APPELLATE CIVIL.

Before Sir Sydney Robinson, Kt., Chief Justice, and Mr. Justice Brown.

MA MARY
v.
MA HLA WIN.*

1924
Aug. 6.

Limitation Act (IX of 1908), Article 49—Original possession, permissive—Possessor setting up a claim to ownership, time when limitation begins to run.

Where the original possession of property had been permissive, *held*, that a bare allegation, on the part of the possessor, of her own ownership of the property did not change the character of her possession into an unlawful one, but that her possession became unlawful only on her refusal to comply with a formal demand for the return of the property and that, therefore, under Article 49 of the Limitation Act, limitation would begin to run only from the date of such refusal.

In Civil Regular Suit No. 722 of 1921 the respondent sued the appellant, for the return of certain articles of jewellery or their value, alleging that the jewellery had been lent to the appellant by her brother to wear while she was living with him and the respondent, his wife. The appellant's defence was, that the jewellery was her property, the same having been given to her absolutely by her brother many years previously, and further that the suit was barred by limitation under the provisions of Article 49 of the Limitation Act. The trial Judge, Mr. Justice Beasley, having passed a decree with costs in favour of the respondent, the appellant preferred her present appeal which was in due course dismissed by a Division Bench composed of Robinson, C.J., and Brown, J. The question of limitation dealt with by their Lordships,

* Civil First Appeal No. 164 of 1923 against the judgment and decree of the High Court passed in its Original Jurisdiction in Civil Regular Suit No. 722 of 1921.

1924

MA MARY v. MA HLA WIN.

being the object of this report, will be found in the portion of the judgment of the learned Chief Justice reported below.

Chari—for the Appellant.

Dantra—for the Respondent.

ROBINSON, C.J.—The plaintiff-respondent in this case is a widow of one Ba Thein, who died in 1918; she has apparently always been in weak health. Ba Thein was a good husband and brother, and he appears to have given his sisters a home, in return for which they probably managed his house, relieving his sickly wife of her duty. He had several sisters, Ma Ma Gyi, Ma May May, Ma Aye Gywe and the appellant, Ma Mary, who was the youngest. They lived with him until they married and made a home of their own. It is alleged that he was generous to them, and that he provided jewelleries for his sisters to wear so long as they lived with him.

The present suit is one for the recovery of four items of jewellery or their value from the appellant who, shortly after Ba Thein's death, appears to have fallen out with his widow and left the house, taking the jewellery with her. She now says that she sold it at various times, although in her reply to the notice of action she professed to have the jewellery and to be entitled to it as her own property. Two out of the four items are of small value; but there are a pair of diamond ear-rings, valued at Rs. 2,000, and a diamond ring, valued at Rs. 1,750. The evidence as to these two will practically decide this case.

The appellant's defence is that this jewellery was given her absolutely by her brother many years ago, and has all along been her own property in consequence.

The respondent, on the other hand, alleges that the jewellery still belongs to the estate of Ba Thein

and was only lent to his sisters by him to wear so long as they lived with him.

Which version is correct is now to be decided; and there is a further point of limitation raised, which I will first dispose of.

It is argued that, after Ba Thein's death, there was an attempt to refer certain disputes as to ancestral property to arbitration; and that the plaintiff wished to refer the question of ownership of this jewellery to the arbitrators also. The appellant was at that time ill; but her sisters refused to go to arbitration and then alleged that the jewellery did not form part of the estate. It is said that plaintiff then became aware of the appellant's claim; and that the appellant's possession of the jewellery became from that time unlawful, so that limitation would begin to run under Article 49 from then, and the suit was, therefore, barred. If this plea is correct, the suit would be barred.

A year later, the plaintiff made a formal demand for the return of the jewellery, which was refused. If limitation begins to run from that period, the suit is not barred.

Under Article 49 limitation would begin to run from the date when the detainer's possession becomes unlawful. If the appellant's case is true no question of limitation can arise. If the plaintiff's case is true, then the possession by the appellant of this jewellery was a permissive possession only, and her possession would become unlawful, ordinarily speaking, only when a demand was made, followed by a refusal. If the appellant's possession was permissive, the character of that possession would not be changed by the fact that she set up a claim to it as her own property. Her bare allegation is not sufficient to make her possession unlawful. It will be open to the plaintiff to say that that was not true, and to leave the property with her until she chose to demand its return.

1924

MA MARY v. MA HLA WIN.

ROBINSON, C.J.

In my opinion in this case there was no unlawful possession until a formal demand for the return was made, and the appellant refused to return it. That being so, the suit is not barred by limitation.

BROWN, J.—I concur.

APPELLATE CRIMINAL.

Before Mr. Justice Lentaigne.

1924

Aug. 5.

NGA PO THAIK *v.* KING-EMPEROR AND NGA PO E *v.* KING-EMPEROR.*

Penal Code (XLV of 1860), section 307—Mutual infliction, in the absence of eye-witnesses, of injury in a fight—Plea of self-defence or provocation—Evidence Act (I of 1872), section 105—Conviction under section 326, Indian Penal Code, the appropriate one.

The two appellants in the course of a fight inflicted on each other injuries so serious that their dying depositions had to be taken in both cases. There was no eye-witness to the occurrence; and the evidence in each trial consisted of that of the complainant, the corroborative evidence of the wounds on the complainant and the admission of the accused that he was himself wounded in the occurrence. In separate trials, each was convicted of an offence under section 307 of the Indian Penal Code.

Held, that as either of the appellants would be entitled, in the event of the other dying of the wounds, to the benefit of a reasonable doubt and to plead that the case came within Exception 4 to section 300 of the Penal Code, neither appellant could be legally convicted under section 307 of the Penal Code.

Held, also, that under section 105 of the Indian Evidence Act, the burden of proof of self-de ence or provocation being in each instance on the accused, neither appellant could under the circumstances claim these defences and that section 326 of the Penal Code was the proper section for the conviction of each of the appellants.

LENTAIGNE, J.—It is clear that the above appellant, Nga Po Thaik, and Nga Po E had a fight with each other on the night of the 28th October, 1923, at

* Criminal Appeals $\frac{738}{739}$ of 1924 from the judgment of the First Additional Special Power Magistrate of Bassein in Criminal Regular Trials No. $\frac{68}{69}$ of 1924.