APPELLATE CIVIL.

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

H.C. 1948

June 23.

DR. T. CHAN TAIK (APPELLANT)

v.

ARIFF MOOSAJEE DOOPLY AND ONE (RESPONDENTS).*

Final decree for redemption not drawn up by Court—Order 21, Rule 1—Order 34, Rule 4 (2) and (3) of Code of Civil Procedure—Deposit of Japanese Currency Notes—Its effect—Whether discharges decree—Appeal filed—Leave to file Written Statement on appeal—Considerations governing.

A mortgage by deposit of title deeds was effected in favour of the appellants by the respondents' predecessor in 1941. After the death of the mortgagor the respondents as executors sent a crossed cheque on the Burma State Bank on 20th August 1944 which was not accepted. A suit was filed on 31st January 1945 in the City Court and the sum of Rs. 35,250 in Japanese currency was paid into Court. On 23rd April 1945 the Court passed a judgment for final decree for redemption but no decree was drawn up. The defendant filed an appeal for permission to amend the written statement stating that the appellant could not then raise the issue that he was entitled to receive in British currency only.

Held on appeal per U THEIN MAUNG, C.J.—The fact that the final decree was not drawn up does not make any difference. Under Order XX, Rule 7, of the Code of Civil Procedure, the decree shall bear the date on which the judgment was pronounced and "an act of the Court shall prejudice no man" is a well-known legal maxim.

Broom's Legal Maxims, 10th Edn., p. 73; *Turner* v. *London* and *South-Western Railway Company*, L.R. (1873-4), Vol. XVII, Equity Cases, 561 at pp. 566—9, referred to.

Order XXXIV, Rule 4 (2) and (3), Code of Civil Procedure, shows that preliminary decree shall merely declare that on payment plaintiff can obtain a final decree. The Court could take judicial notice of the necessary amount having already been paid and pass a final decree.

Tata Iron and Steel Company, Limited v. *Baidyanath Laik*, (1923) I.L.R. 2 Pat 754; *Laxminarayan Ganesdas* v. *Ghasiram Dulchand Palliwal*, A.I.R. (1939) Nag. 191; *Mahomed Rahimtulla* v. *Ismail Allarakhia*, 51 I.A. 236, considered.

Order XXI, Rule (1), is not applicable to cases of mortgage decrees.

Ambi (alias) *Subramaniam Pattar* v. *P. A. V. Sridevi*, A.I.R. (1924) Mad. 102, referred to.

The Japanese so-called currency was never lawful currency in Burma.

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* Special Civil 1st Appeal No. 18 of 1947 against the decree of the City Civil Court of Rangoon in Civil Regular Suit No. 13/30 of 1945—48.

Maung Sein Kho v. *Maung Hla Din*, Civil 2nd Appeal No. 3 of 1947; *Ko Maung Tin and eight others* v. *U Gon Man*, 1947 Ran. L.R. 1947, (1947) R.L.R. 149; *J. K. Behara* v. *Lee Shein Yu*, Special Civil 1st Appeal No. 18 of 1946; *U San Wa* v. *U Ba Thin*, Civil 1st Appeal No. 23 of 1947; *U Ba San and one* v. *U Hoke Wan and one*, Civil 2nd Appeal No. 37 of 1947; *U Pe Shein* v. *S.R.M.A.R. Ramanathan Chettyar*, Civil 1st Appeal No. 3 of 1948, referred to and considered.

Acceptance of a payment by Court and the discharge resulting therefrom are subject to the right of appeal by the opposite party and till the right of appeal has become barred or the decree confirmed on appeal the payment cannot be said to have been finally accepted.

The real defence in the case that the defendant was entitled to payment in British currency could not be raised during the Japanese occupation and amendment of the written statement is necessary to enable the real question in issue between the parties to be decided. Final decree set aside.

Held per U SAN MAUNG, J.—The question whether Japanese Military notes were lawful currency in Burma is not *res integra*. The contrary has been decided in *Maung Sein Kho* v. *Maung Hla Din*, Civil 2nd Appeal No. 3 of 1947; *Ko Maung Tin and eight others* v. *U Gon Man*, Civil Reference No. 5 of 1947; McNair's Legal Effect of War, 2nd Edn., p. 337; *Jack Thorington* v. *William B. Smith & John H. Hartley*, S.C.S. 8 Wall 1—14, referred to.

If the question was *res integra* it was entirely beyond the competence of the Japanese Military Authorities under Article 43 of Hague Regulations to issue Burma Monetary Arrangements Ordinance, 1942, equating their currency to the lawful currency of the country. The right of the appellant was a right to be repaid in lawful money and the order of the City Court purporting to direct satisfaction of that liability in currency which was not lawful cannot be upheld in appeal.

U Ba San's case, Civil Reference No. 5 of 1907, relied on.

The Hague Regulations must be treated by the Courts in Burma as part of the Municipal Law.

King v. *Maung Hmin and three others*, (1946) R.L.R. 1 referred to.

The payment had not been accepted in the terms of the Japanese Currency (Evaluation) Act, 1947, s. 4. What is contemplated by s. 4 is the voluntary acceptance of a payment by the creditor, not appropriation by an order of the Judge.

No question of acceptance of payment by anybody would arise in the case of a payment into Court under Order 34, Rule 4, sub-rule 3, of the Code of Civil Procedure. The Legislature has not extended the application of s. 4 of the Japanese Currency (Evaluation) Act, 1947, to decrees.

U Pe Shein v. *S.R.M.A.R. Ramanathan Chettyar*, Civil 1st Appeal No. 3 of 1948, distinguished.

E. C. V. Foucar (with *T. P. Wan*) for the appellant.

P. K. Basu for the respondents.

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U THEIN MAUNG, C.J.—This is an appeal from the final decree for redemption of an equitable mortgage of the properties known as Nos. 204—208, Fraser Street, Rangoon, and Nos. 180—182, 32nd Street, Rangoon, which was passed by the late City Court of Rangoon on the 23rd April 1945.

The facts which are material for the purposes of this appeal are as follows.

M. E. Dooply, since deceased, effected an equitable mortgage of the said properties to the present appellant Dr. T. Chan Taik for the principal sum of Rs. 30,000 with interest at 6 per cent per annum on the 10th April 1941. He died on the 16th June, 1944, leaving a will in which he appointed the present respondents A. M. Dooply and M. M. Dooply to be executors. So, on the 28th September, 1944, M. M. Dooply, as one of the executors to the estate, sent a crossed cheque on the Burma State Bank for Rs. 35,250 in full settlement of the mortgage debt with interest from November 1941 to 30th September, 1944, to Dr. T. Chan Taik, with a forwarding letter (Exhibit F). Dr. Chan Taik, who was then at Mudôn, came back to Rangoon only on the 29th October 1944, and M. M. Dooply appears to have had an interview with him on the following day. According to Dr. Chan Taik he informed M. M. Dooply at the said interview that he could not accept the cheque. He then returned it to M. M. Dooply but the latter left the house after throwing the cheque down. M. M. Dooply does not admit the return of the cheque nor does he admit that he threw it down before he left the house. However, he admits that Dr. Chan Taik told him to redeem the mortgage with British currency as the money he advanced on the mortgage was in British currency. There was some correspondence between the parties after the said interview. (*See* Exhibits H to K2.) A. M. Dooply and M. M. Dooply

then filed the suit for redemption of the mortgage in their capacity as heirs and executors, claiming that under section 213, sub-section (2), of the Succession Act, it is not necessary for them to apply for probate or letters of administration with the will annexed. Dr. Chan Taik's defence in the written statement was that he did not know whether A. M. Dooply and M. M. Dooply were heirs and executors as alleged by them and that he had received information of there being others in India who were entitled to the mortgaged properties, and that A. M. Dooply and M. M. Dooply had no right to redeem them. So, the principal issue in the suit was as to whether A. M. Dooply and M. M. Dooply had the right to redeem the mortage at all.

On the 8th March, 1945, *i.e.* while the suit which had been instituted on the 31st January, 1945, was pending, the plaintiffs paid Rs. 35,250 only into Court for payment to the defendant in redemption of the said mortgage and the case-diary for that date shows they produced a chalan for that amount in Court. The case-diary for the 13th March, 1945, also shows that when the case was called on that date the plaintiffs informed the learned advocate for the defendant that they had paid the said amount into Court.

On the 23rd April, 1945, the Court passed judgment for a final decree in the presence of U Kyaw Myint who held the brief for the learned advocate for the defendant. In the said judgment, the Chief Judge has explained that he passed a final decree for redemption instead of a preliminary decree therefor inasmuch as (1) the plaintiffs had already paid the amount of principal and interest into Court and (2) the defendant did not dispute the correctness of the said amount.

A final decree was then prepared in the said Court but it was not completed probably because of the

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British re-occupation of Rangoon on the 5th May, 1945, and a final decree for the purpose of this appeal has been prepared by this Court only on the 22nd March, 1948.

The appeal was filed on the 19th March, 1947, with an application for permission to amend the written statement for the purpose of raising the real question in issue between the parties, which, according to the affidavits in support thereof, is whether the defendant could insist upon the mortgage being redeemed in British currency.

The memorandum of appeal does not contain any objection to the City Court of Rangoon having stated in the course of its judgment that there was no dispute as to the amount of principal and interest which was due on the mortgage. Nor does it contain any objection to the said Court having passed a final decree straightaway instead of passing a preliminary decree in the first instance.

The respondents have filed an objection to the appellant's application for permission to amend the written statement, stating *inter alia* that the Japanese currency was a legal tender in those days and that the appellant could not then raise "the issue that he was entitled to receive in British currency alone."

The principal questions for consideration in this appeal are as to what are the legal consequences of the City Court of Rangoon having accepted payment of the amount of principal and interest due on the said mortgage although the payment was in Japanese currency, and of its having passed a final decree for redemption after accepting the said payment.

We are of the opinion that the final decree, having not been fully drawn up till after the present appeal was filed, cannot make any difference at all. Order XX, Rule 7, of the Code of Civil Procedure provides that

the decree shall bear the date on which the judgment was pronounced. Besides, *actus curiæ neminem gravabit* (An act of the Court shall prejudice no man) is a well-known legal maxim.

" This maxim ' is founded upon justice and good sense ; and affords a safe and certain guide for the administration of the law.' In virtue of it, where a case stands over for argument on account of the multiplicity of business in the Court, or for judgment from the intricacy of the question, the party ought not to be prejudiced by that delay, but should be allowed to enter up his judgment retrospectively to meet the justice of the case ; and, therefore, if one party to an action die during a *curia advisari vult*, judgment may be entered *nunc pro tunc*, for the delay is the act of the Court, for which neither party should suffer." (1)

In *Turner* v. *London and South-Western Railway Company* (2), Sir Charles Hall V.C. observed,

" In Chitty's Archbold's Practice, Queen's Bench, the rule at law is stated thus : ' The Court will in general permit a judgment to be entered *nunc pro tunc*, where the signing of it has been delayed by the act of the Court.' Therefore, if a party die after a special verdict, or after a special case has been stated for the opinion of the Court, or after a motion in arrest of judgment, or for a new trial, or after a demurrer set down for argument, and pending the time taken for argument, or whilst the Court are considering their judgment, the Court will allow judgment to be entered up after the death *nunc pro tunc* in order that a party may not be prejudiced by a delay arising from the act of the Court." * * * *

" Suffice it to say that the object is to put the party on the one side or the other, Plaintiff or Defendant, exactly in the same position as if judgment had not been delayed by the Court. Therefore, I shall order this judgment to be entered as of the day when the argument terminated, and that will avoid all difficulty."

Besides, " equity looks on that as done which ought to have been done " (3).

(1) Broom's Legal Maxims, 10th Edition, p. 73.
(2) L.R. (1873-4), Vol. XVII, Equity Cases, 561 at pp. 566—9.
(3) Snell's Principles of Equity for Indian Students, p. 16.

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Although as I have stated above there is no objection in the memorandum of appeal to a final decree having been passed straightaway, the learned advocate for the defendant has contended at the hearing before us that according to Order XXXIV, Rule 4 (2), of the Code of Civil Procedure the Court could pass a final decree only if it appeared that nothing was due to the defendant on the mortgage or that he had been overpaid, and that the Court was bound to pass a preliminary decree for redemption in the first instance although the moneys had been paid into Court. However, sub-rule (3) of the said Rule and the Form of the preliminary decree for redemption (No. 8 at page 258 of Vol. VII of the Burma Code) show that the preliminary decree can merely declare that on payment into Court of the necessary amount the plaintiff shall be entitled to apply for and obtain a final decree for redemption. That being so, we are of the opinion that the Court could take judicial notice of the necessary amount having been already paid into Court for payment to the defendant and that the Court could not pass an order declaring that on payment into Court of the necessary amount the plaintiffs shall be entitled to obtain a final decree for redemption when to its own knowledge the necessary amount had already been paid in. Even in a case where the provisions of Order XXI, Rule 1, of the Code of Civil Procedure applies it has been held in *Tata Iron and Steel Company, Limited* v. *Baidyanath Laik* (1) that payment of the decretal amount into Court operates as a satisfaction of the decree though no notice of payment is given to the decree-holder as provided by sub-rule (2) thereof. Compare *Laxminarayan Ganesdas* v. *Ghasiram Dulchand Palliwal* (2) and *Mahomed Rahimtulla* v. *Ismail*

(1) (1923) I.L.R. 2 Pat. 754. (2) A.I.R. (1939) Nag. 191.

Allarakhia (1) at page 240 of which their Lordships of the Privy Council observed, "Their Lordships are clearly of opinion that while the condition would have been satisfied by a payment to the appellant in person, which he accepted, it was equally satisfied by a payment into Court, and that the latter was, in the circumstances, the appropriate mode of satisfying the condition."

Order XXI, Rule 1, is not applicable to cases of mortgage decrees which are governed by Order XXXIV. See *Ambi* alias *Subramaniam Patter* v. *P. A. V. Sridevi* styled *Vala Thamburatti* (2). Besides, if there had been a preliminary decree for redemption under Order XXXIV at all it would have required the respondents to pay the moneys into Court. So there can be no doubt of payment into Court being the appropriate mode of satisfying the decree. It has however been strenuously contended by the learned advocate for the appellant that payment into Court, or rather deposit into Court followed by the appropriation of the money by the Court towards the satisfaction of the mortgage debt for the purpose of a final decree for redemption cannot in this case have the same effect as in ordinary cases of payment into Court inasmuch as the payment was in Japanese currency.

Several rulings, both for and against the above contentions, have been cited before us; but none of them is an exact precedent. *Maung Sein Kho* v. *Maung Hla Din* (3) and *Ko Maung Tin and eight others* v. *U Gon Man* (4), both in the late High Court of Judicature at Rangoon, which were decided before the Japanese Currency Evaluation Act, 1947, came into force, relate to the principles to be followed in arriving at the amount (in British currency) to be decreed after

(1) 51 I.A. 235.
(2) A.I.R. (1924) Mad. 102.
(3) Civil 2nd Appeal No. 3 of 1947.
(4) (1947) Ran. L.R. 149 F.B.

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liberation of Burma, *i.e.* after the Burma Monetary Arrangements Ordinance, 1942, has expired and Japanese notes have become worthless, in respect of debts contracted in Japanese notes during the period of Japanese occupation. *J. K. Behara* v. *Lee Shein Yu* (1) in the same Court relates to a debt contracted during the period of Japanese occupation ; but it is not clear whether it was contracted in Japanese notes or British currency and one of the learned Judges who decided it accepted the plaintiff-appellant's case that the work done by him must be paid for in Indian rupees.

U San Wa v. *U Ba Thin* (2) in the same Court relates to the legal effect of the amount decreed during the period of Japanese occupation having been deposited in Court in Japanese notes during the same period. It was held therein that the liability under the decree was discharged by such deposit even though the opposite party never withdrew it. However, the decree itself was in respect of liability incurred under an agreement during the period of Japanese occupation and the learned Judges had no doubt of both parties having contemplated payment in Japanese notes. Sharpe J. (one of the learned Judges who decided it) observed in the course of his judgment :

"The agreement to which I have referred, that is to say of the 10th July 1944, was an agreement made almost a whole year before the return of the British and there can be no doubt—and it is not contented otherwise—that both parties were thinking in terms of the notes which were then in circulation in Burma and which had been put into circulation by and with the approval of Japanese authorities. I mention this aspect of the case now because the appellant says that he should now receive British currency in lieu of these Japanese notes which have been deposited in Court."

(1) Special Civil 1st Appeal No. 18 of 1946.

(2) Civil 1st Appeal No. 23 of 1947.

U Ba San and one v. *U Hoke Wan and one* (1) in the same Court is a case in which it was held that there was a latent ambiguity in the decree which had been passed during the period of Japanese occupation in respect of a debt incurred before the war inasmuch as it was silent as to whether the claim was to be satisfied in British currency or Japanese notes and that under section 47 of the Code of Civil Procedure the executing Court was competent to interpret the decree in the light of surrounding circumstances. In the present case there is no such ambiguity at all. The deposit in Japanese currency was made on the 8th March 1945 and the Court passed the final decree for redemption on the 23rd April, 1945, stating expressly in the judgment that the plaintiffs had already deposited in Court the amount of principal and interest due on the mortgage.

U Pe Shein v. *S.R.M.A.R. Ramanathan Chettyar* (2) in this Court is a case in which it was held that payment into Court during the period of Japanese occupation of Rs. 12,000 in Japanese notes towards the satisfaction of a preliminary mortgage decree passed before the war satisfied the said decree to the extent of the face value of the Japanese notes although they were never withdrawn by the decree-holder. However, the learned Judges decided the case relying mainly on a special clause in the preliminary (consent) decree which provides "That all payments must be made in Court and certified at once and any payment made outside shall not be recognized." They observed in the course of their judgment,

"The deposit of the decretal amount of Rs. 12,000 in Court will, in the circumstances, have to be considered as payment to the respondent decree-holder, and such payment ought accordingly

(1) Civil 2nd Appeal No. 37 of 1947. (2) Civil 1st Appeal No. 3 of 1948.

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to be considered to be payment which had been accepted by the decree-holder as required under the provisions of section 4 of the Japanese Currency (Evaluation) Act, 1947, because that payment was made into Court, in the only way in which payment under the decree could be made effective."

In administering the law during the period of the Japanese occupation, the City Court of Rangoon which, by the way, had been established by the Japanese Military Ordinance No. 6 of 1942, was bound by force of circumstances to treat the Burma Monetary Arrangements Ordinance, 1942, as valid. It was not open to that Court to consider whether the Japanese, who according to public International Law, could make only such changes in the law and in the administration as were temporarily necessitated by his interest in the maintenance and safety of his army and the realization of the purposes of the war, had power to introduce a new system of currency or to make Japanese currency legal tender at par with British currency.

However, since the final decree was passed by the City Court of Rangoon, the Japanese occupation has come to an end and it has been held by a Full Bench of the then High Court of Judicature at Rangoon in *Ko Maung Tin and eight others* v. *U Gon Man* (1) that the Japanese so-called currency was never lawful currency in Burma and that the Japanese military authorities acted in excess of their authority under the International Law in issuing a parallel system of currency to the currency established by the lawful Government. The Legislature has also enacted the Japanese Currency (Evaluation) Act, 1947, acting on the recommendation of the Full Bench to legislate fixing the value of Japanese notes during different

(1) (1947) Ran. L.R. 149 F.B.

periods of Japanese occupation. Section 4 of the said Act provides :

" Notwithstanding anything contained in any other law for the time being in force, where any debt or obligation, whether contracted or incurred before or during the Japanese occupation of Burma, had been paid or discharged wholly or partially in Japanese currency notes during the Japanese occupation of the area where the payment was made and the payment had been accepted, such payment shall be deemed to be payment in legal currency notes of the same face values, as if the Japanese currency notes were legal currency notes at the time the payment was made."

The City Court of Rangoon was bound, as I have said above, to accept the deposit of and payment in Japanese currency. It was also competent to give a valid discharge on payment of the full amount. However, acceptance of a payment by a Court and the discharge resulting therefrom are subject to the right of appeal by the opposite party. The payment cannot be said to have been finally accepted and the discharge cannot be said to have become absolute until the right of appeal has become time barred or the decree has been confirmed on appeal. Payment which has been accepted by the City Court of Rangoon is not a payment which has been accepted by the mortgage-appellant. It is only an acceptance by the Court subject to the mortgagor's right of appeal and it cannot be regarded as a payment which had been accepted within the meaning of the said section.

We cannot confirm the acceptance of the payment by that Court as (1) the Full Bench has decided that the Japanese so-called currency was never lawful currency in Burma and (2) according to the Schedule to section 3 (*1*) of the Japanese Currency (Evaluation) Act, 1947, the Japanese currency was worth only 5 per cent of its face value in legal currency in the year 1945,

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i.e. when that Court accepted the payment and passed the final decree for redemption.

With reference to the application for permission to amend the written statement it is quite clear that the appellant had objected all along to redemption in Japanese currency. His lawyer wrote to the lawyer for the respondents on the 6th January 1945,

"there has as yet been made no monetary arrangements nor settlements as regards the value of the Burmese and British currencies ; and as such it is most inequitable and unjust for your clients to force payment now and ask for redemption, of a debt contracted on a mortgage, previous to the 8th of December 1941, in British currency (vide *Trimbak* v. *Sakharam*—16 Bom. 599)." [*See* Exhibit K2.]

He filed the written statement, which contained a plea similar to the above extract from Exhibit K2, after drawing lines and writing the word "cancelled" across the plea ; and he and his lawyers have explained that the plea had to be cancelled as one of his lawyers (Mr. T. P. Wan) was intimidated by the Kempeitai and it was obvious that no Court in Burma functioning under the Japanese régime could have entertained the defence that he was entitled to have his mortgage redeemed in British currency. Besides the 2nd respondent M. M. Dooply has admitted in the course of his evidence that the appellant told him to redeem the mortgage with British currency as the mortgage itself was in British currency.

Having regard to all the circumstances of the case we are satisfied that the real defence of the appellant has all along been that he is entitled to payment in British currency, that he and his lawyers had sufficient reason for not raising that defence during the period of Japanese occupation, that the application for amendment of the written statement has been made in good faith on appeal after the liberation of Burma, that the

amendment is necessary to enable the real question in issue between the parties to be decided, and that no further evidence will be necessary after amendent of the written statement. Besides the amendment has become more or less formal and technical in view of the Full Bench ruling and the Japanese Currency (Evaluation) Act, 1947. So we allow the proposed amendment under Order 6, Rule 17, of the Code of Civil Procedure read with section 107 thereof subject to the order as to costs which we are going to pass in this appeal.

The final decree for redemption which was passed by the lower Court on the basis of payment in Japanese currency having been payment in legal currency at par with British currency must be set aside, as we (1) cannot confirm the acceptance of that payment, (2) must allow amendment of the written statement and (3) hold that the appellant is entitled to have the mortgage redeemed with legal currency.

At the same time we must let the respondents have the benefit of the Accrual of Interest (War-Time Adjustment) Act, 1947, just as we have let the appellant have the benefit of the Full Bench ruling. They have sued for redemption offering to pay Rs. 5,250 as interest at the contract rate of 6 per cent per annum from the 1st November, 1941, up to the 30th September, 1944; but according to section 3 of the said Act the appellant is not entiled to any interest from the 8th December, 1941, to the 31st March, 1947.

We accordingly set aside the final decree for redemption and order that there shall be the usual preliminary decree for redemption. The principal amount of the mortgage-debt is Rs. 30,000 and interest thereon is to be calculated at 6 per cent per annum from the 1st November, 1941, only up to and exclusive of the 8th December, 1941. The decretal amount shall carry interest at 1½ per cent per annum from the

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1st April, 1947, up to the date of payment or realization.

Both parties have been victims of circumstances. The decision of the City Court of Rangoon has to be set aside on account of subsequent developments, the respondents have practically lost the money which they paid into Court ; and the appellant has had to ask for permission to amend the written statement on appeal. So we are of the opinion that the parties should bear their own costs in both courts.

U SAN MAUNG, J.—As the facts have been fully set out in the judgment of my Lord, the Chief Justice, it is not necessary for me to recapitulate them here. As the learned Chief Judge of the City Civil Court of Rangoon had passed judgment for a final decree for redemption on the ground that the sum of Rs. 35,250 in Japanese currency which had been deposited into the Court by the plaintiff-respondents was sufficient to pay the amount due to the defendant-appellant Dr. Chan Taik on the equitable mortgage of the properties in suit, the question which arises for determination in this appeal is whether the finding of the learned Chief Judge of the City Civil Court of Rangoon on this point should be confirmed by this Court. Therefore, in my opinion, it is impossible to decide this appeal without considering the question whether the Japanese notes which were deposited in Court by the plaintiff-respondents in payment of the amount due to the defendant-appellant on the aforesaid mortgage should be considered as legal currency in Burma.

Now, the Burma Monetary Arrangements Ordinance, 1942, being an ordinance to provide for adjustment of value of and to render legal tender currency in circulation with the Japanese Government Military currency notes in Burma was promulgated by

the Prime Minister of the Japanese-sponsored Burmese Government on the 15th of September, 1942. By this Ordinance the currency, which was legal tender in Burma on the 8th of December, 1941, was ordained to continue to be current in Burma in the same manner and to the same extent as before and was to be of the same value as the Japanese Government Military currency notes. So, the Japanese Military notes were equated to the currency which was legal tender in Burma on the 8th of December, 1941, namely, British currency which was the legal currency for Burma. Regarding the measure thus taken by the Japanese-sponsored Burmese Government, E Maung J. observed in *Maung Sein Kho* v. *Maung Hla Din* (1):

"The Japanese Military Forces which occupied Burma and the administration set up by them in the name of the Burmese Independent State never had, under International Law, any authority to set up a currency system of their own. The legislation, either of the Military administration or of the Civil administration sponsored by the Military authorities during the occupation of Burma, equating the Japanese Military notes to the legal currency of the country is not within the competence of the occupying power. In law, therefore, the Japanese Military notes which were handed over by the appellant to the respondent on the 2nd of March 1945 could not be considered as legal currency."

In the case of *Ko Maung Tin and eight others* v. *U Gon Man* (2) where a Full Bench of the late High Court had occassion to consider whether the Japanese Military notes were lawful currency in Burma, the learned Chief Justice agreed with the dictum of E Maung J. in *Maung Sein Kho* v. *Maung Hla Din* (1) that the Japanese so-called currency was never lawful currency in Burma. While Sir Ba U J. considered that it was unnecessary to go into the question whether or not the Japanese Military Commander-in-Chief had

(1) Civil 2nd Appeal No. 3 of 1947. (2) (1947 Ran. L.R. 149 F.B.).

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power under the Law of Nations to change the currency law of Burma during the time of occupation, Blagden J. observed that he was in entire agreement with the opinion of E Maung J. as to the illegality under International Law, of the conduct of the occupier in relation to the currency of occupied Burma. What E Maung J. observed in that case was this :

"In holding that the Japanese military authorities in occupation of Burma acted in excess of its legitimate authority at international law in setting up a parallel system of currency relating the same to the system established by the lawful Government of Burma, I was not unmindful of the precedents set in the War of 1914—18 by Germans in France and Belgium and the Austrians in Serbia repeated in the War of 1939 onwards by Germany and powers associated with her. German jurists and the Reighsgericht sought to justify these actions on the theory that in an effective occupation of enemy territory the power of the occupying country totally excludes and replaces the State power of a lawful Government. This theory has not received general acceptance and is not in consonance with modern views on the status of the occupying power.

The right of an occupant in occupied territory is merely a right of administration. McNair in his Legal Effects of War, 2nd Edition, at page 337, has stated the rule to be that :

> 'The occupant being under a duty to maintain order and to provide for the preservation of the rights of the inhabitants and having a right recognized by international law to impose such regulations and make such changes as may be necessary to secure the safety of his forces and the realization of the legitimate purpose of his occupation, his acts, whether legislative, executive, or judicial, so long as he does not overstep these limits will be recognized by the British Government and by British Courts of law.'

Articles 42 to 56 of the Hague Regulations of 1907 clearly cannot be invoked in support of the exercise of the occupying power of effecting a change in the currency system of the occupied territory and to make that change binding on the lawful Government.

The decision in the *Bank of Ethiopia* v. *National Bank of Egypt and Liguori* (1) does not militate against the view that the acts of the *de facto* Government of the occupying power must, in the circumstances of the present case, be tested by such acts being necessarry for preserving peace, order and good government."

The observations made by the learned Judges in the case cited above are worthy of the greatest respect. Furthermore it is interesting to note that the decision arrived at by them in that case was on the same lines as the decision of the Supreme Court of the United States in the case of *Jack Thorington* v. *William B. Smith & John H. Hartley* (2), a copy of which was produced before us by the learned advocate for the respondents. In that case it was held that the confederate notes issued by the Confederate States in rebellion against the United States must be regarded as a currency imposed on the community by irresistible force, that that currency must be considered in courts of law in the same light as if it had been issued by a foreign government, temporarily occupying a part of the territory of the United States, and that the party entitled to be paid in confederate dollars can recover their actual value at the time and place of the contract, in lawful money of the United States.

Thus, the question as to whether or not the Japanese Military notes were ever lawful currency in Burma is not *res integra*. However, even if such a question had arisen for the first time now, I would, while conceding that it was within the competence of the Japanese Military Authorities to issue their own military notes in order to supplement the lawful currency of the country as a measure to restore and

(1) (1937) 1. Ch. 513.

(2) S.C.S. 8 Wall. 1—14.

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ensure public order as required of an occupying power by Article 43 of the Hague Regulations, it was entirely beyond their competence to issue an Ordinance such as Burma Monetary Arrangements Ordinance, 1942, equating their currency to the lawful currency of the country. While the occupation lasts, their currency although worthless or practically worthless is imposed on the community by irresistible force. It has purchasing power for the time being but like all uncontrolled currency the purchasing power will be rapidly on the wane. Therefore, to hold that the Japanese Military Authorities had power to ordain that their currency should be at par for all times with the legal currency of the country would be to admit that the occupying power can by legislation take away from the subjects of the enemy whose territory they occupy, valuable substantive rights such as the right to repayment of debts in lawful currency. While it may be necessary for the military authorities of an occupying power to issue their own currency to supplement the lawful currency of the country it is quite unnecessary for them to ordain that their currency must be at par at all times with the legal currency of the country occupied by them.

In the case under appeal the learned Chief Judge of the City Civil Court no doubt was impelled to come to the conclusion that the amount due to the defendant-appellant on the equitable mortgage could be satisfied by the sum of Rs. 35,250 in Japanese currency which the plaintiff-respondents had deposited in the Court. But the questions which now arise is whether he was right in coming to that conclusion and whether his conclusion should be affirmed in appeal. Having held that the Japanese Military Authorities were not competent to issue an ordinance equating the Japanese Military notes with the lawful currency of the country,

I would now refer to the case of *U Ba San and one* v. *U Hoke Wan and one* (1) where the facts are briefly these: In Civil Regular Suit No. 1 of 1944 of the Subdivisional Court of Tharrawaddy, during the Japanese occupation period a decree was passed in favour of the appellants against the respondents in the sum of Rs. 5,325-8, the sum of 8 annas being described in the decree in terms then current, namely, 50 cents. The suit was based on a promissory note dated the 28th of November, 1936, the consideration for the note being a loan in terms of the lawful currency of the country. The suit was instituted on the 5th of January, 1944, and the decree was passed on the 6th of November, 1944. On the 27th of February, 1945, the respondents paid into the Court Rs. 5,325/50 cents in terms of Japanese military notes towards a purported satisfaction of the decree. On the 4th of June, 1946, the appellants applied to the Assistant Judge of Tharrawaddy in Civil Execution Case No. 3 of 1946 to have the decree in Civil Regular Suit No. 1 of 1944 enforced. The respondents claimed that they having deposited Rs. 5,325/50 cents in Japanese Military notes in the Court on the 27th of February, 1945, the decree had been fully satisfied. This plea was accepted by the learned Assistant Judge who held that the decree had been fully satisfied and that the application for execution should be rejected. On appeal to the District Court of Tharrawaddy the order of the Assistant Judge was upheld and on a second appeal being preferred to the High Court of Judicature at Rangoon, E Maung J. observed :

"The learned District Judge has taken the view that the decree in Civil Suit No. 1 of 1944 of the Subdivisionl Court of Tharrawaddy during the Japanese occupation of Burma was a decree in terms of Japanese currency. That view is clearly wrong.

(1) Civil 2nd Appeal No. 37 of 1947.

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A Court which was set up by the military authorities of the occupation was merely the machinery through which the rights of parties could be enforced. The right of the appellants under the promissory note in this case was a right to be repaid in lawful money. It is impossible to hold that the Subdivisional Court of Tharrawaddy by its decree directed the judgment-debtors to satisfy that liability by a repayment in what was not lawful currency. In fairness to the learned District Judge it must be said that when he took the view he did, he did not have the advantage of my decision in *Ko Maung Tin and eight others* v. *U Gon Man* (1). In that case I have given my reasons for holding that the occpaution authorities had no right in law to set up a parallel system of currency and that Japanese military notes which were in circulation during the Japanese occupation do not satisfy the test of money lawfully current. This view which I expressed was accepted by my Lord the Chief Justice and my learned brother Blagden.

Once it is granted that the decree is one for payment of Rs. 5,325-8 as in lawful currency it is clear that this decree cannot be discharged by a deposit into Court of Rs. 5,325/50 cents. in comparatively worthless Japanese paper. That payment into Court can at best discharge the judgment-debtor's liability *pro tanto* only and the decision of this Court in *Ko Maung Tin and eight others* v. *U Gon Man* (1) above referred to will indicate the principles to be followed in assessing to what extent the decree has been satisfied by that payment into Court."

These observations of E Maung J. seem apposite to the case now under consideration. The City Civil Court set up by the Japanese-sponsored Burmese Government was merely the machinery through which the rights of party could be enforced. The right of the defendant-appellant under the equitable mortgage was a right to be repaid in lawful money and the order of the learned Judge of the City Civil Court purporting to direct the plaintiff-respondents to satisfy that liability by a repayment in what was not lawful currency cannot possibly be upheld in appeal.

(1) 1947 Ran. L.R. 149 F.B.

No doubt, E Maung J. in the later part of his judgment in *U Ba San*'s case proceeded to observe :

"Of course, if, after the deposit, the Subdivisional Court of Tharrawaddy before the reoccupation of Burma by the lawful Government and its armed forces had under section 47 of the Civil Procedure Code adjudged that the payment made into Court effected a comple discharge of the liability under the decree the position would have been different ; different consideration then would apply. The payment might not have been, in my opinion it could not have been, in full discharge of the decree but the adjudication by the executing Court under section 47 of the Code of Civil Procedure, whether that adjudication be right or wrong, is binding *unless set aside on appeal in due course of law*."

However, the portion italicized clearly indicates that where in a case like the present the appellate Court has *seizin* of the whole matter in appeal it can go into the question whether the court functioning during the Japanese occupation period was right in coming to the conclusion that the liability in respect of a debt contracted before the Japanese occupation period could be discharged by payment of Japanese currency of the same face value.

In this view of the case I am clearly of the opinion that it is competent for this court in appeal to say that the learned Judge of the City Civil Court was wrong in coming to the conclusion that the amount due to the defendant-appellant Dr. Chan Taik on the equitable mortgage in suit could be discharged by appropriation of the sum of Rs. 35,250 in Japanese currency which was on deposit in that Court. No doubt the learned Judge of the City Civil Court had, at the time he delivered the judgment, no option but to come to the decision arrived at by him. But this does not mean that we are bound to say in appeal that his decision on this point should not be disturbed. The position, in my opinion, is analogous to a case where a court of

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original jurisdiction had passed an order in accordance with an Act of Legislature which the appellate Court in an appeal against that order declares to be *ultra vires* of the Legislature. The decision of the Chief Judge of the City Civil Court that a final decree for redemption should be passed in the suit under appeal because the amount on deposit was sufficient to repay the debt due to the defendant-appellant Dr. Chan Taik cannot therefore be upheld.

As pointed out by Dunkley A.C.J. in the *King* v. *Maung Hmin and three others* (1), the Hague Regulations must be treated by the Courts in Burma as incorporated into the Municipal Law of Burma to such extent as they are not inconsistent with the ordinary law of the country and so long as the courts constituted by the occupying power in accordance with the Municipal Law of the occupied country administered the Municipal Law of that country, their decisions are valid and binding on the lawful government and the inhabitants of the country, and should be given effect to. Therefore, I hold that the Burma Monetary Arrangements Ordinance, 1942, in so far as it purported to equate the Japanese Government Military currency notes to the British currency was never, in fact, the Municipal Law of Burma during the Japanese occupation period as it was *ultra vires* the Japanese military authorities. Consequently, effect should not be given to the decision of the City Civil Court that the amount of Japanese currency in deposit in that Court was sufficient to repay the amount due to the defendant-appellant Dr. Chan Taik on the equitable mortgage in suit.

However, this is not sufficient to dispose of the matter. Since the decision of the late High Court in

(1) (1946) R.L.R. 1 at p. 11.

Ko Maung Tin and eight others v. *U Gon Man* (1) became known to the Government, the Japanese Currency (Evaluation) Act, 1947 (Burma Act No. XXXVI of 1947), being an Act to fix the value of the Japanese currency notes in terms of Burma notes and coins for certain purposes specified therein, was enacted by the Governor of Burma who had assumed to himself all powers vested by or under the Government of Burma Act, 1935, in the Legislature of Burma. So far as is relevant to this case, section 4 of that Act provides that notwithstanding anything contained in any other law for the time being in force, where any debt contracted before the Japanese occupation of Burma had been paid wholly or partially in Japanese currency notes during the Japanese occupation of the area where the payment was made, *and the payment had been accepted*, such payment shall be deemed to payment in legal currency notes of the same face value as if the Japanese currency notes were legal currency notes at the time the payment was made. Now, in order to attract the provisions of this section, it is necessary to show not only that payment was made in Japanese currency notes for a debt contracted before the Japanese occupation period of Burma but *that the payment had been accepted*. Therefore, it is a matter for consideration as to whether the amount of Rs. 35,250 in Japanese currency notes had been accepted in the manner contemplated in section 4 of the Japanese Currency (Evaluation) Act, 1947, in payment of the debt due to the defendant-appellant Dr. Chan Taik. The answer, in my opinion, is clearly in the negative. This amount was deposited into Court by the plaintiff-respondents during the pendency of the suit under appeal and appropriated towards the mortgage debt due

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to the defendant-appellant Dr. Chan Taik by the order of the learned Chief Judge of the City Civil Court in his judgment dated the 23rd of April 1945, wherein he directed that a final decree for redemption should be passed in favour of the plaintiff-respondents. What section 4 of the Japanese Currency (Evaluation) Act, 1947, really contemplates is payment by a debtor to his creditor, in Japanese currency notes, for a pre-occupation debt, and the voluntary acceptance of the payment by the creditor. In such circumstances, the creditor would, by section 4 of the Act, be estopped from challenging later the validity of the payment on the ground that he was paid in Japanese currency notes where he was entitled to be repaid in legal currency. In the case now under consideration, no question of acceptance of the payment of the amount deposited in Court in Japanese currency ever arose, because, in a suit for redemption, if the account is in favour of the defendant the Court is bound to pass a preliminary decree declaring the amount found due by the plaintiff to the defendant and further declaring that on payment into Court of the said amount on or before a date to be fixed by the said decree the plaintiff shall be entitled to apply for and obtain a final decree directing the defendant to deliver to the plaintiff the mortgage property in the possession of the defendant and to execute an acknowledgment in writing that all rights created by the mortgage have been extinguished, and so forth (*see* sub-rule 3 of Rule 4, Order XXXIV, of the Code of Civil Procedure). Therefore, when the Court passes a preliminary decree in these terms and the defendant has deposited into Court the amount mentioned in the decree, all the legal consequences as set out in the decree automatically follow. No question of the acceptance of payment by the Court or by anybody would ever arise in such a case as the Court

is bound to accept the deposit thus made by the defendant.

Statutes which encroach on the rights of the subjects, whether as regards person or property, should be subject to a strict construction. A person who has lent money to another in legal currency is clearly entitled to be repaid in legal currency. Since section 4 of the Japanese Currency (Evaluation) Act, 1947, limits this right, it must be strictly construed. If it is intended by the Legislature that in regard to pre-occupation debts payment into Court in pursuance of a decree passed during the Japanese occupation period should operate as a valid discharge of the debt, one would have expected the Legislature to say so in unmistakeable terms. As it is, on a plain reading of section 4 of the Act it is apparent that the payment in Japanese currency notes in discharge of a pre-occupation debt and acceptance thereof must be between parties or their agents duly authorized in this behalf.

In coming to this conclusion I am not unmindful of the decision of U Tun Byu and U Aung Tha Gyaw JJ. in *U Pe Shein* v. *S.R.M.A.R. Ramanathan Chettyar* (1). However, the present case is clearly distinguishable from that decided by these learned Judges because in that case the compromise decree contained a clause "that all payments must be made in Court and certified at once and that the payment made outside shall not be recognized." In these circumstances, the learned Judges considered that under that clause of the preliminary mortgage decree the Court must be considered to be an agent of the respondent-decree-holder for the purpose of receiving payments under the decree. I am prepared to concede that, in these circumstances, from the very nature of the compromise effected between

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the parties, the Court was constituted a duly authorized agent of the creditor for the purpose of receiving payments due to him under the terms of the consent decree.

For these reasons, I consider that the judgment of the learned Chief Judge of the City Civil Court directing that a final decree for redemption be passed in the suit under appeal on the ground that the amount of Japanese currency notes in deposit was sufficient to repay the debt found due to the defendant-appellant Dr. Chan Taik is wrong and should be set aside. Instead, there should be an order directing that a preliminary mortgage decree in the usual form be passed for the redemption of the properties in suit for the amount found due to the defendant-appellant on the date of the suit, bearing in mind the provisions of the Accrual of Interest (War-Time Adjustment) Act, 1947 (Burma Act No. XI of 1947).

I agree in the order proposed by my Lord.