

I am of opinion, therefore, that the decision of the lower Courts on the point now in issue was correct.

I dismiss this appeal with costs.

1927

V. E. R. M.
FIRM.v.
MAUNG PO
KYONE.

BROWN, J.

APPELLATE CIVIL.

Before Mr. Justice Das and Mr. Justice Baguley.

N. N. CHETTYAR FIRM

v.

TAN MA PU AND OTHERS.*

TAN BABU AND OTHERS

v.

N. N. CHETTYAR FIRM.

1927

Sep. 2.

Administration—Letters issued under Probate and Administration Act (V of 1881) in a case governed by the Succession Act (X of 1865), effect of—Powers of the administrator—Court's permission to sell does not imply permission to mortgage—Limited powers under one Act not extended unless Letters altered under the other Act.

A son obtained under the Probate and Administration Act (V of 1881), Letters of Administration of his deceased mother's estate, describing her as a Chinese Buddhist. She was, in fact, a Karen Christian and Letters would have been issued under the Succession Act (X of 1865) had she been correctly described. The administrator obtained leave of the Court to sell the immoveable property of the deceased to pay off debts, but instead he mortgaged it.

Held, that Letters issued under the Probate and Administration Act must be regarded as being under that Act and giving only the powers that they could give under that Act until and unless the powers under them are extended by the Letters being altered to Letters under the Succession Act of 1865. Under the former Act permission to the administrator to sell does not *ipso facto* give permission to mortgage. Hence the administrator had no power to bind the interests of any of the heirs except those who had given him authority to effect the mortgage.

Debendra Nath v. Administrator-General of Bengal, 35 Cal. 955 (P.C.) ; *Ram Dhon Dhor v. Sharf-ud-din*, 9 B.L.T. 236—*referred to*.

Ma Yait v. Maung Chit Maung, 49 Cal. 310 (P.C.)—*distinguished*.

* Civil First Appeals Nos. 199 and 206 of 1926 against the judgment of the District Court of Bassein in Civil Regular No. 3 of 1925.

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FIRM.

N. N. Burjorjee for the appellants.

Zeya for the respondents.

BAGULEY, J.—These two appeals arise out of a suit brought by the N. N. Chettyar Firm against six defendants on a series of mortgages. The lower Court gave the plaintiffs a decree for the full amount claimed against the first, second and fifth defendants, but against the second, third and sixth only gave a decree for the amount admitted.

The claim was on a series of transactions. The property mortgaged was the property of one Ma Twe, who died in 1912. She left some sons and daughters. Tan Po Shwe, the eldest of them, applied for Letters of Administration to her estate in the late Chief Court of Lower Burma in 1917. It was then stated that she left eight children, six of whom are the defendants in the present case; one has died and one has apparently disappeared from the proceedings altogether. Letters of Administration were issued to Tan Po Shwe and he proceeded to deal with the estate. He applied to the Court for permission to sell the immoveable property and permission was granted. The estate of the deceased was admittedly encumbered and to pay off the debts due he mortgaged the property now in question for Rs. 40,000 by registered mortgage bond. The liability on this mortgage bond is admitted by all the defendants, but a considerable part of this debt has been paid back. Afterwards a second mortgage over the same property for Rs. 15,000 was executed. The title deeds of the property had been deposited with the plaintiff firm and afterwards the first defendant gave a letter of authority to the plaintiffs authorizing them to lend further sums of money on promissory notes to Tan Babu and his clerk, Tan Kya Lu, and it was agreed that the sums so advanced should constitute a further lien on the

properties already mortgaged. In this way considerable sums of money were advanced and the plaint shows that the total debt outstanding at the time of filing of the suit was Rs. 1,07,340-6-0.

Various defences are raised, and I will deal with them in order.

In the first place it is argued that, as the Letters of Administration were issued to Tan Po Shwe under the Probate and Administration Act and he never got permission from the Court to mortgage the immovable property of the deceased, these mortgages are bad, except, of course, so far as they are admitted. In reply to this, it is urged that the deceased, Ma Twe, although described in the application for Letters of Administration as a Chinese Buddhist, was, in fact, a Karen Christian, and how she came to be described as a Chinese Buddhist is not explained. It would seem that her husband was a Chinaman, but his religion is doubtful. Be that as it may, however, there can be no doubt that, had Ma Twe been correctly described in the application for Letters of Administration, the Letters would have issued under the Succession Act, and, in that case, the mortgage by the administrator would have been good. It is argued that, as the Letters should have been issued under the Succession Act, the administrator had the powers to mortgage that he would have had, had they been correctly issued. This argument, in my opinion, fails. The Letters must be taken to give the powers that they appear to give upon their face until they are revoked or altered.

No case directly in point has been quoted, but for the converse there is authority. [Vide *Debendra Nath Dutt v. Administrator-General of Bengal* (1).] In

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that case Letters of Administration which were issued owing to the fraud of the applicant and which, therefore, might be considered as bad from the start were nevertheless held to be good until and unless they were revoked. In the same way, I hold that Letters issued under the Probate and Administration Act must be regarded as being under that Act and giving only the powers that they could give under that Act until and unless the powers under them are extended by the Letters being altered to Letters under the Succession Act. The case of *Ma Yait v. Maung Chit Maung* (1), was quoted as being authority for beginning the administration under the Probate and Administration Act and completing it under the Succession Act. But in that case, no question of the powers of the administrator was gone into. Originally, Letters of Administration were taken out under the Probate and Administration Act, but the Privy Council decided that, as the deceased was a person whose estate had to devolve according to the rules laid down in the Succession Act, the administrator would have to divide the property among the heirs in accordance with the rules of the Succession Act.

It is true that the administrator got permission to sell, but permission to sell does not *ipso facto* give permission to mortgage. [Vide *Ram Dhon Dhor v. Sharf-ud-din and others* (2).]

Under the Letters of Administration issued, then, I must hold that Tan Po Shwe had not got power to bind the interests of the heirs. The case, however, cannot be disposed of so easily as this.

[His Lordship found that various heirs had given Tan Po Shwe direct authority to act on their behalf under powers of attorney. Tan Po Shwe was

(1) (1921) 49 Cal. 310.

(2) (1916) 9 B.L.T. 236.

responsible personally and as an heir for the whole of the money due. Three other heirs were responsible to the full extent of their interests in the estate and also personally as they had authorized Tan Po Shwe to borrow the money. One heir was liable only to the extent he admitted his liability, as he had not authorized Tan Po Shwe to encumber the estate. One defendant, Kyauk Ho, was not an heir and had no interest in the estate. The result was that the decree of the Lower Court was varied as to the extent of liability of the defendants and as to costs.]

DAS, J.—I concur.

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APPELLATE CIVIL.

Before Mr. Justice Brown.

ISMAIL HOOSAIN MAMSA

v.

K. PURBHUBHAI AND ONE.*

1928
 Mar. 2.

Interest on loan—Rate stated in inadmissible promissory note, whether can be claimed—Reasonable rate whether allowed.

Held, that where a promissory note is inadmissible in evidence for want of stamp, and the creditor sues for the money lent as on the original contract of loan, he may claim a reasonable rate of interest, but he cannot claim at the rate stated in the promissory note.

Maung Kyi v. Ma Ma Gale, 10 L.B.R. 54—*referred to*.

N. N. Sen for the appellant.

BROWN, J.—The same point arises for decision in this case and in Civil Revision Cases No. 246 and No. 247 and they will all be dealt with in this judgment.

The three cases have been heard *ex parte*.

The petitioner filed three suits in the Small Cause Court of Rangoon for payment of money lent with interest. In each case the money was lent on a

* Civil Revision Cases Nos. 245, 246 and 247 of 1927.