

inadmissible, and we think that in consequence of this inducement having been held out to the prisoner, the confession in the present case must be rejected. We may observe that it is no part of the duty of a Magistrate to tell an accused person that anything he may say will go as evidence against him. Putting aside the inadmissible confession and the evidence of a further confession made to the police, there remains no legal evidence upon which the prisoner can be convicted. We therefore set aside the conviction and direct that the appellant be acquitted and released. A copy of this judgment should be sent to the committing Magistrate.

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Appeal allowed.

PRIVY COUNCIL.

MOUNG HMOON HTAW (DEFENDANT) v. MAH HPWAH
(PLAINTIFF).

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[On appeal from the Court of the Recorder of Rangoon.]

Act XVII of 1875, s. 4—Buddhist law in British Burmah—Wife's claim upon husband for maintenance.

By the Buddhist law of marriage, as administered in the Courts of British Burmah, it is the duty of the husband to provide subsistence for his wife and to furnish her with suitable clothes and ornaments. If he fails to do so, he is liable to pay debts contracted by her for necessaries; but it appears that this law would not be applicable where she has sufficient means of her own. No authority has been found for saying that, where the wife has maintained herself, she can sue her husband for maintenance for the period during which she has done so.

A wife, married according to Burmese rights and customs, claimed from her husband in a Court in British Burmah, a certain sum for her expenses of necessaries and living for a past period during which she had maintained herself. *Held*, that this was a question "regarding marriage," within the meaning of the Burmah Courts Act XVII of 1875, s. 4, and that, therefore, the Buddhist law formed the rule of decision. The law, as stated above, was accordingly applicable.

Semble, that if this had been a case in which, by the above Act, a Court would have had to act according to the rule of justice, equity, and good conscience, there would have been no ground for making the husband

Present: LORD FITZGERALD, SIR B. PEACOCK, SIR R. P. COLLIER,
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liable upon this claim, regard being had to the Burmese law as to the property of married persons.

APPEAL from a decree (21st June 1881) of the Recorder of Rangoon.

The principal question raised by this appeal was whether, by the Buddhist law prevailing in British Burmah, a husband was liable to pay for the maintenance of his wife for a period during which she, having had means of her own, had maintained herself.

The facts are stated in their Lordships' judgment.

The plaintiff, alleging herself to have been married to the defendant according to the customs of the Burmese, claimed from him Rs. 10,000 for the expenses of her living for five years during which she had maintained herself.

The defence was a denial of the marriage, and of the right of the plaintiff to any maintenance from the defendant.

The Recorder found the fact of marriage, and on the question of the liability of a husband, according to the law of Burmese Buddhists, to pay for the subsistence of his wife, expressed his opinion as follows :

“There are many passages in the Menu Wonanna and Menu Thara Shwe Myeen Damathâts, both recognized as of high authority, which show that a husband is bound to maintain his wife, and in the Menu Kyay Damathât, translated by the late Dr. Richardson, which is the Damathât hitherto most generally used as a guide in questions of Burmese law, probably from the fact of it being the only one translated into English, in the chapter on the different kind of wives, paragraph 14, page 14, the liability is clearly indicated. There it is laid down in the case of a husband going on a trading trip leaving a sufficiency for his wife's subsistence, that should she marry before the expiration of eight years he may take away all her property and sell her, and if there be debts she must bear them all. But if the husband does not leave subsistence for his wife, and shall be absent eight years trading, and she has not enough for her necessary food and clothing, and publicly incur debts for her subsistence, when her husband arrives he must pay them, and cannot say that they were contracted without his knowledge. Whether or not only one wife is per-

missible, according to the older Damathâts, on page 93 of Menu Kyay Damathât, which at any rate is an old work, in s. 46, Book III, it gives the law when debts are incurred by a head wife, a lesser wife, or the six kinds of concubines. When a head wife incurs the debt for necessary expenses even without the husband's knowledge, and the creditor has informed him of it during her lifetime and she dies, he has to pay it with cent per cent. interest. If it be incurred by a lesser wife he has to pay principal with 50 per cent. interest, and if a concubine who had not been purchased or connected by means of money, but who did not eat out of the same dish with him, then he has to pay the principal with 25 per cent. interest. In the Menu Wonnana, page 112, s. 116, referring to the husband going to a distant country, and expecting to remain there, it says he must provide subsistence before he leaves."

"Having found that the plaintiff is the wife of the defendant, although by mutual consent and for his convenience in trade, she lived in Rangoon whilst his residence was at Moulmein, his position is somewhat analogous to that of the husband who goes for the purpose of trading into a distant or foreign land, and is bound to supply his wife with subsistence according to his means and position. I see no reason why, because a woman happens to be a second wife, his liability to maintain her should not also attach as in the case of a first wife."

The Recorder decreed the claim with costs.

On this appeal—

Mr. J. T. Woodroffe appeared for the appellant.

The principal arguments for the appellant were that, on the assumption that the parties had been married according to Buddhist usage, two broad questions remained, on which depended the liability of the appellant, *viz.*, *first*, whether the marriage had not been dissolved by the husband and wife having discontinued to live together for more than three years before the suit; the husband having refused to recognize the respondent as his wife; and she having expressed her desire to be divorced from him; *secondly*, whether, if the marriage still subsisted, the wife was entitled to the maintenance claimed, under the Buddhist law and

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customs, which were binding on the parties. By Buddhist law the husband and wife might be divorced without any decree or order of Court; see *Mee Hneen Gnoang v. Nga Oung and Mee Tee* (1), in which it was decided that neither a decree of Court, nor a written agreement, witnessed, were essential to divorce. Not only might divorce take place by mutual consent, which consent might be express or implied, see *Mee Thee Shay v. Nga Isan* (2), but also, on certain terms agreed upon as to the distribution of the profits of their property, at the will of either of the parties. Sparks's Code of British Burmah, chap. 3; *Shway Yin v. Mee Thoo Gneh* (3).

Lord Fitzgerald stated the opinion of their Lordships that, there having been no issue raised at the hearing as to divorce, this question could not now be argued.

Mr. J. T. Woodroffe continued :

With regard, then, to the second question, *viz.*, the right of the wife to maintenance under the circumstances of this case, it was submitted that this "regarded marriage;" and was, therefore, to be decided according to the law indicated in Act XVII of 1875, s. 4, *viz.*, Buddhist law. Marriage did *not*, of itself, independently of its form, and under all systems of law, operate as a contract entitling the wife to compel her husband to pay for her maintenance. The affirmative of that proposition appeared to have been put forward by one of the Judges of the Bombay Supreme Court in *Ardaseer Cursetjee v. Perceboye* (4), but it was not assented to by this Committee. There being then no authority for the general right under every system of law, of a wife to maintenance (as to which the observations of the Queen's Advocate, *arguendo*, in the case cited at p. 379, might be referred to), it followed that the wife's claim in this case could only rest on a liability on her husband's part created upon marriage by Buddhist law.

(1) 3 Jardine's notes on Buddhist Law, part 3 on Marriage; Appendix B, p. xi. This work is entitled Notes on Buddhist Law by the Judicial Commissioner, British Burmah. (Rangoon 1882.)

(2) *Select Decisions, Burmah*, p. 3.

(3) 4 Jardine's notes on Buddhist Law, App. III.

(4) 6 Moore's I. A., 318.

Marriage among Buddhists in British Burmah was merely a civil contract for co-habitation, involving the subordination of the wife to the husband, and the mutual performance of conjugal duties; see the Menu Kyay Damathât, Book XII, s. 1; and s. 30 (1); Menu Tsaya Damathât, s. 59 (2); *Moung Ko v. Ma Shway Get* (3); Wagaru Damathât, part ii, s. 1 (4).

According to the Buddhist law the husband and wife did not become united, so as to be regarded as one person. Nor did either husband or wife acquire any interest in the separate property of the other, whether originally belonging to such other or acquired by him or her, after marriage. Each of these kinds of property had their separate names. Husband and wife were, however, equally entitled to the joint profits of both; in other words, the profits arising from the employment by both of the separate property of either; as also were they equally entitled to all property acquired during marriage by their skill and industry. Sparks's Code of British Burmah, chap. 1, s. 14; 1 Jardine's notes on Buddhist law, part II; Menu Kyay Damathât, chap. XII, s. 3 (5).

The respondent also was at best but a wife of the less degree; a first wife, or former wife, to whom the defendant had originally been married on becoming a married man, being alive, and not divorced. As to the position of such a wife, see *Mah Shway Choe v. Moung Oung Gye* (6). Moreover, the wife had means of her own in this case, and carried on a trade, deriving profit from thus employing her separate property. Even if the defendant could be held bound to maintain her, he would still have a defence in this suit on the ground that, by permitting her to use the joint profits to which he, as well as she, was entitled, he had contributed to her maintenance. Buddhist law did, no doubt, provide for the punishment of the husband or wife, who, being possessed of sufficient means,

(1) Richardson's translation of the Damathât; or the laws of Menu translated from the Burmese (Rangoon 1874), pp. 336, 347, 348.

(2) Jardine's notes on Buddhist Law, App. A., p. X.

(3) Sandford's Rulings on Buddhist Law, p. 16.

(4) 4 Jardine's notes on Buddhist Law, part III, p. 3.

(5) Menu, Richardson's translation, 1874, pp. 342, 344.

(6) 4 Jardine's notes on Buddhist Law, part 5, p. V.

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neglected to maintain his, or her, disabled spouse, if the latter should be in want. Such a rule of law accorded with the legislation in our Indian Code of Criminal Procedure in this respect. But the Recorder's conclusion was not supported by the texts, as they applied only to the wife wholly without means of subsistence. Reference was made to Menu, Richardson's translation, pp. 82, 84, 93, 94, 139, and 141; 3 Jardine's notes on Buddhist Law, p. 27.

The respondent did not appear.

On a subsequent day, 9th February 1884, their Lordships' judgment was delivered by

SIR R. COUCH.—The appellant was the defendant in an action brought by the respondent in the Court of the Recorder of Rangoon in which the respondent alleged that she was married in Rangoon to the appellant according to Burmese rights and customs, and claimed Rs. 10,000 for her expenses of necessaries and living for five years, deducting Rs. 1,400, the amount realized by the sale of a house given to her by the appellant. The appellant denied the marriage, and that the respondent was entitled to any maintenance. The Recorder found as a fact that she was the wife of the defendant by a validly constituted marriage, the Burmese law recognizing a plurality of wives, and the plaintiff being what is generally called a lesser wife. Their Lordships are of opinion that this was quite in accordance with the evidence. He then considered the question of maintenance, as to which the material facts may be taken from the evidence which the plaintiff herself gave.

They were married in Tagoo 1235 (about 1873 A.D.) The defendant is a trader in timber and a forester, and has forest leases in Zimmay, the Mine-loon-gyee forest. The plaintiff carried on a business of her own at Rangoon. At the marriage the defendant gave her a dower of Rs. 20,000, and they lived together for some time, principally at Rangoon, but the defendant's business frequently took him away. He wished her to reside at Rangoon, and requested her to live in a respectable style, which she did, entertaining the relatives and friends of the defendant, and he not giving her any money towards the expenses of those entertainments. The plaintiff always carried on a business

of her own, dealing in mineral oil and rice, and accumulated Rs. 80,000 in different kinds of property ; and lived, she said, in the same style after marrying the defendant as she had done before. In the opinion of the Recorder the plaintiff received from the defendant about Rs. 23,500, but she said she had expended all that and large sums of her own in works of merit for the defendant at his request.

Upon the question of maintenance, the Recorder said : " There are many passages in the Menu Wonnana and Menu Thara Shwe Myeen Damathâts, both recognized as of high authority, which show that a husband is bound to maintain his wife, and in the Menu Kyay Damathât, translated by the late Dr. Richardson, which is the Dâmathât hitherto most generally used as a guide in questions of Burmese law, probably from the fact of it being the only one translated into English, in the chapter on the different kind of wives, paragraph 14, page 14, the liability is clearly indicated." Then after stating what was there laid down, he said he was of opinion that the plaintiff was entitled to maintenance suitable to her position as second wife, having reference to the defendant's means and ability to pay. The judgment, from which it is unnecessary to quote more, ended by saying that the plaintiff was not estopped from claiming for the period during which she lived at her cost, provided it was not barred by the law of limitation, and giving the plaintiff a decree for the amount claimed, *viz.*, Rs. 10,000, and costs.

Since this judgment was given, Mr. Jardine, the present Judicial Commissioner of British Burmah, has published some valuable notes on Buddhist law, with translations of the Wonnana Damathât, and several others, on marriage and divorce, and inheritance and partition, with notes, and cases illustrating the Burmese law of marriage and divorce as now administered in the British Courts. In coming to an opinion upon this appeal, their Lordships have had the advantage of this additional information about Burmese law.

For the purposes of marriage, divorce, and inheritance, the property of the married persons is considered separate or joint.

The following is defined as separate property of the husband

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and wife by Major Sparks in his Code, which has been used in the British Courts as an authority on Burmese law :

- (1.) What belonged to either before marriage.
- (2.) What has been given specially to either since marriage.
- (3.) What has come into the possession of either by inheritance from his or her own family since marriage.
- (4.) Clothes, jewels, and ornaments.

The profits or interest arising since marriage from the employment or investment of the separate property of either husband or wife, as also the property acquired during the coverture by their mutual skill and industry, are their joint property.

It is the duty of the husband to provide subsistence for his wife and to furnish her with suitable clothes and ornaments. If he fails to do so, he is liable to pay debts contracted by her for necessaries; but it appears to their Lordships that this law would not be applicable where she has sufficient means of her own. They have not found any authority for saying that, where the wife has maintained herself, she can sue her husband for maintenance for the period during which she has done so.

By the Burmah Courts Act, 1875, s. 4, it is enacted that where in any suit or proceeding it is necessary for any Court under that Act to decide any question regarding succession, inheritance, marriage, or caste, or any religious usage or institution, the Buddhist law, in cases where the parties are Buddhists, shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished, or is opposed to any custom having the force of law in British Burmah. And in cases not provided for by the former part of the section, or by any other law for the time being in force, the Court shall act according to justice, equity, and good conscience. It appears to their Lordships that this is a question regarding marriage, and is to be decided according to the Buddhist law; but assuming that it is a case in which the Court is to act according to justice, equity, and good conscience, their Lordships have considered whether the decree appealed from can be supported on those grounds. The Recorder seems to have taken this view of the case, for he says: "It seems to me unjust that merely because a wife had tacitly lived at her own expense under a particular set of circumstances

she should, as it were, be taken thereby to have contracted herself out of her rights, and be unable to recover them when those circumstances have become changed, and that through the fault of the husband." Their Lordships do not agree to this. Having regard to the Burmese law as to the property of married persons, they do not see in the facts of this case any ground in equity or good conscience for making the defendant liable for maintenance. It may be that he requested the plaintiff to live in a respectable manner, but she incurred no additional expenses in consequence. It did not cause any change in her style of living, and it is not possible to assign any portion of her claim to that request.

It remains to be noticed that in the reasons for the appeal it is said that there had been a divorce according to Buddhist law by the conduct of the parties. This was not made a ground of defence in the defendant's written statement, and there was no issue upon it. And consequently their Lordships intimated to the Counsel for the appellant that they could not allow this question to be argued.

For the reasons above given their Lordships will humbly advise Her Majesty to reverse the decree of the Recorder's Court, and to order the suit to be dismissed with costs in that Court. The costs of the appeal to be paid by the respondent.

Solicitors for the appellant: Messrs. Sanderson & Holland.

Appeal allowed.

PRIVY COUNCIL.

KISHNANAND (PLAINTIFF) v. KUNWAR PARTAB NABAIN
SINGH (DEFENDANT.)

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Limitation Act XV of 1877, Sec. II, Art. 109—Mesne profits—Interest.

A claim for mesne profits during a period preceding the three years next before the filing of the plaint is barred by Act XV of 1877, Sec. II, Art. 109. An under-proprietor having been dispossessed by a manager of the superior estate, appointed under the Oudh Taluqdars' Relief Act, 1870, recovered possession under a decree, and afterwards sued for mesne profits.

Present: LORD BLACKBURN, SIR R. P. COLLIER, SIR R. COYNE, and

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