CRIMINAL REVISION.

Before Mr. Justice Mosely.

1937

Jan. 26.

MAUNG NWE AND ANOTHER

v.

MAUNG PO HLA.*

Trespass—Bona fide *action of landlord*—*Right of possession given to tenant*—Qui facit per alium, facit per se—*Criminal liability of principal for acts of agent*—*Abetment by principal*—*Penal Code (Act XLV of 1860), ss. 107* (1), *447.*

Where a person acting in good faith and believing the land to be his gives to his tenant the right to possession of the land but does not order him to take it on his behalf, he cannot be convicted of the offence of trespass under s. 447 of the Penal Code.

Shwe Kun v. *King-Emperor*, 3 L.B.R. 278, explained.

The maxim "qui facit per alium, facit per se" is not a doctrine of criminal law, but of civil law. The principal can be made responsible for and found guilty of the acts of his agent, under the criminal law only where it is proved that he has instigated or otherwise abetted the acts of the person who actually committed the crime.

Emperor v. *Ghasi*, I.L.R. 39 All. 722, dissented from.

E Maung for the applicants.

MOSELY, J.—The applicants in revision, Maung Nwe and Maung Po Byu, were sentenced to a fine of Rs. 10 each, under section 447, Indian Penal Code, for committing trespass on the land of the complainant, Maung Po Hla. The second applicant, Maung Po Byu, was the person who actually entered on the land, purporting to do so as the tenant of the first applicant, Maung Nwe.

I do not understand the Magistrate's reasoning. He quoted the revision case of *Shwe Kun* v. *King-Emperor* (1), where it was briefly held that the mere

* Criminal Revision No. 771B of 1936 from the order of the Township Magistrate (1) : Nattalin in Criminal Trial No. 170 of 1936.

(1) 3 L.B.R. 278.

sending of a servant to plough was not entry or constructive entry on the land by his master within the meaning of section 441 of the Indian Penal Code. [The ruling quoted wrongly says "section 441 of the Code of Criminal Procedure."] If such an entry by a servant could not be constructive entry by the master, still less could entry by a tenant be, to whom the landlord had merely given the right of possession, but had not ordered him to take it on his own behalf.

The trial Court also relied on *Emperor* v. *Ghasi* (1), for holding that the landlord could have committed the offence of trespass even though he did not personally make entry. In this case, also one in revision, it was very shortly held that a person could be held to have committed entry on property in the possession of another with intent to commit the offence of trespass, within the meaning of section 441, Indian Penal Code, even if he did not personally set foot on the property. Ryves J. said:

"I do not think it is necessary that the entry on such land should be personally effected by the accused. It might well be an entry by any agent of his under his orders."

With due respect, I cannot accede to this interpretation of the law. The maxim of "*qui facit per alium, facit per se*" or the law of agency is not a doctrine of criminal law, but of civil law. The principal can be made responsible for, and found guilty of, the acts of his agents, under the Criminal Code, only where it is proved that he has instigated or otherwise abetted the acts of the person who actually committed the crime. The law of abetment was enacted to deal with such cases, (section 107, *et seq.*, Indian Penal Code).

(1) (1917) I.L.R. 39 All. 722.

1937

MAUNG NWE v. MAUNG PO HLA.

MOSELY, J.

I wish to emphasize this, because *Shwe Kun's* case (1), which, in my opinion, was rightly decided on the facts and materials there, and which merely laid down that a person who sent his servant to make an entry on land in the possession of another cannot be convicted of the substantive offence of trespass, is often wrongly interpreted in the lower Courts as meaning that the principal cannot be convicted of any criminal offence at all. In such a case, of course, the principal can be convicted of abetment by instigation of the trespass, *vide* section 107 (*1*), Indian Penal Code.

As for the merits of the present application, it is obvious, on the face of it, that the accused were acting in good faith and were guilty of no offence at all. The first applicant, Maung Nwe had bought the land in question from one Maung Aye and his wife. After the sale of the land and the registration of the sale deed, Maung Nwe discovered that Maung Aye and his wife had sold the same land by registered deed to the present respondent, Maung Po Hla, some two months previously. Maung Nwe was successful in a civil suit, (Civil Regular Suit No. 88 of 1936 of the Township Court of Nattalin, which was decided about a month after the judgment in the present case), where he obtained a cancellation of the deed of sale to Maung Po Hla on the ground that it was fraudulent and without consideration. In another case, (Criminal Regular Trial No. 54 of 1936 of the First Additional Magistrate of Nattalin), Maung Nwe prosecuted and obtained a conviction of Maung Po Hla and Maung Aye for cheating, though that conviction was set aside on appeal, partly, I think, on wrong grounds, and partly on technical grounds of *autrefois acquit.*

In any event, it is clear that Maung Nwe acted in good faith, believing the land to be his, and, in fact, it has

(1) 3 L.B.R. 278.

subsequently been held by a civil Court that the land is his. The application of Maung Nwe and Maung Po Byu will, accordingly, be allowed, and their convictions and sentences set aside, and the fines of Rs. 10 each, which have been paid, refunded to them.

1937

MAUNG NWE v. MAUNG PO HLA.

MOSELY, J.

CIVIL REVISION.

Before Mr. Justice Mosely.

1937

Mar. 2.

DESRAJ CHANANLAL
v.
RAMJASRAN MADANCHAND.*

Shan States Courts—Applicability of Civil Procedure Code—Burma Laws Act (XIII of 1898), s. 10—Political Department Notification No. 33 of 21st June 1926—Burma Courts Act (Burma Act XI of 1922), s. 10 (2)—Shan States Civil Justice Orders, 1900 and 1906—Attachment before judgment—Property situate in Shan States—No District Court in Shan States—Civil Procedure Code (Act V of 1908), s. 136.

The Civil Procedure Code is not in force in the Shan States. In virtue of the power contained in s. 10 of the Burma Laws Act by Political Department Notification No. 33 of 21st June 1926 sections 36, 38, 39 and 41, and rules 4, 5 and 6 of Order 21 only of the Civil Procedure Code have been extended to the Shan States. The Burma Courts Act which establishes grades of civil Courts in Burma does not extend to the Shan States. The Shan States Civil Justice Orders of 1900 and 1906 regulate the simplified procedure of officers administering civil justice and no power to issue attachment before judgment is conferred upon any of the Shan States Courts.

S. 136 of the Civil Procedure Code authorises the issue of an order of attachment before judgment to any District Court in British India. There is no District Court or Court with the powers of a District Court under the Civil Procedure Code established in the Shan States to which an order of attachment before judgment could be sent. *Held* it is illegal for a Court in British Burma to issue an order for attachment before judgment of property situate in the Shan States.

Chaudhri v. *Dina Nath*, A.I.R. (1936) Lah. 330; *Mela Mal* v. *Bishun Das*, A.I.R. (1931) Lah. 723; *Soma Sundaram* v. *Muthu Verappa*, 4 B.L.T. 89, referred to.

K. C. Sanyal for the applicant.

Hormasjee for the respondent.

---

* Civil Revision No. 259 of 1936 from the order of the Subdivisional Court of Mandalay in Civil Misc. Case No. 32 of 1936.