APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

H.C. 1948

Apl. 5.

V.E.R.M. KRISHNA CHETTIAR

v.

M.M.K. SUBBIYA CHETTIAR.*

Occupation of Burma by Japanese—Effect on contracts of agency—Decision of Supreme Court during occupation—Defence of Burma Act and Rules—Rule 97—English Common Law if applicable—Doctrine of stare decisis*—Declaration of war by Burma on Great Britain—Its legal effect.*

Held : Agency of an agent in Burma of a principal residing in India did not terminate when Burma was occupied by the Japanese and the agent remained in occupied Burma though the communication between the principal and the agent became impossible.

Held : That such question is to be decided in accordance with the Municipal Law of Burma and not by International Law.

Condition of Burma under Japanese occupation was peculiar and there is no Common Law authority on the point. The Municipal Law of Burma is in consonance with the American decisions in *Kershaw* v. *Kelsey*, (100 Mass. 561) and *Williams* v. *Paine* (169 U.S. 55).

Held : That the courts were always reluctant to upset decisions which have been accepted by the public as the basis of their transactions for a length of time and the ruling of the Supreme Court in Civil Reference No. 2 of 1943 should not be disturbed and should be followed.

Held : That during the Japanese occupation Burma did not attain the necessary status to declare war on Great Britain. Therefore the alleged declaration of war by the then Burmese Government could have no legal effect.

A.S.N.S. Firm by their duly constituted agent Karappaya Pillay v. *Maung Po Khin and Ma Thaung Kywai*, Civil Reference No. 2 of 1943 of the Supreme Court of occupied Burma, followed.

U San Wa v. *U Ba Thin*, Civil Reference No. 2 of 1947, referred to.

R.M.M.R.M. Perichiappa Chettiar v. *Ko Kyaw Than*, Civil 1st Appeal No. 34 of 1947, followed.

Sovfracht's case, (1943) A.C. 203 ; *Freis* v. *Slover*, 22 S.C. Wall. 98 ; *Chem Abbhcong* v. *Mapacarai Mohamed Rowther and eight others*, (1946) Mad 768 ; *Daimler Company, Limited* v. *Continental Tyre and Rubber Company (Great Britain), Limited*, (1916) 2 A.C. 307 ; *Waghela Rajsanji* v. *Shekh Masludin*, 14 I.A. 89 ; *Thomas Bear & Sons (India), Ltd.* v. *Prayag Narain*, 67 I.A. 212 ; *Tingley* v. *Muller*, (1917) L.R. 2 Ch. 144 ; *Ma Mya* v. *Ma Thein*, I.L.R. (1926) Ran. 313 (F.B.) ; *Lodewyk Johannes De Jager* v. *The Attorney-General of*

* Civil Misc. Appeal No. 39 of 1947 against the order of the District Court of Bassein in Civil Execution No. 2 of 1947.

Nalni, (1937) A.C. 326; *The King* v. *Maung Hmin and three*, (1946) Ran. 1, referred to.

Per U SAN MAUNG, J.—Sir Frederick Pollock's observations "Laws of every nation are determined by their historical condition not only as to details but as to structure" should be applied to the special conditions in Burma during occupation.

The agent in Burma could very well look after the interest of his principal in India without supplying the Japanese with sinews of war.

The growth of English Common Law on the subject is not based on experience of enemy occupation of English territory.

Payment to the agent would rather tend to increase the sinews of war to the British and the Courts in Burma during occupation have followed the decision of the Supreme Court of Massachusetts.

The question is not *res integra* and the principle of *stare decisis* must apply.

Beecheno (supported by *P. K. Basu*) for the appellant.

P. B. Sen (supported by *Dr. Ba Han*, *S. K. N. Iyer*, *P. N. Ghosh*, *N. K. Bhattacharya* and *V. S. Venkatram*) for the respondent.

U THEIN MAUNG, C.J.—This is an appeal from an order passed by the District Court of Bassein in Civil Execution No. 2 of 1947 allowing the application of the respondent M.M.K. Subbiya Chettiar to record that the decree of the appellant V.E.R.M. Krishna Chettiar has been fully satisfied. The payment was made in accordance with the terms of an agreement which had been incorporated in a joint application which was signed by Annamalai Chettiar as agent for the appellant and Chocklingam Chettiar as agent for M.M.K. Kuttian Chettiar, the Judgment-debtor, since deceased, and filed in Civil Execution No. 7 of 1937 of the District Court, Bassein, on the 7th February 1942 (*see* Exhibit A). The payment was made by Chocklingam Chettiar as agent of the Judgment-debtor to Annamalai Chettiar as agent of the Decree-holder at Kangyidaung in Bassein District on the 14th September

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1944, *i.e.* during the period of Japanese occupation of Burma and therefore in Japanese currency. The Decree-holder has never been in Burma and the Judgment-debtor had evacuated himself to India after the outbreak of the war. It appears that both Annamalai Chettiar and Chocklingam Chettiar were at the time of the said payment under the impression that the Judgment-debtor was alive, but it has since been found out that he died in India on the 3rd September 1943, *i.e.* long before the payment was made.

Before the said payment Annamalai Chettiar had applied for execution of the decree as nothing had been realized in accordance with the terms of the said agreement and as he was afraid that the claim of the Decree-holder would be time barred. His application "was against the Judgment-debtor through his agent Chocklingam Chettiar." Chocklingam Chettiar never appeared in Court, but the application was dismissed on the ground that Annamalai Chettiar's agency had been terminated inasmuch as according to the learned Divisional Judge who dealt with it "War terminates agency if either the principal or the agent is a subject of a belligerent State." (*See* Exhibit B.)

The only question that has been raised in this appeal is the question as to whether Annamalai Chettiar and Chocklingam Chettiar ceased to be agents of the Decree-holder and the Judgment-debtor respectively for the reason that Burma was occupied by the Japanese. It has been conceded that nothing turns on the fact that the Judgment-debtor had died before the payment was made in view of section 208 of the Contract Act which provides, "The termination of the authority of an agency does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them."

With reference to the dismissal of the application for execution in 1944, the learned advocate for the respondent has pointed out that the Judgment-debtor had died before the application was filed and no one was made a party to the application as the legal representative of the deceased Judgment-debtor. Annamalai Chettiar has also admitted in his evidence that Chocklingam Chettiar never appeared in Court in connection with that application. Under these circumstances the learned advocate for the appellant does not seriously contend that the question as to whether Annamalai Chettiar remains an agent of the Decree-holder was *res judicata*.

The amount which is claimed by the Decree-holder as outstanding under the decree, *i.e.* ignoring the payment made by Chocklingam Chettiar to Annamalai Chettiar is Rs. 4,601 only. However, there are several other cases pending both in this Court and in subordinate Courts in which the same question of law as to the fact of Japanese occupation of Burma on contracts of agency arises. Several of the advocates, who are appearing in those cases, have asked for permission to be heard on this question of law and the learned advocates for the appellant and the respondent have no objection to their being heard. So we have heard them all and we must say that we have received valuable assistance from their arguments.

In a sense the question is not *res integra*. The question as to whether an agent, carrying on business on behalf of his principal, a British subject, formerly residing in Burma and now in India, can sue in a Court in Burma established by the Commander-in-Chief of the Nippon Imperial Army, in respect of a cause of action that has arisen before the British evacuation, was referred to a Full Bench of the Supreme Court of Burma in Civil Reference No. 2 of 1943

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(*A.S.N.S. Firm by their duly constituted agent Karappaya Pillay* v. *Maung Po Khin and Ma Thaung Kywai*). The Supreme Court was the highest Tribunal in Burma during the period of Japanese occupation and it has answered the said question in the affirmative. In the course of their judgment their Lordships observed, "What is thus now clear is that the national character of Burma and its people remains as it was before; consequently the British Indian subjects living either in Burma or in India cannot be treated as 'alien enemies' of this country. The necessary and in fact the inevitable corollary that follows from this is that British Indian subjects residing in India can sue in any Court in Burma."

This decision of the Supreme Court must be treated with great respect inasmuch as a Bench of the High Court of Judicature at Rangoon has held in *U San Wa* v. *U Ba Thin* (1) "that the Supreme Court established in Burma by the Japanese Authorities during their occupation was a duly constituted Court of Law, that decrees and orders made by it are now valid in all respects and are of the same effect as if they had been made by the High Court of Judicature at Rangoon either before or after the Japanese occupation here and that the Judges of the High Court of Judicature at Rangoon are successors to the Supreme Court."

The question as to the effect of Japanese occupation of Burma on a contract of agency where the agent was in Burma and the principal was in British India was also considered and decided by a Bench of the High Court of Judicature at Rangoon in *R.M.M.R.M. Perichappa Chettiar* v. *Ko Kyaw Than* (2). In that case the principal had executed a Power of Attorney

(1) Civil Reference No. 2 of 1947. (2) Civil 1st Appeal No. 34 of 1947.

empowering his agent to take possession of and let his properties and to do several other things, but the agent was expressly prohibited from selling or alienating any property except with the principal's express consent and in spite of the express prohibition the agent sold some of the properties ; and the Bench held that not only was the contract of agency not terminated by the Japanese occupation of Burma, but the agent under the circumstances of war could even act as an agent of necessity under section 189 of the Contract Act. . In the course of his judgment in that case Mr. Justice Blagden observed, " Even however if it be correct to regard it as a settled and universal rule that a contract of agency is determined by war where the principal is an enemy alien, it does not necessarily follow that the rule is applicable in the converse case which is before us. There is nothing obviously advantageous to His Majesty's enemy and detrimental to His Majesty's belligerent interests in a man's being employed to look after the property and rights of His Majesty's unfortunate subjects whose homes have been overrun by the enemy."

Gledhill J. also observed therein, " In the American Civil War, there was a still nearer approach to the situation with which we are dealing than that in *Sovfracht*'s case (1). The enemy is, it is true, a belligerent, but he is a rebel, and the Federal Government regards him as one to be reduced again to allegiance and to whom it owes more responsibility than it would to a neutral whose country has been overrun by the enemy. In consequence, possibly of this, in cases arising out of the circumstances of the *Civil War*, the American Courts appear to have evolved doctrines more indulgent than those in British Courts (*see* McNair, p. 208), and in the only American

(1) (1943) A.C. 203.

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case cited before us, *Fretz* v. *Stover* (1) it was not held that the outbreak of war necessarily terminated an agency, when the principal was in Federal territory, and the agent within one of the Confederate States . . . . . In the absence of authority, I would say that a British subject in enemy subjugated British territory is not in the category of enemy alien, and that subjugation does not abrogate a contract of agency between a British subject in the subjugated area and another British subject who has escaped his fate."

A Bench of Madras High Court has also held in *Chem Abbheong* v. *Mapacarai Mohamed Rowther and eight others* (2) that a Chinaman who was carrying on business in the Federated Malay States which had been overrun by the Japanese was not an alien enemy within the meaning of section 83 of the Code of Civil Procedure, that Penang in the Federated Malay States was not enemy territory within the meaning of the Defence of India Rules, and that the Chinaman was not an enemy within the meaning of those Rules.

However, it has been contended before us that the said decisions must be held to be wrong in view of (1) : the ruling of the House of Lords in *Sovfracht* v. *Van Udens Scheepvaart En Agentuur Maatschappij* (3) ; (2) the provisions of the Defence of Burma Act, 1940, and the Rules thereunder and (3) the English Common Law relating to intercourse with alien enemies.

In *Sovfracht*'s case (3) their Lordships held that a ship-owning company incorporated under the law of the Netherlands and having their principal place of business in Rotterdam was in the position of an alien enemy *at common law* and had ceased to enjoy the right of resort to the King's courts save by permission given by royal licence as the Germans had invaded the

(1) 22 S.C. Wall 98. (2) I.L.R. (1946) Mad. 768.
(3) (1943) A.C. 203.

Netherlands and brought the country entirely under their control. One of their Lordships, namely, Lord Porter also held that authority of the solicitors, who had been retained by the company before it became an alien enemy to represent it terminated when it became a technical enemy. However, his Lordship's finding thereon must be regarded as *obiter* as Viscount Simon L.C. has remarked (at p. 209 of the report) " A subsidiary question as to the validity of the retainer of the solicitors for the respondents becomes irrelevant if the appeal on the main point were to succeed" and Lord Wright has remarked (at p. 236 of the report) " The precise question does not, however, arise for decision in this appeal."

It was not a case in which the question as to the effect of enemy occupation arose in the country under enemy occupation for decision by the Courts therein. It was a case in which the question arose in another country and was decided in accordance with the Municipal Law thereof. Besides, as Blagden J. has pointed out in *R.M.M.R.M. Perichappa Chettiar* v. *Ko Kyaw Than* (1), it does not necessarily follow that English Courts themselves would apply the same rule to a converse case.

As a matter of fact there is no English precedent for a converse case, *i.e.* for a case like the one before us. Sir Arnold McNair has observed at p. 322 of Legal Effects of War, 2nd Edition, " It is a long time since any British territory was under enemy occupation though this happened for a short time in the South African War and we are not aware of English Judicial authority in the matter."

The question as to the effect of the outbreak of war or enemy occupation on contracts must be decided in accordance with Municipal Law. Oppenheim has

(1) Civil 1st Appeal No. 34 of 1947.

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stated at page 254 of International Law, Volume II, 6th Edition Revised, "The matter is one essentially of Municipal, as distinguished from International Law;" and Webber has pointed out at pages 158-9 of the Effect of War on Contracts, 2nd Edition, 1946, that the *Sovfracht* case itself "dealt with Municipal Law and any references to prize law were strictly *obiter dicta*." So what we have to consider is whether the Indian principals (who are British subjects), became enemies of Burma and the inhabitants of Burma according to the Municipal Law of Burma—not whether their agents in Burma became enemies of British India according to the Municipal Law of India. Even though British subjects in India might have to regard the inhabitants of Burma as their enemies, the latter may not be required by their Municipal Law to regard the former as their enemies.

The Municipal Law of Burma on this question is to be found in the Contract Act, the Defence of Burma Act, 1940, and the Defence of Burma Rules which continued to be in force in spite of enemy occupation. Section 201 of the Contract Act, which relates to termination of agency, does not provide that an agency shall be terminated by an outbreak of war or by the principal becoming an alien enemy. However, section 56 thereof provides that a contract to do an act which, after the contract is made, becomes impossible or unlawful shall be void when the act becomes impossible or unlawful. So we must consider whether as a result of enemy occupation of Burma it became impossible or unlawful for the agents in Burma to act on behalf of their principals in British India on account of the Defence of Burma Act, 1940, and the Rules thereunder.

Now the Defence of Burma Act, 1940, was enacted for the defence of British Burma; the Rules

thereunder were also made for the same purpose ; and neither the Legislature nor the Governor appears to have contemplated that Burma would be occupied by Japanese. They certainly did not intend to provide in the Act and the Rules for the defence of Burma while it was under enemy occupation. Sharpe J. has observed in *T. N. Ahuja* v. *H. H. Sen Gupta*,* Special Civil 1st Appeal No. 2 of 1946, "The object and intention of the Legislature in passing the Defence of Burma Act was the defence of Burma ; when once Burma was occupied by the Japanese forces, no further defence of Burma was possible, from the point of view of His Majesty and his loyal subjects. Except for those very small parts of Burma which never passed into the hands of the Japanese authorities, the Act could have no practical application until the liberation of Burma by the British forces again rendered it possible to defend Burma on behalf of His Majesty. You cannot defend what is held by somebody else."

The object of the Act and the Rules being as stated above, they do not contain any provision as to whether the inhabitants of Burma should regard the inhabitants of British India as their enemies in the case of Burma being occupied by the Japanese ; and it is fairly obvious that occupied Burma and the inhabitants thereof cannot be required to regard one another as enemies in spite of enemy occupation.

As Blagden J. has pointed out in *R.M.M.R.M. Perichiappa Chettiar* v. *Ko Kyaw Than* (1), "strict logic is not the only matter that has to be considered in trying to ascertain what the law is : humanity also enters into the question, and the maxim *lex non cogit ad impossibilia* has to be remembered." So the answer to the question as to whether the Indian principals were enemies of Burma and the inhabitants of Burma must

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depend on whether they were enemies as defined in Rule 97 of the Defence of Burma Rules, *i.e.* whether they themselves were resident in enemy territory as defined in Rule 2 (2) thereof; and there can be no doubt that they were not enemies within the purview of the said rule as British India, in which they were resident, was "an area in the occupation of His Majesty."

"The rule against trading with the enemy is a belligerent's weapon of protection" as pointed out by Lord Parker in *Daimler Company, Limited* v. *Continental Tyre and Rubber Company (Great Britain), Limited* (1); "belligerent nations at times enact laws forbidding or regulating intercourse of their nationals with the nationals of enemy countries" as stated at page 255 of Schwarzenberger's International Law, Volume I; and British India was an enemy country so far as the Japanese were concerned. However, the Japanese never made any law to forbid or regulate intercourse between the inhabitants of occupied Burma and the inhabitants of British India.

The contracts of agency did not become illegal as the principals did not become enemies nor did they become impossible of performance within the meaning of section 56 of the Contract Act.

It has been contended that the contracts of agency must be deemed to have been terminated as it became impossible for the principals in British India to give further directions to their agents in enemy occupied Burma. However, section 201 of the Contract Act does not provide that agencies are terminated under such circumstances. On the other hand section 211 thereof contains provisions as to how an agent should conduct his principal's business in the absence of his

(1) (1916) 2 A.C. 307 at p. 344.

directions and section 189 thereof even gives an agent further authority to act in an emergency.

The English Common Law is not applicable as such in civil cases instituted in Courts other than this Court in its ordinary original jurisdiction, although it may, so far as it is applicable to Burmese society and circumstances, be used as a guide to justice, equity and good conscience under sub-section (3) of section 13 of the Burma Laws Act in the absence of any enactment [see *Waghela Rajsanji* v. *Shekh Masludin* (1)]. We cannot deal with the question as to whether English Common Law is still applicable in cases instituted in this Court in its ordinary original jurisdiction in spite of sub-section (2) of the said section and the Letters Patent of the late High Court of Judicature having been repealed as it does not arise in this appeal which is an appeal from an order of a District Court. Besides it is not necessary for us to do so as (1) even if the English Common Law be applicable, it cannot override the Defence of Burma Act, 1940 and the rules thereunder [see *Chem Abbheong* v. *M.A.P.M. Rowther and eight others* (2)] ; (2) there is no direct common law authority on the questions under reference and (3) conditions peculiar to Burma under enemy occupation must be borne in mind in applying any doctrine of English Law [cf. *Thomas Bear & Sons (India), Ltd.* v. *Prayag Narain* (3)].

With reference to the question of justice, equity and good conscience we find that our view of Burmese Municipal Law is in consonance with that of the Supreme Judicial Court of Massachusetts in *Kershaw* v. *Kelsey* (4). There Gray J. observed,

"When a creditor, although a subject of the enemy, remains in the country of the debtor, *or has a known agent there authorized*

(1) 14 I.A. 89 at p. 96.
(2) I.L.R. (1946) Mad. 768.
(3) 67 I.A. 212 at p. 216.
(4) 100 Mass. 561.

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to receive the amount of the debt, throughout the war (italics ours) payment there to such creditor *or his agent* can in no respect be construed into a violation of the duties imposed by a state of war upon the debtor ; it is not made to an enemy, in contemplation of international or municipal law ; and it is no objection that the agent may possibly remit the money to his principal in the enemy's country ; if he should do so, the offence would be imputable to him and not to the person paying him the money."

It is also in consonance with the ruling of the Supreme Court of the United States in *Williams* v. *Paine* (1) which is cited in *Tingley* v. *Muller* (2),

" There a power of attorney granted by an officer on his wife resident in Pensylvania to convey land in the City of Washington was held not to be revoked by the war in which the grantors of the power took an active part with the confederates, but to be well executed notwithstanding the war."

Besides our view of Burmese Municipal Law is in accordance with the principle of *stare decisis*. Broom has stated—

" It is, then, an established rule to abide by former precedents, *stare decisis*, where the same points come again in litigation, as well to keep the scale of justice steady, and not liable to waver with every new Judge's opinion, as also because, the law in that case being solemnly declared, what before was uncertain and perhaps indifferent, is now become a permanent rule . . . ."

" for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise . . ."

" the Courts are reluctant to upset former decisions, which, although anomalous, have been accepted by the public as the basis of their transactions for a length of time, a rule embodied in the maxim, *communis error facit jus*. It is pointed out by Lord Hatherley in *Bain* v. *Fothergill* (3) that the House of Lords has frequently acted upon the mistaken practice of conveyancers, and will regard the necessity for following previous decisions as more imperative where the common dealings of

(1) 169 U.S. 55. (2) (1917) L.R. 2 Ch. 144 at pp. 156-7.
(3) L.R. 7 H.L. 158 at p. 209.

mankind are in question." (See pages 90 to 92 of Broom's Legal Maxims, 10th Edition.)

The questions under reference have to be determined in accordance with Burmese Municipal Law as it was in force during the period of Japanese occupation of Burma and a Full Bench of the Supreme Court, which as the name implies was the highest judicial tribunal in Burma then, has held in *A.S.N.S. Firm by their duly constituted agent Karappaya Pillay* v. *Maung Po Khin and Ma Thaung Kywai* (1)

" What is thus now clear is that the national character of Burma and its people remains as it was before ; consequently the British Indian subjects living either in Burma or in India cannot be treated as 'alien enemies' of this country. The necessary and, in fact, the inevitable corollary that follows from this is that British Indian subjects residing in India can sue in any Court in Burma."

This ruling of the Supreme Court must have been " accepted by the public as the basis of their transactions for a length of time. " Even after the liberation of Burma a Bench of the High Court of Judicature at Rangoon decided in *R.M.M.R.M. Perichiappa Chettiar* v. *Ko Kyaw Than* (2) that a contract of agency between an agent in Burma and his principal in British India is not abrogated by the Japanese occupation of Burma and that the agent could even act in the emergency under section 189 of the Contract Act ; and the public must have accepted the ruling as the basis for many more transactions, thereby aggravating the necessity for following the previous decisions. Besides the necessity to follow them is more imperative as the common dealings of mankind such as payments of debt, satisfaction of decrees and redemption of mortgages are in question.

(1) Civil Reference No. 2 of 1943. (2) Civil 1st Appeal No. 34 of 1947.

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W. E. Hall, who has always been regarded as most characteristically British and positivist in his exposition of International Law, has stated at page 579 of his International Law (8th Edition),

"Thus judicial acts done under the control of the occupant, when they are not of a political complexion, administrative acts so done, to the extent that they take effect during the continuance of his control, and the various acts done during the same time by private persons under the sanction of municipal law, remain good. Were it otherwise, the whole social life of a community would be paralysed by an invasion (that is, occupation) * * * *."

Otter J. has also observed in *In re Ma Mya* v. *Ma Thein* (1)

"It seems to me of the greatest importance to bear this principle (*i.e.* the principle of *stare decisis*) in mind in view of the varied local conditions and customs peculiar to this Province (Burma)."

Mr. P. K. Basu, one of the learned advocates who appeared before us to support the view that the agency was abrogated by enemy occupation, has also relied on the "Declaration of war by Burma on Great Britain" on the 1st August, 1943. He has contended that as a result thereof citizens of the rest of the British Empire became enemies of the inhabitants of enemy occupied Burma. However, a declaration of war is a communication by one State to another that the condition of peace between them has come to an end and a condition of war has taken its place (*see* Oppenheim's International Law, Vol. II, 6th Edition, Revised, page 237). So, before Burma can declare war on Great Britain or any other State, Burma must be a State and therefore a subject of International Law, and Burma was not a State, not even a Dominion, at the time of the alleged declaration of war. It was only a

(1) I.L.R. (1926) 4 Ran. 313 (F.B.) at p. 346.

dependency in the British Empire. It is true that the Japanese purported to confer independence on Burma after they had occupied it, but they had no power to do so under International Law. Oppenheim has stated at page 342 of his International Law, Vol. II, 6th Edition, Revised,

"As the right of an occupant in occupied territory is merely a right of administration, he may neither annex it, while the war continues, nor set it up as an independent State."

He has also added at page 344, *ibid*,

"Nor may he compel them to take an oath of allegiance. Since the authority of the occupant is not sovereignty the inhabitants owe no temporary allegiance to him."

Besides, as has been pointed out by Lord Loreburn L.C. in *Lodewyk Johannes De Jager* v. *The Attorney-General of Natal* (1),

"The protection of a State does not cease merely because the State forces, for strategical or other reasons, are temporarily withdrawn, so that the enemy for the time exercises the rights of an army in occupation. On the contrary, when such territory reverts to the control of its rightful Sovereign, wrongs done during the foreign occupation are cognizable by the ordinary Courts. The protection of the Sovereign has not ceased. It is continuous, though the actual redress of what has been done amiss may be necessarily postponed until the enemy forces have been expelled."

Moreover, Mootham J. has also pointed out in *The King* v. *Maung Hmin and three others* (2),

"The 'Independent Government of Burma' had of course no legal status, and its subordination to the occupying power has not been disputed."

So, we are of the opinion that Burma never had the necessary status to declare war on Great Britain and that the alleged declaration of war can have no legal

(1) (1907) A.C. 326 at pp. 328-9. (2) (1946) Ran. 1 at p. 27.

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effect, except perhaps to render the person who purported to declare war punishable in accordance with the remarks of Lord Loreburn L.C.

With reference to the acts of the Governments of the rebel Confederate States the Supreme Court of America has observed in *Texas* v. *White* (1),

> "Acts in furtherance or support of rebellion against the United States * * * * and other Acts of like nature must in general be regarded as invalid and void."

Mr. P. K. Basu has also relied upon Act No. 5 of 1943 which was enacted during the period of the Japanese occupation by the then "Head of State." Section 2 thereof provides that Indians who are British subjects and who are resident in Burma should be regarded not as enemy subjects but as nationals of friendly countries in spite of the said declaration of war. Mr. P. K. Basu contends that the implication is that Indian British subjects who were resident in British India must be regarded as enemy subjects. However, the Act does not say so and, having regard to the circumstances under which the Act was made and promulgated, we are of the opinion that it will not be safe to infer that there was any implication as suggested by Mr. Basu. On the other hand, this enactment throws a good deal of light on, and detracts a good deal from, the so-called declaration of war, which as we have stated above was void *ab initio*.

For all the above reasons we hold that Annamalai Chettiar and Chockalingam Chettiar remained agents of the appellant and M.M.R. Kuttain Chettiar respectively in spite of the outbreak of war and enemy occupation of Burma.

One of us (*viz.* U Thein Maung) decided in ***K. M. Modi*** **v.** ***Mohamed Siddique and another***, Civil

(1) (1868) 7 Wall. 700 at p. 733.

Regular Suit No. 53 of 1946 in the Original Side of the High Court of Judicature at Rangoon that a contract of agency between a principal, who remained in Burma, and an agent, who went over to India after the outbreak of war, was abrogated by enemy occupation of Burma, following the ruling in *Sovfracht*'s case (1). However, there was no issue in that case as to whether the contract of agency was abrogated by enemy occupation. The question arose as a subsidiary one in connection with one of the several issues. So the learned advocates who appeared in that case did not discuss it fully. They did not refer even to the Full Bench decision of the Supreme Court of Burma in *A.S.N.S. Firm by their duly constituted agent Karappaya Pillay* v. *Maung Po Khin and Ma Thaung Kywai*, Civil Reference No. 2 of 1943.

The Special Bench of the High Court of Judicature at Rangoon which confirmed the decree in the said suit found it unnecessary to deal with the question. (*See* the judgments in Civil 1st Appeal No. 22 of 1947.) However as we have stated above, a Bench of the High Court of Judicature at Rangoon has come to a contrary decision in *R.M.M.R.M. Perichiappa Chettiar* v. *Ko Kyaw Than*, Civil 1st Appeal No. 34 of 1947, and we respectfully agree with them.

The appeal is dismissed with costs. Advocate's fee in this Court five gold mohurs.

U SAN MAUNG, J.—I am so entirely in agreement with the reasons given by my Lord the Chief Justice in his judgment, which I have had the advantage of reading, that I feel I can add very little to it. The only question for decision in this appeal is whether Annamalai Chettiar and Chockalingam Chettiar ceased to be the agents of the Decree-holder and the Judgment-

(1) (1943) A C. 203.

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debtor respectively by reason of the occupation of Burma by the Japanese at the time their respective principals were in India. This question must undoubtedly be answered in accordance with the Municipal Law of Burma and for this purpose we must look to the Contract Act or the Defence of Burma Act, 1940, and Rules thereunder. Failing this, the decision must be based upon justice, equity and good conscience, which in the generality of cases, mean the English Common Law. There is no provision in the Contract Act to the effect that a contract of agency shall be terminated by an outbreak of war or by the principal becoming an alien enemy. Therefore, it only remains to be considered whether as a result of the Japanese occupation of Burma, it became impossible or unlawful for the agents in Burma to act on behalf of their principals in British India on account of the Defence of Burma Act, 1940, and the Rules thereunder. As pointed out by my Lord, the Defence of Burma Act, 1940, and the Rules framed thereunder were designed to ensure the public safety and interest and the defence of British Burma. It could never have been contemplated that the Act and Rules thereunder should be fully operative in Burma while practically the whole of it was under the occupation of the Japanese. To hold otherwise would lead to absurd consequences, because practically everyone in Burma would have daily committed offences punishable under the Defence of Burma Act and Rules, for the whole of the Japanese occupation period of Burma. Furthermore, the Act and the Rules do not contain any specific provision as to whether the inhabitants of Burma should regard the inhabitants of British India as their enemies in the case of Burma being occupied by the Japanese. Assuming that the relevant provisions of the Defence of Burma Act and Rules thereunder

were in operation in Burma during the time it was occupied by the Japanese, we must look to Rule 97 and the definition of "enemy" for the purpose of Part XV which relates to Control of Trading with Enemy. Obviously, to the agent in Burma, his principal in British India cannot be an "enemy" within the definition of that Rule because he is not an individual resident in enemy territory, India being "an area in the occupation of His Majesty." Hence it cannot be considered unlawful for him to act on behalf of his principal in India.

The question which remains to be considered is whether the English Common Law should be looked to as a guide to justice, equity and good conscience under sub-section (*3*) of section 13 of the Burma Laws Act in the absence of any enactment on the issue involved. Now, Sir F. Pollock in his book on "The Expansion of the Common Law" observes (at pp. 9 and 10) :

"We have long given up the attempt to maintain that the Common Law is the perfection of reason. Existing human institutions can only do their best with the conditions they work in. * * * It may perhaps be safe to assume, in a general way, that what is reasonable for Massachusetts is reasonable for Vermont. It will not be at all safe to assume that everything reasonable for Massachusetts is reasonable for British India. * * * We now realize that the laws of every nation are determined by their own historical conditions not only as to details, but as to structure."

The Common Law position as regards the effect of the outbreak of war upon agency has been summarized by McNair in his "Legal effects of war", page 206, Chapter 9 of the 2nd Edition. There he says,

"If we look at the matter from the point of view of principle, agency is certainly a contract which we should expect to be abrogated by reason of the prohibition of intercourse with

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enemies in the territorial sense, and moreover incapable of being created during the war. Leaving on one side for the present the American cases, we find that in *Tingley* v. *Muller* (1) (which we shall discuss later) Lord Cozens-Hardy M.R. said: 'It is true that most agencies, involving as they do continuous intercourse with an alien enemy, are revoked, or at least suspended.' (The suspension theory was then at its last gasp.) And in *Hugh Stevenson & Sons, Ltd.* v. *Actiengesellschaft fur Cartonnagen-Industrie* (2) (a partnership case) it was held by Atkin J. and by the Court of Appeal that both the partnership and the contract of agency between the partners were *ipso facto* abrogated by the outbreak of war which made one of them an enemy in the territorial sense. In the words of Swinfen Eady L.J. (3), 'the contract of agency was terminated by the war. It was a trading contract, and war dissolves all contracts which involve trading with the enemy.'"

The principles to be deduced therefrom are twofold:

(1) As the agency involves intercourse with enemies, it is abrogated by the outbreak of war by reason of prohibition of intercourse with the enemy in the territorial sense.

(2) If the agency is such that it involves trading with the enemy it is abrogated by war which dissolves all contracts involving trading with the enemy.

However, to apply the principles of the English Common Law regarding the abrogation of agency by war, to the facts of the present case, as in justice, equity and good conscience, would, in my opinion, be tantamount to an admission that what has been considered reasonable for England, which since the Norman Conquest has never experienced enemy invasion and occupation of her territory by the enemy, would be reasonable for Burma which has had to strive hard towards normal existence during the long period of three years for which she had to remain under the occupation of the Japanese. During that period, and

(1) [1917] 2 Ch. 144, 156. (2) [1917] 1 K.B. 842; (1918) A.C. 239.
(3) [1917] 1 K.B. 845.

only subject to the limitations imposed upon her people by the war and the fact of enemy occupation, life in the country had to go on. People must try to carry on their ordinary avocations or else starve. Business must prosper, debts must be contracted or discharged, immovable property must be looked after, Courts of law must function, and so on. As observed by Blagden J. in *R.M.M.R.M. Perichiappa Chettiar* v. *Ko Kyaw Than* (1),

> "His Majesty has no right at Common Law to expect the unfortunate inhabitants of his territory who have come for the time under the power of his enemies to denude themselves of assets, cease from gainful occupation, and starve, just because he has been unable to afford them the protection which he had afforded them. If so, the plaintiff could legitimately have carried on his business at Henzada himself, and therefore there was nothing illegal in his doing so by an agent."

In fact, in such a time as this, it is to the advantage of the principal who finds himself unable to come to Burma to look after his business, owing to enemy occupation, to have an agent there protecting his interests—and His Majesty cannot possibly object to him having an agent in Burma for this purpose, if this could be done without having intercourse across the line of war. In the generality of cases this purpose will be achieved without actual communication between the principal in India and his agent in Burma. Therefore the contract of agency between them should not be deemed to be abrogated for the reason that on the occupation of Burma by the Japanese the intercourse with the enemy in the territorial sense is prohibited.

The reason behind the prohibition against trading with the enemy is that by that process the enemy should, as far as possible, be deprived of sinews of war.

(1) Civil 1st Appeal No. 4 of 1946.

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An agent in Burma could very well look after the interests of his principal in India without supplying the Japanese with what may be described as "sinews of war." In fact he could manage his principal's business in such a way as to deprive the Japanese as much as possible of the benefits accruing therefrom, and thus achieve the very end which the prohibition of trading with the enemy intended.

Therefore, English Common Law cannot be taken as a safe guide to the determination of the question involved in this case. The position would be otherwise, if the English Common Law had been enriched by decisions born of experience of enemy occupation of English territory. As it is, the growth of English Common Law in regard to the subject now under discussion has been stunted and not to be compared with the Common Law in America, which though it came from the same stock as the English Common Law, has grown in stature owing to the experience gained during the Civil War. Hence the views of the Supreme Judicial Court of Massachusetts in *Kershaw* v. *Kelsey* (1) and of the Supreme Court of the United States in *Williams* v. *Paine* (2) cited in *Tingley* v. *Muller* (3) are far more apposite. In regard to these views, McNair, in his chapter on Agency, has the following observations to make :

"English law therefore rejects the lax view expressed in the Supreme Judicial Court of Massachusetts in 1868 in *Kershaw* v. *Kelsey* (1) where Gray J. said : 'When a creditor, although a subject of the enemy, remains in the country of the debtor, or *has a known agent there authorized to receive the amount of the debt thorughout the war*, payment there to such creditor *or his agent* can in no respect be construed into a violation of the duties imposed by a state of war upon the debtor ; is it not made to an

(1) 100 Mass. 56. (2) 169 U.S. 55.
(3) [1917] 2 Ch. 144, 156.

enemy, in contemplation of international or municipal law ; and it is no objection that the agent may possibly remit the money to his principal in the enemy's country ; if he should do so, the offence would be imputable to him, and not to the person paying him the money.' "

The criticisms against the American decisions are apparently twofold :

(1) The American Courts are more indulgent than the English to the agent suing in his own country on behalf of a principal in the enemy country.

(2) The American Courts overlooked the fact that by paying a debt due to an enemy to his agent, the enemy can increase the sinews of war by raising money in a neutral country because of his increased credit.

Both these criticisms would fail when the principle laid down in *Kershaw* v. *Kelsey* (1) are applied to the circumstances of the present case, for (*a*) the Courts in Burma functioning during the Japanese occupation period have held following the decision of the Supreme Court in *A.S.N.S. Firm by their duly constituted agent Karappaya Pillay* v. *Maung Po Khin and Ma Thaung Kywai* (2), that an agent carrying on business on behalf of his principal, a British subject in India could sue in the Courts in Burma, and (*b*) payment of a debt due to a principal in India to his agent in Burma would rather tend to increase the sinews of war to the British rather than to the Japanese.

Sovfracht's case (3) has been the anchor sheet of the arguments adduced on behalf of the appellants, especially the observation by Lord Porter at page 254 of the report, which reads,

" Ordinarily, when the principal becomes an enemy the authority of the agent ceases on the ground that it is not

(1) 100 Mass. 56. (2) Civil Reference No. 2 of 1943.
(3) (1943) A.C. 203.

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permissible to have intercourse with an enemy alien and the existence of the relationship of principal and agent necessitates such an intercourse."

In this connection, I would respectfully adopt the observations of Gledhill J. in *R.M.M.R.M. Palaniappa Chettiar* v. *Ko Kyaw Than* (1) where the learned Judge said,

"In the American Civil War, there was a still nearer approach to the situation with which we are dealing than in *Sovfracht*'s case (2). The enemy is, it is true, a belligerent, but he is a rebel, and the Federal Government regards him as one to be reduced again to allegiance and to whom it owes more responsibility than it would to a neutral whose country has been overrun by the enemy. In consequence, possibly of this, in cases arising out of the Civil War, the American Courts appear to have evolved doctrines more indulgent than those in British Courts."

Surely, had a situation such as the present arisen in England during the long period of growth of her Common Law, the British Courts could not have failed to evolve a doctrine even more indulgent than those of the American Courts in order to protect the interests of those unfortunate subjects who find themselves compelled to depend upon their trusted agents to look after their property which they had to leave behind in the enemy occupied territory during the pendency of the war. In *Tingley* v. *Muller* (3) where the Court strove to hold that the agency was still subsisting, we are vouchsafed a glimpse of the manner in which the English Common Law might have evolved to the benefit of such unfortunate subjects, had the course of British History been otherwise. Who can say that the general rule regarding the abrogation of agencies by war would not then be so full of exceptions as to be almost obscured by them ?

(1) Civil 1st Appeal No. 4 of 1946. (2) Civil Reference No. 2 of 1943.
(3) (1943) A.C. 203.

Finally, as pointed out by my Lord, the question is not *res integra*, and the principle of *stare decisis* must for ever be borne in mind. The decision of the then Supreme Court of Burma in *A.S.N.S. Firm by their duly constituted agent Karappaya Pillay* v. *Maung Po Khin and Ma Thaung Kywai* (1) must be treated with great respect in view of the ruling in *U San Wa* v. *U Ba Thin* (2) that the Judges of the High Court of Judicature are successors to the Supreme Court. Since that decision of the Supreme Court became known, it has been accepted by the public as the basis of their transactions and for us to come to a finding contrary to that decision would result in confusion worse confounded. "The Courts are always reluctant to upset decisions, which, although anomalous, have been accepted by the public as the basis of their transactions for a length of time, a rule embodied in the maxim *communis error facit jus* (*see* page 92 of Broom's Legal Maxims, 10th Edition).

I agree in the order proposed by my Lord.

(1) Civil Reference No. 2 of 1943. (2) Civil 1st Appeal No. 34 of 1947.