Assistant District Court —Persona designata—Whether revision lies.*

Where the Assistant Rent Controller of Bassein fixed standard rent under s. 19 of the Urban Rent Control Act which was set aside by the First Assistant Judge, Bassein and the said order was sought to be revised under s. 115 of the Code of Civil Procedure.

*Held:* That the Assistant Judge is a *persona designata* and did not act as a court and the High Court has no power of intervention in revision.

*H. A. Aziz* v. *Kilvoboy*, I.L.R. 4 Ran. 305 ; *The Municipal Corporation of Rangoon* v. *M. A. Shakur*, (1925) I.L.R. 3. Ran. 560 at 576, applied and followed

*N. C. Sen* for the applicant.

*K. R. Venkatram* for the respondent.

U ON PE, J.—This is an application to revise the order of the First Assistant Judge, Bassein, dated the 20th July 1949, setting aside the order of the Assistant Controller of Rent, Bassein, who has fixed the standard rent of a piece of land belonging to the respondent under section 19 of the Urban Rent Control Act. A preliminary objection has been taken before me that this revision does not lie on the ground that the Assistant Judge who passed the order in exercising the powers under the Urban Rent Control Act did so as a *persona designata* and not as a Court and that therefore the High Court has no power of interference in revision.

* Civil Revision No. 58 of 1949 against the order of the 1st Assistant Judge's Court of Bassein in Civil Regular Suit No. 2 of 1949, dated 20th July 1949.

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U ON PE, J.

In support of this view the case of *H. A. Aziz* v. *Kilvoboy* (1) which is a similar case where an application was made to the Rent Controller for issue of a certificate to fix the standard rent, has been cited. The judgment which was by a Full Bench quoted the following reasoning pursued in a previous Rangoon case, *The Municipal Corporation of Rangoon* v. *M. A. Shakur* (2) " When, by an Act of the Legislature, a new authority is constituted for the purpose of determining questions concerning rights which are themselves the creations of the Act, and a Judge or Presiding Officer of a Court, as distinct from the Court itself, is directed to perform the functions of the newly created authority, then it must be presumed, unless the contrary is expressly enacted or necessarily implied, that the intention of the Legislature, was that the Judge or Presiding Officer should perform those functions as a *persona designata* and not as a Court," and the present case is one where similar arguments will hold good. It has been contended by the learned counsel for the applicant that the Assistant Judge did not strictly confine himself to the question of rent, in passing his order and that therefore those authorities would not apply. I do not see eye to eye with him in this contention, for the Assistant Judge has not, as urged, embarked upon a consideration of totally irrelevant evidence, for, what is called irrelevant evidence, appears to be quite material for the disposal of the application. If by irrelevant evidence, it is meant that the order of the Assistant Judge to the effect that Ah Yar was not a tenant should not have been made, the observation is clearly unwarranted for that order was a necessary finding on the first issue in the case framed before the lower Court, *viz.*, " Whether the Assistant Rent Controller has acted without

(1) I.L.R. 4 Ran. 305. (2) (1925) 3 Ran. 560 at 576.

jurisdiction." For the disposal of this case it is not necessary for me to go into the question whether the First Assistant Judge had exercised the jurisdiction not vested in him by law in entertaining the reference from the order of the Assistant Controller of Rent. The ground urged before him was that the Assistant Controller of Rent acted without jurisdiction. It may, however, be said that it would be entirely wrong if the learned Assistant Judge were to avoid discussing the issue. If it is necessary to consider whether the matter under reference is one where the rules laid down in the two Rangoon cases referred to would apply one need only refer to the certificate issued by the Assistant Controller of Rent and what has been set down in paragraph 4 of the grounds in this application, particularly this passage : " For that the applicant is a tenant of the respondent as held by the Assistant Controller of Rent." The application made to the Assistant Controller of Rent was made by one who assumed the role of a tenant and this Court must treat the application as one made on that footing. It is not necessary to say more on this aspect of the case nor will it be advisable to discuss other grounds set out in the memorandum of this application in view of the order that is now to be passed. The preliminary objection, in my view, is well founded and this application must be dismissed with costs, Advocate's fee three gold mohurs.

## ORIGINAL CIVIL.

*Before U San Maung and U Bo Gyi, JJ.*

H.C. 1950

*June 2.*

KO AYE AND ONE (PLAINTIFFS)

*v.*

RASUL BIBI AND THREE OTHERS (DEFENDANTS).*

*Buddhist mother—Marrying Mohamedan and changing religion—Succession to estate—Unconverted Buddhist daughter—Rights of—Burma Laws Act (XIII of 1898) s. 13—"Parties"—Meaning of—Interpretation of Statutes—Interpretation conflicting with accepted principles to be avoided.*

Where a Buddhist mother married a Mohamedan, after conversion to the latter faith, and died and her unconverted Buddhist daughter claims a share in her estate.

*Held:* That the claim is governed by Mohamedan Law under which a non-muslim cannot be an heir and her suit must fail. The personal law of the deceased governs succession to the estate.

*C.V.N.C.T. Chedambaram Chettyar* v. *Ma Nyein Me and others*, 6 Ran. 243; *Balwant Rao and others* v. *Baji Rao and others*, 47 I.A. 213; *Mitar Sen Singh* v. *Maqbul Hasan Khan and others*, 57 I.A. 313, referred to and applied.

The law applicable to such a case is to be found in s. 13 (*1*) of the Burma Laws Act. S. 13 (*3*) of the same Act is not applicable. The word "parties" in s. 13 (*a*) (*b*) (*c*) does not mean parties to the suit but has reference to the inception of the right involved in the action.

*Bhagwan Bakhsh Singh* v. *Drigbijai Singh and others*, 6 Luck. 487; *Gobind Dayal* v. *Inayatullah*, 7 All. 775 (F.B); *Khoo Haing Sein and three others* v. *Khoo Peng Hoe and three others*, Bur. L.J. Vol. I, 56; *John Jiban Chandra Datta* v. *Abinash Chandra Sen*, (1939) 2 Cal. 12, approved.

Where two interpretations are possible, the one most in accord with justice, convenience, reason and legal principles, should be applied, as it is most improbable that the legislature would overthrow fundamental principles.

*Maxwell on Interpretation*, referred to.

*P. K. Basu* for the plaintiffs.

*J. B. Sanyal* for the defendants.

U SAN MAUNG, J.—In Civil Regular Suit No. 85 of 1948 of this Court a preliminary issue was raised as

* Civil Regular No. 85 of 1948

to whether a Burmese Buddhist daughter can make a claim to the estate of her mother who died as a Mohamedan after her conversion to that faith on her marriage with her Mohamedan husband. As the question involved was important the learned Judge on the Original Side (U Aung Tha Gyaw J.) made a report to the learned Chief Justice that the question should be heard and decided by a Bench of two or more Judges of this Court, *vide* Rule 4 of the Original Side Rules of Procedure. The report is dated the 6th of February, 1950, and the order of the learned Chief Justice thereon is to the effect that the suit should be heard by a Bench consisting of myself and U Bo Gyi J. Accordingly this Bench has seizin of the whole suit which falls to be determined according to the answer to the preliminary issue raised therein.

As the facts of the case have been fully set out in the report of U Aung Tha Gyaw J., it is not necessary for us to repeat them here. In the case of *C.V.N.C.T. Chedambaram Chettyar* v. *Ma Nyein Me and others* (1), where a Hindu wife of a Mohamedan deceased claimed to be interested in the estate left behind by her deceased husband, Heald J., observed (at page 252):

"By the Burma Laws Act (Act XIII of 1898) it is provided that in deciding questions regarding succession, inheritance, marriage or caste or any religious usage or institution the Buddhist, Mohamedan or Hindu law shall be applied, as the case may be, where the parties are Buddhists, Mohamedans or Hindus, and that in cases other than those so provided for, the decision shall be according to justice, equity and good conscience.

In this case the parties are on the one side a Hindu and on the other side Mohamedans and possibly Buddhists, and there seems to be a conflict between the Hindu and the Mohamedan law. But the law which governs inheritance or succession to a person's estate is ordinarily the law to which he himself is subject at the

(1) 6 Ran. 243.

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time of his death, and in the present case it is admitted that Arunachellam was a Mohamedan when he died and had been a Mohamedan for many years."

It is clear from these observations that the learned Judge held that the religion of the parties to the suit is irrelevant in such proceedings and that it is the personal law of the propositus that governs inheritance or succession to his estate. In *Balwant Rao and others* v. *Baji Rao and others* (1), in which the question of succession to the estate of a Hindu was involved Lord Dunedin in delivering the judgment of their Lordships of the Privy Council observed that it was settled that the law of succession is in any given case to be determined according to the personal law of the individual whose succession is in question. This decision was reaffirmed in the case of *Mitar Sen Singh* v. *Maqbul Hasan Khan and others* (2), where their Lordships pointed out (at page 317) that once a person has changed his religion and changed his personal law, that law will govern the rights of succession of his children and that although it may work hardly to some extent upon expectant heirs, especially if they are the unconverted children of the ancestor who has in fact changed his religion, there is no more hardship in their case than in any other case where the ancestor has changed the law of succession, as, for instance, by acquiring a different domicile. *See* also *Bhagwan Bakhsh Singh* v. *Drigbijai Singh and others* (3), where a Bench of the Chief Court of Oudh followed the ruling in the case of *Mitar Sen Singh* v. *Maqbul Hasan Khan and others* (2).

It has been strenuously contended by Mr. Basu, Advocate for the plaintiffs Ko Aye and Ma Pwa Sein that upon a proper interpretation of section 13 of the

(1) 47 I.A. 213.
(2) 57 I.A. 313.
(3) 6 Luck. p. 487.

Burma Laws Act (Act XIII of 1898) this suit falls to be determined as provided for in sub-section (*3*) of that section. Now, section 13 of the Burma Laws Act is in these terms :

"13. (*1*) Where in any suit or other proceeding in Burma it is necessary for the Court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution :—

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

(*b*) the Mohamedan law in cases where the parties are Mohamedans, and

(*c*) the Hindu law in cases where the parties are Hindus,

shall form the rule of decision, except in so far as such law has by enactment been altered or abolished, or is opposed to any custom having the force of law.

* * * *

(*3*) In cases not provided for by sub-section (*1*), or by any other enactment for the time being in force, the decision shall be according to justice, equity and good conscience."

However, in our opinion the provisions of sub-section (*1*) of section 13 are applicable to this case and not those of sub-section (*3*) as contended by the learned Advocate for the plaintiffs. The word "parties" occurring in clauses (*a*), (*b*) and (*c*) of sub-section (*1*) should not, in our opinion, be interpreted to mean parties to the suit or proceedings but with reference to the inception of the right involved in the action. In this connection we can do no better than adopt the reasonings of Mahmood J., in *Gobind Dayal* v. *Inayatullah* (1) with reference to the intepretation of the word "parties" occurring in section 24 of the Bengal Civil Courts Act (Act VI of

(1) 7 All. 775 (F.B.).

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1871), which is in similar terms to section 13 of the Burma Laws Act. The learned Judge observed :

"Before leaving section 24, I wish to refer to the word '*parties*', which occurs in it. And upon this point much of what I have already said as to the provisions of the old Regulations applies also to the interpretation of this section. I do not understand the word to mean the *parties to an action*, but it must be interpreted with reference to the inception of the right involved in the action. Any other interpretation would render the section impracticable, if not meaningless. Who are necessary *parties to an action* is a matter governed by the rules of procedure, and in a country like India, where personal laws prevail, it is not an uncommon occurrence that every one of the persons arrayed as parties to the suit belongs to a different race and religion. In such a case, it would be impossible to administer any particular law if the word '*parties*' in the section meant '*parties to the suit*'. This is obviously the only interpretation which can apply to the administration of Muhammadan Law of inheritance and succession by our Courts. Indeed, cases are readily conceivable in which none of the *parties to the suit* are Muhammadans, but in which their right, having been derived by transfer or otherwise from Muhammadans, the Muhammadan Law would be the sole rule of decision, because the inception of the rights to be adjudicated upon took place under that law. This can be best illustrated by supposing the case of a Muhammadan who dies leaving a widow, a son, and a daughter, each one of whom conveys his or her share, by gift or sale in the estate of the deceased, to a Hindu, a Christian, and a Parsi, respectively. It is to my mind obvious that in a suit between these various transferees, involving the ascertainment of the extent of the right of each person, the Muhammadan Law would, under the former part of section 24 of the Bengal Civil Courts Act, be the only possible guide for decision, and that law would apply in its strictest force, notwithstanding the circumstance that none of the *parties to the suit* belonged to the Muhammadan persuasion."

If the word "parties" occurring in clauses (*a*), (*b*) and (*c*) of sub-section (*1*) of section 13 of the Burma Laws Act be interpreted to mean parties to an action, this interpretation would lead to absurd consequences.

For instance, if a Mohamedan dies leaving a son and a daughter who are both Mohamedans, the daughter who finds herself placed in a very unfavourable position according to Mohamedan Law of Succession can claim that she is a Buddhist and thus invoke sub-section (*3*) of section 13 of the Burma Laws Act to have the question of inheritance decided according to justice, equity and good conscience. Again, if a Burmese Buddhist dies leaving two children both of whom have become converts to Mohamedanism it would seem that inheritance to the estate of the Burmese Buddhist propositus would have to be governed by Mohamedan Law.

Therefore of the two possible interpretations which can be put upon the word "parties" occurring in sub-section (*1*) of section 13 of the Burma Laws Act, one would not only be in conflict with all the accepted legal principles but would also lead to absurd consequences; "in determining either the general object of the Legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice, and legal principles, should, in all cases of doubtful significance, be presumed to be the true one."—Maxwell on Interpretation of Statutes, 9th Edition, page 198. Furthermore, one of the fundamental principles being that the personal law of the propositus governs the question of inheritance to his estate, "it is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness." Maxwell on Interpretation of Statutes, 9th Edition, page 86.

Our views regarding section 13(*1*) of the Burma Laws Act find further support in the judgment of

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Duckworth J., in *Khoo Haing Sein and three others* v. *Khoo Peing Hoe and three others* (1) where the learned Judge held that in the case of the estate of a Burmese Buddhist the mere fact that an heir or heirs is not exactly of the same religion is immaterial and that therefore the Burmese Buddhist Law applies even though the parties on one side are not Burmese Buddhists. The same *ratio decidendi* governs the case of *John Jiban Chandra Datta* v. *Abinash Chandra Sen* (2) where a Bench of the Calcutta High Court in interpreting the provisions of section 37 of the Civil Courts Act (Act XII of 1887), which are in similar terms to section 13 of the Burma Laws Act, came to the conclusion that on the death of a Mohamedan his property would devolve in accordance with the Mohamedan Law and that the religion of the parties to an action is irrelevant. Under Hanafi texts a non-Muslim does not inherit from a Muslim. *See* page 829, Tyabji's Mohamedan Law, 3rd Edition.

For these reasons we would answer the preliminary issue in the sense that a Burmese Buddhist daughter can make no claim to the estate of her mother who died as a Mohamedan after her conversion to that faith on her marriage with her Mohamedan husband.

U BO GYI, J.—I agree.

(1) B.L.J. Vol. 1, p. 56. (2) (1939) 2 Cal. p. 12.

## APPELLATE CIVIL.

*Before U Thaung Sein, J.*

U BA THA (APPELLANT)

*v.*

BASANTA KUMAR DAS (RESPONDENT).*

H.C. 1950

*June 13.*

*Burma Courts Act, 1945—S. 5—Suit filed before subordinate judge—Decided by assistant judge—Jurisdiction—Code of Civil Procedure, ss. 21 and 99.*

*Held:* That under s. 5 of the Courts Act, 1945 there are three grades of civil courts, the District Court, the Court of the Assistant Judge and the Subordinate Judge. The jurisdiction conferred on the Judges is personal. There is a departure from the old system, when an assistant judge or subordinate judge could exercise territorial jurisdiction and preside over more than one court and the jurisdiction was in the courts. The decision by an assistant judge "sitting as First Subordinate Judge" in a suit instituted before the latter judge is without jurisdiction and not merely an irregularity which can be cured under s. 99 of the Code of Civil Procedure, nor is it an objection to the place of suing under s. 21 of the Code of Civil Procedure.

*Hla Tun Pru* for the appellant.

*Choung Po* for the respondent.

U THAUNG SEIN, J.—This appeal can be disposed of easily on a point of law. I have indicated to the learned advocate for the appellant that so far as the facts are concerned, in view of the concurrent findings by the lower Courts, it would be futile to agitate the matter once again. The point of law involved is whether the learned First Assistant Judge, Akyab (U Tha Noe) who tried the suit and finally decided it while "sitting as First Subordinate Judge" had any jurisdiction to handle the case.

The suit out of which this appeal has arisen was filed in the Court of the First Subordinate Judge,

* Civil 2nd Appeal No. 6 of 1950 against the decree of the District Court of Akyab in Civil Appeal No. 8 of 1949, dated 13th January 1950 arising out of the decree of the 1st Subordinate Judge's Court of Akyab in Civil Suit No. 3 of 1949, dated 15th August 1949.

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Akyab, on the 10th June, 1949. It was a simple suit for the recovery of a sum of Rs. 890 due for labour supplied in the construction of a portion of the Civil Hospital at Akyab. For some unknown reason, there was apparently no Subordinate Judge to preside over the Court at the time and the First Assistant Judge, Akyab (U Tha Noe) took over the case while "sitting as First Subordinate Judge". I am at a loss to understand why the learned First Assistant Judge took upon himself the duty of presiding over the First Subordinate Judge's Court. It should be remembered that under section 5 of the Courts Act of 1945 there are at present only three grades of Civil Courts, *viz.*, the District Court, the Court of the Assistant Judge and the Court of the Subordinate Judge and the extent of their respective pecuniary jurisdictions are set out in section 11 of that Act. So far as Subordinate and Assistant Judges are concerned the jurisdiction conferred upon them is personal to the respective officers. This system is, of course, a departure from the system in force in the pre-war period when the civil jurisdiction was territorial and conferred on the courts. Under that system, an Assistant Judge or a Subordinate Judge could preside over more than one court and exercise the jurisdiction of the court over which he happened to be presiding at the time. For instance, it was not unusual for an Assistant Judge to sit as Judge of a Township Court and also as Judge of a Subdivisional Court. Under section 7 of the then Courts Act of 1922, the jurisdiction to hear and determine civil suits was clearly conferred on the respective courts and not personally on the officers presiding over those courts.

I would repeat once again that at present the civil jurisdiction exercised by Assistant and Subordinate Judges are personal to the officers concerned. That

being so, I cannot understand how an Assistant Judge could possibly "sit as a Subordinate Judge" or to try a suit instituted before a Subordinate Judge. No doubt an Assistant Judge has jurisdiction to try any suit of a value extending up to Rs. 10,000 provided of course this suit is instituted in his court. For instance, suits not exceeding Rs. 1,000 in value should ordinarily be filed before a Subordinate Judge. But nevertheless if they are filed before an Assistant Judge, they could be disposed of by the latter officer. An Assistant Judge could also try any such suits if they are transferred to his court by the District Judge under section 24 of the Civil Procedure Code.

In the case under consideration there is nothing on the record to suggest that the suit was ever instituted before the First Assistant Judge, Akyab, nor was it transferred to this court by the District Judge, Akyab. To all appearances, the learned Assistant Judge merely styled himself as "Subordinate Judge" for the purpose of trying the suit in question and disposed of it. Obviously, an Assistant Judge cannot limit the jurisdiction conferred on him by section 11 of the Courts Act, 1945, by simply changing his nomenclature to that of a Subordinate Judge, nor is he competent to go to the assistance of a Subordinate Judge during the latter's absence to dispose of cases unless authorized to do so by the District Judge under section 24 of the Civil Procedure Code. In my opinion, U Tha Noe, the First Assistant Judge, Akyab, had thus no jurisdiction to handle the suit in question.

The learned advocate for the respondent does not seriously dispute that the First Assistant Judge, Akyab, (U Tha Noe) had no jurisdiction to handle the suit. But he refers to section 21 of the Civil Procedure Code and contends that it is now too late for the appellant to object to "the place of suing". I have

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also been asked to take into consideration section 99 of the Civil Procedure Code and to hold that as there has been no failure of justice, the decrees of the lower Courts should be allowed to stand. All that I need say in respect of the latter part of the contention by the learned advocate for the respondent is that section 99 of the Civil Procedure Code only cures defects and irregularities which do not affect "the merits of the case or the jurisdiction of the court". Where there is a defect in jurisdiction as in the present case, this is a material irregularity which is not curable by section 99 of the Civil Procedure Code.

With regard to the contention that the applicant cannot now be permitted to object to "the place of suing", it may be noted that this suit was instituted at the right place, *viz.* Akyab. In addition, it was filed in the proper court, *viz.* Court of the First Subordinate Judge, Akyab. The objection is to the Judge who dealt with the case. In other words, it is contended that the First Assistant Judge (U Tha Noe) had no jurisdiction to try the suit in question. I have already expressed the view that the First Assistant Judge, Akyab, had no jurisdiction to try the suit under consideration. I need hardly say that it is a fundamental rule that a judgment of a court without jurisdiction is a nullity and hence the judgment by the First Assistant Judge, Akyab, was null and void. That being so, the learned District Judge, Akyab, also had no jurisdiction to deal with it on appeal.

This appeal is accordingly allowed and the judgments and decrees of both the lower Courts are hereby set aside. The suit was, in fact, instituted in a competent court but unfortunately was disposed of by a Judge who had no jurisdiction to deal with it. The proceedings will, therefore, be remanded to the Court of the First Subordinate Judge, Akyab, to be

dealt with by the Subordinate Judge himself according to law. The costs of this appeal shall be part of the costs of the suit.

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## APPELLATE CRIMINAL.

*Before U On Pe, J.*

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*May 13.*

GYO KAR (APPELLANT)

*v.*

THE UNION OF BURMA (RESPONDENT).*

*High Treason Act—S. 3 (1)—Onus of Proof—Purpose and intent of accused—Public nature as against private—Firing on Police Party to escape.*

*Held :* It is the duty of the prosecution to make out the case charged against the accused. "Waging War" is defined in s. 2 of the High Treason Act and the decision in *Aung Hla and others* v. *King Emperor*, (9 Ran. 404) dealing with an offence under s. 121, Penal Code lays down the principles to be followed in such a case. The intention of the accused must be to attain an object of a general or public nature by force or violence.

*R.* v. *Gordon*, (1781) 21 State Trials 486 at 644/45 ; *R.* v. *Hardie*, (1820) 1 State Trials (N.S.) 765 ; referred to.

When the accused fired on a Police Party with intent to escape, it cannot be said they were achieving any object of a general or public nature and a conviction for High Treason is not sustainable but only one under s. 333, Penal Code read with s. 511.

*Kyaw Thaung* for the appellant.

*Choon Foung* for the respondent.

U ON PE, J.—The appellant has been convicted under section 3 (*1*) of the High Treason Act and sentenced to death by the First Special Judge, Sagaing in his Criminal Regular Trial No. 20 of 1948. He now appeals.

The undisputed facts are these : The Police Party and U.M.P. all numbering about twenty-four men

* Criminal Appeal No. 43 of 1950 being appeal from the order of 1st Special Judge of Sagaing, dated 16th January 1950 passed in Criminal Regular Trial No. 20 of 1948.

under S.I.P. U Cho (P.W. 1) went out on 7th December 1948 for operation from Tada-u Police Station to Htaukshagon Village where they arrived at about 3 p.m. They surrounded the village from three sides on the east, north and south. No inhabitants were found. When they got into the village some shots were fired from the western side of the village when they returned the fire. The party fired and advanced to the entrance of the western side of the village. According to H.C. Maung San Hmon (P.W. 2), he saw from that point three men firing at them, three or four others running away towards the north and later two men fall to the ground. When the two men fell the rest ran away. The party next found the appellant lying with a gun shot wound on one of his thighs and another man who was dead. About three or four cubits away from the two men, two Japanese rifles were found on the ground as well as 20 rounds of Japanese rifle cartridges.

The appellant availed himself of the opportunity to give evidence on his own behalf. He says that on the day of the occurrence one Ko Paw Ei, Ko Kyan and he were attending cattle together, that about 11 a.m. four men armed with rifles threatened him to come along with them and that while his two companions escaped he had to go with them to Htaukshagon Village where he was ordered to remain a short distance on the west of the village. After some time he heard the firing of guns and while running away from the place where he was kept, he received about four or five gun shot wounds and fell to the ground. It may be regarded as unfortunate that the two witnesses cited by him were not available as they were in insurgent infested areas.

In this case it is the duty of the prosecution to make out the case as against the accused. Section 2 of

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the High Treason Act, 1948 defines the offence punishable under the Act as follows :

"2. Whoever wages war against the Union or any Constituent Unit thereof, or assists any State or person or incites or conspires with any person within or without the Union to wage war against the Union or any Constituent Unit thereof, or attempts or otherwise prepares by force of arms or other violent means to overthrow the organs of the Union or of its Constituent Units established by the Constitution, or takes part or is concerned in or incites or conspires with any person within or without the Union to make or to take part or be concerned in any such attempt shall be guilty of the offence of High Treason."

For the exposition of law on this point we may rely on *Aung Hla and others* v. *King Emperor* (1) which although it deals with an offence under section 121 of the Penal Code, now repealed, lays down principles that should be followed in a case under the High Treason Act. There it is held that when a multitude rises and assembles to attain by force and violence any attempt of a general public nature it amounts to levying war against the King and that it is not the number or the force but the purpose and intention that constitute the offence and distinguish it from riot or any other rising for a private purpose. The observations by Mansfield C.J., and Lord President Hope were quoted with approval in the said case.

Mansfield C.J. in *R.* v. *Gordon* (2) observed :

". . . The question always is, whether the intent is, by force and violence, to attain an object of a general and public nature, by any instruments, or by dint of their numbers. Whoever incites, advises, encourages or is any way aiding to such a multitude so assembled with such intent, though he does not personally appear among them, or with his own hands commit any violence whatsoever, yet he is equally a principal with those who act, and guilty of high treason."

(1) 9 Ran. p. 404. (2) (1781) 21 State Trials 486 at pp. 644-645.

Lord President Hope in *R.* v. *Hardie* (1) observed :

"To prove such levying of war it is the purpose and intention, the object which they have in view, which congregates and assembles them together, which gives them the impulse in their arming and in their rising ; it is that which constitutes treason, and distinguishes the crime from that of riot, or any other rising for any private purpose that can be imagined ;"

From the above authorities, it will be clear that in order to constitute an offence under the High Treason Act, 1948, the purpose and intention must be of general public nature as contradistinct from a private one. Therefore in a case under the High Treason Act, 1948, it is for the prosecution to show that the object of those who rise and assemble to attain the same by force and violence is of a general public nature as distinguished from a merely private one.

On analysing the evidence of the case now under appeal, we find that there is no evidence on record to show that when those men fired at the Police Party it was with any intention to achieve the object as contemplated under the Act. In fact, it appears, they were trying to effect their escape which they did. The charge under section 3 (*1*) of the High Treason Act is clearly not sustainable and is altered to one under section 333, Penal Code read with section 511 of the Penal Code which is warranted by the circumstances in which he was found with gun shot injuries on him and Japanese rifles and cartridges not far from him. Accordingly the death sentence is set aside and he will now be sentenced to two years' rigorous imprisonment.

(1) (1820) 1 State Trials (N.S.) at p. 765.

## APPELLATE CIVIL.

*Before U Tun Byu, Chief Justice and U On Pe, J.*

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*May 23.*

CHOW YEE (*a*) AH FOON (APPELLANT)

*v.*

KAN AH KONG AND ONE (RESPONDENTS).*

*Tenant—If includes legal representative—Urban Rent Control Act, s. 2 (g)—Code of Civil Procedure, s. 2—Death of tenant—If tenancy terminated—Transfer of Property Act, s. 111.*

*Held :* That legal representatives of a deceased tenant continuing in occupation of leased premises are not trespassers. Under s. 2 (g), Urban Rent Control Act, 1948, the definition of tenant includes a legal representative. A person who intermeddles with the estate of the deceased is also a legal representative under s. 2, Code of Civil Procedure.

On the death of a lessee, the lease is not terminated under s. 111, Transfer of Property Act and the scope of the said section cannot be enlarged beyond the terms of the section. The English Law under which tenancy terminates on the death of a tenant, is different from the law of Burma.

*Messrs. Barnett* v. *Mrs. E. Fowle and one*, (1925) I.L.R. 3 Ran. 46 at 47 referred to.

*W. T. Shan* for the appellant.

The judgment of the Court was delivered by

U TUN BYU, C.J.—The plaintiff-appellant instituted a suit for recovery of possession of a two-storeyed timber building known as No. 27, Kanaungto Creek, Seikkyi and also for possession of 4 dry docks which are situated on the foreshore in front of the house, and for recovery of mesne profits in respect of the said house and dry docks. The record shows that the said house No. 27, Kanaungto Creek, was first leased out to the husband of one Moon Shin and that after his death, Moon Shin became the tenant of the said house.

* Civil 1st Appeal No. 27 of 1950 against the decree of the 2nd Judge, City Civil Court, Rangoon in Civil Regular Suit No. 2306 of 1947, dated the 28th March 1950.

Moon Shin died on the 26th January 1947 ; and the second defendant-respondent Ah Yon is her daughter, while the first defendant-respondent Kan Ah Kong is her son-in-law. The plaintiff-appellant based his suit, which is known as Civil Regular No. 2306 of 1947 of the City Civil Court of Rangoon, on the supposition that the defendant-respondents were trespassers. From what has been stated already, it is clear that the defendant-respondents cannot really be designated as " trespassers " in respect of the house and the dry docks, particularly in view of the definition of the expression " tenant " as given in clause (*g*) of section 2 of the Urban Control Act, 1948, which reads as follows :

" (*g*) ' Tenant ' means any person by whom or on whose account rent is payable for any premises, and includes a legal representative as defined in the Code of Civil Procedure and every person from time to time deriving title under a tenant and also every person remaining in possession of the premises let to him after the termination of the tenancy or lease with or without the assent of the landlord."

In the case of *Messrs. Barnett* v. *Mrs. E. Fowle and one* (1), it was observed as follows :

" It is clear from the Indian Succession Act (section 179), that the persons, who in law would represent the estate of the deceased defendant, would be either his executors or his administrators. The respondents are neither ; and since it is also not alleged that they have intermeddled with his estate and so made themselves responsible as executors *de son tort*, the suit will not lie against them."

The above observation suggests clearly that a suit will lie against the person who intermeddles with the estate of the deceased person which forms the subject matter of the suit, and this, we may say with respect,

(1) (1925) I.L.R. 3 Ran. p. 46 at p. 47.

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is correct in view of the definition of the expression " legal representative ", as defined in section 2 of the Code of Civil Procedure.

The suit was filed against the defendant-respondents, apparently because they were in possession of the house and the docks which form part of the estate of the deceased Moon Shin and were therefore intermeddling with the estate of the deceased Moon Shin, so far as the house and the docks are concerned. In any case, it appears to us, that Ah Yon, who is a daughter of Moon Shin, appears to be a person who comes within the definition of the word " tenant " as defined in the Urban Rent Control Act, 1948, and the provisions of the Urban Rent Control Act will accordingly apply in connection with the premises at No. 27, Kanaungto Creek as well as the docks lying on the foreshore in front of that house. The case which the plaintiff-appellant has filed against the defendant-respondents in Civil Regular No. 2306 of 1947 appears clearly to have been misconceived.

It has been contended strenuously before us that the tenancy which Moon Shin, mother of Ah Yon, held should be deemed to have been terminated on the death of Moon Shin, and we were referred to a passage appearing in the Woodfall's Law of Landlord and Tenant wherein it was mentioned that a tenancy might be considered to have been terminated on the death of the lessee, that was of course in reference to what the English law is. So far as Burma is concerned, we must look to the provisions of section 111 of the Transfer of Property Act in order to find out when a lease of immoveable property can be said to determine, or to other provisions of law, which might have the effect of modifying the provisions of section 111 of the Transfer of Property Act. It has not been pointed out to us that there is any provision of law existing at the

present, which will indicate that a lease of an immoveable property in Burma must also be considered to have been terminated on the death of the lessee, and in the absence of any such provision, we are unable to enlarge the scope of section 111 of the Transfer of Property Act. There is accordingly no substance in this contention.

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We, therefore, see no reason to admit this appeal and it is hereby summarily dismissed.

## APPELLATE CIVIL.

*Before U Tun Byu, Chief Justice, and U On Pe, J.*

H.C. 1950

*May 24.*

S. I. ABOWATH AND FIVE OTHERS (APPELLANTS)

*v.*

T. H. KHAN (RESPONDENT).*

*Urban Rent Control Act, 1946—Ss. 5, 11, 16, 17, 18 and 19—Standard rent fixed—Whether effective from date of Act or order.*

*Held :* There is nothing in the Urban Rent Control Act to indicate that rent in respect of any premises after the commencement of the Act should, in all cases, be reckoned to be at the rate fixed by the Rent Controller. A contract of lease, agreed upon between the parties, should be considered to be binding and subsisting until it is modified by agreement or by operation of law. There is no provision in the 1946 Act to support the contention that the contractual right shall be deemed to have been modified with effect from the date the Act came into force, where an order fixing standard rent is passed. This would be giving a retrospective effect to the order, for which clear provisions would be required in the Act, expressly or by implication.

*A. I. Modan* for the appellants.

*M. E. Dawoodjee* for the respondent.

The judgment of the Court was delivered by

U TUN BYU, C.J.—The appellants, who are trustees of E. M. Abowath Waqf, leased out, in August, 1945, a portion of the frontage of the land at No. 120-122, 25th Street, Rangoon to the respondent T. H. Khan at a monthly rent of Rs. 100 per month. It appears that T. H. Khan paid the rent prior to the 1st January, 1946 and that he was in arrear in the payment of the rents for the period subsequent to 31st December, 1945. On 5th February, 1949 the appellants instituted a suit for the ejectment of the respondent, which was known as Civil Regular No. 132 of 1949 of the Rangoon City

* Civil Misc. Appeal No. 1 of 1950 against the order of the 2nd Judge, City Civil Court, Rangoon in Civil Execution No. 265 of 1949.

Civil Court, and they obtained a decree in their favour. The appellants next applied for the execution of the decree which they obtained against T. H. Khan, which was known as Civil Execution No. 265 of 1949. The respondent also filed an application under section 14 of the Urban Rent Control Act, 1948 for the rescission of the order of ejectment passed against him in Civil Regular No. 132 of 1949, and the concluding portion of the order which the learned Second Judge of the Rangoon City Civil Court passed in respect of that application was as follows :

" From the above facts the result will be that the defendant must pay up all arrears of rent from 1st January, 1946 to 26th December, 1947 at the rate of Rs. 100 per month and from 27th December, 1947 up to the end of October, 1949 he must pay at the rate of Rs. 200 per month. Over and above this the defendant must pay the costs of the suit and also the costs of the execution application. If all these arrears of rent are paid up within a week from the date of this order computed as mentioned above, I shall rescind the decree for ejectment passed against him."

It might be mentioned that there is no dispute in this appeal as to the amount of the rent which was payable by the respondent to the appellants in respect of the period which fell between 1st January, 1946 and 7th October, 1946, that is, in respect of the rents due for the period prior to the enactment of the Urban Rent Control Act, 1946. The point which is in dispute in this appeal is what is the rent payable for the period from 8th October, 1946 to the 26th December, 1947, that is, in respect of the rents for the period starting with the commencement of the Urban Rent Control Act, 1946 up to the date on which the certificate of the Rent Controller was issued. The contention advanced on behalf of the appellants is that the certificate of the Rent Controller fixing the standard

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rent should be considered to be effective from the date on which the Urban Rent Control Act, 1946 came into force, that is, from the 8th October, 1946, and that it would then follow that the rent payable for the period commencing from 8th October, 1946 would have to be considered to be at the rate of Rs. 200 per month, as fixed by the Rent Controller.

The provisions of sections 5, 11, 16, 17, 18 and 19 of the Urban Rent Control Act, 1946 have been referred to on behalf of the appellants, but we are unable to find anything in the provisions of those sections which will really indicate that the rent which the respondent is to pay for the period commencing from 8th October, 1946 to 26th December, 1947 should be deemed to be at the higher rate, which was fixed by the Rent Controller on the 27th December, 1947. We are unable to appreciate how the fact that an increased rent, over and above the standard rent, has been made irrecoverable, or that any sum paid over and above the standard rent is recoverable, can be said to indicate that the tenant is bound to pay the rent at a rate higher than the contractual rate, which had been agreed upon between the parties, in respect of the period prior to the date on which the standard rent was fixed by the Rent Controller. There can be no doubt that the provisions of the Urban Rent Control Act, read as a whole, show that the Act was enacted more for the purpose of safe-guarding the interest of the tenants than that of the landlords. We must therefore insist on having something more definite than the vague inferences to be drawn from certain provisions of the Urban Rent Control Act before we are asked to come to the conclusion that the contractual rate, as agreed upon between the parties, should be deemed to have been altered with effect from the date on which the Urban Rent Control Act, 1946

came into force, to the higher rate fixed by the Rent Controller as that would, in effect, be giving a retrospective effect to the operation of the standard rent fixed by the Controller, for which a clear provision will be required, whether expressly or by implication. Provisions have been made in the Urban Rent Control Act to make the demand for any rent in excess of the standard rent irrecoverable, but there is obviously nothing in the Urban Rent Control Act to indicate that the rent which is payable in respect of any premises after the commencement of the Urban Rent Control Act should in all cases be reckoned to be at the rate fixed by the Rent Controller. The reason why the provisions of section 16 of the Urban Rent Control Act, 1946 were enacted appears to be clear in view of the prohibitive provisions of section 5.

It seems to us that a contract of lease which has been agreed upon between the parties should be considered to be binding or subsisting, until it has been modified by agreement between the parties or by an operation of law. We are unable to understand how the original contract of lease made between the parties could be said to have been altered or modified in this case until the Controller of Rent had issued the certificate fixing the standard rent. It appears to us that until the Controller of Rent issues a certificate fixing the standard rent nothing could be said to have been done or to have occurred by which it might be said that the original contract of lease which the parties have agreed upon had been altered, so far as the rate at which the rent is to be paid is concerned. It will be wrong on our part to give effect to the contention which has been urged on behalf of the appellants unless there is clear provision in the Urban Rent Control Act, 1946 to indicate that the contractual rent, which the parties have agreed upon should be

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deemed to have been modified, in a case like the one under consideration with effect from the date of the commencement of the Urban Rent Control Act. The findings of the learned Second Judge, Rangoon City Civil Court are therefore correct, and the appeal is dismissed with costs. Advocate's fees three gold mohurs.

## APPELLATE CIVIL.

*Before U Tun Byu, Chief Justice, and U On Pe, J.*

AHMED SOOLEMAN DADABHOY (APPELLANT)

*v.*

MESSRS. P. M. MOHAMED HAMID SONS (RESPONDENTS).*

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*June 2.*

*Promissory note—Signature as agent not in document—Negotiable Instruments Act, 1881, ss. 26, 27, 28—Whether execution on behalf of undisclosed principal could be proved.*

Where two promissory notes in favour of appellant were signed by P. P. Thevar and there was nothing on the instruments to suggest that P. P. Thevar acted as agent for anybody.

*Held :* That the name of the person to be charged upon a negotiable instrument should be clearly stated in the instrument so that the responsibility is made plain and can be instantly recognized.

*Sadasuk Janki Das* v. *Sir Kishan Pershad*, (1919) I.L.R. 44 Cal. 663 at 668-669, followed.

*Ramgopal Ghose* v. *Dhirendra Nath Sen and others*, (1927) I.L.R. 54 Cal. 380 at 387-388, referred to.

*C. A. Soorma* for the appellant.

The judgment of the Court was delivered by

U TUN BYU, C.J.—The appellant Ahmed Sooleman Dadabhoy filed a suit, known as Civil Regular No. 631 of 1948 of the Rangoon City Civil Court, for the recovery of a sum of Rs. 7,000, being the amount alleged to be due on two promissory notes, one being for the sum of Rs. 5,000, and the other for the sum of Rs. 2,000, which had been marked as Exhibits A and B. The respondent firm Messrs. P. M. Mohamed Hamid Sons was the 1st defendant, while one P. Periaswamy Thevar was made the 2nd defendant. It ought to be stated at once that both the promissory

* Civil 1st Appeal No. 67 of 1949 against decree of the Chief Judge of the City Civil Court of Rangoon, in Civil Regular Suit No. 631 of 1948, dated the 20th September 1949.

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notes were executed by P. P. Thevar only. It was, however, alleged by the plaintiff-appellant that P. P. Thevar was a recognized agent of the respondent Messrs. P. M. Mohamed Hamid Sons and that P. P. Thevar obtained those loans for the purpose of the business of the meat stalls, which he was carrying on for and on behalf of the respondent firm.

P. P. Thevar, who is not a party in this appeal, admitted the execution of the said two promissory notes ; and he alleged that he took those loans for and on behalf of the respondent firm and that the money so obtained by him was used in the business which he carried on for Messrs. P. M. Mohamed Hamid Sons. The respondent firm, however, denied *inter alia* that P. P. Thevar was at any time an agent of the respondent firm or that he was at any time authorized by any person belonging to the respondent firm to act as an agent of the respondent firm. The learned Chief Judge, Rangoon City Civil Court, dismissed the suit of the plaintiff-appellant as against the respondent firm with costs on the 20th September, 1949.

P. M. Mohamed Hamid, in whose name the meat stalls in Soortee Bara Bazaar were leased before the War with Japan broke out evacuated, with his two sons Mustafa and Mohamed Eusoof, to India in February, 1942 ; and he died in India about a year after his arrival there. According to his two sons Mohamed Eusoof and Mustafa, who gave evidence in this case, P. P. Thevar was only a servant of their father P. M. Mohamed Hamid and that his duty was to take out the goats for grazing near about the slaughter house. We are unable to see anything on the record to indicate why their evidence ought not, in this respect, to be accepted. There was also no evidence to suggest that P. P. Thevar at any time, prior to the Japanese occupation of Burma in 1942,

assisted P. M. Mohamed Hamid at his meat stalls in the Soortee Bara Bazaar. The evidence shows that P. P. Thevar came into possession of the meat stalls, which had been leased out to P. M. Mohamed Hamid before the War broke out with Japan, only in May, 1942, when the latter and his sons were already in India. A. M. Sadek, who was Secretary to the Soortee Bara Bazaar Company from March or April, 1942, to June 1948, explained in his evidence how P. P. Thevar came to occupy the meat stalls after the British evacuation of Burma, and what he said was as follows :

" The 2nd defendant came into possession of these stalls in May 1942 and paid the rent himself. By rent I mean rent of the stalls paid to the bazaar company. I did not know the 1st defendant before the Japanese occupation of Rangoon. I was not then the Secretary of the bazaar company. This is how we permitted the 2nd defendant to occupy the stalls standing in the name of P. M. Md. Hamid. He came and told me that these stalls belonged to his master P. M. Md. Hamid and that Md. Hamid had evacuated to India where he died and that he might be permitted to occupy the said stalls. I made enquiries as to the truth of his statement and after that enquiry I gave him these stalls. I gave these stalls to him because from my enquiry I found that he was a servant of P. M. Md. Hamid and not because he was his agent."

We do not see any reason why the evidence of A. M. Sadek ought not be accepted, and thus, it is clear that P. P. Thevar did not inform A. M. Sadek that he was an agent of P. M. Mohamed Hamid or that he had been authorized by the latter, or by any of his sons, to carry on his business at the Soortee Bara Bazaar while he was in India. It appears to us that on the evidence of A. M. Sadek alone, it could rightly be held that P. P. Thevar was never appointed or authorized to act as an agent of P. M. Mohamed Hamid or of the respondent firm, because if

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P. P. Thevar had been authorized by P. M. Mohamed Hamid, or by any of his sons, to carry on their business at the Soortee Bara Bazaar, one would have expected P. P. Thevar to have informed A. M. Sadek about it. The evidence of T. S. Md. Yacoob Sahib, a witness for the plaintiff-appellant, is also interesting, and he stated at page 65 of the record as follows :

"I had business dealings with the 1st defendant. During the Japanese occupation of Burma he and I worked together in partnership in butcher's business. When P. M. Md. Hamid left for India, I saw the 1st defendant taking over his stalls and working them. I first met Mustafa after the War either about the end of 1946 or during the beginning of 1947. I first met Md. Eusoof about 3 months after I met Mustafa. The two brothers after their arrival in Burma in 1946 or 47 started doing 'loongyi business.' About a year afterwards they got back the mutton stalls from the 1st defendant. The two brothers applied to the Secretary of the bazaar to return to them their stalls, and they got them back only about a year afterwards."

In cross-examination on the reverse of page 65, this witness also stated as follows :

"I was a partner with the 1st defendant for about 6 months in this business, and 15 stalls which belonged at one time to Md. Hamid were included in our partnership business. These 6 months were during the Japanese period. After the British re-occupation he and I started the partnership again and sold mutton in the same stalls. We were partners this time only for about 4 or 5 months. This second partnership was dissolved about the end of 1945. The 1st defendant thereupon carried on the business alone."

Thus, the evidence of T. S. Md. Yacoob also suggests that P. P. Thevar was running the meat stalls in the Soortee Bara Bazaar after the British evacuation of Burma in 1942 for himself, and on his own account, and not for the benefit of P. M. Mohamed Hamid or his sons. He certainly conducted the business in a

way, which an agent would not have done. There is no evidence to explain why he entered into a partnership with T. S. Md. Yacoob Sahib at all, if he was working the meat stalls merely as an agent of P. M. Mohamed Hamid and his sons. It could, therefore, be said that there is sufficient evidence on the record on which it might properly be found that P. P. Thevar was or must have been running the meat stalls in the Soortee Bara Bazaar on his own account, and not on behalf of P. M. Mohamed Hamid or any of his sons. Moreover, there is no evidence to show what assets or property belonging to P. M. Mohamed Hamid or his sons P. P. Thevar took over when the latter re-opened the meat stalls at the Soortee Bara Bazaar in 1942. We also cannot find any evidence to indicate that P. P. Thevar kept P. M. Mohamed Hamid or any of his sons informed about the state or progress of the business he was alleged to have been running on their behalf since 1942. There was also no evidence to show that P. P. Thevar was at any time actually running the meat stalls under the direction of any of the sons of P. M. Mohamed Hamid, although three of them arrived back in Burma in 1946, which was long before the present litigation arose.

Lord Buckmaster in the case of *Sadasuk Janki Das* v. *Sir Kishan Pershad* (1), observed as follows :

" It is of the utmost importance that the name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or on the back of the document, so that the responsibility is made plain and can be instantly recognised as the document passes from hand to hand.

* * * *

It is not sufficient that the principal's name should be ' in some way ' disclosed ; it must be disclosed in such a way

(1) (1919) I.L.R. 44 Cal. Series, p. 663 at pp. 568 and 669.

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that on any fair interpretation of the instrument his name is the real name of the person liable upon the bills.

Their Lordships' attention was directed to sections 26, 27 and 23 of the Negotiable Instruments Act of 1881, and the terms of these sections were contrasted with the corresponding provisions of the English Statute. It is unnecessary in this connection to decide whether their effect is identical. It is sufficient to say that these sections contain nothing inconsistent with the principles already enunciated, and nothing to support the contention, which is contrary to all established rules, that in an action on a bill of exchange or promissory note against a person whose name properly appears as party to the instrument, it is open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal."

We respectfully agree with the observation quoted above. The above quotation was also cited with approval in the case of *Ramgopal Ghose* v. *Dhirendra Nath Sen and others* (1), at pages 387 and 388. We have already observed that the promissory notes, Exhibits A and B, were executed by P. P. Thevar only, and in fact, there is nothing on the promissory notes to even suggest that P. P. Thevar probably signed them as an agent of P. M. Mohamed Hamid or any of his sons. This appeal could have, for this reason alone, been dismissed.

In view of the observations which have been made above, it is really not necessary for us to decide whether there was any ratification of the two promissory notes by either P. M. Mohamed Hamid or any of his sons. However, as this point has been argued before us, we feel that we should state at once that our answer on this point is in the negative even if we were to assume that there was such a firm as P. M. Mohamed Hamid Sons before the War with Japan broke out. We ought to mention here that there is no proper evidence in this case to prove that P. M. Mohamed

(1) (1927) I.L.R. 54 Cal. Series, p. 380 at pp. 387-388.

Hamid was running the meat stalls in the Soortee Bara Bazaar in partnership with his sons. It is nothing unusual to find his sons or some of his sons assisting P. M Mohamed Hamid at the meat stalls he set up in the Soortee Bara Bazaar. Exhibit K has, in our opinion, no probative value as it was not signed by any of the partners of P. M. Mohamed Hamid Sons. Exhibit L also does not help the plaintiff-appellant, and moreover, P. P. Thevar, who signed it, had not been examined as a witness in this case. Exhibit O and Exhibit P letters, dated the 2nd November, 1946 and 15th November, 1945, which were said to have been sent to P. P. Thevar and signed by Aboo Backer and Mohamed Eusoof respectively, have not been admitted to be genuine documents, and, in fact, it has been alleged that they were false documents. No evidence has been produced to prove that the signature or handwriting on Exhibit O was that of Aboo Backer, or that the signature or handwriting on Exhibit P was that of Mohamed Eusoof. No expert had been examined in this matter, nor was any person, who was familiar with the signature or handwriting of Aboo Backer or Mohamed Eusoof, examined on behalf of the plaintiff-appellant.

There is, therefore, no merit in this appeal and it is dismissed.

## APPELLATE CIVIL.

*Before U Tun Byu, Chief Justice, and U San Maung, J.*

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*June 19.*

# THE OFFICIAL RECEIVER, RANGOON (APPELLANT)

*v.*

# M. M. MULLA (RESPONDENT).*

*Contract Act, s. 70—Conditions of Liability—"Lawfully"—Meaning of—"Person enjoys the benefit"—Official Receiver—If such person—Position of.*

*Held:* S. 70 of the Contract Act requires three conditions, *viz.*, that a thing must be done lawfully, that it must not be done gratuitously and the person sought to be charged must have enjoyed the benefit. To support a suit under this section, there must be an obligation, express or implied, to repay.

*Ram Tuhul Singh* v. *Biseswar Lall Sahoo*, (1875) 2 I.A. 131 at 143, followed.

The terms of the section are wide but must be applied with discretion to do substantial justice in cases where a contractual relationship cannot be imputed.

*Suchand Ghosal* v. *Balaram Mardana*, (1911) 38 Cal. 1 at 7, referred to.

The word "lawfully" in the section is not a surplusage. The question in each case would be whether the person paying had a lawful interest in making it. "Lawful" has a wider meaning than legal.

*Gopeswar Banerjee* v. *Brojo Sundari Devi*, (1922) 49 Cal. 470 at 473; *Raja Baikunto Dey Bahadur* v. *Uday Chand Maiti*, (1905) 2 C.L.J. 311; *Punjabhai* v. *Bhagwandas*, (1929) 53 Bom. 309 at 313-314; *Chedi Lal* v. *Bhagwan Das*, (1888) 11 All. 234; cited with approval.

A receiver is merely an officer of court, sometimes referred to as the hand of the court. He acquires no proprietary interest in the property. He is not the agent or representative of any party to the suit and holds the property for the benefit of the party ultimately successful in the suit. He cannot therefore be said to be a person who had benefited by the repairs to the property, belonging to another person.

*Po Shan* v. *Maung Gyi*, 5 Lower Burma Rulings, 213 at 215; *Maung Ohn Tin* v. *P.R.M.P.S.R.M. Chettyar Firm and others*, (1929) 7 Ran. 425 at 426; *Eastern Mortgage and Agency Co., Ltd. and T. C. Tweedle* v. *Muhammad Fuzlul Karim and another*, (1925) 52 Cal. 914 at 931; *Ma Joo Tean and another* v. *The Collector of Rangoon*, (1934) 12 Ran. 437 at 440; *Harihar Mukerji* v. *Harendra Nath Mukerji*, (1910) 37 Cal. 754, referred to and followed.

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* Civil 1st Appeal No. 62 of 1949 against the decree of 2nd Judge, City Civil Court, Rangoon in Civil Regular No. 184 of 1947.

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*P. B. Sen* for the appellant.

*C. C. Khoo* for the respondent.

U TUN BYU, C.J. -The surviving children of one Mulla Hashim created, after his death, a trust called Mulla Hashim Family Endowment Waqf. The Official Receiver, who is the appellant in the present appeal, was appointed Receiver by the High Court, in Civil Regular No. 619 of 1933, to take charge of the property belonging to Mulla Hashim Family Endowment Waqf. The premises at No. 52, Mogul Street, which belongs to the said Waqf, was in the charge of the Official Receiver when the war with Japan broke out at the end of 1941. The office of the Official Receiver was removed temporarily to India during the last great war. M. M. Mulla, the respondent, stated that he made an attempt to be in touch with the Official Receiver after the Japanese occupation of Burma, and he discovered that the office of the Official Receiver was not in existence then in Burma. On or about 23rd June, 1942, M. M. Mulla applied to the Muslim Estates Enquiry Committee for possession of the premises at No. 52, Mogul Street. It ought to be observed here that the Muslim Estates Enquiry Committee was submerged subsequently into the Absentee Indian Properties Department, Indian Independence League, and it was for this reason that M. M. Mulla applied in October, 1942 to the Absentee Indian Properties Department for the grant of an ownership certificate in respect of four properties, one of which was the property at No. 52, Mogul Street. On or about 12th June 1943, M. M. Mulla received a permit, Exhibit 3, allowing him to take charge of the properties mentioned in the permit.

We ought to mention here that Mulla Ahmed, Amina Bi Bi and Ebrahim Ismail were the trustees of

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Mulla Hashim Family Endowment Waqf and that one of the trustees, *viz.*, Mulla Ahmed evacuated to India during the Japanese occupation of Burma while the other two trustees, *viz.*, Amina Bi Bi and Ebrahim Ismail remained in Burma. Amina Bi Bi, who was a daughter of Mulla Hashim, died in or about August, 1942, and Ebrahim Ismail died in 1945. One Seedat, a beneficiary in the Mulla Hashim Family Endowment Waqf and who was one of the plaintiffs in Civil Regular No. 619 of 1933, was also in Burma during the Japanese occupation of the country. Mulla Azim, who is also a beneficiary in the said Waqf, was also in Burma during the Japanese occupation.

Exhibit 10, dated the 23rd June, 1942 and issued to M. M. Mulla by the Muslim Estates Enquiry Committee, Japanese Military Administrative Department, shows that M. M. Mulla applied, on 23rd June, 1942, to be allowed to take possession of the premises at No. 52, Mogul Street, but no certificate was issued to him by the Muslim Estates Enquiry Committee, apparently because that Committee became submerged into the Absentee Indian Properties Department before it decided to issue any certificate to M. M. Mulla. On 20th October, 1942, M. M. Mulla applied for an ownership certificate from the Absentee Indian Properties Department in respect of four properties, including the premises at No. 52, Mogul Street, and he was authorised, under Exhibit 3, dated the 12th June, 1943, to take possession of the four houses mentioned in it. M. M. Mulla stated that he also obtained permission, verbally, from the Muslim Estates Enquiry Committee to do the necessary repairs in respect of the properties which he had applied to be allowed to take possession of. The first repair, which is said to have cost Rs. 2,300, to the premises at No. 52, Mogul Street was completed about the middle of July, 1942,

that is, before M. M. Mulla obtained the permit to take possession of the properties from the Absentee Indian Properties Department. The second repair to the premises at No. 52, Mogul Street, was carried out in June, 1945, and it is said to have cost Rs. 1,400 ; and this repair was made before the Official Receiver refunctioned in Rangoon.

Maung Tun, son of U Hla Oung, stated that he supervised the repairs that were carried out at the premises at No. 52, Mogul Street, both in 1942 as well as in 1945 and that the receipts for the repairs, which had been filed as Exhibits 4 and 5, were signed by him. He said that he personally supervised the repairs that were carried out at the premises at No. 52, Mogul Street, and that the cost of the first repairs was Rs. 2,300 while the cost of the second repairs was Rs. 1,400. We have not been able to find anything on the record, which will really suggest that we ought not to accept the evidence of Maung Tun in this respect. The fact that the firm, of which he was a registered partner, did not keep and maintain proper accounts until 1947 is not in itself sufficient to indicate that his evidence must have been untrue. Mallapa Chettyar, a witness cited on behalf of M. M. Mulla, also saw the repairs being carried out at the premises at No. 52, Mogul Street, while the witness was living there. It is true that Mulla Azim, a witness called on behalf of the Official Receiver, stated that he used to visit the house at No. 52, Mogul Street, and that he was not aware of any repairs being carried out in that house. His evidence appears to be rather vague. He had not stated specifically that no repairs could have been done, as alleged by Maung Tun, to the doors, windows, and roof of the premises at No. 52, Mogul Street. It is also not clear whether he actually went into the house in question to see if any repair could have been

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carried out at that premises. There was accordingly sufficient material on which the learned Second Judge, Rangoon City Civil Court, could have found that the repairs, shown in Exhibits 4 and 5, had in fact been carried out.

It has been contended that M. M. Mulla is entitled to recover the sum of Rs. 3,700 which he paid for the two repairs carried out at the premises at No. 52, Mogul Street, in view of the provisions of section 70 of the Contract Act, which reads :

" 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."

It is thus clear that section 70 of the Contract Act requires three conditions, namely, that—

(1) it must have been done lawfully ;
(2) it must have been done by a person who did not intend to do it gratuitously ; and
(3) the person for whom it was done must have enjoyed the benefit of it.

The Privy Council observed in the case of *Ram Tuhul Singh* v. *Biseswar Lall Sahoo* (1) as follows :

" . . . it is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay."

In the case of *Suchand Ghosal* v. *Balaram Mardana* (2) it was also observed as follows :

" The terms of section 70 are unquestionably wide, but applied with discretion they enable the Courts to do substantial

(1) (1875) 2 I.A. 131 at 143. (2) (1911) 38 Cal. Series 1 at 7.

justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract. It is, however, especially incumbent on final Courts of fact to be guarded and circumspect in their conclusions and not to countenance acts or payments that are really officious."

It seems to us that we ought always to bear in mind the observations cited above in construing the provisions of section 70 of the Contract Act, and, if that is done, we are not likely to go wrong in attempting to find out whether the provisions of section 70 of the Contract Act apply in any particular case or not.

It has not been disputed during the arguments that M. M. Mulla did not purport to carry out the repairs in question gratuitously. A question arises whether the repairs can be said to have been done lawfully as contemplated in section 70 of the Contract Act. It has been submitted on behalf of M. M. Mulla that the expression "lawfully" in section 70 ought to be given its widest meaning, so as to include all acts which are not forbidden by law. We cannot, however, accede to this suggestion, because if that was done we would be shutting our eyes to the salutary observations that have been cited above, from the cases of *Ram Tuhul Singh* v. *Biseswar Lall Sahoo* (1) and *Suchand Ghosal* v. *Balaram Mardana* (2).

In *Gopeswar Banerjee* v. *Brojo Sundari Devi* (3), it was observed :

"There I find I said as follows : The test as regards the meaning of the word 'lawfully' was laid down by my learned brother Mr. Justice Mookerjee in the case of *Raja Baikunto Dey Bahadur* v. *Uday Chand Maiti* (4). The word 'lawfully' in section 70 of the Contract Act is not merely a surplusage. It must be considered in each individul case, whether the person, who made the payment, had any interest in making it ; if not, the payment cannot be said to have been made

(1) (1875) 2 I.A. 131 at 143. (3) (1922) 49 Cal. Series 470 at 473.
(2) (1911) 38 Cal. Series 1 at 7. (4) (1905) 2 C.L.J. 311.

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'lawfully.' Then I proceeded to say 'I expect my learned brother would agree with me, when I say he meant 'had any lawful interest in making it'. My learned brother did not deliver a separate judgment in that case but he said that he entirely agreed. It is interesting to note that in the Commentary on the Indian Contract Act by the learned commentator, Sir Frederick Pollock, at page 388 (4th edition), he refers to the matter as follows :

The word 'lawfully' in this section is not mere surplusage. It must be considered in each individual case whether the person who made the payment had any lawful interest in making it ; if not, the payment cannot be said to have been made lawfully."

In *Punjabhai* v. *Bhagwandas* (1), it was also observed :

"The term 'lawful' no doubt has a wider meaning than the term 'legal.' 'Legal' is what is in conformity with the letter or rules of the law as administered in the Courts ; 'lawful' is what is in conformity with (or frequently not opposed to) the principle or spirit of the law whether moral or judicial. In ascertaining whether an act is 'lawfully' done for another the test to be applied should be as was laid down by Straight and Mahmood, JJ., in *Chedi Lal* v *Bhagwan Das* (2) *viz.*, 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. According to Mahmood, J. (page 244) any other view of the law would amount to saying that the effect of section 70 of the Indian Contract Act is to enable a total stranger, without any express or implied request on behalf of a debtor, to put himself into the shoes of the creditor by the simple fact of paying the debts due by such debtor. The section in the opinion of the learned Judge, could not have been intended to involve such a result. With great respect it seems to me that this is the proper test to apply in interpreting the term 'lawfully' in section 70."

M. M. Mulla is, on his own admission, not a beneficiary under the Mulla Hashim Family Endowment Waqf, nor is he a trustee to the said Waqf. He

(1) (1929) 53 Bom. Series 309 at 313-314. (2) (1888) 11 All. 234.

also did not obtain the consent of any of the trustees who were still in Burma after the British evacuation in 1942. Neither Amina Bi Bi, nor Ebrahim Ismail, was ever consulted about the repairs which M. M. Mulla carried out. There is also no evidence to show that M. M. Mulla had been asked by any of the beneficiaries to take charge of the premises at No. 52, Mogul Street. It is also clear that none of the trustees had asked him to do so. M. M. Mulla could, in the circumstances, be described as an intermeddler. He was clearly under no obligation to make the repairs, nor had he any interest in the premises at No. 52, Mogul Street. The Muslim Estates Enquiry Committee and the Absentee Indian Properties Department are not statutory bodies, and we have not been shown how the Muslim Estates Enquiry Committee or the Absentee Indian Properties Department could be said to have power to interfere with the rights of private persons who were still in Burma at the time of the Japanese occupation. Thus the repairs which M. M. Mulla carried out at the premises at No. 52, Mogul Street cannot, in the circumstances of this case, be considered to have been lawfully carried out for the purpose of section 70 of the Contract Act.

Another point which arises is that whether the Official Receiver can be said to be a person who enjoys the benefit of the repairs that had been carried out in the premises at No. 52, Mogul Street. The answer must, in our opinion, be in the negative. It will be necessary, in this connection, to consider what is the nature of the office which a Receiver holds. In *Po Shan* v. *Maung Gyi* (1). Fox, C.J., observed as follows :

" The status of a Receiver is merely that of an officer of the Court. He is sometimes referred to as the ' hand of the Court.'

(1) 5 Lower Burma Rulings, 213 at 215.

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He acquires no proprietary rights or interest in the property of which he is appointed Receiver. Having no title to the property he cannot convey or assign any title to it to any other person."

The observation of Sir Charles Fox was quoted with approval in the case of *Maung Ohn Tin* v. *P.R.M.P.S.R.M. Chettyar Firm and others* (1). The commentary which appears in Woodroffe on Receivers was also cited with approval in that case, which is as follows :

"A receiver has no proprietary rights or interest whatever Notwithstanding his appointment the proprietary rights in the estates remain in the persons who are by law entitled to the estate The receiver's possession is not possession by any personal right. It is the possession of the Court, and he is totally devoid of any interest in the property." (Woodroffe on Receivers, 3rd edition, page 4.)

Mukerji, J., observed, in *Eastern Mortgage and Agency Co. Ltd. and T. C. Tweedle* v. *Muhammad Fuzlul Karim and another* (2), as follows:

"The nature of the office of a Receiver is simply this, that he is an impartial person appointed by the Court to collect and receive pending the proceedings the rents, issues and profits of land or personal estate or other things in question which it does not seem reasonable to the Court that either party should collect or receive. The object sought by the appointment of a Receiver is the safeguarding of property for the benefit of those entitled to it. His possession is on behalf and for the benefit of all the parties to the suit in which he is appointed, and is the possession of all the said parties according to their titles. The property in his hands is in *custodia legis* for the person who can make a title to it. The title of the real owner is in no way affected either in theory or on principle by his appointment. He collects and receives the rents, issues and profits not upon his own title but upon the title of some persons, parties to the action."

(1) (1929) 7 Ran. 425 at 426. (2) (1925) 52 Cal. Series 914 at 931.

The observation of Mukerji, J., was cited with approval in the case of *Ma Joo Tean and another* v. *The Collector of Rangoon* (1).

It was also held in *Harihar Mukerji* v. *Harendra Nath Mukerji* (2) as follows :

"The Receiver ordinarily is not the representative or agent of either party to a suit in the administration of the trust, but the appointment is for the benefit of all parties, and he holds the property for the benefit of those ultimately found to be the rightful owners."

Thus it is clear that a Receiver is an officer of a Court, having no title to or interest in the property which is placed in his charge, and that he only holds the property for the benefit of the person who will ultimately succeed in the litigation pending before the Court. The Official Receiver could not, therefore, be said to be a person who had benefited by the repairs which M. M. Mulla had carried out at the premises at No. 52, Mogul Street, a property which belongs to another person.

The commission which a Receiver obtains cannot, in our opinion, be considered to be anything more than a remuneration to him for the time and trouble he expended in taking charge of the property which had been placed by the order of a Court in his possession. The appeal is therefore allowed with costs in both Courts.

We do not consider, in view of the conclusion which we have arrived at about, that it is necessary for us to express any opinion, as to whether the provisions of section 80 of the Code of Civil Procedure apply in the circumstances of the present case, and, if so, whether the third written-statement which contains

(1) (1934) 12 Ran. Series 437 at 440. (2) (1910) 37 Cal. Series 754

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the counter-claim of the respondent M. M. Mulla ought to be rejected, or whether any part of the claim of M. M. Mulla can be considered to be barred by limitation of time. We accordingly refrain in this case from expressing our opinion on them.

U SAN MAUNG, J.—I agree.

## CIVIL REVISION.

*Before U On Pe, J.*

H.C. 1950

*June 8.*

## HABIBUR RAHMAN (APPLICANT)

*v.*

## MA AH MA (RESPONDENT).*

***Registration of document—Formalities—Registration when complete—Registration Act, ss. 52 (1) (c) and 61 (2) and 87—Non-copying of document in Book 1 if an irregularity and curable.***

Where a deed of sale was presented for registration and a receipt was obtained from the Registration office on 24th April 1945 but the document was never returned to the party and the deed was not copied into Book No. 1 under s. 52 (1) (c) of the Registration Act,

*Held :* That the document was not duly registered, as the registration was not complete. The certificate is that which gives the document the character of a registered instrument as the Act expressly says that the certificate shall be sufficient to allow its admissibility in evidence. In its absence, the object of the Registration Act will have been defeated.

*Muhammad Ewaz and others* v. *Birj Lal and another*, I.L.R. All. Vol. I, p. 465, referred to.

The fact that applicant was not responsible and could not be penalized for others' defaults is irrelevant—as the point for decision was whether there was a valid registered document. This does not amount to a defect in procedure curable under s. 87, Registration Act.

*Ma Kha* v. *S. I. Ispahany*, (1946) Ran. 192, distinguished.

*Ba Han* for the applicant.

*P. N. Ghosh* for the respondent.

U ON PE, J.—This is an application to revise the judgment and decree of the lower Court, declaring that the plaintiff is entitled to the suit properties. The main ground, among others, is that the trial Court had wrongly held that the deed of sale of the suit properties had not been duly registered in the office of the Sub-Registrar, Rangoon. The facts, as related by the

* Civil Revision No. 12 of 1950 against the decree of 4th Judge, City Civil Court, Rangoon in Civil Regular No. 617 of 1949, dated the 6th February 1950.

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applicant leading to the registration of the sale deed in question, are as follows :—

"The purchase of the suit properties from the respondent for a sum of Rs. 8,000 (Japanese currency) was by a deed of sale dated the 24th April, 1945. The deed was presented by the parties for registration at the Office of the Sub-Registrar, Rangoon when the applicant obtained an acknowledgment receipt from the Sub-Registrar, Rangoon. The receipt is filed in the suit and marked as Exhibit A. Owing to circumstances arising out of the War, the document was never returned to the applicant nor could it be traced.

Several issues were framed by the lower Court. For the purpose of disposal of this application, it is sufficient to take up the material issue, namely, whether the deed of sale presented for registration had been duly registered. From the evidence of the Registration Clerk U Aung Khin, it is clear that some of the formalities had been gone through but the deed had not been copied in the Book No. 1 which was maintained for the purpose as required under section 52 (*1*)(*c*) of the Registration Act. The consequence of this is that the registration of the document in question cannot be deemed to be complete, *vide* section 61, sub-section 2) of the Registration Act. The observation made in *Muhammad Ewaz and others* v. *Birj Lal and another* (1) may be aptly quoted to show the importance of the certificate mentioned in section 61 of the Registration Act.

"The certificate is that which gives the document the character of a registered instrument, and the Act expressly says that that certificate shall be sufficient to allow of its admissibility in evidence."

In the absence of the certificate, it is obvious that the object of the Registration Act will have been defeated.

(1) I.L.R. All. Vol. I, p. 465.

It has been strenuously urged before me for the applicant that the loss of the document was due to the circumstances which was not his doing, and that it would amount to penalizing him for the misdeeds of others. This is however, another matter and has no relation to what the Court should decide from the materials placed before it. It is, next contended that the circumstances in which the document was lost and for that account could not be copied into Book No. 1 should be treated as constituting a defect in procedure which should be curable under section 87 of the Registration Act. In support of this contention, the case of *Ma Kha* v. *S. J. Ispahany* (1) is quoted. That is a case in which a power of attorney was executed before and authenticated by an officer who held a dual office of a Magistrate and a Sub-Registrar and who, by mistake, signed as a Magistrate and not as a Sub-Registrar and, for that mistake, authenticated document was questioned. That was undoubtedly a defect in the procedure which was therefore curable but the facts in the present case are quite different. I therefore come to the conclusion that the lower Court is quite right in coming to the finding that the document in question has not been duly registered. Section 54 of the Transfer of Property Act requires that the transfer in this case could be made only by registered instrument. In the absence of a registered instrument, which must be one, as laid down in proviso 1 to section 3 of the Transfer of Property Act, that is, the instrument has been registered and its registration completed in the manner prescribed in the Registration Act and the rules made thereunder, it must be held that the claim to the title to the suit property based on the deed in question fails.

In the result this application is dismissed with costs.

(1) (1946) Ran. p. 192.

## CRIMINAL REVISION.

*Before U San Maung, J.*

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*June 8.*

MAUNG TUN YIN (APPLICANT)

*v.*

THE UNION OF BURMA (RESPONDENT).*

*Essential Supplies and Services Act (XLVII of 1947)—S. 8 (1) and (2) to be read with s. 517, Criminal Procedure Code—"Shall be liable to confiscation"—Meaning—Order of acquittal under s. 8 (1)—If can be varied or ignored by District Magistrate under s. 520, Criminal Procedure Code.*

*Held :* The words "shall be liable to confiscation" in s. 8 (2) of the Essential Supplies and Services Act, 1947 does not mean the same thing as "shall be confiscated." The discretion of the Court with reference to disposal of property conferred by s. 517 of the Criminal Procedure Code, is not in any way fettered by s. 8 (2). What is envisaged by s. 8 (2) is that the Court should bear in mind the desirability of confiscating the property mentioned in that sub-section. As the accused had been acquitted by the trial Court on a charge under this sub-section, it is not open to the District Magistrate purporting to act under s. 520, Criminal Procedure Code to come to a contrary finding ; as there was no appeal against the acquittal and such an appeal did not lie to that Court.

*Tin Hla* for the applicant.

*Choon Foung* (Government Advocate) for the respondent.

U SAN MAUNG, J.—In Criminal Regular Trial No. 111 of 1949 of the Headquarters Magistrate, Yenangyaung, four accused, namely Maung Ba Shin, Maung Htwe Maung, Maung Lu Maw and Maung Tun Yin, were prosecuted for an offence punishable under sub-section (*1*) of section 8 of the Essential Supplies and Services Act, 1947 (Burma Act XLVII of 1947) for being jointly concerned in the unauthorized possession

* Criminal Revision No. 32-B of 1950 being review of the order of District Magistrate of Magwe, dated the 4th of March 1950 passed in Criminal Revision No. 12 of 1950.

with a view to removal thereof without a permit of 11 drums of crude oil in contravention of the orders of the Deputy Commissioner, Yenangyaung, dated the 23rd September, 1949. These drums of crude oil were actually found loaded on truck No. RA 254, of which Maung Tun Yin was the owner and Maung Lu Maw was the driver and they were the properties of Maung Ba Shin and Maung Htwe Maung. The learned trial Magistrate after hearing the evidence cited by both parties convicted Maung Ba Shin, Maung Htwe Maung and Maung Lu Maw of offences punishable under section 8 (*1*) aforesaid and sentenced them to various terms of imprisonment. The truck owner Maung Tun Yin was acquitted on the express finding that he had no prior knowledge of the fact that his truck was being utilized for the transport of illicit crude oil. The appeal of Maung Ba Shin and Maung Htwe Maung against their convictions and sentences was unsuccessful, while Maung Lu Maw did not appeal. No appeal was preferred by Government against the acquittal of Maung Tun Yin.

Subsequently the learned District Magistrate, Magwe, purporting to act under section 520 of the Criminal Procedure Code, read with sub-section (*2*) of section 8 of the Essential Supplies and Services Act, 1947, ordered that the truck No. RA 254 which the learned Magistrate had ordered to be returned to the owner Maung Tun Yin be confiscated. Hence this application for revision by Maung Tun Yin. Now, sub-section (*2*) of section 8 of the Essential Supplies and Services Act, 1947, is in these terms :

"8 (*2*) All things in respect of which an offence punishable under sub-section (*1*) has been committed shall be liable to confiscation by order of the Court trying the offence.

The receptacles, packages and coverings of such things, and the vessel, vehicle or means of tranport used for the conveyance

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thereof shall also be liable to confiscation unless the owner proves that he had no reason to believe that such an offence was being or was likely to be committed."

The learned District Magistrate has interpreted the words "shall be liable to confiscation" occurring in this sub-section to mean "shall be confiscated" and in my opinion he was wrong in the interpretation adopted by him. Section 517 of the Criminal Procedure Code provides *inter alia* that the Court of inquiry or trial may make such order as it thinks fit for the disposal, by destruction, confiscation, etc., of any property regarding which any offence appears to have been committed, or which has been used for the commission of any offence, and the discretion of the Court in this regard does not appear to have been fettered in any way by sub-section (*2*) of section 8 of the Essential Supplies and Services Act, 1947. To my mind what seems to be envisaged by this sub-section is that the Court trying an offence punishable under sub-section (*1*) of section 8 should ever bear in mind the desirability of confiscating the property enumerated in sub-section (*2*) in preference to the other modes of disposal enumerated in sub-section (*1*) of section 517 of the Criminal Procedure Code.

Hence an order for the confiscation of property passed by a Court under sub-section (*2*) of section 8 of the Essential Supplies and Services Act, 1947, should be regarded as one falling within the ambit of section 517 (*1*) of the Criminal Procedure Code and therefore subject to modification, alteration or annulment by a Court of appeal, confirmation, reference or revision acting under section 520 of the Criminal Procedure Code. In this connection it is interesting to note that had the words "shall be liable to confiscation" meant "shall be confiscated" as interpreted by the learned District Magistrate, the order of confiscation would not

be one under section 517 (*1*) of the Criminal Procedure Code but under the special enactment, namely, sub-section (*2*) of section 8 of the Essential Supplies and Services Act and accordingly would not be subject to modification, alteration or annulment by a Court acting under section 520 of the Criminal Procedure Code.

Now, as regards the merits of the case, the learned trial Magistrate having expressly acquitted Maung Tun Yin on the ground that he had no prior knowledge of the fact that his truck was being used for the purpose of removing illicit crude oil, it is not open to the learned District Magistrate purporting to act under section 520 of the Criminal Procedure Code to come to a contrary finding because that would be tantamount to saying that Maung Tun Yin was guilty of the offence punishable under section 8 (*1*) of the Essential Supplies and Services Act, 1947, or for abetment of an offence punishable under that section. Until and unless the order of the learned trial Magistrate acquitting Maung Tun Yin of the offence punishable under section 8 (*1*) aforesaid is reversed—and this can only be done by a Court to which an appeal against his acquittal lies—the finding that Maung Tun Yin had no prior knowledge of the fact that his truck was being used for the removal of illicit crude oil must stand.

In the result the order of the learned District Magistrate, Magwe, dated the 4th March 1950, passed in his Criminal Revision Case No. 12 of 1950, is set aside and the order of the trial Magistrate returning the truck to Maung Tun Yin restored. There will be no order as to the costs of this application.

## CRIMINAL REVISION.

*Before U San Maung, J.*

H.C. 1950

*June 9.*

EBRAHIM A. AZIZ (APPLICANT)

*v.*

THE UNION OF BURMA (RESPONDENT).*

*Foreign Exchange Control Regulation Act, 1947—S. 9 (2) and s. 24 (1)—Jewels removed from baggage before customs examination—Whether any offence committed—Or attempted under s. 511, Penal Code.*

*Held:* No offence is committed under s. 24 (*1*) read with s. 9 (2) of the Foreign Exchange Control Regulation, 1947, where jewels contained in a tin are removed from the baggage before customs examination, as no jewellery has been taken out of Burma, without written permission of the Controller of Exchange. Nor can there be a conviction for attempt under s. 511, Penal Code as an attempt cannot be said to have been committed, unless the full offence would have been completed if not interrupted. S. 511, Penal Code is only applicable to attempts to commit an offence punishable under the Penal Code and not one punishable under a Special enactment.

*Tun Sein* for the applicant.

*Choon Foung* (Government Advocate) for the respondent.

U SAN MAUNG, J.—In Criminal Regular Trial No. 291 of 1949 of the Eastern Subdivisional Magistrate, Rangoon, the applicant Ebrahim A. Aziz was sent up for trial under section 24 (*1*) of the Foreign Exchange Regulation Act, 1947 (Burma Act No. XLIV of 1947) on the report in writing of the Chief Inspector, Preventive Service, Custom House, Rangoon. According to that report, at about 5 a.m. on the 15th February 1949 at the time of embarkation of passengers per B.O.A.C. aircraft bound for Calcutta,

* Criminal Revision No. 464-B of 1950 being review of the order of Eastern Subdivisional Magistrate of Rangoon, dated 30th January 1950 passed in Criminal Summary Trial No. 291 of 1949 arising out of the recommendation of the Sessions Judge, Hanthawaddy in his Criminal Revision No. 8 of 1950.

personal baggage of Mr. Ebrahim A. Aziz, a passenger by the above plane, was brought to the Customs Examination Enclosure for necessary examination. When this baggage was about to be examined by the Customs Officer on duty Mr. Ebrahim A. Aziz was seen by the Baggage Inspector, who was present at the scene, returning to the Reception Enclosure and handing over a tin of talcum powder, which he had removed from his baggage, to his friend Mr. Haroon, who came to see him off. The Baggage Inspector, U Hla Pe, immediately seized the tin of powder and on thorough examination of the inside of the tin jewellery to the value of Rs. 4,251 were found concealed in the powder.

On this allegation it is clear that no offence punishable under section 24 (*1*) read with section 9 (*2*) of the Foreing Exchange Regulation Act, 1947, has been committed by the applicant. Section 9 (*2*) aforesaid runs as follows :

"No person shall, except with the general or special permission of the Controller or the written permission of a person authorized in this behalf by the Controller, take or send out of Burma any gold, jewellery or precious stones, or Burma currency notes, bank notes or coin or foreign exchange other than foreign exchange obtained from an authorized dealer."

The applicant has, in fact, not taken out of Burma any jewellery. It is even doubtful whether he can be said to have made an attempt to take these jewellery out of Burma and in this connection I am in respectful agreement with the observations of U E Maung J., in the case of *Rahima Bibi* v. *C. A. Rahman* (1). His Lordship observed :

"An attempt within the meaning of section 511 of the Penal Code cannot be said to have been committed unless the

(1) Criminal Revision No. 183-B of 1947 of the late High Court of Judicature at Rangoon.

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full offence would have been completed if not interrupted. In other words, before a person can be convicted under section 511, it is incumbent on the prosecution to establish that the accused person had done everything in his power for the complete commission of the substantive offence and that it was circumstances beyond his control which intervened to stop the consequences of the act from flowing on to that of a completed offence."

Even assuming for the sake of argument that the applicant Ebrahim A. Aziz had made an attempt to take out of Burma the jewellery mentioned above, he cannot be charged and convicted of an offence punishable under section 24 (*1*) of the Foreign Exchange Regulation Act, 1947, read with section 511 of the Penal Code as the latter section is only applicable to attempts to commit an offence punishable by the Penal Code and not to attempts to commit an offence punishable under a special enactment. It would seem, unless the Foreign Exchange Regulation Act, 1947, is suitably amended, that section 9 (*2*) thereof would be a dead letter as it is difficult to envisage any one apprehended in Burma, having committed anything more than an attempt to take out of Burma gold, jewellery, currency notes, etc.

For these reasons, I would accept the recommendation of the learned Sessions Judge, Hanthawaddy, and direct that the prosecution of the applicant Ebrahim A. Aziz under section 24 (*1*) read with section 9 (*2*) of the Foreign Exchange Regulation Act, 1947, be quashed.

## CRIMINAL REVISION.

*Before U Thaung Sein, J.*

BA THET OO AND ONE (APPLICANTS)

*v.*

THE UNION OF BURMA (RESPONDENT).*

H.C. 1950

*July 5.*

*Burma Excise Act—Ss. 30 (a) and 46—Enhanced punishment for offender with previous conviction—Summons case or warrant case—Case tried as summons case and fines of Rs. 100 and Rs. 60 imposed—Trial—Illegal or irregular.*

Where applicants, husband and wife, were convicted under s. 30 (*a*) of the Burma Excise Act for being in possession jointly of excisable articles without a permit, and were sentenced to pay fines of Rs. 100 and Rs. 60, as being previous offenders under s. 46 of the Act on a trial as a summons case.

*Held that :* As the maximum sentence liable to be imposed in the case, is imprisonment for one year or a fine of Rs 2,000, for a subsequent conviction for the same offence, the magistrate could not try the case as a summons case under the Criminal Procedure Code.

*Gayaprasad* v. *Emperor*, A.I.R. (1932) Nag. 111 ; *Sufal Golai* v. *Emperor*, A.I.R. (1938) Cal. 205, referred to.

Such a trial is not a mere irregularity curable under s. 537, Criminal Procedure Code.

*Mya Thein* (Government Advocate) for the respondent.

U THAUNG SEIN, J.—On the 1st March 1949 an excise party raided the house of the first respondent Ba Thet Oo in Thayagon Quarter, Ramree Town, and there found one and three-quarter quarts of country spirit hidden in a water bottle. This bottle was discovered in the actual possession of Ma Saw U (second respondent), the wife of Ba Thet Oo, while she was trying to secrete it between her legs and was busy emptying the contents on to the ground. Both

* Criminal Revision No. 7-B of 1950 being review of the order of Subdivisional Magistrate of Kyaukpyu, dated 30th August 1949 in Criminal Regular Trial No. 11 of 1949.

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U THAUNG SEIN, J.

Ba Thet Oo and his wife were considered to be in joint possession of the country spirit and they were accordingly sent up for trial before the learned Subdivisional Magistrate, Kyaukpyu, of offences under sections 30 (*a*) read with 46 of the Excise Act. Section 46 of the Excise Act was added to the charge under section 30 (*a*) as both the respondents had previously been convicted of offences under the latter section and they were thus liable to enhanced punishment.

Now, ordinarily an offence under section 30 (*a*) of the Excise Act for the possession of excisable articles, *e.g.*, country spirit, without a licence or permit is punishable with imprisonment which may extend to six months or a fine amounting to Rs. 1,000. But where an accused has previously been convicted of an offence under this section he is liable to twice the punishment which might be imposed on first conviction, *vide* section 46 of the Excise Act. In other words, where an offender has a previous conviction under section 30 (*a*) he is liable to a maximum imprisonment of one year or a fine of Rs. 2,000 for a subsequent conviction under the same section. The question is whether an offence under sections 30 (*a*) read with 46 of the Excise Act should be dealt with as in "summons-case" or "warrant-case"? Section 4 (*v*) and (*w*) of the Criminal Procedure Code define summons-case and warrant-case as follows :

> "(v) 'summons-case' means a case relating to an offence and not being a warrant-case; and
>
> (*w*) 'warrant-case' means a case relating to an offence punishable with death, transportation or imprisonment for a term exceeding six months."

The learned trial Magistrate fully realised that the maximum term of imprisonment which the respondents were liable on conviction was one year but he was

apparently unable to make up his mind as to whether the case should be tried as a summons-case or warrant-case and eventually dealt with it as a summons-case.

On the evidence led he held that the liquor though found on the wife Ma Saw U was in the joint possession of both husband and wife and convicted them of offences under sections 30 (*a*) read with 46 of the Excise Act and sentenced Ba Thet Oo to pay a fine of Rs. 100 and Ma Saw U to pay Rs. 60. During the trial the respondents objected to the learned Magistrate dealing with the case as a "summons-case" and insisted that it was clearly a case which should have been disposed of as a "warrant-case." The learned Magistrate does not appear to have paid any serious attention to this contention and spent most of his time disputing with the Counsel for the respondents as to the admissibility or otherwise of certain questions put by the Counsel to the witnesses. The respondents then went up on revision to the learned Sessions Judge, Arakan, to have their convictions and sentences set aside and a re-trial ordered. The application was allowed and the learned Sessions Judge has submitted the proceedings to the High Court with the recommendation that a re-trial be ordered.

In the first place, I am in entire agreement with the learned Sessions Judge that the learned Magistrate erred in following the procedure for a summons-case as the maximum punishment awardable on conviction clearly exceeds six months. There is also direct authority in the rulings of *Gayaprasad* v. *Emperor* (1) and *Sufal Golai* v. *Emperor* (2) for the view that cases of a similar nature to that of the present one should be dealt with as "warrant-cases." In *Gayaprasad* v. *Emperor* (1) the prosecution was under section 34 (*b*) read with section 45 of the Central Provinces Excise

(1) A.I.R. (1932) Nag. 111. (2) A.I.R. (1938) Cal. 205.

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Act which corresponds in almost all details with the provisions of sections 30 and 46 of our own Excise Act. It was held that as the maximum term of imprisonment awardable on conviction exceeded six months the procedure for a warrant case should be followed. In *Sufal Golai* v. *Emperor* (1) also the prosecution was under sections 46 and 62 of the Bengal Excise Act which is practically identical to sections 30 and 46 of our own Excise Act. The same view was expressed as in the previous ruling. In both these cases the procedure prescribed for summons-cases had been followed and it was laid down that this was not a mere irregularity which could be cured under section 537 of the Criminal Procedure Code, and re-trials were accordingly ordered. No doubt in the case under consideration also the wrong procedure has been followed and ordinarily a re-trial should be ordered. But it should be noted that the respondents were convicted as long ago on 30th August 1949 and ten months or so have elapsed since that date. The question is whether any useful purpose would be served by ordering a re-trial after such a long lapse of time? The learned Government Advocate has submitted that in his opinion it would be a mere waste of time, money and expense to both the respondents and the Government to start the proceedings afresh and that substantial justice has been done already. I am in agreement with the view that no useful purpose would be served by ordering a re-trial in the present case. If a re-trial is ordered the question whether the possession by the wife Ma Saw U of the liquor should be considered as possession by her husband Ba Thet Oo would have to be gone into. I do not propose to go into this question of the so-called "joint possession" of the liquor by the husband and

(1) A.I.R. (1938) Cal. 205.

wife as there is no intention to interfere with the findings of his trial Court. Accordingly I direct that the proceedings be returned to the lower Courts with the above remarks.

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U THAUNG SEIN, J

## APPELLATE CIVIL.

*Before U Tun Byu, Chief Justice, and U Aung Tha Gyaw, J.*

H.C. 1950 — *July 18.*

C. AH FOUNG (*a*) CHOW FUNG MEE (*a*) CHAW FONG MEE (APPELLANT)

*v.*

K. MOHAMAT KAKA AND TWO OTHERS (RESPONDENTS).*

*Urban Rent Control Act, 1948—S. 11* (1) (d)—'Bona fide' *required for erection or re-erection of building—Whether landlord should also live in new house.*

*Held :* What is required to be proved under s. 11 (*1*) (*d*) of the Urban Rent Control Act, 1948 is that the landlord should require the premises, which is in possession of the tenant, *bona fide* for construction of a building thereon The fact that the landlord took proceedings out of spite because rent was reduced in Rent Control Proceedings is only one factor in judging of the *bona fides*. There is nothing in the clause to support the suggestion that the landlord should erect the building for his own use or occupation.

*Thein* for the appellant.

*R. Jaganathan* for the respondents Nos. 1 and 2.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—The plaintiff-appellant C. Ah Foung (*a*) Chow Fung Mee (*a*) Chaw Fong Mee instituted, under section 11 (*1*) (*d*) of the Urban Rent Control Act, 1948, a suit, which in effect was for ejectment of the defendants-respondents K. M. Kaka, M. Soopi and P. M. Mohamed from and for vacant possession of a portion of the land which is situated at No. 311, Canal Street, on the ground that he required it for constructing a building thereon for his own use. The issues were answered in favour of the defendants-

* Civil 1st Appeal No. 8 of 1950 against the decree of the Registrar, City Civil Court, Rangoon in Civil Regular Suit No. 760 of 1949.

respondents, and the suit of the plaintiff-appellant, which was known as Civil Regular No. 760 of 1949 of the Rangoon City Civil Court, was dismissed with costs.

The real question which falls for consideration in this appeal is, whether C. Ah Foung, the plaintiff-appellant, can succeed in the case which he had instituted against the three respondents under the provisions of section 11 (*1*) (*d*) of the Urban Rent Control Act, 1948, the relevant portion of which reads as follows :

> "11. (*1*) 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—
>
> * * * *
>
> (*d*) the premises, in the case of land which was primarily used as a house site and was subsequently let to a tenant are *bona fide* required by the landlord for erection or re-erection of a building or buildings and the landlord executes a bond in such amount as the Court may deem reasonable that the premises will be used for erection or re-erection of a building or buildings, that he will give effect to such purpose within a period of one year from the date of vacation of the premises by the tenant, reinstate the tenant displaced from the land on completion of erection or re-erection of such buildings in case the buildings are erected for the purpose of letting ;
>
> * * * *

It will thus be observed that what C. Ah Foung is required to prove for the purpose of clause (*d*) of section 11 (*1*) of the Urban Rent Control Act, 1948, is that he requires the land, which is in the possession of the defendants-respondents, *bona fide* for constructing a building thereon. We might say at once that the

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U TUN BYU, C.J.

motive which impelled C. Ah Foung to file a suit against the defendants-respondents does not, and cannot, constitute a deciding factor in this matter, although it is a circumstance which the Court ought to take into consideration in attempting to find out, on the evidence which is produced before it, whether C. Ah Foung really requires the land in question *bona fide* for constructing a building thereon.

It will be observed that there is nothing in clause (*d*) of section 11 (*1*) of the Urban Rent Control Act, 1948, to even suggest that the building which C. Ah Foung proposes to build must also be for his own use or occupation. The land in question was purchased by C. Ah Foung in 1947. The date of his purchase is of no importance so far as this case is concerned in that it was a case which was instituted solely under clause (*d*) of section 11 (*1*) of the Urban Rent Control Act, 1948. The evidence shows that the defendants-respondents at one time paid C. Ah Foung a rental of Rs. 60 per month for the land they occupied, that the defendants-respondents afterwards applied to the Controller of Rents to fix the standard rent of the land in question and that the Controller of Rents fixed the standard rent for that land at Rs. 10 per month. It has, accordingly, been argued on behalf of the defendants-respondents that C. Ah Foung did not in reality *bona fide* require the land in question for constructing a building thereon, but that he instituted his suit against the defendants-respondents to avenge for the reduction of the rent which the defendants-respondents had obtained through their application to the Controller of Rents. The fact that the Controller of Rents reduced the rent for the land in question is, of course, a matter which the Court ought to consider in connection with the *bona fides* of the plaintiff-appellant for the purpose of clause (*d*) of section 11 (*1*) of the Urban Rent

Control Act, 1948. This means that the evidence will have to be scrutinized carefully for the purpose of considering whether the land in question is required *bona fide* by the plaintiff-appellant for constructing a building thereon.

C. Ah Foung, the plaintiff-appellant, in his evidence said that he required the land in question for constructing a house and that the plan, Exhibit C, was the approved plan of the house he proposed to construct. It was not suggested to him in his cross-examination that he was not in a position to build a house as indicated on the plan Exhibit C or that he did not in reality intend to build a house on the land in question.

U Tun Shwe testifies about the plan Exhibit C as well as the plan Exhibit G. His evidence also shows that arrangements had been made for one U Tin, an engineer with whom the witness works, to supervise the constuction of a building on the land in question. The evidence of U Tun Shwe could, therefore, be considered to indicate that C. Ah Foung did *bona fide* intend to construct a house on the land in question.

K. Mohamed Kaka, the first defendant-respondent, and the two witnesses, who were examined on behalf of the defendants-respondents, had not stated anywhere in their evidence that they did not think that C. Ah Foung would build a house on the land in question or that C. Ah Foung was not in a position to build a house on the land in question. There is accordingly no evidence to rebut the statements of C. Ah Foung that he requires the land in question for constructing a building on it, and the evidence of C. Ah Foung in this respect must, accordingly, be accepted. He was in a way supported by the evidence of U Tun Shwe, in whose office the plan of the house which Ah Foung proposes to build was prepared.

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U TUN BYU, C.J.

It has been urged on behalf of the defendants-respondents that the evidence shows that Ah Foung could not have required a new house for him and his children and grandchildren to live in, but it appears to us to be clear that it is not necessary for the purpose of clause (*d*) of section 11 (*1*) of the Urban Rent Control Act, 1948, that C. Ah Foung or his family must also live in the house which is to be constructed after its completion before he could succeed in his suit. Clause (*d*) of section 11 (*1*) shows clearly that this is so, for it provides that the old tenant should be given the option of renting the premises which is to be constructed, if it were to be rented out.

In view of the finding of the Lower Court on the first, second and third issues, from which we are not prepared to dissent, the judgment and decree of the Lower Court passed in Civil Regular No. 760 of 1949 of the Rangoon City Civil Court are hereby set aside, and the plaintiff-appellant C. Ah Foung will be entitled to a decree for the ejectment of the defendants-respondents and for vacant possession of the land in question. The defendants-respondents ought to be allowed a reasonable time to remove all materials and things that belong to them from the land in question.

A good deal of evidence was led in this case as to whether the building was required for the *bona fide* use of the plaintiff-appellant, a point which arose out of the plaint filed by the plaintiff-appellant and we consider, in the circumstances of this case, that each party should bear its own costs.

The plaintiff-appellant will be required to execute a bond to the satisfaction of the Court below in the sum of Rs. 25,000, with one surety, for the erection of a building as indicated in the plan Exhibit C within a period of one year from the date the land in question is vacated by the defendants-respondents and that he

will, if the defendants-respondents so desire, rent a portion of the building, after it has been erected, which is required by the defendants-respondents for their business, if the building is intended to be let out after its completion.

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C. AH FOUNG. (*a*) CHOW FUNG MEE (*a*) CHAW FONG MEE *v.* K. MOHAMAT KAKA AND TWO OTHERS.

U TUN BYU, C.J.

## APPELLATE CRIMINAL.

*Before U On Pe and U San Maung, JJ.*

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*June 28.*

SA PONT (*alias*) PAW LU (APPELLANT)

*v.*

THE UNION OF BURMA (RESPONDENT).*

*Penal Code, ss. 84 and 302 (1) (a)—Murder committed by person undergoing sentence of transportation—Accused subject to fits—Test—Knowledge of nature of act—Unsoundness of mind—When a defence.*

A person, undergoing a sentence of transportation for life, stabbed a convict warder to death on the chest with a pointed weapon and claimed that he came under the provision of s. 84 of the Penal Code as he was subject to epileptic fits of giddiness and that he was not liable to conviction and cannot be sentenced to death under s. 302 (1) (*b*), Penal Code.

*Held :* On appeal, that under s. 84, Penal Code, which is in substance the same as the law laid down in the answers of the Judges to the House of Lords in *Mcnaghten's* case, it is only unsoundness of mind which materially impairs the cognitive faculties of the mind so that the offender is incapable of the nature of the act or that he is doing wrong, that exempts from criminal liability.

*Queen-Empress* v. *Kader Nasyer Shah*, (1886) I.L.R. 23 Cal. 604 ; *Nga Po Tha* v. *Queen-Empress*, (1893—1900) Printed Judgments, Lower Burma 249 ; *Mani Ram* v. *The Crown*, (1927), I.L.R. 8 Lah. 114 ; *Chungar Mal Ghania Lal* v. *Emperor*, A.I.R. (1939) Lah. 355 ; *Maung Gyi* v. *King-Emperor*, 7 L.B.R. 13 ; *Tun Baw* v. *King-Emperor*, 6 L.B.R. 100 (F.B.) ; *Nga Sein Gale* v. *King-Emperor*, I.L.R. (1934) 12 Ran. 445, referred to.

There was no evidence that the cognitive faculties were so impaired in this caseland the conduct of the accused subsequent to the occurrence showed that he stabbed human beings in vital parts for reasons, real or imaginary, the conviction for murder was correct.

*Ba U* for the appellant.

*Tin Maung* (Government Advocate) for the respondent.

The judgment of the Bench was delivered by

U SAN MAUNG, J.—In Criminal Regular Trial No. 6 of 1950 of the Special Judge (U Ba Swe), Bassein, the

* Criminal Appeal No. 290 of 1950 from the Order of the Special Judge of Bassein, dated 15th June 1950 passed in Special Judge Trial No. 6 of 1950.

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appellant Sa Pont (*a*) Paw Lu was convicted under section 302 (1) (*a*) of the Penal Code for committing murder while being under a sentence of transportation for life and also under section 324 of the Penal Code for voluntarily causing hurt. He was sentenced to death for the first offence and was sentenced to one year's rigorous imprisonment for the second offence.

The appellant Sa Pont, who is a Karen Christian, was sentenced to transportation for life for an offence under section 302 of the Penal Code on the 24th of December 1948 in Criminal Regular Trial No. 15 of 1948 of the Special Judge, Bassein. While in jail, he was given light duties as an infirm person because his left hand had been cut off at a point about six inches below the left elbow and also because he had suffered a big *dah* cut injury on his head. Ba Zan (P.W. 1), the convict warder whom he stabbed several times with a sharp pointed weapon on the day of occurrence of this case, was a person under whom he had to work. The deceased Aung Din, whom the appellant was said to have stabbed to death, was a person in charge of the keys of the main gate and as such he used to station himself at a spot near the main gate. On the 19th of April 1950, the day when this case occurred, the appellant was put to work to sweep the floor of ward No. 5 by Ba Zan who then went to have a bath at ward No. 5 which was known as the "sleeping ward." At about 7-30 a.m. when Ba Zan came out of ward No. 5 after having his bath, he met Sa Pont near the entrance. Not paying any attention to Sa Pont, Ba Zan came out of that ward whereupon the appellant stabbed him several times on the chest with a sharp pointed weapon. Ba Zan turned to run whereupon Sa Pont chased him and stabbed him once on the hip. Sa Pont then ran towards ward No. 7, chased by about ten or fifteen convicts. He then came out of ward

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No. 7, and the witnesses who were near Aung Din at that time saw him pushing Aung Din on the chest with his right hand. At that time Aung Din, who had been seated before the appellant came, was seen to stand up on his approach. After being pushed on the chest, Aung Din sat down with his hand pressing the regions of his stomach. Thereafter he was found lying on the ground with a stab wound on the left side of his chest. To Noor Mohamed (P.W. 4), who brought Ba Zan towards the main gate, Aung Din said that he had been stabbed by Sa Pont with a *dah*. Meanwhile Sa Pont, who ran towards gate No. 4, found himself chased by a few convicts and he accordingly took refuge in the office of U Mya Pe (P.W. 12), the Assistant Jailor who was then on duty at ward No. 4. On hearing the commotion, U Mya Pe came out of ward No. 4 and saw Sa Pont being chased by three or four men. He therefore went into his room and closed the door to prevent Sa Pont being mobbed. Meanwhile Aung Din, who was taken to the jail hospital in a more or less unconscious state, died at 7-50 a.m. without regaining consciousness. He was found to have one stab wound $\frac{1}{2}''$ by $\frac{1}{4}''$, penetrating into the chest cavity, on the left side of the chest between the second intercostal space $\frac{1}{2}''$ away from the sternum. The injury which was subsequently found to have penetrated the right auricle and the right ventricle of the heart, was, in the opinion of Dr. S. K. Dutta (P.W. 18), who performed the post-mortem examination, necessarily fatal.

The appellant Sa Pont was taken before U San Tint (P.W. 11), Superintendent of Bassein Jail, to whom he stated that he had stabbed Aung Din because the latter would not allow him to enter the room in which some Karens were under arrest under section 5 of the the Public Order Preservation Act. The deceased

Aung Din was in charge of the keys of the room in which these Karens were confined. Sa Pont said that he had stabbed Ba Zan because the latter had beaten him a few months before on the report of one Nga Pu whose cup he was alleged to have taken. As regards the exhibit blood-stained weapon which was picked up by Maung Sein (P.W. 14), who had tried to grapple with the appellant Sa Pont while the latter came running towards gate No. 4 from the spot where he had stabbed Aung Din, the appellant stated to U San Tint that it was the weapon which he found inside the dust bin at the time he went to throw refuse there. The first information report Exhibit A was lodged by Ba Zan (P.W. 1) and after due investigation, the appellant was sent up for trial under sections 302/324 of the Penal Code on the evidence narrated above. His defence was that he did not know what he had done either to Ba Zan or to Aung Din or what he had stated to the Superintendent of Jail U San Tint and that he was not in his right senses at the time of the alleged occurrence. That the appellant was the person who had caused the injuries found on Ba Zan is clear from the evidence of these witnesses. As regards the injury caused to Aung Din, there is the evidence of Noor Mohamed (P.W. 4) the convict to whom Aung Din was able to denounce the appellant as his assailant when Noor Mohamed met Aung Din. Furthermore, from the evidence of San Htike (P.W. 5) and Thein Aung (P.W. 6), who actually saw the appellant pushing Aung Din on the chest with the right hand, it is manifest that the injury found on Aung Din, was caused by the appellant. As the appellant had just stabbed Ba Zan with a sharp pointed weapon held in his right hand—which was the only hand in which the weapon could be held—it must be presumed that the same weapon was in his hand at the time he

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pushed Aung Din on the chest. In fact when Thein Aung (P.W. 6) was asked to demonstrate what he meant by saying that he saw Sa Pont pushing Aung Din on the chest, he demonstrated what appeared to be a jab with a *dah*.

Therefore, the appellant Sa Pont must be held to have caused the death of Aung Din by stabbing him with a sharp pointed weapon like the exhibit *dah*.

Now, section 300 of the Penal Code enacts that 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. As none of the circumstances enumerated in section 299 of the Penal Code is present in this case, the only question to be determined is whether the act which caused the death of Aung Din was intentional as contradistinct from a merely accidental one. The injury caused was in fact more than sufficient in the ordinary course of nature to cause death. Now, by reference to the plan Exhibit D, it is clear that the appellant Sa Pont after deliberately stabbing Ba Zan several times with a sharp pointed weapon like the exhibit ran towards the main gate where the deceased Aung Din was usually stationed. Before reaching near the spot where Aung Din was seated, he could apparently have turned to the left into the road leading to the pagoda or to the right into the road leading to the machine house. He did neither but ran to the spot where Aung Din was and as the latter stood up, jabbed him on the chest with the same weapon with which he had stabbed Ba Zan. He then ran towards gate No. 4 and grappled with Maung Sein (P.W. 14) who tried to stop him.

Thence he ran into U Mya Pe's office where he was able to obtain refuge. When questioned, he said that he had stabbed Aung Din because the latter had refused him access to the room where his fellow-Karens were confined. Sometime before he had told San Htike (P.W. 5) that he was sad because he was not allowed to enter the room in which these Karens were confined for the purpose of saying his prayers. When asked his reason for stabbing Ba Zan, he said that Ba Zan had once beaten him on the report of one Nga Pu, and although Ba Zan denied having beaten Sa Pont, he admitted that he had admonished Sa Pont for kicking Nga Pu on account of a quarrel about a water cup. These facts all go to establish that the jab which he gave Aung Din on the chest with a sharp pointed weapon was, far from being an accidental act, a deliberate one. Whoever stabs another on the chest with a sharp pointed weapon and thus cause an injury which penetrates the heart must be presumed to intend the natural consequences of his act. Therefore, the act of the appellant in causing the death of Aung Din is *prima facie* murder as defined in section 300 of the Penal Code.

On behalf of the appellant, several witnesses, like Saw Nyein Maung (D.W. 1), San Twa (D.W. 2), Po Tet (D.W. 3) and Soke Ka Myin (D.W. 4), have come forward to state that the appellant was subject to epileptic fits and that he often complained of giddiness. However, these witnesses stated what was not true by saying that the appellant was in fact treated by the jail doctor for epilepsy, a fact which Mr. Day (P.W. 17) categorically denied. Mr. Day stated that all the injections which he had to give to the prisoners were noted in the register and that it was not a fact that he gave any injection to the appellant for apoplexy. However, assuming that the appellant did in fact have

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epileptic fits and fits of giddiness, these are insufficient to bring his case within the ambit of section 84 of the Penal Code. The appellant's witnesses had to admit that all that happened to the appellant when his fits were on was that he was incapacitated for the time being. This is far from saying that the appellant was subject to homicidal mania as his learned counsel now urges the Court to accept.

Now, section 84 of the Penal Code enacts that nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law. The scope of this section has been fully explained by a Bench of the Calcutta High Court in *Queen-Empress* v. *Kader Nasyer Shah* (1) where it was held that a person subject to insane impulses, but whose cognitive faculties appear to be unimpaired, is not by virtue of section 84 of the Indian Penal Code exempt from criminal liability. The learned Judges observed at page 607 of the report :

"The law on the subject is that laid down in section 84 of the Indian Penal Code which enacts that 'nothing is an offence which is done by a person who at the time of doing it by reason of unsoundness of mind is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.' This provision of our law, which is in substance the same as that laid down in the answers of the Judges to the questions put to them by the House of Lords in *Mcnaghten's* case shows that it is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility, the nature and the extent of the unsoundness of mind required being such as would make the offender incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law. Instances of unsoundness of mind of this description would be such as these :

(1) (1886) I.L.R. 23 Cal. 604.

A person strikes another, and in consequence of an insane delusion thinks he is breaking a jar. Here he does not know the nature of the act. Or he may kill a child under an insane delusion that he is saving him from sin and sending him to heaven. Here he is incapable of knowing by reason of insanity that he is doing what is morally wrong. Or he may under insane delusion believe an innocent man whom he kills to be the man that was going to take his life; in which case, by reason of his insane delusion, he is incapable of knowing that he is doing what is contrary to the law of the land."

This decision of the Calcutta High Court was quoted with approval by the learned Judicial Commissioner of Lower Burma in *Nga Po Tha* v. *Queen-Empress* (1) where he held that the Indian Penal Code does not concede that all insane impulses are beyond the power of self-control, but places them under the restraint of the ordinary criminal law when the insanity is not so advanced as to render the insane offender incapable of knowing the nature of his act, or that he is doing what is wrong or contrary to law. A more recent case is that of *Mani Ram* v. *The Crown* (2). There the accused, after killing four persons in rapid succession with a *gandasa*, dropped it and began to run away, and subsequntly volunteered information concerning the death of one of the deceased, and it was held by a Bench of the Lahore High Court that a man may be suffering from some form of insanity in the sense in which the words would be used by an alienist but may not be suffering from unsoundness of mind as defined in section 84 of the Indian Penal and that the law recognises nothing but incapacity to realise the nature of the act and presumes that where a man's mind or his faculties or ratiocination are sufficiently clear to apprehend what he is doing, he must always be presumed to intend the consequences

(1) (1893—1900) Printed Judgments, L.B. 249.
(2) (1927) I.L.R. 8 Lah. 114.

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of the action he takes. This case was followed by another Bench of the Lahore High Court in *Ghungar Mal Ghania Lal* v. *Emperor* (1) : Cf. *Maung Gyi* v. *King-Emperor* (2) ; *Tun Baw* v. *King-Emperor* (3) and *Nga Sein Gale* v. *King-Emperor* (4).

Assuming that the appellant Sa Pont was subject to epileptic fits and to fits of giddiness, the evidence on record does not at all establish that at the time he stabbed Ba Zan and Aung Din, his cognitive faculties were so impaired that he did not know the nature of his act, namely that he was stabbing human beings on the vital parts of the body with a sharp pointed weapon. On the contrary, his conduct subsequent to the occurrence clearly shows that he knew that he had stabbed these two persons for reasons which might be either real or imaginary, and the probabilities are that these reasons were real. For these reasons, we hold that the action of the appellant does not fall within the general exception enacted in section 84 of the Penal Code. It is not necessary for us to decide whether the assault upon Aung Din was or was not premeditated as the appellant must be punished in any event under section 302 (1) (*a*) of the Penal Code.

In the result, the convictions and sentences must be confirmed and the appeal dismissed.

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(1) A.I.R. (1939) Lah. 355.
(2) 7 L.B.R. 13.
(3) 6 L.B.R. 100 F.B.
(4) (1934) 12 Ran. 445.

## CIVIL REVISION.

*Before U Aung Tha Gyaw, J.*

TORAB ALLY (APPLICANT)

*v.*

MOHAMED AYUB AND ONE (RESPONDENTS). *

H.C. 1950

*Aug. 2.*

*Amendment of plaint—Suit stated to be under s. 9, Specific Relief Act—Amendment application after evidence closed—Change omitting reference to s. 9—Whether different causes of action—Order 6, Rule 17—Civil Procedure Code—Principles governing amendment.*

*Held:* The principles governing applications for amendment of plaint are settled. Leave to amend should be refused if (1) it is not necessary, (2) the plaintiff's suit will be wholly displaced by the proposed amendment, (3) the effect is to take away from defendant a legal right which has accrued to him by lapse of time, (4) the amendment would introduce a new and inconsistent case, at a late stage, or (5) the application is not *bona fide*.

*U Naing and others* v. *Ko Sein*, A.I.R. (1938) Ran. 125; *E.K.S. Chettyar Firm* v. *Maung Min Maung and others*, A.I.R. (1933) Ran. 247, distinguished.

*Ma Shwe Mya* v. *Maung Mo Hnaung*, 48 I.A. 214 at 217, followed.

The averments in the present case amounted to no more than a repetition of the original allegations and did not prejudice the defendant's defence or result in any injustice to him. To describe the allegations in the original plaint as under s. 9 of the Specific Relief Act, without an allegation of dispossession by defendant otherwise than in due course of law, is a mistake in pleadings due to lack of skill. It is the duty of courts to decide the rights of parties and not to punish them for their mistakes in the conduct of cases.

*Cropper* v. *Smith*, 26 Ch. D. (1884) 700 at. 710, followed.

The plaintiff's object was to recover possession but only asserted in a form which the Statute did not permit.

*Charan Das and others* v. *Amor Khan and others*, 47 I.A 255 at 262 followed.

*Narain Das* v. *Het Singh and others*, 40 All. 637, referred to and approved.

*Tun Sein* for the applicant.

*P. K. Basu* for the respondents.

U AUNG THA GYAW, J.—This matter in revision arises out of a suit brought in the Court of the Third

* Civil Revision No. 21 of 1950 against the decree of the 3rd Judge of City Civil Court, Rangoon in Civil Regular No. 496 of 1948, dated 12th May 1950.

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TORAB ALLY v. MOHAMED AYUB AND ONE.

U AUNG THA GYAW, J.

Judge, City Civil Court, Rangoon, for recovery of possession of a room in house No. 508/510, Dalhousie Street, Rangoon. The plaint filed by the plaintiff-respondent was titled as one brought under section 9 of the Specific Relief Act. The plaint, however, sets out that the plaintiff as the tenant of one C. M. A. Ismail in respect of the said room, is paying a daily rent of Rs. 4-8, that on the 16th January 1948 when he left for India the said premises where handed over to the care and management of one Abdulla, the first defendant in the suit, that on the plaintiff's return from India on the 12th April 1948 he found the first and the second defendants on the suit premises carrying on their business and that on demand being made to give up peaceful possession of the premises the defendants promised to do so within two or three days and eventually failed to give up possession as promised and have since been in unlawful occupation of the room. On these averments the plaintiff-respondent claimed that he was entitled to a decree for recovery of possession of the said premises. Then in paragraph 7 of his plaint where valuation for the purposes of jurisdiction and Court-fees was set out, the plaintiff stated that the subject-matter of the suit both for the purposes of jurisdiction and Court-fees was valued at Rs. 3.000 being the proportionate market value of the property under the Court Fees Act read with section 9 of the Specific Relief Act.

The second defendant who alone contested the suit, admitted that the plaintiff-respondent was the tenant of the room and that he had left the same in the care and management of the first defendant from whom the second defendant had, on the 10th March 1948, hired the same on a daily rental of Rs. 5 in order to carry on his trunk and leather suit case business. The second defendant further denied that he ever agreed to give

up possession of the suit premises to the plaintiff on the 1st May 1948.

Issues were fixed on these and other pleadings entered by the parties and evidence was taken at length. After the conclusion of the evidence in the case and while arguments were being addressed to the Court, the question of the desirability of the amendment of the plaint was raised on the plaintiff-respondent's behalf and, on a formal application being made, the Court after hearing the objections raised on the applicant's behalf, granted its permission to the plaintiff-respondent to make the amendment asked for. This amendment was to the effect that the suit was for recovery of possession only omitting all reference to section 9 of the Specific Relief Act. The amendment also embraces such averments as were found necessary to meet the allegations set up by the defendant.

It is now contended that the amendment of the nature proposed in this case cannot be permitted at such a belated stage of the proceedings and that the suit avowedly brought under section 9 of the Specific Relief Act should not be permitted to be converted into an ordinary suit for recovery of possession based on title, causes of action in the two claims being entirely different calling for alternate and mutually exclusive remedies.

A suit brought under section 9 of the Specific Relief Act is by the very terms of the section limited in its scope. In such a suit a party alleging previous possession, whatever be the nature of the title to the property, is bound to allege dispossession by the defendant otherwise than in due course of law within six months of the bringing of the suit and the points for determination in such a suit are whether the plaintiff, as alleged, was in possession of the

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disputed property within the six months, as stated, and whether the plaintiff had been deprived of such possession by the defendant otherwise than in due course of law.

Now, the plaint in this case sets out from the very beginning that the plaintiff was in previous possession of the room deriving title thereto under the tenancy held from one Ismail, that during his temporary absence in India the person left in charge of the premises had brought the second defendant on to the premises for the purpose of carrying on his trade and that this defendant, on the return of the plaintiff from India, refused to deliver up possession of the premises to the plaintiff.

It is thus noticed that no allegation has been made of any act of dispossession of the plaintiff by the second defendant otherwise than in due course of law in respect of the premises in suit. The averments made by the plaintiff-respondent impliedly suggest that the first defendant, who was left in charge of the premises, had no authority to keep the second defendant in the premises in suit. The claim of the plaintiff-respondent would accordingly appear to be one purely based on his title to the property and not on any act of dispossession as would bring his claim within the scope of section 9 of the Specific Relief Act.

Under Order VI, Rule 17, of the Civil Procedure Code the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. Where the pleadings and the issues raised therein are consistent only with the claim for possession based on title and where, instead of the summary inquiry contemplated

under section 9 of the Specific Relief Act, a full and detailed investigation has been made into the respective rights of the parties, as was done in this case, the Court would certainly be embarrassed in making its decision unless the amendment necessary to the plaint is first permitted. The discretion exercised by the trial Court to meet such a contingency should not be interfered with unless such exercise of discretion is not in accord with the well-established principles. These principles are summarised in Mulla's Commentary, 11th Edition, at page 592. Leave to amend should be refused—

(1) Where the amendment is not necessary for the purpose of determining the real question in controversy between the parties, as where it is—

(i) merely technical, or

(ii) useless and of no substance.

(2) Where the plaintiff's suit would be wholly displaced by the proposed amendment.

(3) Where the effect of the amendment would be to take away from the defendant a legal right which has accrued to him by lapse of time.

(4) Where the amendment would introduce a totally different, new and inconsistent case, and the application is made at a late stage of the proceedings.

(5) Where the application for amendment is not made in good faith.

The main ground on which the objection to the amendment in this case has been taken relates to the alleged introduction in the proposed amendment of a totally different, new and inconsistent case coupled with the making of the application for such amendment at a late stage of the proceedings. Reliance has been

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U AUNG THA GYAW, J.

placed on the cases of *U Naing and others* v. *Ko Sein*, (1) where the claim for redemption of a usufructuary mortgage was not permitted to be amended to one of possession based on title, the causes of action in the two plaints being entirely different and *E.K.S. Chettyar Firm* v. *Maung Min Maung and others* (2) where the plaintiff leaving the foundation of his case entirely unchanged sought to amend the plaint by asking for a different relief. In this latter case the amendment was allowed for the reason that the fundamental character of the suit had not been altered by the amendment sought for.

These decisions, in effect, followed the principle of law laid down by their Lordships of the Privy Council in *Ma Shwe Mya* v. *Maung Mo Hnaung* (3) where the following dictum occurs :—

" 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. "

Looking at the facts presented in this case, *viz.*, the original pleadings contained in the plaint and the nature of the amendment sought for, it would appear that this principle of law on which the objection to the amendment has been founded cannot have any direct application. Except for the mention of section 9 of the Specific Relief Act in the title of the suit and in its valuation for the purposes of jurisdiction and Court fees, the pleadings set out in the plaint, as originally filed, were in substance those required to be alleged in

(1) A.I.R. (1938) Ran. 125. (2) A.I.R. (1933) Rgn. 247.
(3) 48 I.A. 214 at 217.

a suit for possession based on title. The averments made in the amended plaint are a repetition in different terms of the same allegations. They do not in any way place the second defendant at a disadvantage. In whatever manner the claim for possession be presented by the plaintiff, the second defendant has one only plea to enter in support of his rights, *viz.*, that he entered into the premises as a tenant of the person who was left by the plaintiff in charge of the premises. An amendment of the plaint in the manner permitted to the plaintiff-respondent cannot therefore prejudice his defence or result in any injustice to him.

To name the suit as one brought under section 9 of the Specific Relief Act without making any allegations amounting to dispossession otherwise than in due course of law is clearly a mistake in pleadings attributable to a want of skill on the part of the person who advised the plaintiff and drafted his plaint, and "it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights." [See *Cropper* v. *Smith* (1).] That special circumstances, like those noticed in the present case, outweigh other considerations in matters of amendment of pleadings was noticed in the case of *Charan Das and others* v. *Amir Khan and others* (2) where dealing with a suit for pre-emption it was said "that however defective the frame of the suit may be, the plaintiffs' object was to pre-empt the land; their cause of action was one and the same whether they sued for possession or not. If this be so, all that happened was that the plaintiffs, through some clumsy blundering, attempted to assert rights that they

(1) 26 Ch. D. (1884) 700 at 710. (2) 47 I.A. 255 at 262.

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undoubtedly possessed under the statute in a form which the statute did not permit."

As was pointed out in the well-written order of the trial Court, the facts of this case are not dissimilar to those met with in *Narain Das* v. *Het Singh and others* (1) where, on a construction of the plaint, the suit was held in substance to be one for possession based on title and that the same should have been tried as such, notwithstanding the reference in the plaint to section 9 of the Specific Relief Act.

There does not therefore appear to be any cogent reason for denying to the plaintiff-respondent in this case an opportunity to amend his plaint in order to enable the court to arrive at a decision in conformity with the substance of the pleadings set up by him.

This application will accordingly be dismissed with cost; Advocate's fee five gold mohurs.

(1) 40 All. 637.

## CIVIL REVISION.

*Before U Thaung Sein, J.*

SULTAN AHMED (APPLICANT)

*v.*

NASARA JAMAN (RESPONDENT).*

H.C. 1950

*July 6.*

*Rangoon City Civil Courts Act, ss. 17 and 25—Suit under—Permissive occupation must be proved—Revision against—When finding of fact can be considered.*

*Held :* In order that an applicant may succeed in a proceeding under s. 17, Rangoon City Civil Courts Act, it is necessary for him to prove that defendant is a tenant or in permissive occupation.

*Savari Ammal* v. *A. Jaganathan Servai*, (1947) R.L.R. 387, referred to.

S. 25 of the City Civil Courts Act is almost identical with s. 25, Burma Small Causes Courts Act. It is only in exceptional cases that the High Court will interfere with findings of fact in such cases, *viz.*, when the finding is perverse or unwarranted by the evidence.

*Siva Dass Dey* v. *Ashabi and one*, 3 Ran. 471, referred to.

*N. Bose* for the applicant.

*Hla Pe* for the respondent.

U THAUNG SEIN, J.—The applicant Sultan Ahmed sued the defendant-respondent Nasara Jaman in the City Civil Court of Rangoon for ejectment of the latter from certain premises known as room No. 7 of house No. 12 in the 52nd Street, Rangoon. This was a suit under section 17 of the Rangoon City Civil Courts Act and in order that the applicant should succeed in the case it was necessary for him to prove that the defendant-respondent was in permissive occupation of the premises. This view is clearly laid down in the

* Civil Revision No. 16 of 1950 against the order of the Registrar, City Civil Court, Rangoon in Criminal Regular No. 877 of 1949, dated the 16th March 1950.

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case of *Savari Ammal* v. *A. Jaganathan Servai* (1). Evidence was led by both parties before the City Civil Court and the learned Registrar of that Court who dealt with the case was not impressed with the plaintiff-applicant's story and dismissed the suit. In his judgment he has set out the evidence led for and against the parties in the case and has given reasons for disbelieving them. I have been asked to hold that the findings arrived at by the learned Registrar of the City Civil Court are not supported by the evidence led. In other words, it has been contended that the reasons given for disbelieving the plaintiff-applicant's witnesses are not sound and that the plaintiff-applicant had, in fact, proved the permissive nature of the occupation by the defendant-respondent. Accordingly I have been asked to set aside the decree of the City Civil Court and to order the ejectment of the defendant-respondent.

It should be remembered that this is not an appeal against the judgment of the City Civil Court and that the present application is one under section 25 of the Rangoon City Civil Courts Act. No doubt this section is rather loosely or vaguely worded and is almost identical in terms to section 25 of the Provincial Small Cause Court Act (IX of 1887). In *Siva Dass Dey* v. *Ashabi and one* (2) the purport of section 25 of the Provincial Small Cause Court Act was clearly explained and it was laid down that it is only in exceptional cases that the High Court will interfere with the finding of fact arrived at by the Rangoon Small Cause Courts. Those cases are ones in which the decision of the lower Court is either perverse or altogether unwarranted by the evidence on record. Applying this principle to the present case, I would repeat once again, that it is not an appeal and as such a detailed

(1) (1947) R.L.R. 387. (2) 3 Ran. 471.

examination of the evidence led is unnecessary. All that the learned Registrar of the City Civil Court meant to say was that he disbelieved certain witnesses for reasons which he has set up and it is not for me to examine those witnesses in the light of my own experience and to decide whether they should be believed or not. I would therefore accept the finding of the learned Registrar and that being so the plaintiff-applicant failed to prove the permissive nature of the occupation by the defendant-respondent. The suit was thus rightly dismissed and this application for revision also fails and is dismissed with costs. Advocate's fee two gold mohurs.

## CIVIL REVISION.

*Before U Thaung Sein, J.*

H.C. 1950

*Dec. 6.*

SULTAN AHMED (APPLICANT)

*v.*

NASARA JAMAN (RESPONDENT). *

*Ejectment under*—Ex parte *decree for ejectment*—*Set aside later*—*Application for reinstatement by defendant*—*S. 144 or s. 151 of Code of Civil Procedure*—*Order under s. 144 of the Code*—*If appeal lies*—*Revision*—*Interference.*

Where the lower court gave a decree for ejectment *ex parte* and put plaintiff in possession in execution and the decree was later set aside upon defendant's application and the court purported to put the defendant back in possession under s. 144, Code of Civil Procedure.

*Held* : That s. 144 of the Code of Civil Procedure applies only when the decree had been varied or reversed by any appellate or revisional authority ; and the order for restoration was in this case one under the inherent power of court under s. 151, Code of Civil Procedure and not under s. 144.

Where substantial justice has been done, the High Court will not interfere in revision. The error in quoting s. 144, Code of Civil Procedure is only a technical error.

*Valab Das and one* v. *Maung Ba Than and Jivandas Savchand* v. *Maung Ba Than*, 1 Ran. 372, followed.

*N. Bose* for the applicant.

*Hla Pe* for the respondent.

U THAUNG SEIN, J.—This application for revision is closely connected to Civil Revision No. 16 of 1950. It appears that the plaintiff-applicant had obtained an *ex parte* decree for the ejectment of the defendant-respondent and took advantage of it and ejected the latter from the premises in dispute. The *ex parte*

* Civil Revision No. 13 of 1950 against the order of the Registrar, City Civil Court in Civil Misc. No. 46 of 1950, dated 16th March 1950 arising out of decree, dated 16th March 1950 of the Registrar of the said Court.

decree was later set aside and the defendant-respondent applied to be restored to the premises in question. The learned Registrar of the City Civil Court dealt with the application as if it was one under section 144 of the Civil Procedure Code and kept it pending till the suit was finally decided. That suit was eventually dismissed and the learned Registrar ordered that the defendant-respondent be restored to the premises in question under section 144 of the Civil Procedure Code. This was undoubtedly wrong as section 144 only applies where a decree is varied or reversed by an appellate or revisional Court. In the case before the learned Registrar, that decree had not been varied or reversed by any appellate or revisional authority. All that had been done was to set aside the *ex parte* order and the case was heard afresh. However, it was quite within the competence of the learned Registrar of the City Civil Court to have ordered restitution under section 151 of the Civil Procedure Code, that is to say, in exercise of his inherent powers. The present application is not one in appeal against the order of the City Civil Court and it has been laid down in *Valab Das and one* v. *Maung Ba Than and Jivandas Savchand* v. *Maung Ba Than* (1) that where substantial justice has been done in the lower Court there should be no interference with the order of that Court. In my opinion, the order of the learned Registrar would have been correct if it had been passed under section 151 of the Civil Procedure Code and not under section 144. The error in quoting section 144 was merely technical and I do not therefore propose to interfere with it. The application for revision accordingly fails and is dismissed. No costs by way of Advocate's fees will be allowed.

(1) 1 Ran. 372.

## CRIMINAL REVISION.

*Before U On Pe, J.*

H.C. 1950

*Mar. 20.*

MA SHA BI AND TWO OTHERS (APPLICANTS)

*v.*

THE UNION OF BURMA (RESPONDENTS).*

*Criminal Procedure—Trial of case as summons case—Proceeded as Warrant case trial later—Irregularity or illegality—Failure of justice.*

*Held:* When a criminal case was tried as a summons case at the start and then proceeded as a warrant case, the conviction is not illegal. The Magistrate is bound to apply the procedure laid down for a warrant case, when he finds that an offence triable as a warrant case has been committed.

*In re K. V. Venkata Ramanier and others*, A.I.R. (1938) Mad. 815, followed.

*Rajaratnam Pillai* v. *Emperor*, A.I.R. (1936) Mad. 341, not approved.

If a mandatory provision of the Code of Criminal Procedure is infringed, it does not follow therefrom that there has been a miscarriage of justice.

*Nga U Khine and others* v. *King-Emperor*, 13 Ran. 1, referred to.

*Ba Than* for the applicants.

*Mya Thein* (Government Advocate) for the respondents.

U ON PE, J.—This is an application asking this Court to revise the order of the trial Court, which was affirmed by the lower Appellate Court, on the grounds that the trial proceeded as a summons case under Chapter XX of the Criminal Procedure Code, that without disposing of the case as such it was suddenly altered and proceeded as a warrant case and that therefore the whole proceedings has thereby been vitiated. In support of this contention it is argued by the learned counsel for the applicants that non-compliance with the mode of trial is not only an irregularity but illegality which must necessarily

* Criminal Revision No. 47-B of 1950, Review of the order of 1st Additional Magistrate of Thatôn, dated 9th January 1950 passed in Criminal Regular Trial No. 7 of 1949.

vitiate the proceedings. He quotes the case of *Rajaratnam Pillai* v. *Emperor* (1) where it has been held that "Once a Magistrate has taken cognizance of a summons case, he cannot convict an accused person for anything but an offence triable as a summons case," and the proceedings were sent back to the Magistrate to proceed according to law.

The learned Government Advocate in answer to that contention quotes among others, *In re K. V. Venkata Ramanier and others* (2) which is a case on all fours with the case under revision. The head-note there reads as follows :

> "If a Magistrate begins a trial as a summons case and then finds that an offence triable only under warrant case procedure has been committed, he is bound to apply warrant case procedure thence forward ; he is not in any way disqualified from proceeding with the trial."

This is a case which has dissented from *Rajaratnam Pillai* v. *Emperor* (1) and lays down a correct view of law in the matter. It might be observed that the procedure adopted by the Magistrate in the present case has not really resulted in any miscarriage of justice, for even if a new trial were ordered the result would have been the same. It is also in accord with the general principle laid down that if a mandatory provision of the Code of Criminal Procedure is infringed, that does not of itself make it necessary to hold that the Court must have failed in administering justice to the accused. [Please see *Nga U Khine and others* v. *King-Emperor* (3).] It is a case where it cannot be held that the Court has, by adopting the procedure in question, failed in administering justice to the applicants. The application must necessarily fail and is accordingly dismissed.

(1) A.I.R. (1936) Mad. 341. (2) A.I.R. (1938) Mad. 815.
(3) 13 Ran. 1.

## CRIMINAL REVISION.

*Before U Tun Byu, Chief Justice, U Ou Pe and U San Maung, JJ.*

H.C. 1950.

*Aug. 21.*

THE UNION OF BURMA (APPLICANT)

*v.*

U KHIN MAUNG LAT AND ONE (RESPONDENTS).*

*Special Crimes (Tribunal) Act, 1947, ss. 5 and 8—Nature of trial before—Revision of order of discharge whether lies to the High Court—Union Judiciary Act, 1948, s. 24—S. 439, Criminal Procedure Code—Interpretation of.*

Respondents were sent up for trial before a Special Tribunal constituted under the Special Crimes (Tribunal) Act, 1947, under ss. 409/109 and 420/120B, Penal Code and discharged. A revision was filed by Government and objection was raised on behalf of the Respondents that no revision lay.

*Held :* Under s. 5 of the Special Crimes (Tribunal) Act, 1947, cases coming before the Special Tribunal will have to be tried as warrant cases. S. 8 of the same Act makes Criminal Procedure Code applicable to trials before the Special Tribunal and to all matters which arose out of or connected with such trials and the section further provides that the Special Tribunal will be treated as if it were a Court of Session. The order of discharge in the present case is clearly a matter which arises out of a case heard by the Special Tribunal acting as if it were a court of Sessions exercising original jurisdiction. The Special Tribunal must be regarded as a court which is inferior to the High Court. Further under s. 24 of the Union Judiciary Act, 1948, the High Court ordinarily has revisional power over all courts subject to its appellate power and the Special Tribunal is one of such courts. Consequently a revision was competent.

*Held further :* That the terms of s. 439, Criminal Procedure Code is comprehensive in language and full effect must be given to the terms of the section. The main idea underlying s. 439 is to enable the High Court to rectify cases of injustice or illegality when the person affected is unable to appeal.

*Emperor* v. *Bishen Das*, (1910) 8 I.C. 116 at 164-165.

*The National Bank of India Ltd.* v. *G. V. Kothandarama Chetti and one*, (1913) 14 Cr. L.J. 529 at 535, referred to and applied.

*Chan Htoon* (Attorney-General) for the applicant.

*Kyaw Myint*, *Paing*, *Tun Maung*, and *Sein Tun* for the respondents.

* Criminal Revision No. 57B of 1950 being review of the order of the Special Tribunal 1 of Rangoon, dated the 24th April 1950.

The judgment of the Special Bench was delivered by

U TUN BYU, C.J.—The two respondents U Khin Maung Lat and U Tha Din were sent up before the Special Tribunal, which was constituted under the Special Crimes (Tribunal) Act, 1947, under sections 409/109 and sections 420/120B of the Penal Code. The Special Tribunal after having recorded the evidence and heard the arguments, passed an order whereby the two respondents were discharged.

It is now sought to revise the said order of dicharge of the two respondents. A preliminary objection has been raised on behalf of the respondents that the application for revision does not lie against an order of discharge passed by the Special Tribunal constituted under the Special Crimes (Tribunal) Act, 1947. The relevant portion of section 5 of the Special Crimes (Tribunal) Act, 1947, reads :

"5. (1) The Special Tribunal may take cognizance of offences without the accused being committed to it for trial and, in trying accused persons, shall follow the procedure prescribed by the Code for the trying of warrant cases by Magistrates :

Provided that—

(i) the Special Tribunal shall not be bound to adjourn any trial for any purpose whatsoever unless such adjournment is, in its opinion, necessary in the interests of justice ;

(ii) the Special Tribunal may refuse to summon any witness if satisfied that the evidence of such witness will not be material."

It is thus clear that cases, which come before the Special Tribunal, will have to be tried as warrant cases. It appears to be obvious also that when cases are sent up before the Special Tribunal, it might have occasion, now and again, to pass an order of discharge as is often

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done in the cases tried by Magistrates. It will be convenient to reproduce section 8, which reads :

" 8. 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, and all other matters connected with or arising from such trials, as if the Tribunal was a Court of Session exercising original jurisdiction :

Provided that—

(i) the provisions of section 526 of the Code shall not apply to the proceeding held before the Special Tribunal ;

(ii) no appeal shall lie in any case tried by the Special Tribunal unless the Special Tribunal passes a sentence of death or a sentence of transportation or imprisonment exceeding five years."

It will be observed that section 8 makes the Code of Criminal Procedure applicable to trials before the Special Tribunal, to the appeals arising from the cases tried by the Special Tribunal, and to all matters which arose out of, or are connected with, the trials before the Special Tribunal. We are of opinion that the present application to revise the order of discharge passed by the Special Tribunal is clearly a matter which arose out of a case which was heard by the Special Tribunal. Section 8 also indicates that the Special Tribunal must be regarded as a Court which is inferior to the High Court.

We cannot agree to the suggestion that the words " as if the Tribunal was a Court of Session exercising original jurisdiction " must be read to mean that the Special Tribunal is a Court of Session in the sense it is understood in the Code of Criminal Procedure, especially as cases which come before the Special Tribunal are tried by it in the same manner as warrant

cases are tried by Magistrates, which was not the procedure prescribed for the trial of cases before a Court of Session under the Code of Criminal Procedure. Moreover, we cannot construe that a hiatus has been created in respect of the procedure, in connection with the cases that come before the Special Tribunal, unless there is a clear indication to that effect. We ought also to reproduce the provisions of section 24 of the Union Judiciary Act, 1948, which read as follows :

"24. The High Court shall be a Court of reference and Revision from the criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases as may be referred to it by any Judge or other authority in accordance with law ; or to revise all such cases as are subject to revision under any law."

Thus the High Court ordinarily has revisional power over all Courts which are subject to its appellate power, and the Special Tribunal is one of the Courts which are subject to the appellate jurisdiction of the High Court—*vide* section 8 of the Special Crimes (Tribunal) Act, 1947.

In *Emperor* v. *Bishen Das* 1), it was observed :

"As we read section 439 of the Code the meaning of that section is that in any case to which section 435 or section 438 is applicable, the High Court can, with reference to any particular order (whether appealable or not), exercise all or any of the powers, which under section 423, an Appellate Court could exercise if that order happened to be one open to appeal, and that it was not intended by the Legislature that the High Court's powers of revision were to be limited merely to orders from which an appeal would lie. Obviously, the main idea underlying section 439 is that the High Court should be in a position to rectify cases of injustice or illegality in cases when the person affected is unable to appeal."

(1) (1910) 8 I.C. 116 at 164-165.

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It was also observed in the case of *The National Bank of India Ltd.* v. *G. V. Kothandarama Chetti and one* (1):

"The inference is that the Court may make such alteration as appears fit to it. The fact that the Criminal Procedure Code does not provide for an appeal against the order of discharge is immaterial. The nature of the powers that the Court has in revision is the same as that which a Court of Appeal has in the case of an appeal from any order against which an appeal is provided by the code, as in the case coming within sections 405 and 406. I do not think that any restriction should be placed on the comprehensive character of the High Court's powers under section 439 on the ground that section 437 expressly confers on the High Court and the Sessions Court power to set aside a discharge made either by a District Magistrate or by a Magistrate subordinate to him. The result of cutting down the ordinary signification of the language of section 439 would be anomalous; under section 436 a Sessions Judge and a District Magistrate have power in certain cases to direct an accused person who has been discharged to be committed for trial. It is extremely unlikely that it was intended that the High Court should not have similar power where there has been an improper discharge by a District Magistrate or other inferior Magistrate. It could be held to have such power only by construing section 439 without limiting the comprehensiveness of its language. I see no good reason for not giving full effect to the terms of section 439."

We respectfully agree that section 439 of the Code of Criminal Procedure ought to be given a more comprehensive meaning. We must accordingly overrule the preliminary objection which has been raised on behalf of the respondents.

U Khin Maung Lat, the first respondent, was during the relevant period of this case Commissioner of Civil Supplies, while U Tha Din, the second respondent, was Secretary in the Civil Supplies Department; and they were appointed to these

(1) (1913) 14 Criminal Law Journal, 529 at 535.

positions on or about the 1st March, 1948. The prosecution alleged that the first and second respondents were responsible for the payment of three large sums of money, totalling in all over 30 lakhs of rupees belonging to the Government, to Messrs. Zeyawaddy Sugar Factory Ltd.; that the first payment for Rs. 10,22,010 was made on 29th December, 1948, the second payment for Rs. 11,07,177-8 was made on 15th January, 1949, and the third payment for 10 lakhs of rupees was made on 22nd February, 1949. The third payment of 10 lakhs of rupees was made after Zeyawaddy had fallen into the hands of Karen rebels, which was said to have occurred on or about 31st January, 1949.

It has been contended that U Khin Maung Lat and U Tha Din can properly, in the circumstances under which the said three payments of large sums of money belonging to the Government were paid out to Messrs. Zeyawaddy Sugar Factory Ltd., particularly in respect of the last payment of 10 lakhs of rupees which was said to have been made after Zeyawaddy had fallen into the hands of Karen rebels, be said to have committed, at least an offence under section 420 read with section 511 of the Penal Code, or in the alternative under section 409 read with section 511 of the Penal Code. It has, on the other hand, been argued on behalf of the two respondents, who have been represented separately, that the said three payments made to Messrs. Zeyawaddy Sugar Factory Ltd. were in respect of money which the Civil Supplies Department was bound under their contract or agreement with the Company to pay to the latter, and that, in any case, those three payments were made *bona fide* under the impression that the Civil Supplies Department was liable to pay those sums of money to Messrs. Zeyawaddy Sugar Factory Ltd., without any fraudulent

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or dishonest intention on the part of any of the respondents.

It seems to us to be clear that if those three payments were made in respect of money which the Civil Supplies Department was liable under an agreement or a contract to pay to the Company at the time they were paid out, there could have been no dishonest or fraudulent intention on the part of the respondents, and in any case they could, in that circumstance, contend that they acted *bona fide*. We ought, accordingly, to consider whether on the evidence on the record any contract or agreement had been arrived at to indicate that those payments were payments which the Civil Supplies Department was bound or had agreed to pay to the Company at the time the payments were accorded.

We have been referred, during the argument, to the various documents that have been filed as exhibits before the Special Tribunal, and we have also been referred to the evidence that were recorded by the Special Tribunal, and it will be sufficient, so far as the present application for revision is concerned, to state that we do not find anything on the record at the present to show that there was clearly a concluded contract or agreement arrived at between the Civil Supplies Department and the Company under which the Civil Supplies Department could be said to have been legally liable, or legally were bound, to pay those three sums of money to Messrs. Zeyawaddy Sugar Factory Ltd., on the dates those three payments were made. The Exhibit 4 letter dated the 28th December, 1949, shows that when the Company asked for the first payment, the payment was to be considered as provisional only and that no binding agreement for the purchase of sugar for 1948-49 had been concluded or executed. The relevant portion of the letter Exhibit 4,

which was written by Mr. Chhaganjee, the Resident Director of Messrs. Zeyawaddy Sugar Factory Ltd., reads :

"I am accepting this as a provisional payment pending settlement of the agreement submitted to you. I hope before the 16th of the next month, the agreement will be finalised and we will be paid regularly."

There is an endorsement on Exhibit 4 letter by U Tha Din, the second respondent, and the endorsement was apparently accepted by U Khin Maung Lat, the first respondent, that the Commissioner of Civil Supplies, namely U Khin Maung Lat, had agreed to make a provisional payment as requested in the Exhibit 4 letter. We must say that we are unable to find anything on any of the exhibits that have been so far filed in Court, or on the evidence that have been recorded, to indicate when and in what circumstances the provisional payment was alleged to have been agreed to, or between whom that agreement was arrived at. The Company in their letter Exhibit 1K, dated the 4th November, 1948, which was sent to the Secretary, Sugar Control Board, suggested that they should be paid from day to day for the sugar that was to be supplied by them for the season 1948-49. This letter was considered by the Sugar Control Board on 16th December, 1948, when it was decided that the Commissioner of Civil Supplies and the Resident Director of the Company should discuss as to how the payments for the sugar to be supplied for 1948-49 were to be made and as to what arrangement should be made for the storage of the sugar to be supplied, and that the Commissioner of Civil Supplies was to report to the Sugar Control Board what has been provisionally agreed to between the Commissioner of Civil Supplies and the Resident Director in those

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discussions. As the Commissioner of Civil Supplies was present at the meeting of the Sugar Control Board, it is only proper to presume that he had consented to the adoption of the procedure which was arrived at at that meeting.

The letter of Mr. Chhaganjee, dated 23rd December, 1948 (Exhibit 5), also shows that no binding agreement had been arrived at on the date that letter was sent in respect of the supply of sugar for the season 1948-49 ; and the last paragraph of that letter reads :

" Pending settlement of the agreement at an early date, we would request you, in the meanwhile, to pay us for the 1948-49 stocks accumulated, on presentation of our bills, by the end of this month."

It will thus be observed that it was not alleged in the letters, Exhibits 4 and 5, sent by the Company on 28th and 23rd December, 1948 respectively, that the sugar for which payment was being requested provisionally had become property of the Government or of the Civil Supplies Department, or that it had already been agreed to pay the Company provisionally.

The Company asked for the second payment in their letter, Exhibit 6, dated the 14th January, 1949, the last paragraph of which reads :

" Please expedite finalising the agreement which is lying pending now for over a month and a half."

The words " for sugar produced and stocked by us on your behalf," in the first paragraph of that letter, do not by themselves indicate that the property in the sugar referred to in that letter had passed to the Government or the Civil Supplies Department, or that a definite agreement had been arrived at in respect of the purchase of sugar for the season 1948-49 between the Civil Supplies Department and Messrs. Zeyawaddy

Sugar Factory Ltd. at the time when the Company asked for the second payment, particularly if the Exhibit 6 letter is read in the light of earlier correspondence sent by the Company. U Tha Din made an endorsement on the Exhibit 6 letter, and which endorsement was apparently approved by U Khin Maung Lat, that it had been agreed upon to pay the amount required by the Company as advances. The observations which we have made in respect of the endorsement made by U Tha Din on the earlier letter of the Company, Exhibit 4, will apply also to the endorsement which U Tha Din made in the subsequent Exhibit 6 letter. The second payment to the Company, which was for the sum of Rs. 11,07,177-8, was made on the 15th January, 1949. It appears, at least at present, that this second payment, which was made in pursuance of the letter sent by the Company on the 14th January, 1949, was also made in contravention of the ban placed by the Ministry of Finance and Revenue, *vide* Exhibit K, dated the 6th January 1949, the material part of which reads :

> " *Subject.*—Purchases by Civil Supplies Department.
>
> The Additional Secretary, Ministry of Commerce and Supply, is informed that no fresh purchases on a large scale exceeding Rs. 50,000 in each case should be undertaken by the Civil Supplies Department during January and February 1949 in the first instance without the prior approval of this Ministry. The question of extending the ban beyond February 1949 or not will depend on circumstances then prevailing and a further communication to you on the subject will be issued in due course."

Thus, the Civil Supplies Department was required, by reason of the ban issued on the 6th January, 1949 by the Ministry of Finance and Revenue, to obtain the previous sanction of the Finance and Revenue Ministry for all payments in excess of Rs. 50,000·

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An explanation is therefore required as to why the second advance of Rs. 11,07,177-8 was paid out to the Company without first obtaining the prior sanction of the Ministry of Finance and Revenue, as desired in their Memorandum, Exhibit K. The respondents were, however, not even examined before they were discharged.

Mr. Chhaganjee, in his letter Exhibit 7, dated the 31st January, 1949, again asked fresh payment for the sugar that had been stocked in the godowns at Zeyawaddy, and the last paragraph of this letter reads :

" Please expedite finalising the agreement which is lying pending now for two months."

This letter also indicates that no binding agreement had been arrived at, on the date this letter was sent, in respect of the purchase of sugar for 1948-49, and this is what the word " finalising " clearly suggests. U Khin Maung Lat made the following endorsement on the letter Exhibit 7 :—

" (1) We have no means of verifying the stocks at Zeyawaddy, and thus it is difficult to finalise the accounts.

(2) Re-Moving the sugar from Zeyawaddy—we will do so as soon as the railway is restored.

(3) Re-Agreement, please expedite."

The endorsement of U Khin Maung Lat, which he made on the 1st February, 1949, appears to also indicate that no definite or binding agreement had yet been arrived at for the purchase of the sugar for 1948-49 at the time he made the endorsement on Exhibit 7 letter sent by Mr. Chhaganjee. On 2nd February, 1949, U Tha Din made his endorsement supporting the request of the Company for further payment, and to use his own phrase, " The claim seems to be justified." The note which U Tha Din made on 2nd February, 1949 in connection with the Company's letter

Exhibit 7, also suggests that he must have realized that there was some difficulty in removing the sugar from Zeyawaddy at that time ; and paragraph 2 of this endorsement reads :

" 2. In view of the large quantity of sugar stocked, I am not sure whether CS and ACCM should not be requested to investigate the possibility of lifting the sugar by road from Zeyawaddy to Kanyutkwin, a matter of 22 miles, the latter being the present rail head. If CCS is agreeable, the two officers concerned will be requested to probe into this possibility."

The note, which U Tun Yin, Controller of Civil Supplies, made on 2nd February, 1949, also suggests that there was some difficulty at that time in bringing the sugar to Rangoon ; and this difficulty was realized in the Civil Supplies Department before the third payment was made to the Company. The Chief Account-Officer made a note on the 4th February, 1949, to the effect that the payment desired could not be made without the order of the Ministry of Finance and Revenue in view of the ban, which had been imposed by that Department. U Khin Maung Lat on the same day made the following note :

" Please ask for Finance and Revenue's approval to pay the amount due (which should be worked out)."

It will be observed that the first respondent, in effect, suggested that the amount for which sanction was applied for was legally due to the Company, and this appears to us to be also a point which will require explanation. On 14th February, 1949, U Khin Maung Lat also made a note in connection with the request for the third payment, the relevant portion of which reads :

" (2) The present case relates to payment for the sugar already manufactured. Is it necessary to place it before the Board. Perhaps, what is necessary is to obtain Finance and

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Revenue's approval to payment of a large sum (am I right ?) without being able to move the sugar from Zeyawaddy on account of insurgent activities.

(3) When is the agreement going to be finalised ? "

This note shows that U Khin Maung Lat also realized at the time that there was difficulty in removing sugar from Zeyawaddy, owing to the activities of the insurgents round about there, and that no definite agreement had yet been arrived at in respect of the purchase of sugar for the year 1948-49.

It was on the background of these adverse circumstances that U Tha Din wrote his note of 16th February, 1949, and submitted to the Secretary, Ministry of Finance and Revenue, for the concurrence of that Ministry to the payment of a sum of 10 lakhs of rupees to Messrs. Zeyawaddy Sugar Factory Ltd. This concurrence, it might be mentioned, was obtained on 21st February, 1949. The note which U Tha Din wrote reads as follows :

" The Civil Supplies Department is committed to pay a sum of Rs. 10 lakhs for the cost of sugar purchased from the Zeyawaddy Sugar Factory Ltd. Will the Ministry of Finance and Revenue kindly concur ? According to the terms of agreement payments are to be made regularly on the 1st and the 16th of each month, and this Department has not yet made the payment which fell due on the 1st February 1949.

This may please be treated as immediate."

This note seems to us to also require explanation as it does not appear, at least at the present, that any binding contract had yet been concluded at the time the note was made in respect of the purchase of sugar for the season 1948-49. Paragraph 4 of Exhibit G, which was prepared, it is said, by U Tha Din, also suggests that no binding contract had been concluded in respect of the purchase of sugar for 1948-49, even by the 5th July, 1949.

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From what had been set out above, it will be observed that it is difficult to say, at least at the present, that there was an agreement or a binding contract or a definite agreement to make the three payments which were made to Messrs. Zeyawaddy Sugar Factory Ltd., on 28th December, 1948, 14th January, 1949 and 22nd February, 1949 respectively. This is therefore a matter which the respondents ought at least to be called upon to explain, particularly when the two subsequent payments were made, apparently after the ban had been issued by the Ministry of Finance and Revenue and in view of the fact that the third payment for Rs. 10 lakhs was made after Toungoo and Zeyawaddy had fallen into the hands of Karen rebels. We might also add that we have not been able to discover anything in the minutes of the meetings of the Sugar Control Board which will show that there was a definite agreement to pay the advances when demanded by the Company.

It has been urged on behalf of the respondents that the Ministry of Finance and Revenue was not influenced by any of the statements which U Tha Din made on the 16th February, 1949, when it gave its concurrence to the payment of 10 lakhs of rupees to the Company, and reference was made to the evidence of U Kyin, who was then Secretary to the Ministry of Finance and Revenue where he stated as follows :

" It was not what was written on the note of the Civil Supplies Department asking for the sanction which made me concur to the payment of that money. I might have made a note of the fact mentioned in the noting of the Civil Supplies Department that they were committed to make the payment. The sanction asked for with regard to this particular payment was only a Ways and Means sanction where we were only concerned to find out our cash position for the day. If it was an ordinary financial sanction, as distinguised from Ways and Means sanction, we would study the case from A to Z to find out

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whether the proposed expenditure was proper or necessary. On mere request of the Civil Supplies Commissioner, I would concur to the payment if the cash position permitted it and if it was in accordance with the Civil Supplies Department Management and Control Order."

We do not think it will be necessary for us at present to consider what the effect of U Kyin's evidence is, when it is considered with other evidence that are produced in this case. We might however observe that the note giving the concurrence of the Ministry of Finance and Revenue was signed by another officer who purported to sign it for the Secretary, Ministry of Finance and Revenue. We have not been able to trace anything on the record to indicate that U Kyin, as Secretary, had power to give concurrence to the payment of 10 lakhs of rupees without first consulting the Hon'ble Minister concerned.

It will be observed from what has been stated above that this is not a case where the two respondents should have been discharged without, at least, examining them, and it could therefore be said that this is a case where a retrial should be ordered. The fact that over 70,000 bags of sugar were recovered is more a fortuitous circumstance. We might add that we do not think it proper for us to deal with all the different features or aspects of this case, as we do not desire to say anything which might indirectly have the effect of influencing the new Special Tribunal when the case goes back for retrial. The new Special Tribunal should be left to decide this case afresh and freely. It is for this reason that we have refrained from entering into discussion whether the materials on the record are sufficient to indicate that there had been a deception practised by either of the respondents whether they could be said to have intentionally induced the Ministry of Finance and Revenue to do

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something which it would not have done if it would not have been deceived, whether the Government had suffered any damage through that inducement, if any or whether all the necessary ingredients required have been proved either in connection with section 420 or section 409 of the Penal Code.

The order of discharge passed by the Special Tribunal in the Special Trial No. 1 of 1950 is hereby set aside, and the case against the two respondents will be retried *denovo*.

## APPELLATE CIVIL

*Before U Tun Byu, Chief Justice and U On Pe, J.*

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June, 8.

SIN YON HTAUNG (APPELLANT)

*v.*

U BA NYUN AND ONE (RESPONDENTS).*

*S. 231, Contract Act—Rights of undisclosed principal—S. 11 (1) (f), Urban Rent Control Act—"Reasonably and* bona fide *"—Meaning of.*

Where the appellants had taken a lease of one floor of a house from the owner's son and subsequently the owner filed a suit for ejectment claiming that the house was wanted *bona fide* and reasonably for her occupation.

*Held:* That the house having been leased on behalf of his illiterate mother by the son he must have done it on behalf of his mother. Under s. 231 of the Contract Act a principal can claim the benefit of a contract entered into by the agent in his own name and a suit for ejectment by the principal was competent.

That the owner had resided in the house prior to war; and the desire of the owner to occupy the same house is *bona fide*, as she desired to live together with her son and family—the son having retired from service, such desire cannot be said to be unreasonable because the owner had lived in another house previously. The requirments of s. 11 (1) (*f*) of the Urban Rent Control Act have therefore been duly complied with.

*T. P. Wan* for the appellant.

*Hla Pe* for the respondents.

The judgment of the Court was delivered by

U TUN BYU, C.J.—The respondents Daw Thin and her son U Ba Nyun filed a suit, known as Civil Regular No. 46 of 1949 of the Rangoon City Civil Court, to eject the three defendants from the first floor of a two-storeyed building situate at No. 135, Godwin Road, Rangoon, which they had leased out to the appellant Sin Yon Htaung about one year

*Civil 1st Appeal No. 13 of 1950 against the decree of the 3rd Judge, City Civil Court, Rangoon in Civil Regular No. 45 of 1949, dated 16th January 1950.

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before the suit was instituted at a rental of Rs. 80 per month. Ko Aye and Tan Hlyan Wun, the 2nd and 3rd defendants, were said to be persons who had been allowed by Sin Yon Htaung to occupy the said premises also. Sin Yon Htaung, the first defendant alone contested the suit while Ko Aye and Tan Hlyan Wun allowed the case against them to be heard *ex parte*. A decree for ejectment was passed against the defendants, with costs, on the 16th January, 1950.

The first point, which was raised on behalf of the appellant, is that as Sin Yon Htaung obtained a lease of the premises from U Ba Nyun, there was no privity of contract between Sin Yon Htaung and Daw Thin and that the latter could not therefore sue to eject Sin Yon Htaung from the premises in question. It is not disputed in this appeal that it was Daw Thin who purchased the two storeyed building at No. 135, Godwin Road, and she is therefore the owner of the premises in question. U Ba Nyun is her son. He was a Resident Excise Officer under Government and has retired from Government service. It is also not disputed in this case that the premises in question were rented out to Sin Yon Htaung by U Ba Nyun. It is said that U Ba Nyun leased it out on behalf of his mother Daw Thin who was living with him in his house at Prome Road. In the lawyer's notice, marked Exhibit A, sent on behalf of Daw Thin and her son U Ba Nyun to the defendants, it was, in effect, stated that U Ba Nyun leased out the premises on behalf of his mother Daw Thin. Daw Thin is said to be illiterate. She is apparently a widow. It is only natural in the circumstances for her to ask her son to act for her in leasing out the premises which she owns, particularly after U Ba Nyun had retired from Government service. It seems to us

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that it is only proper in the circumstances to conclude that U Ba Nyun in letting the premises in question to Sin Yon Htaung was doing it for and on behalf of his mother. We are also unable to find anything in the evidence which will point to the contrary. It will be convenient to reproduce the relevant portion of section 231 of the Contract Act, which reads—

"231. If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal."

Thus a principal can claim the benefit of a contract which has been entered into by his agent in the latter's own name, and Daw Thin could therefore sue the appellant and the persons whom he had allowed to occupy the premises in question for ejectment in accordance with the provisions of the Urban Rent Control Act, 1948.

It will be necessary in regard to the contention which has been advanced on behalf of the appellant that Daw Thin did not require the premises in question reasonably and *bona fide* for her occupation as required under clause (*f*) of section 11 (1) of the Urban Rent Control Act to examine the evidence more closely. Daw Thin in her evidence states—

"After the purchase of the house in question, U Ba Nyun and I had lived in it together. On the out-break of the last War, we left the house in charge of some people whom I know only at sight. My son U Ba Nyun knew them. During the pre-war days, about 14 or 15 persons lived in that house. We occupied both the upper flat and the ground floor. During the Japanese occupation period when things had settled down in Rangoon we came back and lived in it. We left it again on the

eve of Japanese retreat. After re-occupation, we came back from Tantabin, Insein District, and lived in it. We lived in it for two years. Then, my daughter-in-law Ma Khin Aye, the wife of U Ba Nyun, bought a house on the Prome Road. Then, we all shifted to the Prome Road house as we felt noisy in house No. 135, Godwin Road. After we left, my son U Ba Nyun let out the suit flat to one Chinaman with my consent. As I am illiterate I asked my son U Ba Nyun to do all the needful things in connection with the renting and collecting of the rents of the house in question."

Her witness Ko San Maung also deposed to as follows :

"I had seen them living together in that house before the last War and also during the Japanese occupation period. I had also seen them living in that house together for about two years. They occupied both the ground floor and the upper flat. They shifted to the house on the Prome Road, afterwards."

Thus Ko San Maung's evidence also shows that Daw Thin and her son U Ba Nyun used to live together in Rangoon and that they had previously occupied the whole of the house at No. 135, Godwin Road, for their occupation. Ma Khin Aye, a daughter-in-law of Daw Thin, also stated as follows :

"Daw Thin bought the house No. 135, Godwin Road, about ten years ago. She bought it for her residence. Daw Thin always lives with us. After the purchase we lived in it for about 6 months. At that time my husband was on leave. On the expiry of the leave my husband was posted to Pyapôn. So, we went to Pyapôn. When we went to Pyapôn, Daw Thin lived in the house in question. She mostly spent her time in Rangoon. She visited us occasionally at Pyapôn. After Rangoon had been occupied by the Japanese Forces we came to live in Rangoon. We came from Pyapôn. We stayed in that house throughout the Japanese occupation period. But, we used to stay at Kamayut and Thamaing when the air raids became intensive. We occupied both the ground floor and the upper flat of the house in question.

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After re-occupation, we lived in that house for about two years. Daw Thin lived with us. Our two or three servants also lived with us. Then, we shifted to the house on the Prome road."

Ma Saw Khin, a witness for the plaintiff-respondents also stated as follows:

"I know the suit premises. I had been to that building. Before the out-break of the last war, the 2nd plaintiff Daw Thin lived in that house while her son, the first plaintiff used to come and live with her and left it. The 2nd plaintiff Daw Thin occupied both the flats (floors). Both the plaintiffs occupied the two floors of the house during the Japanese occupation period. As far as I know about 15 persons lived together in that house.

About one year after re-occupation, they shifted to the house on the Prome Road."

The evidence of the witnesses referred to above shows clearly that Daw Thin and her son U Ba Nyun had previously occupied the entire house at No. 135, Godwin Road, for their residence, both before the last Great War as well as after the British reoccupation of Burma. It cannot in the circumstances be said that Daw Thin did not require the entire house *bona fide* for her occupation. Daw Thin is a widow and her son U Ba Nyun has been suffering from paralysis for the last 4 or 5 years, and it is only natural in the circumstances, particularly after her son had retired from Government service, that she should desire to live together with her son U Ba Nyun and his family

The next point which requires consideration is whether the desire of Daw Thin to occupy the entire house can be said to be reasonable. It has been urged on behalf of the appellant that Daw Thin could conveniently have gone and lived with U Ba Nyun and his family on the ground floor of the building at No. 135,

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Godwin Road. The ground floor, it is said, measures 25 feet by 50 feet, which is smaller than the house in Prome Road, which is said to measure 35 feet by 50 feet. It is said that there are also servants' quarters in the house at Prome Road. We cannot accordingly accept the suggestion that because Daw Thin was able to live with her son U Ba Nyun in Prome Road she could also conveniently live with him on the ground floor of the house at No. 135, Godwin Road, as it is clearly a smaller place than the house at Prome Road. According to Ko San Maung, a witness for the plaintiff-respondents, about 10 or 11 persons are living on the ground floor of the house at No. 135, Godwin Road, and his evidence agrees with the statement of Maung Hla Maung, a witness for the defendant-appellant, who saw about 10 persons living on the ground floor of the house in Godwin Road. It is also clear from the evidence of Ma Saw Khin that Daw Thin is now living with her grandson somewhere in Kokkine Road and that her two nieces who are the children of U Ba Nyun also live with Daw Thin when their school is closed. The eldest daughter of U Ba Nyun is said to be about 15 years of age. We do not think it can in this case be said that the premises in question were not required reasonably for occupation by Daw Thin and her son U Ba Nyun and his family in view of the fact that there would be about 13 persons living there, including of course Daw Thin and her two nieces, and especially when her son U Ba Nyun is a sick man suffering from paralysis. It is obvious that we cannot expect Daw Thin and U Ba Nyun to live in the way that the poorer people live, and particularly when her son U Ba Nyun is practically a sick man. The evidence shows that Dr. U Tin had been attending on U Ba Nyun occasionally.

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It seems to us to be only natural that Daw Thin, a widow, should like to live together with her son after his retirement from Government service, particularly when he suffers from paralysis, and in her case her desire in this respect cannot be said to be unreasonable in view of the fact that she had also previously lived with her son and his family at the house in Godwin Road before it was rented out to the appellant. We might add that the learned Third Judge of the Rangoon City Civil Court is also correct in striking off the name of U Ba Nyun from the proceeding as he was obviously an unnecessary party to the present litigation, and that was made quite clear at the time the Exhibit A, lawyer's notice, dated 19th September 1948, was sent to the defendants. We do not see how any of the defendants can be said to have been prejudiced by the addition of U Ba Nyun's name as a plaintiff in Civil Regular Suit No. 46 of 1949.

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

## APPELLATE CRIMINAL.

*Before U Tun Byu, Chief Justice and U On Pe, J.*

MOGYO (*a*) BA THAW (*a*) MAUNG THAW (APPLICANT)

*v.*

THE UNION OF BURMA (RESPONDENT).*

H.C. 1950.

*Aug. 12.*

*Union Judiciary Act, s. 5—Criminal Case—Special leave.*

*Held* : Where no question of the validity of any law having regard to the provisions of the Constitution as set out in the Union Judiciary Act, 1948, s 5 (*a*), is involved, no leave for appeal to the Supreme Court can be granted.

The judgment of the Court was delivered by

U TUN BYU, C.J.—This is an application presented by the applicant Mogyo (*a*) Ba Thaw (*a*) Maung Thaw praying for the grant of a certificate to appeal to the Supreme Court against the judgment, dated the 6th July, 1950, passed in Criminal Appeal No. 243 of 1950 of this Court confirming the sentence of death passed upon him by the First Special Judge, Sagaing in his Criminal Regular Trial No. 3 of 1950.

The application is apparently made under section 5 of the Union Judiciary Act, 1948, the relevant portion of which reads :

" Save where an appeal lies to the High Court itself under the provisions of section 20, an appeal shall lie to the Supreme Court from the judgment, decree, or final order of the High Court (whether passed before or after the commencement of the Constitution) in any civil, criminal, or other case, if the High Court certifies—

(*a*) that the case involves a question as to the validity of any law having regard to the provisions of the Constitution."

It is clear to us that the applicant's case is one in which no question as to the validity of any law having

* Criminal Misc. Application No. 11 of 1950.

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MOGYO (*a*) BA THAW (*a*) MAUNGTHAW v. THE UNION OF BURMA.

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regard to the provisions of the Constitution within the meaning of clause (*a*) of section 5 of the Act is involved. On this ground alone the application must fail. We however, find it necessary to make our observation as regards the contention urged in this application that this Court has failed to consider the evidence adduced by the defence in support of the *alibi* set up. It is true that we did not specifically mention in our judgment that the defence evidence did not establish the case sought to be proved, but the evidence for the defence was however discussed at the hearing of the appeal before us. It appeared to us then that the lower Court was correct in its finding that the defence failed to rebut the prosecution case. We were also unable to accept the evidence adduced by the defence as helping to prove his innocence.

In the circumstances of the case, we must refuse to grant the certificate applied for. The application is accordingly dismissed.

## APPELLATE CIVIL.

*Before U On Pe, and U San Maung, JJ.*

ABDUL BARI (APPELLANT)

*v.*

S. M. ABOWATH (RESPONDENT).*

H.C. 1950.

*July 28.*

*Notice under s. 106, Transfer of Property Act and s. 11 (1) (a), Urban Rent Control Act, 1948—Sent by registered post—Wrong address—No presumption of service.*

*Held:* The despatch of a notice under s. 106, Transfer of Property Act and s. 11 (*1*) (*a*), Urban Rent Control Act, 1948 by registered post to a person at a wrong address will not raise any presumption of service. The burden of proof is on the party asserting to show that inspite of a wrong address being given on the notice, it was in fact delivered to the defendant. The service of notices under the above sections is a condition precedent to the filing of an ejectment suit.

*H. Subramaniam* for the appellant.

*A. I. Modan* for the respondent.

The judgment of the Bench was delivered by

U SAN MAUNG, J.—In Civil Regular Suit No. 192 of 1949 of the City Civil Court, Rangoon, the plaintiff-respondent S. M. Abowath sued the defendant-appellant Abdul Bari for his ejectment from house No. 488, Prome Road, Rangoon, which was alleged to have been rented from him at a rental of Rs. 30 per month. The plaintiff alleged that rent was lawfully due from the defendant and that due notices under section 106 of the Transfer of Property Act and under clause (*a*) of sub-section (1) of section 11 of the Urban Rent Control Act, 1948, had been sent to the defendant by

* Civil 1st Appeal No. 12 of 1950 against the decree of the 4th Judge, City Civil Court of Rangoon in Civil Regular No. 192 of 1949, dated the 30th January 1950.

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U SAN MAUNG, J.

registered post. The defendant-appellant in his written statement contended *inter alia* that the house was built by him upon the land hired from the plaintiff at a rental of Rs. 10 per month only and that the notice alleged to have been sent to him was not valid in law. He also denied having received any such notice as alleged by the plaintiff. Only two issues were framed by the learned trial judge, and these are —

> " 1. Whether the defendant hired from the plaintiff as alleged in paragraph 1 of the plaint or as alleged in paragraph 1 of the written statement ; and
> 2. Whether the notice is valid. "

And after evidence had been led by both parties issue No. 1 was answered in the sense that the plaintiff had let out to the defendant the house and its site but not the land adjoining it. The second issue was also answered in favour of the plaintiff who was accordingly given a decree for the ejectment of the defendant from the house in suit. Hence this appeal by the defendant Abdul Bari.

In this appeal one of the contentions raised by the learned Advocate for the appellant is that the learned trial Judge was wrong in coming to the conclusion that the notices required by section 106 of the Transfer of Property Act and by section 11 (*1*) (*a*) of the Urban Rent Control Act, 1948, had been served upon the defendant. In our opinion this contention must be allowed to prevail. In his evidence the defendant Abdul Bari denied ever having received the notice which was alleged to have been sent to him by registered post and there is no evidence on record to show that the signature of the addressee on the postal acknowledgment Exhibit B is that of the defendant. Whereas the defendant was in occupation of the house known as No. 489B, Prome Road, the notice which was alleged

to have been sent to him was addressed to him at No. 488, Prome Road. The despatch of a notice by registered post to a person at a wrong address will not raise any presumption of its service either under section 106 of the Transfer of Property Act or under section 11(*1*) (*a*) of the Urban Rent Control Act, 1948. If the plaintiff wishes to contend that in spite of the fact that a wrong address had been given on the notice which was sent by registered post it was in fact delivered to the defendant, the burden of proof is upon him to establish this fact. This the plaintiff has entirely failed to do in the case now under appeal. As the termination of the lease by due notice under section 106 of the Transfer of Property Act and the demand for arrears of rent by notice under section 11 (*1*) (*a*) of the Urban Rent Control Act, 1948, are conditions precedent to the filing of a suit for the ejectment of a tenant, the plaintiff's suit must fail.

In the result the appeal succeeds, the judgment and decree in the suit under appeal are set aside and the plaintiff's suit is dismissed with costs, Advocate's fees three gold mohurs.

## APPELLATE CIVIL.

*Before U On Pe and U San Maung, JJ.*

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*July. 28.*

S. L. BARUA (APPELLANT)

*v.*

S. M. ABOWATH (RESPONDENT).*

***Urban Rent Control Act, 1948, s. 11 (1) and Transfer of Property Act, s. 106—Consolidate notice under—Notice not strictly accurate—Effect—"Rent lawfully due"—Meaning of—Tenant building—Title to building after tenancy terminated.***

The Appellant was the tenant of the house No. 489C, Prome Road, belonging to the Respondent. In the notice served on the tenant to determine the tenancy, the number of the house was given as 489 and not 489C and the receipt of the notice was admitted. It was contended that notice was invalid owing to mention of the wrong number.

*Held :* The notice was good and effective in law. The test of sufficiency of notice, is what it would mean to the tenant conversant with all the facts and circumstances and not what they would mean to a stranger.

*Harihar Banerji* v. *Ramshashi Roy*, (1919) I.L.R. 46 Cal. 458 P.C., followed.

There is no definition of 'rent lawfully due' mentioned in s. 11 (*1*) (*a*), Urban Rent Control Act, 1948. S. 2 (*i*) of that Act defines standard rent as the rent fixed by Rent Controller and in other cases, as defined in s. 2 (*f*) (*ii*) ; where no standard rent is fixed but there is a contractual rent, such rent must be deemed to be the rent lawfully due.

Where a previous tenant erected a building and his tenancy ceased, he could not remove the building and the landlord had the right to lease out the land and the house standing thereon.

*Gobindaprasad Shaha* v. *Charusheela Dasee*, (1933) I.L.R. 60 Cal. 1042, referred to.

*H. Subramaniam* for the appellant.

*Aung Min* (2) for *A. I. Modan* for the respondent.

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* Civil 1st Appeal No. 10 of 1950 against the decree of the City Civil Court of Rangoon in Civil Regular Suit No 191 of 1949.

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S. L. BARUA v. S. M. ABOWATH.

The judgment of the Bench was delivered by

U SAN MAUNG, J.—In Civil Regular Suit No. 191 of 1949 of the City Civil Court, Rangoon, the plaintiff-respondent S. M. Abowath sued the defendant-appellant S. L. Barua for his ejectment from the house and site in suit on the ground that the defendant was his tenant who had failed to pay the rent lawfully due after due notices had been served as required by section 106 of the Transfer of Property Act and clause (*a*) of section 11 (*1*) of the Urban Rent Control Act, 1948. The defendant, in his written statement, denied that the house in suit belonged to the plaintiff and contended that the house known as No. 489 C, Prome Road, which he was occupying, was built by him on the site which was hired from the plaintiff at a rental of Rs. 17 per month. He also contended that the notices served upon him by the plaintiff were invalid and that in any event a standard rent not having been fixed by the Controller of Rents, a suit for his ejectment under section 11 (*1*) (*a*) of the Urban Rent Control Act did not lie. On the pleadings, the learned Fourth Judge of the City Civil Court, who tried the suit, framed two issues, namely, (1) whether the defendant hired from the plaintiff as alleged in paragraph 1 of the plaint or as alleged in paragraph 1 of the written statement, and (2) whether the notice is valid. After evidence had been led by both parties to the suit, the learned Judge answered issue No. 1 in the sense that the defendant was the plaintiff's tenant in respect of the house and the ground on which it stood but not the contiguous portion of land. He also answered the second issue in favour of the plaintiff and gave a decree for the ejectment of the defendant from the house which he was occupying. Hence this appeal by the defendant S. L. Barua.

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U SAN MAUNG, J.

In this appeal much stress has been laid by the learned advocate for the appellant upon the language in which Exhibit A is couched. It is a letter written by S. L. Barua to S. M. Abowath in these words:

"Dear Sirs,

I hereby agree to occupy the premises known as flat No. 489 in House No. . . Prome Road Street on the following terms :—

1. The rent is to be Rs. 17 (Rupees Seventeen) per mensem commencing from the . . . day of . . . 194 .

* * * * "

The learned advocate contends that No. 489 mentioned in Exhibit A refers to a site in Prome Road on which there stand four houses and that since the house which the defendant is now occupying is No. 489 C, this letter must be deemed to be referring to the site only and not to the house. Furthermore, he contends that since the defendant is paying the Municipal tax in respect of the house in dispute, the defendant's statement that he is the owner of the house must be accepted as correct. However, it is clear from the Municipal tax receipt Exhibit D, filed in the proceedings, that the house has been assessed in the name of A. S. Abbas, a former tenant of S. M. Abowath, and Abbas himself has come forward to say that he was a tenant of the plaintiff continuously for about fifteen years prior to the war in respect of the land on which the house in dispute now stands, that the house was the one actually built by him and that when after the war he came back to Rangoon he found the defendant occupying the very same house which he had built. Abbas's statement, therefore, is strong corroboration of the plaintiff's story that he had let out to the defendant at a rental of Rs. 17 per month not only the land but

also the house which was built thereon. Notwithstanding the fact that the defendant had tried to adduce some evidence to the contrary, the learned Judge's finding on the first issue must be confirmed.

As regards the second issue, it must be noted here that notices required under section 106 of the Transfer of Property Act and under clause (*a*) of sub-section (1) of section 11 of the Urban Rent Control Act, 1948, have been consolidated into a single notice dated the 23rd August 1948, which is in the following terms :—

"To,

Mr. S. L. Barua,
Tenant,
No. 489, Prome Road, Rangoon.

Dear Sir,

We hereby call upon you :

1. To quit, vacate and give up peaceful possession of the above house on the expiry of the tenancy month of September 1948 and

2. To pay all arrears of rent lawfully due by you for the period 1st July 1947 up-to-date in respect of the aforesaid house forthwith.

If you fail to comply with the above demands within a fortnight from today, legal proceedings will be instituted against you without any further reference and at your sole risks and account as to all costs."

In regard to this, it is contended firstly that since the defendant S. L. Barua is a tenant of house No. 489C, Prome Road, the notice in which the address is merely shown as No 489, Prome Road, is invalid because of the inaccuracy. However, the receipt of this notice is admitted, and as laid down by their Lordships of the Privy Council in *Harihar Banerji* v. *Ramshashi Roy* (1), the principles laid down by the English authorities are

(1) (1919) I.L.R. 46 Cal. 458.

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equally applicable to cases arising in India. They establish that notices to quit, though not strictly accurate or consistent in the statements embodied in them, may still be good and effective in law and the test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances touching the holding they purport to relate, but what they would mean to tenants presumably conversant with all those facts and circumstances. As out of the four houses situated on No. 489, Prome Road, S. L. Barua is occupying only one, namely, No. 489C, it is clear that S. L. Barua knew fully well that the notice was meant to be in respect of the suit house.

The next contention raised by the learned advocate for the appellant is that although clauses (1) and (2) of the notice Exhibit B may comply with the provisions of law, the last paragraph thereof must be deemed so to have restricted their terms as to make them no longer conformable with the requirements of section 106 of the Transfer of Property Act and section 11 (*1*) (*a*) of the Urban Rent Control Act, 1948. However, in our opinion, the words "If you fail to comply with the above demands within a fortnight from today, legal proceedings will be instituted against you without any further reference and at your sole risks and account as to all costs", occurring in Exhibit B, are mere idle threats which the plaintiff could not, and in fact did not, carry out although, according to clause (1), the tenancy was to be terminated at the end of the month of September 1948, the suit for ejectment was not filed till the month of March 1949. For these reasons, we concur in the finding arrived at by the learned trial Judge on the validity of the notice Exhibit B.

A much more difficult point which the learned trial Judge does not seem to have taken into consideration now arises for our determination, and that is, whether

the contractual rent may be said to be rent lawfully due from the tenant to the landlord when no standard rent has yet been fixed by the Controller of Rents. Now, there is no definition in the Urban Rent Control Act, 1948, of the term "rent lawfully due" occurring in clause (*a*) of sub-section 11 of the Act. However, clause (*f*), section 2 of the Act defines standard rent as follows :

"2. In this Act unless there is anything repugnant in the subject or context—

* * * *

(*f*) 'standard rent' in relation to any premises means—

(I) in the cases specified in section 19 of the rent fixed by the Controller, subject to any order of the Chief Judge of the City Civil Court of Rangoon in respect of the City of Rangoon or to any order of the Judge prescribed under section 22, in respect of any other urban area ;

(II) in all other cases—

(A) the rent at which the premises were let on the first day of September 1939 ;

(B) where the premises were not let on the first day of September 1939, the rent at which they were let before that date ;

(C) where the premises were first let after the first day of September 1939 and before the first day of January 1941 the rent at which they were first let ;

* * * * "

From this definition, it is clear where no standard rent has been fixed by the Controller of Rents under section 19 of the Urban Rent Control Act, 1948, the standard rent in cases enumerated under clause (II) of the definition must be the rent set out therein.

Now, section 5 (*l*) of the Urban Rent Control Act, 1948, provides that subject to the provisions of the Act, where the rent of any premises has been increased prior to the date on which the Act came into force or

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is increased during the continuance of the Act above the standard rent, the amount by which such increased rent exceeds the standard rent shall, notwithstanding any agreement to the contrary, be irrecoverable. Therefore, where the standard rent has been fixed by the Controller of Rents under section 19 of the Urban Rent Control Act or is fixed by law under clause (II) of the definition of "standard rent" occurring in section 2 (*f*), any rent in excess of the standard rent is a rent which is not lawfully due. In the absence of any standard rent having been fixed under section 19 of the Urban Rent Control Act or under clause (II) of the definition, the contractual rent must be deemed to be the lawful rent, as it cannot be said to exceed the "standard rent" which is non-existent. In this connection we agree with the observations of a Bench of this Court in *S. I. Abowath and others* v. *T. H. Khan* (1) where the learned Judges said :

> "It seems to us that a contract of lease, which has been agreed upon between the parties, should be considered to be binding or subsisting, until it has been modified by agreement between the parties or by operation of law. We are unable to understand how the original contract of lease made between the parties could be said to have been altered or modified in this case until the Controller of Rent had issued the certificate fixing the the standard rent. It appears to us that until the Controller of Rent issues a certificate fixing the standard rent nothing could be said to have been done or to have occurred by which it might be said that the original contract of lease which the parties have agreed upon had been altered, so far as the rate at which the rent is to be paid is concerned."

We would, however, like to observe that the contractual rent may be varied not only by the fixation of the standard rent by the Rent Controller under section 19 of the Urban Rent Control Act but also by

(1) Civil Misc. Appeal No. 1 of 1950 of the High Court, Rangoon.

the fixation of the standard rent by clause (II) of the definition relating thereto.

Applying the above test, we find that in the present case the contractual rent of Rs. 17 per month payable by S. L. Barua to S. M. Abowath in respect of the suit premises is a rent lawfully due as no standard rent has been fixed by the Controller under section 19 of the Rent Control Act or by clause (II) of the definition. Before the war Abbas was a tenant of the plaintiff only in respect of the site and not of the house ; therefore, the rent which was payable by Abbas to S. M. Abowath can afford no criterion in regard to fixation of standard rent.

It has been contended on behalf of the appellant that S. M. Abowath could not have rented the house built by Abbas as it did not belong to him. However, it is clear that the tenancy of Abbas had terminated in view of the Monthly Leases Termination Act, 1946, and, as held by a Bench of the Calcutta High Court in *Gobindaprasad Shaha* v. *Charusheela Dasee* (1), Abbas had no further right to remove the building which he had built upon Abowath's land. Abowath therefore had a right to lease out to S. L. Barua not only the land but also the house standing thereon.

In the result, the appeal fails and must be dismissed with costs. Advocate's fees three gold mohurs.

(1) (1933) I.L.R., 60 Cal. p. 1042.

## CIVIL REVISION.

*Before U Aung Tha Gyaw, J.*

H.C. 1950

*Aug. 1.*

BABU BINDRAJ (APPLICANT)

*v.*

RAJ BAHADUR PATHAK AND ONE (RESPONDENTS).*

*S. 115, Code of Civil Procedure—Interference with interlocutory orders in revision.*

*Held :* The High Court will interfere in re vision with interlocutory orders from which no appeal lies if irreparable damage would be caused by refusal to interfere.

*Jupiter General Insurance Company, Limited* v. *Abdul Aziz*, 1 Ran. 231, referred to and followed.

It is a material irregularity to decide a case in the absence of a necessary party.

*Umed Mal* v. *Chand Mal*, 53 I.A. 271 ; *Lala Atma Ram* v. *Lala Ben Prasad and others*, 62 I.A. 257 or 57 All. 678, referred to

If the order of the Lower Court amounts to a decision dismissing a necessary party from the suit and driving him to a separate litigation such order can be revised under s. 115 of the Code of Civil Procedure. It is desirable that where there are common questions of law or fact to decide, the same court in order to avoid possible conflict of decisions in separate suits should decide those questions in one suit.

*C. S. Govindaraja Mudaliar* v. *Alagappa Chambiram and others*, A.I.R. (1926) Mad. 911, referred to and applied.

*Sein Tun* for the applicant.

*Ba On* for the respondents.

U AUNG THA GYAW, J.—This is an application in revision brought against the order of the First Subordinate Judge, Henzada, passed in his Civil Regular Suit No. 44 of 1949, where, exercising his discretion under Order 1, Rule 10 of the Civil Procedure Code,

* Civil Revision No. 17 of 1950 against the order of the 1st Subordinate Judge of Henzada in Civil Regular No. 44 of 1949, dated the 7th February 1950.

the respondent's name was struck off as being an unnecessary and improper party to the suit.

The suit brought before the Court of the Subordinate Judge was, for recovery of three cows or Rs. 300 as their value from the two defendants named Ram Samujh Sukul and Raj Bahadur Pathak. As against the 1st defendant it was alleged that he had in his possession two of the three cows belonging to the plaintiff-applicant which this defendant had sold to the applicant under a sale deed containing a condition that the cows were to be retained in the defendant's possession on behalf of the plaintiff-applicant until such time as the original price paid by the plaintiff-applicant had been fully repaid.

As against the 2nd defendant, it is alleged that of the three cows which the 1st defendant originally retained in his possession one had been bought by this defendant with full notice and knowledge of the condition under which the cows in question were held by the 1st defendant.

To these claims the 1st defendant in the suit admitted all the averments made by the plaintiff-applicant in his plaint and confessed judgment. The 2nd defendant on the other hand, while admitting the taking of one cow from the possession of the 1st defendant in satisfaction of a decree obtained against the latter, pleaded that he had no knowledge of the condition under which the cow in question was held by the 1st defendant. The 2nd defendant further pleaded that the suit was bad for misjoinder of parties and causes of action.

The preliminary issue arising out of this latter plea urged by the 2nd defendant was heard by the learned Subordinate Judge and the order now sought to be revised was passed striking out the 2nd defendant as an unnecessary and improper party to the suit.

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It is now urged on the applicant's behalf that the order of the learned Subordinate Judge was wrong and that it amounted to an exercise of jurisdiction with material irregularity, an allegation on which the respondent has joined issue.

There is no doubt "That the High Court will interfere in revision with interlocutory orders from which no appeal lies if irreparable damage would be caused by refusal of the High Court to interfere at that stage." [See *Jupiter General Insurance Company, Limited* v. *Abdul Aziz* (1).] One consequence of the order striking off the respondent from the suit would be to drive the plaintiff-applicant to a separate suit which would in effect mean additional expense to him and substantial delay in the realization of the relief to which he would be entitled should he succeed in proving his claim.

"It is a material irregularity to decide a case in the absence of a necessary party or to summarily dismiss an application of a person to be brought on the record as a party." [See *Umed Mal* v. *Chand Mal* (2) *and Lala Atma Ram* v. *Lala Beni Prasad and others* (3).] The order of the learned Subordinate Judge in this case in effect amounts to a decision dismissing an alleged necessary party from the suit. Consequently such an order will appear to be subject to revision under section 115 of the Code.

Coming to the question as to whether the respondent is in fact a necessary party to the suit or whether his being impleaded as a party defendant in the suit would infringe the provisions of Order 1, Rule 3, it is necessary to consider the basis of the plaintiff-applicant's claim made in the suit. The pleadings clearly set out that such a basis lies in the title to the

(1) 1 Ran. 231. (2) 53 I.A. p. 271.
(3) 62 I.A. p. 257 or 57 All. p. 678.

cows derived under the sale deed executed in his favour by the 1st defendant. Of the four cows thus bought by the plaintiff-applicant from the 1st defendant and left in the latter's care, one according to the plaintiff-applicant, was sold by the 1st defendant to the 2nd defendant who bought the same with alleged notice of the plaintiff-applicant's title thereto. If the 1st defendant, as alleged by the plaintiff, did not possess any title to the cows left in his keeping, he could not pass a better title to the 2nd defendant in the cow sold to him and if the plaintiff-applicant can prove his title to the property, he would be entitled to call upon the 2nd defendant to account for the property passed on to him.

Thus, in the unity of title to the property alleged in the plaint to be in the possession of the two defendants lies the justification of the claim made against them in the same suit. If a separate suit were to be brought against the 2nd defendant, the plaintiff-applicant would similarly have to prove his title to the property to which he was making a claim. "It is desirable where there are common questions of law or fact to decide, that they should be decided in one suit rather than in many to avoid possible conflict of decisions." [See *C. S. Govindaraja Mudaliar* v. *Alagappa Thambiran and others* (1).] The facts in that case are not dissimilar, being alienations made by a party with a defective title. The principle there explained would appear to apply to the facts of this case. Where claims against different parties may involve common questions of fact bearing sufficient importance in proportion to the rest of the action, it is desirable that the whole of the matter should be disposed of at the same time. This being the case,

(1) A.I.R. (1926) Mad. p. 911.

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this application must be sustained and the order of the Lower Court set aside with a direction that the hearing of the suit be proceeded with against both the defendants in the suit ; costs three gold mohurs.

## ORIGINAL CIVIL.

*Before U Bo Gyi, J.*

MESSRS. SENG HWAT & CO. (PLAINTIFF)

*v.*

THE UNITED CHEMICAL WORKS (DEFENDANTS).*

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*Aug. 17.*

*Sale of goods—Contract for "May" shipment of 400 drums—60 offered—Divisibility of contract—White oil—Contract void because of likelihood of being used for adulteration—Appropriation out of larger quantity—Refund of advance.*

*Held* : Where goods are sold by description, the description amounted to a warranty or a condition that the goods are of the kind described. Before a buyer can be compelled to take any thing in fulfilment, it must be shown that the goods are those bargained for ; otherwise the buyer is not bound to take it. The condition as to the time of shipment of goods is vital and is of the essence of the Contract.

*Edmund Bowes* v. *Charles Shand*, (1876-77) 2 A.C. 455 ; *J. Aron & Co.* v. *Comptoir Wegimont*, (1921) 3 K.B. 435 ; *James Finlay & Co., Ltd.* v. *N. V. Kwik Hoo Tong Handel Maatschappij*, (1929) 1 K.B. 40, referred to and followed.

Where a contract provided for supply for 400 drums of white oil, by May shipment, the buyer is not bound to accept any lesser quantity, unless the contract provides for the same.

*In Reuter* v. *Sala*, L.R. (1878-79) IV C.P.D. 239, followed.

In the absence of material from which it could be inferred that the oil was wanted for adulteration purposes the contract is not void on this ground. A contract for sale of unascertained goods is not complete sale until the goods are appropriated with the assent express or implied, of the purchaser.

*Badische Anilin Und Soda Fabrik* v. *Hickson*, (1906) A.C. 419, referred to.

Subject to special provisions of the contract, payments on account of purchase price are recoverable if the consideration for which that price is being paid wholly fails.

*Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combo Bargour, Ltd.*, (1943) A.C. 32 ; *Piari Lal and others* v. *Mina Mal Balkishan Das*, (1926) I.L.R. 50 All. 52, referred to.

*Dr. Ba Han* for the plaintiff.

*R. K. Roy* for the defendants.

* Civil Regular Suit No. 84 of 1949.

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MESSRS. SENG HWAT & CO. *v.* THE UNITED CHEMICAL WORKS.

U Bo Gyi, J.—This suit and Civil Regular No. 98 of 1949 of this Court were, by consent, heard together. During the pendency of the proceedings, the latter suit was dismissed as being instituted without a proper authority.

It is common ground that the plaintiffs Messrs. Seng Hwat & Company of the one part and the United Chemical Works by their Proprietor Mr. Noor Mohamed of the other part entered into an agreement as per Exhibit A, dated the 30th April, 1949, whereby the plaintiffs agreed to buy and the defendants agreed to sell 400 drums of technical white oil to be shipped from London during May, 1949. The terms of the contract are as hereunder—

" Received Rs. 20,000 for the advance 400 drums white oil from London lbs. 373. Nett shipment during May at Rs. 220 per drum *ex*-godown the balance of the amount will be paid on arrival of the steamer. Delivery charges free."

The plaintiffs' case is that the time and place of shipment were of the essence of the contract and that the defendants failed to ship the goods at the stipulated time and that when the goods arrived the defendants failed to deliver them. The reason why the defendants have failed to deliver the goods was that on the 1st July, 1949, before the arrival of the goods in Rangoon, Government imposed a ban on technical white oil on the ground that the oil had been used by some unscrupulous traders for adulteration purposes. The defendants contend that no time was fixed for delivery of the goods and that it was the plaintiffs who committed a breach of the contract in failing to procure the necessary permit from the Government to remove the goods from the possession of the Customs authorities. They have also pleaded

"that the consideration or the object of the contract became unlawful and void." They therefore claim that the plaintiffs have forfeited the advance paid under the contract.

The following issues have been fixed :—

"1. Was there a breach of the contract of sale ? If so, who were responsible for the breach ?

2. Did the plaintiffs want the oil for the purposes of adulteration as alleged in paragraph 4 of the written statement ? If so, what would be the legal effect ?

3. Did the consideration or the object of the contract become unlawful and void as stated in paragraph 6 of the written statement ?

(NOTE :—Mr. Roy states that he meant to use 'was' when he used the the word 'became' in paragraph 6 of the written statement.)

4. Have the plaintiffs forfeited the advance ?

5. To what relief, if any, are the plaintiffs entitled ? "

The parties are agreed that all the terms of the contract have been embodied in the agreement Exhibit A. According to this document, the 400 drums of white oil must be shipped from London during May, 1949. It appears from the evidence of Mr. Noor Mohamed that at or about the time of the contract in question, he placed orders for 5,000 drums of technical white oil. Against these orders, 60 drums of white oil were shipped by the S.S. "Prome," *vide* Exhibit 47 and 750 drums of white oil consisting of two consignments were shipped by the M.V. "Herefordshire," *vide* Exhibits 53 and 54. Mr. Noor Mohamed states that the dates mentioned in the bills-of-lading Exhibits 47, 53 and 54 are correct. The Exhibit 47 is dated the 21st May 1949, and the Exhibits 53 and 54 are dated the 20th June, 1949. It is clear therefore that the two consignments of 250 drums

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and 500 drums of white oil by the M.V. "Herefordshire" were shipped in June, 1949, whereas according to the terms of the contract as per Exhibit A, the 400 drums of white oil must be shipped in May of the year. In these circumstances, the law seems to be well settled. In *Edmund Bowes* v. *Charles Shand* (1) two contracts were made in London for the sale of 300 tons of rice, each contract being for 300 tons of rice, to be shipped at Madras, or coast, during the months of March and/or April, 1874, per Rajah of Cochin. All the rice except some 4 tons was put on board in February and the remaining 4 tons were loaded in March. The buyers refused to accept the rice when tendered on the ground that it had not been shipped during the months stipulated. It was held by the House of Lords that the defendants were justified in refusing to accept the rice. Lord Blackburn observed that if an article sold was described, the description amounted to a warranty or a condition precedent that it should be an article of the kind described and on page 480 of the report his Lordship, apparently, in answer to the contention that equally good rice might have been shipped from a place in the neighbourhood of Madras, in the month of February, and by another boat, said :

". . But the parties have chosen, for reasons best known to themselves, to say : We bargain to take rice, shipped in this particular region, at that particular time, on board that particular ship, and before the Defendants can be compelled to take anything in fulfilment of that contract it must be shewn not merely that it is equally good, but that it is the same article as they have bargained for, otherwise they are not bound to take it.

That being so, the question which arises in this case is, whether the rice here tendered was shipped within the period stipulated for or not. . . . ."

(1) (1876-77) 2 A.C. 455.

This decision has been followed in *J. Aron & Company* v. *Comptoir Wegimont* (1) and in *James Finlay and Company Ltd.* v. *N. V. Kwik Hoo Tong Handel Maatschappij* (2) in the letter of which case Scrutton L.J., said :

" . . Since the decision in *Bowes* v. *Shand* (3) it has been well settled that on a sale of goods a condition as to the time of shipment is vital and is of the essence of the contract. Accordingly, if a person has contracted to sell a September shipment, it is useless for him to tender an October shipment and say that the difference is very little . . "

With regard to the 60 drums shipped by the S.S. " Prome " in May, 1949, the plaintiffs are not bound to accept them even if they can be delivered ; for the contract between the parties was for sale of 400 drums of white oil and there is nothing in the terms of the contract to show that it is divisible. In *Reuter* v. *Sala* (4) where the contract was for sale of 25 tons, more or less, Penang pepper and the sellers could deliver only 20 tons, it was held that the contract was entire, and that therefore the buyers were not bound to accept the 20 tons, but were entitled to insist upon the delivery of 25 tons according to the contract. For all the above reasons, I hold that the defendants in failing to have the entire 400 tons of white oil shipped in May, 1949, committed a breach of the contract, and I answer the first issue accordingly.

The second and third issues may be disposed of shortly. Mr. Noor Mohamed admits that technical white oil can be used for industrial purposes and that he did not know for what purpose the plaintiffs wanted the oil and had no reason to think that the oil was wanted for improper use. Lim Lai Hwat, Manager of the plaintiffs,

(1) (1921) 3 K.B. 435.
(2) (1929) 1 K.B. 400.
(3) (1876) 11 A.C. 455.
(4) (1878-79) 4 Common Pleas Division, 239.

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states that the order was placed for technical white oil for purpose of resale to the plaintiffs' customers. There is no material on the record from which a legitimate inference may be drawn that the plaintiffs wanted the oil for adulteration purposes. I accordingly hold that the contract was not void on the ground alleged by the defendants and answer these issues against them.

As regards the fourth issue, Mr. Noor Mohamed states that the 60 drums as per bill-of-lading, Exhibit 47 arrived in Rangoon five or six days after the ban had been imposed on technical white oil by Government on the 1st July, 1949, and that the remaining 750 drums of oil as per bills-of-lading, Exhibits 53 and 54 arrived in Rangoon on the 7th July, 1949. He admits that on the 1st July, 1949, the Commissioner of Civil Supplies notified that under the Civil Supplies Management and Control Order, technical white oil was an essential for the purpose of taking suitable action in the public interest in regard to its procurement, distribution, or price. He also admits that on the same day, the Secretary to the Ministry of Commerce and Supply issued Press Communiqué No. 20 of 1949 notifying that technical white oil was not covered by Open General Licence and that importers of the oil were required to apply for Import Licence and further that consignments already shipped on or before the 1st July, 1949 need not be covered by an Import Licence, but would be cleared only under written permits to be issued by theDeputy Director of Industries for industrial purposes. This evidence is in accordance with the Exhibits O and P.

It is clear from the above that the 810 drums of technical white oil arrived in Rangoon after the Government's order relative thereto had been promulgated. It was urged on behalf of the defendants

that it was the Plaintiffs' duty to procure the necessary permit from Government for removal of the white oil which is now stored in the ware-house of the Port Commissioners, Rangoon. Sixty drums of the oil had been consigned to the United Chemical Works and the remaining 750 drums to A. Habeeb & Co. belonging to Mr. Noor Mohamed's father. When I observed during the arguments that the question who was responsible for the procurement of the Government permit would seem to depend upon the question whether the property in the goods had passed or not, the learned Advocate for the defendants contended that the property in the goods had passed to the plaintiffs. This plea has not been taken in the written statement, and it is plain on the materials at present available that the question cannot be decided unless evidence has been adduced. Moreover, there is nothing to show that on the date of the contract as per Exhibit A the drums of white oil contracted for were in existence at all. On Mr. Noor Mohamed's own admission, he placed orders for some 5,000 drums of white oil at or about the material time ; and there is nothing to show that at any material time any drums of oil have been appropriated to the contract in suit. In *Badische Anilin Und Soda Fabrik* v. *Hickson* (1) Lord Loreburn observed :

" . . A contract to sell unascertained goods is not a complete sale, but a promise to sell. There must be added to it some act which completes the sale, such as delivery or the appropriation of specific goods to the contract by the assent, express or implied, of both buyer and seller. Such appropriation will convert the executory agreement into a complete sale. "

This principle is embodied in section 23 of the sale of Goods Act.

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(1) (1906) A.C. 419.

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In the course of the trial, the defendants attempted to show, though they have not pleaded it, that the Plaintiffs undertook to procure the necessary permit from Government. Lim Lai Hwat for the Plaintiffs denies having given any such undertaking. On the other hand, there is nothing to show besides Mr. Noor Mohamed's evidence that any such undertaking was ever given. Further more, Mr. Noor Mohamed admits having received from the Deputy Director of Industries a letter similar to Exhibit T, and this letter on the face of it shows that it was sent by the Deputy Director of Industries in reply to the letter which had been sent to him by the addressee. The letter asked for information regarding the present stock of technical white oil in hand and the purpose for which the oil would be used and other matters to enable the Director to take necessary action. It seems therefore that Mr. Noor Mohamed knew that it was his duty to take action to clear the goods.

On the strength of a sentence in the notice Exhibit D sent by the Plaintiffs to the defendants, which sentence runs, " My clients are however ready and willing to perform their part of the contract, " it is contended that the plaintiffs have entered into a new contract with the defendants. But novation of the contract has not been pleaded in the written statement and the sentence in question must be read with and subject to the last paragraph of the notice in which the plaintiffs called upon the defendants to refund the advance Rs. 20,000.

Even apart from the doctrine of frustration which may not be applicable in this suit, inasmuch as the contract has been held to have been broken by the defendants before the ban was imposed by Government, it seems that the Plaintiffs are entitled to the refund of the advance. In *Fibrosa Spolka Akcyjna* v.

*Fairbairn Lawson Combo Bargour Ltd.* (1) Lord Roche said at page 75—

" It is, I think a well settled rule of English law that, subject always to special provisions in a contract, payments on account of a purchase price are recoverable if the consideration for which that price is being paid wholly fails. . . . . "

This rule of law was followed in *Piari Lal and others* v. *Mina Mal Balkishan Das* (2). Here in this case, no mention is made in the terms of the agreement Exhibit A that the advance shall be forfeited, nor is any mention made therein that the plaintiffs would be responsible for the production of the necessary permit from Government to have the goods cleared. In point of fact, such a contingency was never contemplated by the parties at the date of the contract. I hold, therefore, that the plaintiffs have not forfeited the advance but on the contrary that they are entitled to the refund of the advance Rs. 20,000.

There will, therefore, be a decree for Rs. 20,000 in favour of the plaintiffs as against the defendants with costs.

(1) (1943) A.C. 32. (2) (1926) I.L.R., 50 All. 82.

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