business which was carried on by Esak at Kyaukme and Hsipaw in the Shan States was a branch.

We are therefore of opinion that leave to file the suit on the Original Side was rightly given and that this Court has jurisdiction.

The appeal is accordingly dismissed.

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## ORIGINAL CIVIL.

*Before Mr. Justice Chari.*

## MAUNG BA TU
*v.*
## MA THET SU AND THREE OTHERS.*

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*Aug.* 11.

*Civil Procedure Code (Act V of* 1908), *O.* 9, *r.* 9—*Fresh suit in respect of same cause of action, though mode of relief is varied, will not lie—Partition suits, whether rule applies to—Incidents of the right to claim partition—Buddhist Law and Hindu Law—Whether Burmese Buddhist heir can file such partition suit in respect of his ancestor's property.*

*Held*, that a suit will be barred under the provisions of Order 9, rule 9, of the Civil Procedure Code, if the cause of action in the suit is the same as that in the previous suit, that has been dismissed for default of appearance of the plaintiff, though a different relief is claimed in the subsequent suit. The rule does not apply to partition suits for the right to partition is a legal incident of a joint tenancy, and if the parties continue to be in possession after the first decree, the continuance of the joint possession after the decree gives rise to a fresh cause of action.

In a partition suit proper, plaintiff seeks to convert his joint ownership and joint possession of the whole property into separate property and separate possession of a portion of the property. Partition signifies the surrender of a portion of a joint right in exchange for a similar right from the co-sharer. A partition suit lies only if the parties have (1) unity of interest or title in the property sought to be partitioned, and (2) unity of possession.

The estate of a deceased Burman Buddhist vests in his heirs on his death, but there is no analogy between their position and that of the co-parceners of a joint Hindu family under the Hindu Law. In the former case the estate does not vest collectively or jointly, but each heir gets a definite fraction in every portion of the estate of the deceased ancestor, which vests in him separately and individually which he is entitled to claim. He cannot be deemed to be with his co-heirs a joint owner or joint tenant of the property nor is he entitled to joint possession of the property with them. A Burman Buddhist heir is not

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* Civil Regular Suit No. 163 of 1927.

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entitled to maintain a partition suit in the strict sense of the word, and his suit must be one for division of inheritance, *i.e.*, an administration suit.

A Burman Buddhist whose suit for the administration of his deceased father's estate has been dismissed for default, is debarred, under the provisions of Order 9, rule 9, of the Civil Procedure Code, from filing a fresh suit, based on the same cause of action, and claiming partition of the estate.

*Aìrabannessa* v. *Safatullah*, 43 Cal. 504, *Biseshar* v. *Ram Prasad*, 28 All. 627 ; *Doobee Singh* v. *Jowkeeram*, N.W.P. H C.R. (1868) 381 ; *Durga Charan* v. *Khundkar*, 27 C.L.J. 441 ; *Madon Mohan* v. *Baikantanath*, 10 C.W.N. 839 ; *Mukerji* v. *Afzal Beg*, 37 All. 155 ; *Mukunda Lal* v. *Laheireux*, 20 Cal. 379 ; *Nandakeshwar* v. *Sudarsan*, 68 I.C. 804 ; *Nasratullah* v. *Mujibulla*, 13 All. 309 ; *referred to.*

*Assafally* v. *Abdeali*, 45 Bom. 75 ; *Fuzhar Rahman* v. *Fayzur Rahman*, 10 C.W.N. 677 ; *Mi Mya* v. *Mi Mye*, U B.R. (1897-01) 229 ; *Moideensa* v. *Mahomed Cassim*, 28 I.C. 895 ; *Nga Po Chein* v. *Mi Pwa Thein*, U.B.R. (1907) 21 ; *Pakkiri* v. *Haji Mahammad*, 46 Mad. 844—*distinguished.*

*Halkar*—for Plaintiff.
*Burjorjee*—for Defendants.

CHARI, J.—The facts of this case are that one Maung Bā Tu filed an application to be allowed to sue *in formâ pauperis* for his share in the estate of his father, U Taing.

The applicant, Maung Ba Tu, was the son of U Taing by his deceased wife, Ma We. U Taing married a second time, and his second wife, Ma Thet Su, was the respondent in the application.

Two persons claiming an interest in the estate later filed an application to be made parties, and they were made parties. The application to sue *in formâ pauperis* was granted and the application was treated as a plaint in the suit. Ma Thet Su, the surviving widow, was the 1st defendant and the two persons who applied to be made parties were the 2nd and 3rd defendants.

Maung Ba Tu claimed a half share of the estate and valued that share at Rs. 1,02,917. He alleged that the cause of action arose on the 31st December, 1923, on which day U Taing died. He asked for enquiry and accounts in respect of the estate left by U Taing

and for a decree for his share in the estate. He later filed an amended plaint which was the same as the original plaint except that he made one U Shwe Doung 4th defendant in the suit, on the allegation that Ma That Su, the 1st defendant, had by a fraudulent deed of gift transferred certain properties to U Shwe Doung. He asked for a further relief, *viz.*, a declaration that the deed of gift was void and of no effect as against his share in the estate. Written statements were filed and the parties joined issue and on the 15th of February 1926 when the case was called for hearing neither the plaintiff nor his advocate was present while the advocates for the defendants were present. The suit was dismissed for default and on the 9th of March 1926 the plaintiff applied to set aside the dismissal order. On the 3rd of May 1926 the application to restore the case was dismissed. This order was appealed against but the appeal was also dismissed and the order was confirmed by the Appellate Court. Thereupon on the 29th of March 1927 the plaintiff filed a suit for administration and accounts claiming again a half share in the estate and valuing his share, which formerly he valued at more than a lakh of rupees, at Rs. 500. Leave under Clause 10 of the Letters Patent was also applied for and obtained. A preliminary written statement was filed in which Mr. Burjorjee for the defendants challenged the valuation and also contended that by virtue of the provisions of Order 9, Rule 9 of the Civil Procedure Code, the suit did not lie. The matter was placed before me for orders and on the 23rd of May 1927 Mr. Halkar for plaintiff wanted time to apply for an amendment of the plaint. He was allowed to do so and when the application came on for disposal Mr. Burjorjee objected to the amendment, on the ground that the cause of action in the amended plaint was different. I held

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that the relief claimed was different, but the cause of action the same, since the plaintiff relied on the same facts in the amended plaint as in the original plaint, the only difference being that in the second plaint he claimed a partition of the joint property instead of administration of the estate as in the original plaint. I therefore allowed the amendment.

The matter then came up for argument again and the point whether this second suit, even as amended, would lie has been argued before me as a preliminary point of law. The question of court-fees has not been argued up till now.

The argument of the learned advocate for the defendant is that Order 9, Rule 9 of the Code is a bar to the suit. He argues that the cause of action in both the suits is the same, and though a different relief is claimed, the suit is barred as being in respect of the same cause of action. This is obviously correct but the learned advocate for the plaintiff argues that the suit is a suit for partition and that the previous suit which had been dismissed for default though framed as a suit for administration was in effect a suit for partition and that the dismissal of a prior suit for partition does not bar a subsequent suit. He relies upon the case of *Biseshar* v. *Ram Prasad* (1) and other cases in which the same principle was applied. [*Mukerji* v. *Afzal Beg* (2); *Madon Mohan* v. *Baikantanath* (3)]. The reasoning on which these cases are based is that the cause of action in a partition suit is a continuing cause of action, and till the joint ownership is put an end to the joint owner has a right to get the property partitioned. The dismissal, therefore, of a suit under Order 9, Rule 8 of the Civil Procedure Code, cannot put an end to his right to enforce partition of

(1) (1906) 28 All. 627? (2) (1914) 37 All. 155.
(3) (1906) 10 C.W.N. 839.

joint property which continues after the dismissal and subsists till his status as joint owner is determined.

The following propositions have to be considered :—

(1) Is the reason on which the Allahabad case of *Biseshar* is based sound ?

(2) What are the incidents of the right to claim partition of immovable property ?

(3) What is the position of the heirs of a Burmese Buddhist, deceased, and can they file a partition suit strictly so called, in respect of the property of their ancestor ?

The case of *Biseshar* was a case where certain members of a joint Hindu family filed a suit for partition of the joint assets. The suit was dismissed for default and a second suit was filed to enforce partition. It was contended that the second suit was barred by virtue of the provisions of section 103 of the then Civil Procedure Code (Order 9, Rule 9 of the present Code). The District Court held that the fresh demand alleged in the second suit had not been proved and was further of opinion that it would not affect the case even if there had been a fresh demand. On appeal the learned Judges applying the principles of a previous case of their own Court, held that the suit was not barred. They were of opinion that the right to enforce partition is a legal incident of a joint tenancy, and as long as such tenancy subsists so long may any of the joint tenants apply to the Court for partition of the joint property. They also cited a passage from the earlier case [*Nasratullah* v. *Mujibulla* (1)]. The parties in this last case were Mahommedans and the suit was one for partition of the estate of a common ancestor. They had obtained a prior decree which was never carried into effect. It

(1) (1891) 13 All. 309.

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was urged that the prior suit for partition operated as *res judicata* in the second suit. In considering this question the learned Judges made the statement quoted and relied upon in the 28 Allahabad case. In the case of *Mukerji* v. *Afzal Beg* (1), the parties were co-owners in a house. The plaintiff had filed a suit for partition in 1905 wherein a compromise decree was passed by which the defendant in that suit agreed to convey his share to the plaintiff for Rs. 5,750. The then defendant died without giving effect to the compromise decree by transferring the share and his successors in title were unwilling to do so. The plaintiff thereupon filed a fresh suits, which was objected to on the ground that it was not maintainable on account of the previous compromise decree. The Allahabad High Court held that the parties were relegated to their original rights, because the compromise decree was not given effect to on account of the laches of the defendants and their predecessor in title. They then said that the right to bring a suit for partition unlike other suits is a continuing right incidental to the ownership of joint property. "It may be that at one time the desire for partition may cease. Circumstances may again arise which may make it desirable or necessary that partition should take place."

The Calcutta ruling in *Madon Mohan's* case is to a similar effect. All these cases proceeded on the assumption that the right to partition is incidental to a joint tenancy and continues to exist till the joint tenancy is determined. This reasoning is not very convincing since in the case of almost every right, the right continues till it is determined by satisfaction or discharge. The provisions of the law which bar a second suit in certain circumstances,

(1) (1914) 37 All. 155.

like Order 2, Rule 2 and Order 9, Rule 9 of the Civil Procedure Code, which in terms apply to all suits, will on this reasoning be rendered of no effect. A better basis for these decisions is the ground referred to in the still earlier case of the Allahabad High Court, *Doobee Singh* v. *Jowkiram* (1). If the parties continue to be in possession after the first decree the continuance of the joint possession after the decree gives rise to a fresh cause of action. It is however unnecessary to consider this point any further because in the view I take of the rights of Burman Buddhist heirs, they are not entitled to maintain a suit for partition strictly so called, and it is only in such cases that the right could, if at all, be a continuing or recurring right.

The next question to be considered is as to the incidents of the right to enforce partition. The word "partition" is generally used in a loose way for the division or separation of interest of whatever kind in property. But, strictly, "partition" is applicable only to those suits in which the plaintiff seeks to convert his joint ownership and joint possession of the whole property into separate ownership and separate possession of a portion of the property. Therefore a partition suit lies only when the plaintiff and the defendant have (1) unity of interest or title in the property sought to be partitioned; and (2) unity of possession. The incidents of a partition suit were considered in the case of *Atrabannessa* v. *Safatullah* (2). (That case is no longer authority for the proposition laid down therein that a *benamidar* cannot maintain a suit for partition of joint immovable property, because of the two propositions on which that ruling is based, first that the *benamidar* cannot maintain a suit for recovery of possession of immovable

(1) N.W.P. H.C.R. (1868), p. 381. (2) (1915) 43 Cal. 504.

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property, and second, that a suit for partition of immovable property is in effect a suit for recovery of possession of immovable property, the first proposition is in view of the Privy Council ruling no longer tenable. The remarks of the learned Judges dealing with the essentials of a partition suit are not however affected by the Privy Council ruling). They say : "In our opinion, a suit for partition of immovable property should, for our present purpose, be included in the same category as a suit for possession of land. The object of a suit for partition is to alter the form of enjoyment of joint property by the co-owners or as has sometimes been said, partition signifies the surrender of a portion of a joint right in exchange for a similar right from the co-sharer. Partition is thus the division made between several persons, of joint lands which belong to them as co-proprietors, so that each becomes the sole owner of the part which is allotted to him ; the essence of partition is that the property is transformed into estates in severalty and one of such estates is assigned to each of the former occupants for his sole use and as his sole property." This reasoning was applied and acted upon in the case of *Durga Charan* v. *Khundkar* (1). It was there held that in a partition suit the plaintiffs must establish that in respect of the lands in question the plaintiffs are not only joint owners with the defendants but are also entitled to joint possession. "It is essential in a suit for partition that the plaintiffs should establish that they and the defendants are not only joint owners but are also entitled to joint possession because the object of the suit is to transform the joint possession into possession in severalty." Though the plaintiff must be in joint possession or entitled to joint possession with the defendant, the possession

(1) 27 C.L.J. 441.

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alleged by the plaintiff may be actual or constructive. If the plaintiff is not in joint possession, either actual or constructive, but is entitled to joint possession then he must frame the suit as one for joint possession and partition. This is merely a matter of pleading and court-fees but the essential requisites are that the plaintiff must have a joint interest in the property and must be in joint possession, actually or constructively, or, at all events, entitled to such joint possession as could be enforced by suit. [*Nandakeshwar* v. *Sudarsan* (1); see also *Mukunda Lal* v. *Laheireux* (2), where it was held that joint possession without unity of title is not sufficient to enable a person to maintain a partition suit.]

Turning now to the question of the rights of the heirs of a deceased Burmese Buddhist it may be taken as settled that the estate of a deceased Burman Buddhist vests in the heirs on the death of the ancestor. Their position resembles that of the heirs of a deceased Mahomedan under Mahomedan Law, and there is no analogy between their position and that of the co-parceners of a joint Hindu family under the Hindu Law. I note that there are cases in which it is taken for granted that a suit for partition is maintainable by the heir of a Mahomedan against the co-heirs who are in possession of the estate. Thus in *Fuzliar Rahman* v. *Fayzur Rahman* (3), it was held that there was no distinction between the heirs of a Hindu and the heirs of a Mahomedan so far as the right to partition was concerned and that a partial partition cannot be allowed in a partition suit between Mahomedan heirs. In *Assafally Alibhai* v. *Abdeali Gulam Hussain* (4), the argument urged before the Court was that a partition suit is the only remedy open

(1) 68 I.C. 804.
(2) (1892) 20 Cal. 379.
(3) (1911) 15 C.W.N. 677.
(4) (1920) 45 Bom. 75.

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to a Mohamedan heir and that he could not file a suit for the administration of the estate of his deceased ancestor. In these cases the words "partition suit" are used in a broad sense to mean a suit in which a division of the inheritance is asked for, and attention was not directed to the essential requirements of a "partition" suit. If the heirs by an agreement express or implied, remain in possession of the estate of the ancestor jointly and continue to enjoy that estate jointly, then they have created as among themselves, by a contractual act, unity of interest and unity of possession which would enable one of the heirs to file a suit for partition. But it is doubtful whether a Mahomedan heir who is not in joint possession or joint enjoyment of the property could file a suit for partition strictly so called. In the case of *Pakkiri* v. *Haji Mahommed* (1), the learned Judges held that a partial partition may be allowed in the case of Mahomedan heirs because the estate they hold is a *common* estate as distinguished from a joint estate. The learned Judges say "We have not been shown any direct authority that a suit for partition of common property not joint property is liable to dismissal on the ground that all the common property in respect of which it might have been brought has not been included." Two things are noticeable in this case :—(1) a distinction is drawn between common properties and joint properties and it is assumed that in the case of Mahomedans the ancestral property is common and not joint and (2) a division of "common" property is styled a partition of that property. (The case is not very satisfactorily reported and the facts are not fully set out but I presume it is a case between Mahomedan heirs.) A Mahomedan heir takes a fractional share in the estate of his ancestor

(1) (1923) 46 Mad. 844.

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and he does not become a joint owner of the estate nor is he entitled to joint possession of the estate with his co-heirs. The legal position is made clear in another case, *Moideensa* v. *Mahomed Cassim* (1), where it was held that under Mahomedan law each heir gets a definite fraction in every portion of the estate of the deceased ancestor, and that in the case of Mahomedans a suit ought really to be an administration suit in those cases in which, if the parties were Hindus, the suit would be a suit for partition. Whether this is a correct statement of the position of Mahomedan heirs or not it is in my opinion a correct statement of the position of the heirs of a deceased Burman Buddhist. The estate of the ancestor in the case of Burman Buddhists vests in the heirs immediately on the death of the ancestor but not collectively or jointly. The fractional part of the estate to which each is entitled becomes vested in each of them. There are no direct authorities on the position of the heirs of a deceased Burman Buddhists and the conclusion I have arrived at is merely an inference from the general conceptions of Burman Buddhist Law and the indications given in the *Dhammathats* as to what the writers conceived to be rights of the heirs of a deceased Burman Buddhist. A passage from the *Manugye* cited in section 51 of Volume I of Kinwun Mingyi's Digest runs as follows :—" Partition of inheritance should be made within seven days or within a month after the obsequies of the parents are over when shares according to the customary rules of inheritance shall be allotted to heirs present as well as those absent at the time." This alternative period within which partition should be made is explained unambiguously in the Rajabala cited in the same chapter of the Digest. " Claims for partition of inheritance shall be preferred within seven days (after the burial of the parents.) If the

(1) 28 I.C. 895.

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heir is resident in a not very distant place, claim shall be made within a month ; if resident in a more distant place within three months ; if still more distant within a year." To the same or similar effect are passages from other *Dhammathats* cited in the same section. The first point to notice is that the claim to be made by the heir is *for his share* according to the customary rules of inheritance. The *Manugye* states that these shares shall be allotted to the heirs. The second point is the extreme shortness of the time within which claims have to be preferred. The heirs on the spot have to prefer their claims within seven days and those who are not on the spot within a month. These passages negative the idea that the *Dhammathat* writers contemplated the estate of a deceased as vesting jointly or collectively in the heirs, and they also show that the heirs are not entitled to joint possession of the estate as against each other. There are certain passages which may seem at first sight to lead to a different conclusion. Thus in section 85 of the Digest, Volume I, a rule is laid down from the *Manugye* that there shall be no partition of ancestral property among great-grandchildren. There are similar passages in other *Dhammathats* and this may lead one to infer that according to the Burmese Buddhist text-writers the property of an ancestor vests jointly in the heirs who are entitled to remain in joint possession of the estate generation after generation till a division finally takes place. But this rule is merely an application and not a very logical or intelligent application of the rule of Hindu Law that a co-parcenary exists between the common ancestor or the last holder of a share down to three generations only and does not extend any further. The Hindu text-writers who conceived the family as a corporate unit capable of holding property had to fix a limit to the membership of the family and they had accordingly made the rule that a co-parcenary exists only for three

generations and that a man and his great-great-grandchild cannot be co-parceners in a joint Hindu family. In a partition of joint family property the great-great-grandchild whose intermediate ancestors had predeceased the original ancestor, will not be entitled to a share. But the Buddhist text-writers never contemplated the family as a unit capable of being the joint owner of property. They apply the rule of Hindu Law to cases where one heir is, by express or implied agreement, put in possession of property which he and his descendants hold on their own behalf and in trust for the co-heirs. Thus the Yazathat says (section 91 of the Digest, Volume I). The *Dhammathats* lay down as follows :—" The parental estate is left in the hands of one of the co-heirs and no partition is made of it. On the death of that co-heir the estate is handed down to one of his or her children who is a grandchild of the owner of the estate and no partition is made then also. On the death of the grandchild who acted as custodian of the estate it is again handed down to one of his or her children who is a great-grandchild of the original owner of the estate and then also no partition is made. On the death of the last named custodian who belongs to the third of the generations succeeding the original owner of the estate, it is handed down to one of his or her children. In the hands of the last custodian who is the child of the original owner's great-grandchild the estate is no more subject to partition. Therefore it is ruled that an estate is subject " to partition during three generations succeeding the owner of the estate ; but when it gets beyond the third generation it is no longer subject to partition."

The Burmese words translated " custodian " literally mean the person in whose hands the estate was left, and that which is translated " partition " connotes merely the idea of division or separation.

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In going through the *Dhammathats* one comes across such strange applications of the rules of the Hindu Shastras and one must be careful to analyse and ascertain the underlying idea which is not always the same as that of the Hindu Law. Thus according to the conceptions of the *Dhammathat* writers it is the fractional share of each Burmese Buddhist heir which vests in him separately and individually and he is entitled to claim a division of that share on the death of the ancestor, and nothing more. His right extends no further and he cannot be deemed to be with his co-heirs a joint owner or joint tenant of the property nor is he entitled to joint possession of the property with them. In my opinion, therefore, a Burmese Buddhist heir is not entitled to maintain a partition suit, in the strict sense of the word, and his suit must be one for division of inheritance, that is, a suit for the due administration of the estate of his ancestor.

I see that there are two cases decided by the Judicial Commissioner of Upper Burma [*Nga Po Chein* v. *Mi Pwa Thein* (1) and *Mi Mya* v. *Mi Mye* (2)] in which the rule of the Indian Courts whereby a suit for partial partition was held liable to be dismissed was applied in the case of a partition suit between Buddhist heirs. The point which I am now considering was not considered in those cases it being assumed that a Burmese Buddhist heir can enforce his rights by a partition suit. The rule against allowing partial partition was applied as a rule of equity. The right of a Burman Buddhist heir, is not a continuing or recurring right but one which vests in him on the death of the ancestor. The reasoning adopted in the case in 28 Allahabad is, therefore, inapplicable and when a suit for the division of inheritance is dismissed for default he is debarred by

(1) U.B.R. (1907) II C.P. 21. (2) U.B.R. (1897-01) II 229.

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the provisions of Order 9, Rule 9 from instituting a second suit on the same cause of action.

In the case before me the fact that the second suit was allowed to be amended into a suit claiming partition makes no difference in the legal position. If the heirs of a Burman Buddhist are joint owners in the estate of the ancestor entitled to joint possession, then no matter how the suits are framed, they would always be entitled to file a second suit as as the right continues till the joint ownership is determined.

I therefore hold that the present suit is barred by virtue of the provisions of Order 9, Rule 9 of the Civil Procedure Code. The suit is therefore dismissed with costs.

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## APPELLATE CIVIL.

*Before Sir Guy Rutledge, Kt., K.C., Chief Justice and Mr. Justice Brown.*

1927

*Aug.* 19.

### REDDIAR AND SAN CHEIN v. SECRETARY OF STATE FOR INDIA IN COUNCIL AND THE SPECIAL COLLECTOR OF RANGOON.*

*Land Acquisition Act (I of 1894), s. 23 (1)—"Market-value" of land, meaning of—No difference between English and Indian principle of awarding compensation.*

*Held*, that there is no difference between the English and Indian principle of determining compensation to be awarded for land compulsorily acquired. The Court takes into consideration the market-value of the land which is the price that an owner willing and not obliged to sell might reasonably expect to obtain from a willing purchaser with whom he was bargaining for the sale and purchase of the land There is no intention to compensate for any attachment by reason of sentiment or family association.

*Kailas Chandra Mitra* v. *Secretary of State for India in Council*, 17 C.L.J. 34, *Narasingh Das* v. *Secretary of State for India in Council*, 52 I.A. 133—*referred to.*

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* Civil First Appeals Nos. 149 and 155 of 1926.