

*Privy Council Appeal No. 26 of 1928.*

Bon Kwi and others - - - - - *Appellants*

*v.*

The Firm of S.K.R.S.K.R., by its agent Latchmanan Chetty, and  
others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT RANGOON.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 21ST NOVEMBER, 1929.

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*Present at the Hearing :*

VISCOUNT SUMNER.

LORD ATKIN.

LORD THANKERTON.

SIR JOHN WALLIS.

SIR LANCELOT SANDERSON.

[*Delivered by* SIR LANCELOT SANDERSON.]

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This is an appeal by special leave from a decree of the High Court of Judicature at Rangoon dated the 7th September, 1925, which affirmed a decree of the District Judge of Pyapon dated the 12th November, 1924.

The suit was brought on the 10th November, 1923, by the respondent firm to enforce a mortgage dated the 1st August, 1921, which was executed by Ma Kyin Yon, the second respondent in this appeal. The property, which is the subject of the mortgage, was part of the estate of one Ko Sit So, a Chinese Buddhist, who died intestate in 1917.

Ko Sit So had two wives, one Chinese, by whom he had three sons, and one Burmese, viz., Ma Kyin Yon, by whom he had no children.

The Chinese wife predeceased him, and his family by her is represented in this litigation by the first three appellants (who

are the issue of Ko Sit So's deceased son, Son Hock) and his two sons, Hon Leong (the fourth appellant) and Po Whet (the third respondent).

The fifth and sixth appellants are said to have purchased the interests of two children (Eng Hock and Eng Whet), who were adopted by Ko Sit So and Ma Kyin Yon.

Ma Kyin Yon admitted the mortgage and supported the claim of the plaintiff firm.

The three minor children of Son Hock, through their mother Ma Set Yi, together with their uncle Hon Leong, filed a joint written statement denying that the property which belonged to the estate was liable for the mortgage debt, while Po Whet filed a separate written statement to the same effect. Sit Paung and Sein Don, who claimed to have bought the interest of Eng Hock, put in a similar defence, and Eng Whet filed a petition saying that he had sold his interest to Sit Paung and Sein Don.

The learned Additional District Judge, who tried the suit, made a decree in favour of the plaintiff firm, declaring that the estate left by the deceased Ko Sit So is liable for the mortgage debt, and directing a preliminary decree for Rs. 5,413-4, with costs in Form 4, Appendix D, of the Civil Procedure Code in respect of the mortgaged lands.

The present appellants appealed to the High Court, which dismissed the appeal, holding that the lower Court was right in finding that the mortgaged property was liable for the debt; hence this appeal.

The question involved in this appeal is whether the mortgage of the 1st August, 1921, which was executed by Ko Sit So's widow, Ma Kyin Yon, is a valid mortgage, binding on the property therein described.

On behalf of the appellants it was argued (1) that the widow (Ma Kyin Yon) had no power to bind the estate of Ko Sit So by the mortgage, and (2) that, even if she had power to bind the estate for necessity, such necessity had not been shown to exist, and that she had not borrowed the money, which was the consideration for the mortgage, for the benefit of the estate.

With regard to the above-mentioned second contention, the learned Judge who tried the suit held that Ma Kyin Yon borrowed the money to meet field expenses as well as litigation expenses, and that the transaction was *bona fide* and for valuable consideration. He added :—

“ There is evidence to show that she worked the estate lands and looked after the estate cattle. She did so manage the estate for two or three years after the death of her husband. It is obvious that she administered the said estate—no doubt without letters—for herself and on behalf of her children, who are the heirs, and for the benefit of the estate. It is not suggested that there had been maladministration of the estate by Ma Kye Yon in those years. Till the latter part of 1921, none of the heirs questioned her management of the estate. A not unfair inference under the circumstances is that there had been tacit consent on the part of the

heirs when Ma Kye Yon raised the loans from the plaintiff firm in order to meet field expenses and litigation expenses between herself and Sein Don."

The High Court came to a similar conclusion. The learned Judges said: "As for the question of fact, the actual evidence was meagre, but it was not rebutted, and we are satisfied that the loans were reasonably taken for the purposes and benefit of the estate."

Their Lordships are of opinion that in effect the High Court confirmed the findings of the lower Court in this respect.

Their Lordships' attention was drawn to the evidence relating to this part of the case, and they see no reason for interfering with the decisions at which both the Courts in Burma arrived.

It must therefore be taken that the mortgage executed by the widow Ma Kyin Yon was a *bona fide* transaction; that necessity for the loan existed, and that the money was expended for the benefit of the estate.

The above-mentioned first contention of the appellants remains to be considered. The learned Judges of the High Court were of opinion that Chinese customary law was applicable, and decided that it was not contrary to such law for a widow to have possession of the family property after her husband's death and to manage it, and that in such circumstances it was not contrary to justice, equity and good conscience that if her dealings with the property were for the reasonable purposes of the estate and for its benefit, these dealings should bind the estate.

It was argued on behalf of the appellants that Chinese customary law was not applicable, and, further, that if it was, the widow Ma Kyin Yon would by such customary law be excluded from succession, and that consequently she would have no power to mortgage the property of her deceased husband.

In their Lordships' opinion, the decision in this case does not depend upon the widow's right to succession, and consequently it is not necessary for them to express—and they do not express—any opinion thereon. It may, however, be noted that Sir Henry Pratt, when officiating as Chief Justice of the Rangoon High Court, expressed the opinion that it must be regarded as settled law that ordinarily Chinese customary law governs the succession to the estate of a Chinaman domiciled in Burma (see *Chan Pyu v. Saw Sin*, I.L.R. 6 Rangoon 623, at p. 631).

The learned Judges of the High Court relied on certain passages, which they cited in their judgment, from Jamieson's "Chinese Family and Commercial Law," and Mollendorf's "Family Law of the Chinese" (Broadbent's translation), from which it appears that if the widow is the widow of the head of the family she can refuse to consent to a division of the estate, in which case she has the practical control of the inheritance, and

that "one frequently hears of an old lady, with the assistance of  
"a younger son, managing the whole family property, while  
"perhaps the elder ones live in other provinces and take orders  
"from their mother."

Their Lordships are of opinion that the learned Judge's decision involves a finding of fact that the above-mentioned statement correctly describes the Chinese customary law, applicable to the present case.

Their Lordships, however, do not consider it necessary to enter upon a further consideration of this part of the case, in view of the findings of fact hereinbefore referred to.

It appears to them that, whether the Chinese customary law or the ordinary law is applicable, the findings that the widow Ma Kyin Yon did administer the estate of her deceased husband for herself and her children from the death of her husband, and was so administering it at the date of the mortgage, that there was necessity for the borrowing, and that the money was expended for the benefit of the estate, are sufficient to justify the decisions of the Courts in Burma that the mortgage was a valid mortgage and was binding upon the property comprised therein.

During the argument reference was made to the facts that the widow Ma Kyin Yon presented a petition dated the 5th of July, 1921, to the District Court of Pyapon for a grant of letters of administration of the estate of her late husband, and that letters of administration were not granted to the widow, by reason of a decision in an administration suit, which was instituted by Bon Kwi and others against the widow and others in 1921.

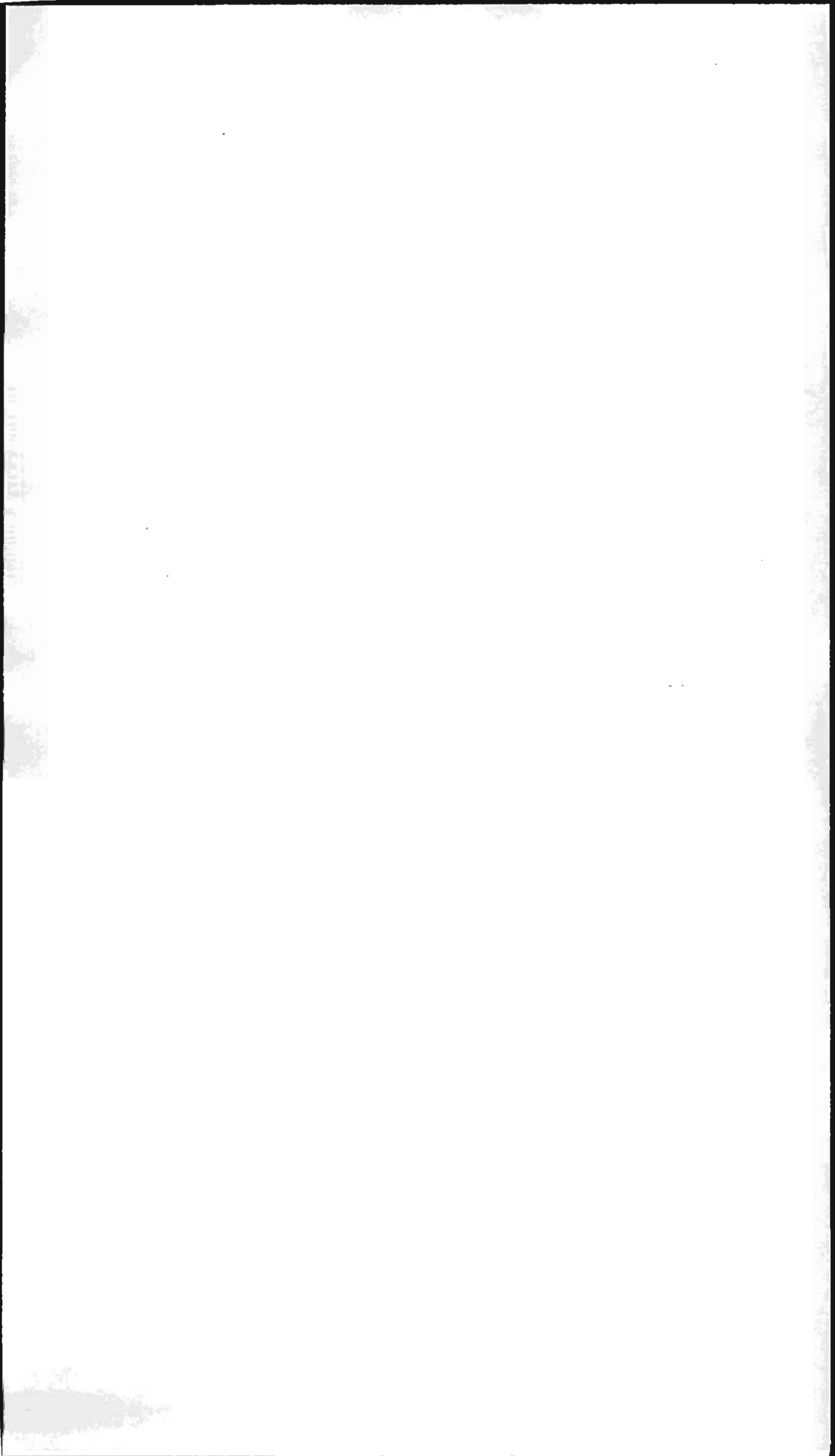
In that suit the District Judge decided on the 9th March, 1922, that the widow was entitled to a third share of her late husband's estate. The result of this decision was that on the same day, viz., the 9th March, 1922, the application for letters of administration by the widow was not pressed and it was dismissed for want of prosecution.

It may be noted that on appeal to the High Court it was decided in April, 1923, that the estate belonged to the children and that the widow had a claim for maintenance, but took no share in cases where there are children.

Their Lordships have referred to these proceedings for the purpose of showing that they have not been overlooked.

In their opinion, however, they do not affect the decision of the appeal, which, as already mentioned, is based upon the findings of fact hereinbefore stated, and which is in no way dependent upon the question whether the widow had a right to share in the estate of her late husband or whether her right was limited to maintenance out of such estate.

For these reasons their Lordships are of opinion that the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.



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BON KWI AND OTHERS

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THE FIRM OF S.K.R.S.K.R., BY ITS AGENT  
LATCHMANAN CHETTY, AND OTHERS.

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[DELIVERED BY SIR LANCELOT SANDERSON.]

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