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HEALD, J.

abetment is expressly made so punishable, but I regard cases in which section 114 is applied not as cases of abetment but as cases where the offender is punishable for the substantive offence as a principal.

I would accordingly answer the question which arises on the reference as follows :—

"If a person is convicted of an offence under a particular section of the Indian Penal Code read with section 114 of that Code, and if the offence under the particular section of the Code renders the offender liable to whipping in lieu of or in addition to any other punishment either under the Whipping Act or under Burma Act VIII of 1927, the person so convicted is punishable with whipping in lieu of or in addition to any other punishment."

RUTLEDGE, C.J.—I concur.

MAUNG BA, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Otter.

FUT CHONG *v.* MAUNG PO CHO.*

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Bailee's liability—Contract Act (IX of 1872), ss. 151, 152—Bailee's power to limit or increase liability by special contract—Revisional powers of High Court—Court's erroneous decision, and Court's failure to consider law or important fact, distinction between.

A bailee can by the law of India contract himself out of liability for negligence. S. 151 of the Indian Contract Act lays down the ordinary duty of a bailee to use the requisite care in all cases of bailment and s. 152 enacts that that degree of care is to be exacted from him in the absence of a special contract. By such special contract a bailee can increase as well as decrease the amount of his liability.

* Civil Revision No. 296 of 1928 from the judgment of the District Court of Prome in Civil Appeal No. 49 of 1928.

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A pawnee who has totally exempted himself from liability in terms of the pawn ticket in case of theft or robbery of the jewellery deposited with him, can therefore avail himself of the protection provided for in his contract, in case of such loss.

B.I S.N.Co., Ltd. v. *Ali Bhai*, 10 L.B.R. 292—*referred to.*

If a lower Court has failed to take into account some proposition of law or some material fact in evidence, it has acted illegally and its decision may be revised by the High Court; but where the lower Court has applied its mind to the case and duly considered the facts and the law applicable, then, although its decision may be erroneous, the error cannot be corrected on revision.

C. Kaliyaparama v. *C.V.A.R. Chetty*, 9 L.B.R. 71; *Venkubai* v. *Lakshman*, 12 Bom. 617; *Zeya* v. *Ma On Kra Zan*, 2 L.B.R. 333—*referred to.*

Rafi for the applicant.

Maung Ni for the respondent.

OTTER, J.—This case raises a somewhat interesting point. The matter came before the Court by way of an appeal from a judgment and decree of the District Court of Prome. Mr. Rafi, however, on behalf of the appellant agrees that no appeal lies to this Court for it is a Small Cause Court matter of the value of less than Rs. 500. He asked me, however, to treat the case as arising by way of revision and in the circumstances I think I may do so. In this connection I would point out this course should only be taken in exceptional circumstances and where it is apparent that injustice might be done by refusing.

The facts are simple. The applicant is a licensed pawnshop-keeper and with him was deposited certain jewellery by the respondent. A pawn ticket was issued to which reference must later be made. Subsequently a robbery took place at the pawnshop and the property deposited together with other articles was stolen. The pawn ticket in question upon which appears the thumb impression of the respondent contains a clause exempting the pawnshop-keeper from liability in the event of destruction of

the property by the "five kinds of enemies, insects and mice." At the foot of the ticket appears a note "The following is regarded as acts of Providence :— Destruction by vermin, rats, water, fire or robbery or theft", there is no dispute between the parties that the respondent is *primâ facie* bound by the terms of the pawn ticket, and also that the contract purported to exempt the pawnshop-keeper from liability in the case of robbery or theft. The respondent brought a suit in the Township Court of Paungde claiming the property or its value. The learned Township Judge decreed the suit in his favour being of opinion that the applicant was not protected by the terms of the contract. He took the view that bailees such as the applicant are protected only by sections 151 and 152 of the Indian Contract Act, 1872, and that the liability therein provided for cannot be avoided by any special contract between the parties. It should be stated that this question was clearly raised upon the pleadings, and there is no doubt that the point was both argued before, and considered by, the Judge of the Township Court. On appeal, however, to the District Court of Prome, the learned Additional District Judge makes no mention at all of this matter. He deals only with the question from the point of view of the liability imposed by the sections of the Indian Contract Act to which I have just referred, and agrees with the view taken by the Township Judge, which was that the applicant did not take the amount of care laid down in section 151 of the Act, and dismissed the appeal.

So far as I can see from his order, the learned Additional District Judge did not apply his mind to what was the real point at issue.

The first question therefore for me is whether in this circumstance the applicant may be said to have

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brought himself within the provisions of section 115 of the Civil Procedure Code. It is suggested here that the learned Additional District Judge acted in the exercise of his jurisdiction illegally or with material irregularity in that he omitted to decide what was the real question in the case. It should be observed that the question in the present case is one of law.

From among the numerous cases decided in the various Courts of India upon the point three were cited before me. They are (i) *Venkubai* v. *Lakshman Venkoba Khot* (1), (ii) *Zeya* v. *Ma On Kra Zan and others* (2), and (iii) *C. Kaliyaparama Padiyachi* v. *C. V. A. R. Chetty* (3). The second of these cases was decided by a Bench of the late Chief Court of his Province and it will be convenient for me to set out a portion of the headnote which is as follows:—"After consideration of the ruling of the Privy Council in the light of subsequent decisions of the High Courts that where the lower Court has applied its mind to the case and duly considered the facts and the law applicable, then, although its decision may be erroneous the error cannot be corrected on revision; but that if the lower Court has failed to take into account some proposition of law or some material fact in evidence, it has acted illegally and its decision may be revised." A very large body of authority was examined by the learned Judges in this case and after this full consideration their decision is well summarised in the portion of the headnote set out above. Accepting this statement of the law as correct it is evident that this is a case where this Court could exercise its powers of revision. The question next arising is whether the applicant is protected from liability by

(1) (1887) 12 Bom. 617. (2) (1904) 2 L.B.R. 333.
(3) (1917) 9 L.B.R. 71.

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the terms of the clause in the pawn ticket. Apart from the provisions of sections 151 and 152 of the Indian Contract Act no ground was suggested—and I know of none—why he is not in this position. Section 151 is as follows :—" In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk and value as the goods bailed." And section 152 provides that " the bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151." The suggestion before me was that the special contract referred to in the latter section can in law increase, but cannot decrease, the amount of liability of a bailee. Upon the face of it the argument lacks conviction, for if such had been the intention of the Legislature it would have been a simple matter to give expression to it.

Mr. Maung Ni who appeared for the respondent relies on a Full Bench decision of *Sheik Mahamad Ravuther* v. *The British India Steam Navigation Co., Ltd.* (1). In that case a Bill of Lading containing a clause exempting the steamship company from liability in certain circumstances was under consideration, and one of the majority members of the Court was of opinion that the Carriers in India cannot exempt themselves by express contract from liability. It is to be observed that this case may be distinguished from the present case upon the facts. I need not however deal further with this authority for the matter has been the subject of decision by a Full Bench of the late Chief Court of this Province in the case of the

(1) (1909) 32 Mad. 95.

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B.I.S.N. Co., Ltd. v. *Ali Bhai Mahomed* (1). In that case the question was whether a common carrier by sea can by the law of India contract himself out of liability for negligence, and it was held that he can. It will be sufficient for purposes of the present case to quote two passages from the judgments of the members of the Court. At page 299 of the Report Mr. Justice Robinson, as he then was, said this "Lastly I am quite unable to agree that a bailee cannot limit his liability under section 152 of the Act. That he can do so by making a special contract was pointed out in *Moothora Kant Shaw's* case. Section 151 lays down the ordinary duty of a bailee in all cases of bailment and section 152 enacts that that degree of care is to be exacted from him in the absence of a special contract. To read it otherwise than as allowing him to reduce his liability, is to hold that the legislature enacted an unnecessary provision and to give a forced meaning to the language used." At page 306, Twomey, C.J., said: "It is not clearly deducible from the terms of section 152 that a bailee may only make a special contract increasing his responsibility, and that he cannot make a special contract reducing it. This is a proposition curtailing the ordinary right of freedom of contract, and we must hesitate to give effect to such a proposition on the strength of a mere inference and in the absence of express enactment." So far as I know the authority of the last mentioned case has not been questioned in this Province. It is agreed on all hands that the only question for me is, whether as a matter of law, the appellant cannot avail himself of the protection provided for in the pawn ticket. I must hold, therefore, in view of the case I have just referred to and

(1) (1920) 10 L.B.R. 292.

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in view of what I think is the meaning of the sections of the Contract Act under review that he can. The application must therefore be allowed.

As I have already stated the matter came before me by way of appeal. I am of opinion therefore that although this application is successful, the applicant ought not to receive his costs in this Court. The application must be allowed without costs in this Court but the respondent will pay to the applicant his costs in the two lower Courts.

FULL BENCH (CRIMINAL).

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

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U PO HLA
v.
KO PO SHEIN.*

Criminal Procedure Code (Act V of 1898), ss. 423, 435, 439, 517, 518, 519, 520—Trial Court's order for disposal of property on conviction or acquittal—Session Court's and District Magistrate's powers to alter such order as a Court of revision—"Court of appeal, revision" wider meaning of under s. 520—Appellate Court's and High Court's respective powers of disposal under ss. 423 and 439.

Held, that in the case of an acquittal by the trial Court, the Sessions Judge or District Magistrate as a Court of revision has power under s. 520 of the Criminal Procedure Code to interfere with the order of the trial Court passed under s. 517, regarding the disposal of the property in respect of which the offence was committed.

In the case of a conviction by a first class Magistrate the District Magistrate has, in the absence of an appeal to the Sessions Court, power to interfere with an order passed under s. 517 of the Criminal Procedure Code, by the trial Court.

Where there is an appeal or a case for revision, the Court of appeal and the High Court respectively have powers to pass orders as to disposal of property, under ss. 423 and 429 respectively of the Criminal Procedure Code. So the words "Court of appeal, or revision" in s. 520 have a wider meaning and

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*Criminal Reference No. 1 of 1929 arising out of Criminal Revision No. 607B of 1928 from an order of the District Magistrate of Pyapôn.