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up against the accused on February 18, and it would certainly appear in the highest degree relevant to show that the excise department were working the case up against this particular man for more than a month previously.

I see no reason to interfere in revision and therefore dismiss this application.

APPELLATE CIVIL.

Before Mr. Justice Brown.

MAUNG KYI AND OTHERS.
v.
MA SHWE BAW.*

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Aug. 7.

Mahomedan Law of marriage—Proposal and acceptance in presence of Mahomedan witnesses essential for validity of marriage—Proof of marriage—Presumption as to marriage by cohabitation and acknowledgment of children as legal.

According to Mahomedan Law, it is essential to the validity of a marriage that there should be a proposal made by or on behalf of one of the parties to the marriage and an acceptance of the proposal by or on behalf of the other, in the presence and hearing of two male or one male and two female witnesses who must be sane and adult Mahomedans. The proposal and acceptance must both be expressed at one meeting. No religious ceremony is essential.

In the absence of such direct proof, marriage between a husband and wife can be presumed from a long course of cohabitation and living together as husband and wife and from acknowledgment of the children as the legal children.

Aklemannessa Bibi v. *Mahomed Hatem*, 31 Cal. 849; *Habibur Rahman* v. *Altaf Ali*, 48 I. A. 114; *Imambandi* v. *Mutsaddi*, 45 Cal. 878; *Khajah Hidayut Collah* v. *Rai Jan Khanum*, M. I. A. Vol. 3, 295—*referred to.*

E Maung for the appellants.

Rafi for the respondent.

BROWN, J.—The main question in issue in these appeals is whether the appellant Ma Chit May was legally married to Dawood, the deceased.

* Special Civil Second Appeals Nos. 85, 86, 87 of 1927 from the judgments of the District Court of Thayetmyo in Civil Appeals Nos. 77, 78, 79 of 1928.

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According to Ma Chit May, Dawood first eloped with her and then took her to the house of his mother Ma Shwe Baw. Ma Chit May herself was a Burman and had hitherto been a Buddhist. But when she reached Ma Shwe Baw's house, a Moulvi was called in and she was first of all converted to Mahomedanism and was then formally married to Dawood according to Mahomedan Law. After that, she and Dawood lived together as husband and wife until his death. She now has two children by him, one aged about 8 and the other about 5.

Most of the facts alleged by Ma Chit May are admitted. It is admitted that Ma Chit May and Dawood lived together as husband and wife. Ma Sa Ki, the daughter and agent of the respondent Ma Shwe Baw, says that Ma Chit May and Dawood were living as man and wife for about nine years and during that period there was nothing against her character. She also says "I have treated the children of Dawet as my nephew and niece." Ma Shwe Baw herself, giving evidence, says "They were living as husband and wife in my house . . . . . They were living as man and wife for about nine years. The two children are the son and daughter of Dawet. Ma Chit Mai performed the formalities of the Mohamedan custom as I have done now. I treated her as my daughter-in-law during her coverture with Dawet and I consider his children as my grandchildren. My son Dawet treated Ma Chit Mai as his wife and her children as his children." It is also admitted by the respondent that the ceremony of conversion to Mohamedanism did take place.

The only dispute is as to whether the formalities required by Mohamedan Law for a valid marriage were observed. According to the Principles of Mahomedan Law by D. F. Mulla, ninth edition, paragraph

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196, it is essential to the validity of a marriage that there should be a proposal made by or on behalf of one of the parties to the marriage, and an acceptance of the proposal by or on behalf of the other, in the presence and hearing of two male or one male and two female witnesses, who must be sane and adult Mahomedans. The proposal and acceptance must both be expressed at one meeting; a proposal made at one meeting and an acceptance made at another meeting do not constitute a valid marriage.

It is admitted that no religious ceremony is necessary at all and although it may be customary to call in a Moulvi for the purpose of celebration, it is not necessary to do so for the purpose of a valid marriage.

In the case of *Khajah Hidayut Collah* v. *Rai Jan Khanum* (1) the following passages from the works of Mr. Macnaghten on Mahomedan Law are cited and apparently approved :—

"The Mahomedan lawyers carry this disinclination (that is against bastardizing) much further; they consider it the legitimate of reasoning to infer the existence of marriage from the proof of cohabitation." "None but children who are in the strictest sense of the word spurious are considered incapable of inheriting the estate of their putative father. The evidence of persons who would, in other cases, be considered incompetent witnesses is admitted to prove wedlock, and, in short, where by any possibility a marriage may be presumed, the law will rather do so than bastardize the issue, and whether a marriage be simply voidable or void *ab initio* the offspring of it will be deemed legitimate."

It had not been proved in that case that a ceremony of marriage had been gone through; but it was nevertheless held that there had been a legal marriage.

In the case of *Habibur Rahman Chowdhury and another* v. *Altaf Ali Chowdhury and others* (2),

(1) Moore's India Appeals, Vol. III, page 295 at p. 317.
(2) (1921) 48 I.A. 114 at p. 120.

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their Lordships of the Privy Council remark, with reference to Mahomedan Law, "the term 'wife' necessarily connotes marriage; but, as marriage may be constituted without any ceremonial, the existence of a marriage in any particular case may be an open question. Direct proof may be available, but if there be no such, indirect proof may suffice." Their Lordships proceeded to point out that the presumption to be drawn from such indirect proof may be rebutted but that unless and until it is rebutted the presumption must prevail. The question of the Mahomedan Law of marriage was also considered by their Lordships of the Privy Council in the case of *Imambandi* v. *Mutsaddi* (1). In that case their Lordships found that the oral testimony regarding the solemnization of marriage was unsatisfactory but that the marriage was nevertheless proved by the subsequent acknowledgment by the husband of the legitimacy of his children. At page 889 of the Report the following passage occurs:—

"In the absence of any statutory provision making compulsory the registration of Mahomedan marriages, the Indian Courts, in case of a dispute as to the factum of a marriage, are usually left to discover or attempt to discover the truth from a mass of conflicting and often very unsatisfactory evidence of witnesses."

There are a number of other cases in which the principle has been followed that marriage between a husband and wife can be presumed from a long course of cohabitation and living together as husband and wife and from acknowledgment of the children as the legal children.

In the case of *Aklemannessa Bibi* v. *Mahomed Hatem* (2), the High Court of Calcutta held that as pointed out in Wilson's Digest of Anglo-Mahomedan

(1) (1918) 45 Cal. 878. (2) (1901) 31 Cal., 849 at p. 856.

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Law, although neither writing nor any religious ceremony is necessary to the validity of a marriage contract, "words of proposal and acceptance must be uttered by the contracting parties or their agents in each other's presence and hearing and in the presence and hearing of two male or one male and two female witnesses, who must be sane and adult Moslems, and the whole transaction must be completed at one meeting." But the question as to the necessity for insisting on these requirements when there was strong evidence of subsequent living together as man and wife was not discussed. Nor have I been able to find any case in which it has been held that, although a man and woman have been living together as husband and wife for a large number of years and have always treated each other as husband and wife and have always been looked on as husband and wife, the marriage is invalid, if in fact the proposal and its acceptance has not taken place in a formal manner.

It is at any rate quite clear from the rulings that once proof has been given such as has been given in this case as to cohabitation and repute, the burden is on the person who denies the marriage to prove that it did not take place.

In the present case there was no obstacle to the marriage. Admittedly Ma Chit May was converted to Mahomedanism. Can it therefore be held as proved on the evidence that the requirements of the Mahomedan Law as to offer and acceptance did not take place? Ma Chit May herself says on this point that when the Moulvi came to the house Ma Shwe Baw and Ko Esoof requested the Moulvi to convert her and then perform the marriage ceremony according to Mahomedan Law. "Then I was converted by the Moulvi. He also asked me if I agreed to marry

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Dawet. Dawet and I had to reply thrice saying that I agreed to marry Dawet. Ko Dawet was also asked if he agreed to marry me and he had also to reply thrice that he agreed to marry me. Then the Moulvi gave me a cup of *Sherbat* saying that it was '*thitsaye*.' The Moulvi, Forozorali, himself has been called. He says that he converted Ma Chit Mai but denies that Dawet and Ma Chit Mai were legally married. He does not explain what he means by saying that they were not legally married; nor has he definitely denied that they formally agreed to the marriage in the presence of witnesses and it may be that by a ceremony of marriage he had in mind some special rite such as would ordinarily be followed in such cases. It is difficult to imagine a case in which the evidence of cohabitation and repute could be stronger than in this case. Ma Chit May came to the house and was formally converted to Mahomedanism. She was accepted by her mother-in-law and has admittedly been treated by her mother-in-law as the legally married wife of Dawood ever since. She and Dawood lived together as husband and wife for nine years. It is admitted by the very relatives who now challenge the legitimacy of the marriage that she behaved in every way as a wife, that she was looked on as a wife by them, that her children were treated as Dawood's children and that they had no complaint whatsoever to make as to her conduct as a wife. Her children are quite clearly treated as Dawood's children; and the evidence to rebut the presumption arising in the circumstances would have to be very strong indeed before the Court could come to a conclusion "bastardizing" the issue.

It must be remembered that the marriage is alleged to have taken place some nine or ten years before the witnesses gave evidence and the production

of oral evidence as to what took place would be a matter of great difficulty. In the circumstances I am not satisfied that it has been proved substantially that the requirements of the Mahomedan Law as to proposal and acceptance were not satisfied in the present case. I therefore hold that Ma Chit May was legally married to Dawood and that her children are legitimate.

It is suggested on behalf of the respondent that even if this be so Ma Shwe Baw is nevertheless an heir under the Mahomedan Law. That would appear to be correct; but in none of the cases has Ma Shwe Baw's claim ever been based on her right as one of several heirs.

In the first case she has sued to have a deed of sale by Ma Chit May of property which belonged to Dawood set aside. Her case as set forth in her plaint was that Ma Chit May was not married to Dawood and had no rights whatsoever to transfer the property. It may be that Ma Chit May had no power to transfer the rights of her minor children and it may also be that the transfer would be subject to the claims of Ma Shwe Baw as one of the heirs of the estate. But these were points which were not raised in the lower Courts. Ma Shwe Baw's suit was dismissed by the trial Court. Although there was an appeal in the District Court, the appeal was not taken on these grounds. That Ma Shwe Baw was not entitled to a cancellation of the registered deed is clear. The suit was based on the claim that Ma Chit May was not entitled to deal with the property at all and that the deed was wholly void. I am not satisfied that there is sufficient reason for allowing Ma Shwe Baw to raise a fresh case in this appeal.

As regards the other two cases, in one of them, Ma Shwe Baw sues for possession of certain jewellery.

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This claim of hers must obviously fail on the finding that Ma Chit May was the wife of Dawood.

The third case is a suit by Ma Chit May and her children against Ma Shwe Baw for recovery of household furniture and clothings. These properties were apparently in the possession of Ma Chit May and her children after her husband's death and have since reached the possession of Ma Shwe Baw because Ma Chit May went into her house to live and took the properties with her. She and her children are therefore merely suing for properties which they allege have been wrongfully taken from their possession by Ma Shwe Baw. In this case also it was never suggested in either of the lower Courts that even if Ma Chit May were the wife of Dawood, the suit must fail because Ma Shwe Baw was also an heir; and here too I do not see sufficient reason for allowing a fresh case to be made in this Court.

The result is that I allow all these appeals and I set aside the decree of the District Court in each case and restore that of the trial Court in each case. The respondent will pay the costs of the appellants in all three Courts.