mitted). Now, the punishment under section 325 of the Indian Penal Code is either "imprisonment" or imprisonment and fine". Therefore a person committing an offence thereunder may be punished with whipping in lieu of or in addition to "imprisonment" or in lieu of or in addition to "imprisonment and fine" : but, as fine alone is not one of the punishments to which a person is liable under this section of the Indian Penal Code, for an offence under this section whipping cannot be awarded in lieu of or in addition to fine alone.

The history of the law relating to the infliction of whipping as a punishment, as also the decisions of the other High Courts to which my learned brother has referred, make it clear that this view is the correct one.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

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Dec. 5.

Appeal to His Majesty in Council—Loss or detriment to applicant—"Fit case for appeal"—"Nursapuri" Mahomedan—Question affecting rights and privileges of a large body—Concurrent findings—Questions of law and fact—Civil Procedure Code (Act V of 1908), ss. 109 (c), 110.

In a suit to amend a scheme for the management of the Nursapuri mosque in Rangoon the trial Judge, Ormiston J., construed the term "Nursapuri" to mean all sunni mahomedans who came to Rangoon from the taluk and the town of Nursapur situate on the Godavari river in South India and their descendants. On appeal the High Court remanded the case with a direction that the issue as to the meaning of the term "Nursapuri" should be retried upon oral evidence in addition to the evidence already on the record, and the finding reported to the appellate Court before it finally determined the appeal. Sen J. who retried the issue after remand gave the term a wider meaning, *viz.*, all Telugu speaking sunni mahomedans who came from the Andhra districts of South India. The appellate Court

* Civil Misc. Applications Nos. 62 and 63 of 1934 arising out of Civil First Appeal No. 47 of 1930 of this Court.

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accepted the wider interpretation, and allowed the appeal from the decree of Ormiston J. The applicants applied for leave to appeal to His Majesty in Council.

Held, that (1) it was not possible to estimate in money or by any pecuniary standard the loss or detriment to the applicant, and that the case therefore did not fulfil the requirements of s. 110 as to value, but (2) the dispute affected the religious sentiments, rights and privileges of a large body of mahomedans, and that the case was "a fit one for appeal to His Majesty in Council" within s. 109 (*c*) of the Civil Procedure Code.

Radhakrishna Ayyar v. *Swaminatha Ayyar*, 48 I.A. 31; *Subhan* v. *Baburam*, I.L.R. 52 All. 329—*followed*.

(3) these were not concurrent findings by the Courts, for the appeal was from the decree of the trial Judge, and not from the finding of the second Judge with whose view the appellate Court agreed, and (4) the construction of the term "Nursapuri" as used not in common parlance but in the deed of trust, if it was not an unmixed question of law, was not an unmixed question of fact.

Narendranath Dutta v. *Abdul Hakim*, 55 I.A. 380; *Palaniappa Chetty* v. *Pandara*, 44 I.A. 147—*referred to*.

Rafi for the applicant. It is difficult to estimate in money value the rights of the parties and of the property involved for the purposes of s. 110 of the Civil Procedure Code, but this case ought to be certified as otherwise a fit case for appeal to His Majesty in Council under s. 109 (*c*). The decision in question relates to the religious rights of a large body of mahomedans in Rangoon. *Radhakrishnan Ayyar* v. *Swaminatha Ayyar* (1); *Banarsi Parshad* v. *Kashi Krishna* (2); *Subhan* v. *Baburam Singh* (3); *N. C. Galliara* v. *A.M.M. Murugappa Chetty* (4).

It cannot be said that there have been concurrent findings of fact, because the decision of Ormiston J. as to the meaning of the term "Nursapuri" was set aside by the Appellate Bench.

Clark for the respondents. The only question in issue is as to the meaning of the term "Nursapuri",

(1) 48 I.A. 31.
(2) 28 I.A. 11.
(3) I.L.R. 52 All. 329.
(4) I.L.R. 12 Ran. 355, 364.

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and on this point there have been concurrent findings of fact by the Original Side and the Appellate Side of this Court. The Privy Council does not interfere with concurrent findings of fact, and deprecates the granting of certificates for leave to appeal in such cases. *Moung Tha Hnyeen* v. *Moung Pan Nyo* (1); *Sundaralingasawmi* v. *Ramasawmi* (2).

[PAGE, C.J. The question to be decided is as to the meaning of a term used in a document. Is that a pure question of fact?]

The construction of a document can be a question of fact. The only question in issue is as to the meaning of the term "Nursapuri", and both the Courts have arrived at the same conclusion.

PAGE, C.J.—These are two applications for a certificate granting leave to appeal to His Majesty in Council. The suit was brought to amend a scheme for the management of the Nursapuri mosque that had been settled by Robinson J. in the Chief Court of Lower Burma on the 16th of May 1910. The suit was tried before Ormiston J., and the learned Judge ordered that the scheme should be amended in certain respects. The only item in the amended scheme which was the subject of dispute was the meaning of the term "Nursapuri" as used therein. This question was tried on affidavits, and Ormiston J. construed the term in a restricted sense. From the decree of Ormiston J. an appeal was filed, and Carr and Das JJ. ordered that the case should be remanded to the Original Side with a direction that the issue as to the meaning of the term "Nursapuri" should be tried upon oral

(1) I.L.R. 28 Cal. 1. (2) 26 I.A. 55.

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evidence in addition to the evidence already on the record, and that the finding upon that issue should be reported to the appellate Court before it finally determined the appeal. I am not myself satisfied as to the propriety or the expediency of passing a remand order in that form, but it is unnecessary at this stage of the proceedings to enter upon a discussion of the matter. Pursuant to the order of remand the issue as to the meaning of the term "Nursapuri" was elaborately retried, voluminous oral evidence being tendered on both sides, and in the event Sen J. gave to the term "Nursapuri" a far wider meaning than Ormiston J. had done. The proceedings were then returned to the appellate Court which came to a conclusion in a sense similar to that at which Sen J. had arrived, and the appeals from the decrees of Ormiston J. were allowed.

From the decrees of the appellate Court allowing the appeals from the decrees of Ormiston J. it is sought to obtain leave to appeal to His Majesty in Council.

Now, a difficulty lies in the way of the applicant, for we are not satisfied that this case can be brought within the ambit of section 110 of the Code of Civil Procedure.

In *N. C. Galliara* v. *A.M.M. Murugappa Chetty* (1) it was laid down by this Court 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

(1) (1934) I.L.R. 12 Ran. 355.

order, and from which he seeks to be relieved by His Majesty in Council, is Rs. 10,000 or upwards."

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In my opinion in the present case it is impossible to estimate in money or by any pecuniary standard the loss or detriment which the applicant has suffered by the passing of the decrees from which it is sought to obtain leave to appeal to His Majesty in Council; indeed, it was common ground that that is so. I am of opinion that the applicant has failed to bring the case within the ambit of section 110, Code of Civil Procedure.

The learned advocate for the applicant, however, has urged that the Court, in the exercise of the discretion with which it is invested under section 109 (*c*) of the Code, ought to certify that the present case is "a fit one for appeal to His Majesty in Council".

In *Radhakrishna Ayyar and another* v. *Swaminatha Ayyar* (1) the Judicial Committee of the Privy Council, following *Banarsi Parshad* v. *Kashi Krishna Narain* (2) and *Radha Krishen Das* v. *Rai Krishen Chand* (3), held that

"as an initial condition to appeal to His Majesty in Council it is essential that the petitioners should satisfy the Court that the subject matter of the suit is Rs. 10,000 and in addition that in certain cases there should be added some substantial question of law. This does not cover the whole grounds of appeal, because it is plain that there may be certain cases in which it is impossible to define in money value the exact character of the dispute; there are questions as for example, those relating to religious rights and ceremonies, to caste and family rights, or such matters as the reduction of the capital of companies as well as questions of wide public importance in which the subject matter in dispute cannot be reduced into actual terms of money. Sub-section (*c*) of section 109 of the

(1) (1920) 48 I.A. 31 at p. 33. (2) (1900) 28 I.A. 11.
(3) (1901) 28 I.A. 182.

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Civil Procedure Code contemplates that such a state of things exists, and rule 3 of Order XLV regulates the Procedure."

Now, the dispute in the present case involves the determination of the rights of a large body of persons in connection with the management of the mosque. Indeed, it was contended that if Ormiston J.'s judgment stood the result would be that substantially the whole body of Nursapuris would be deprived of what they claimed to be their right to share in the management of the mosque ; and there is no doubt that the controversy in connection with which this litigation has arisen deeply affects the religious sentiments, rights and privileges of a large body of mahemmedans residing in Rangoon. In my opinion the circumstances obtaining in the present case, and the question that falls for determination in the litigation, bring it within sub-section (*c*) or section 109 of the Code of Civil Procedure. *Primâ facie*, therefore, I should be disposed to hold that a certificate granting leave to appeal to His Majesty in Council ought to be granted [*Subhan and another* v. *Baburam Singh and others* (1)].

On behalf of the respondents, however, it has been contended that in substance, although not in form, this is an attempt to obtain a decision of the Judicial Committee of the Privy Council on a question of fact upon which there have been concurrent findings in both the Courts below, and that this Court ought not to countenance such a proceeding. [*Thakur Harihar Buksh* v. *Thakur Uman Parshad* (2) ; *Sundaralingasawmi Kamaya Naik* v. *Ramaswami Kamaya Naik* (3) ; *Moung Tha Hnyeen*

(1) (1929) I.L.R. 52 All. 239. (2) (1886) 14 I.A. 7.
(3) (1899) 26 I.A. 55.

v. Moung Pan Nyo (1); *Rani Srimati and others* v. *Khajendra Narayan Singh and another* (2); *Narendra Nath Dutta and another* v. *Abdul Hakim and others* (3); and *Jehangir Shapoorji Taraporevala* v. *Reverend Savakar* (4).]

The answer to this contention is that the appeal was from the decree of Ormiston J., and that the appellate Court did not affirm the decree of the trial Court, but allowed the appeal and passed a decree in a different sense. The learned advocate for the respondents further contended that in any event, having regard to the hearing after remand, this Court in the circumstances ought not in the exercise of its discretion to grant leave to appeal under section 109 (*c*), because in substance the appeal was from the decision of Sen J. on a question of fact, and that the appellate Court affirmed the finding of Sen J. The answer would appear to be (1) that the appeal was not from any decree passed by Sen J. and (2) that, although the appeal turned upon an issue of fact, namely, what is the meaning of the term "Nursapuri" in common parlance at Rangoon, the finding of Sen J. with which this Court agreed, as was pointed out in the judgment of the appellate Court,

"does not necessarily conclude the case against the respondents, because the problem to be solved is not the meaning of the term in common parlance at Rangoon, but the meaning which is to be attributed to the word "Nursapuri" as used in the trust deed of 1910. *Primâ facie* the term must be regarded as bearing the same meaning in the scheme as that which is commonly attributed to it."

But, of course, it does not necessarily bear the same meaning; and the question as to what upon a true

(1) (1900) 27 I.A. 165.
(2) (1904) 31 I.A. 127.
(3) (1927) 55 I.A. 380.
(4) 34 Bom. L.R. 1609.

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construction of the trust deed the term "Nursapuri" as used therein means appears to me to be, if not an unmixed question of law, certainly not an unmixed question of fact. [*Palaniappa Chetty and another* v. *Deivasikamony Pandara* (1); and *Narendra Nath Dutta and another* v. *Abdul Hakim and others* (2).]

Upon the whole I am of opinion, for the reasons that I have stated, that the Court ought to certify this case to be a fit one for appeal to His Majesty in Council under section 109 (*c*) of the Code of Civil Procedure, and a certificate granting leave to appeal to His Majesty in Council will issue on each application.

MYA BU, J.—I agree.

CRIMINAL REVISION.

Before Mr. Justice Bagnley, and Mr. Justice Ba U.

1934

Dec. 18.

HTWAN HTIN *v.* KING-EMPEROR.*

Cognizable offence—Power of arrest restricted to District Superintendent of Police—Further requirements for arrest without warrant—Burma Gambling Act (Burma Act I of 1889), ss. 6 (1) (b), 11, 12—Criminal Procedure Code (Act V of 1898), s. 4 (f)—Process Fee Rules, 1923, Rule 18 (b) (2).

Under the provisions of s. 6 (1) (*b*) of the Burma Gambling Act the only police officer who may arrest without warrant a person for an offence under s. 11 or 12 of the Act is the District Superintendent of Police, and then only if he has received credible information or has other sufficient grounds for believing that the place is used as a common gaming house, and furthermore, has recorded in writing the information or the grounds of his belief. Under such circumstances cases under ss. 11 and 12 of the Burma Gambling Act are not cognizable, and the accused must pay process fees for the issue of summonses to his witnesses.

Bahabal Shah v. *Tarak Nath Choudhry*, I.L.R. 24 Cal. 691; *Emperor* v. *Chandri Bawoo*, I.L.R. 49 Bom. 262—*followed.*

Emperor v. *Abasbhai*, I.L.R. 50 Bom. 344; *Queen-Empress* v. *Deodhar Singh*, I.L.R. 27 Cal. 144—*considered.*

* Criminal Revision No. 702B of 1934 from the order of the Additional Sessions Judge, Bassein, in Criminal Revision No. 474 of 1934.

(1) (1917) 44 I.A. 147. (2) (1927) 55 I.A. 380.