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bind the parties. With this opinion I am in entire concurrence.

For these reasons I am of opinion that an award of three arbitrators, made without final discussion with the fourth arbitrator and in his absence and to which he does not agree, is not an award by a majority of four arbitrators, which under the present deed of reference would have to be accepted, but is an award by three arbitrators. The three arbitrators must be regarded as having been guilty of misconduct in drawing up the final award without consulting the fourth one at all.

I would therefore dismiss this appeal with costs, advocate's fee three gold mohurs.

MYA BU, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Chari and Mr. Justice Brown.

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LEON AH FOON AND OTHERS.*

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June 13.

Religion of a deceased person, how provable when a relevant fact—Declaration by deceased in his will—Evidence Act (I of 1872) ss. 11 (2), 14, 21 (2)—Chinese Confucian, testamentary power of a,—Succession Act, (XXXXX of 1925), s. 58—Undue influence—mere disinheritance of one heir does not prove undue influence.

Where the religion of a deceased person is a fact in issue, his own solemn declaration about his religion made in a formal document, e.g. in his will, is admissible in evidence and is entitled to great weight. Such declaration would be admissible under the provisions of ss. 11 (2), 14 and 21 (2) of the Evidence Act.

To establish a *prima facie* case of undue influence as regards the execution of a will, it is not enough to show merely that the eldest son was entirely disinherited and another son given the whole estate.

Bur Singh v. Ullam Singh (P.C.) 38 Cal. 355—referred to.

* Civil First Appeal No. 245 of 1928 from the judgment of the District Court of Amherst in Civil Regular No. 28 of 1927.

Moore and *N. N. Burjorjee* for the appellant.

Sutherland for the 1st and 3rd to 7th respondents.

N. M. Cowasjee and *Kyaw Zan* for the 2nd respondent.

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CHARI and BROWN, JJ.—The appellant Maung Maung *alias* Leong Hone Waing filed a suit in the District Court of Amherst for the administration of the estate of his grand-father Leong Chye deceased. The first two defendants are Leong Ah Foon and Leong Ah Choy, the only surviving sons of the deceased. The other defendants are the representatives of the other two sons of the deceased. Maung Maung claims to have been adopted as the son of Leong Ah Wong, a son of Leong Chye, who died many years ago. Shortly before his death, Leong Chye executed a will and also executed two deeds of gift, whereby he transferred a large portion of his property to the second defendant Leong Ah Choy, and in the will he made Leong Ah Choy his sole heir. His other son, Leong Ah Foon, obtained nothing under the will, and the grand-children and other heirs are given legacies of Rs. 1,000 each. In the plaint it is claimed that at the time of the execution of the will and of the deeds of gift Leong Chye, by reason of mental incapacity and old age, was under the dominance of Leong Ah Choy, and that the execution of the deeds was obtained by undue influence on the part of Ah Choy. The will was duly admitted to Probate after Leong Chye's death, and the present suit was not filed until July 1927, that is over eight years after his death. It is claimed on behalf of the plaintiff that even if Leong Chye did make the will and was not induced to do so by undue influence, nevertheless the will is invalid, because under the Chinese Customary Law he is not competent to make it. Ah

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Choy entirely denies that there was any undue influence in connection with the making of the will. He contends that his father was a Confucian by religion and that therefore under the Indian Succession Act he had full capacity to make the will. It has further been argued on his behalf that, even if the Court should hold that Leong Chye was a Buddhist, nevertheless a Chinese Buddhist is able to make a will and his powers in that respect are unrestricted. A number of issues were framed and evidence was recorded at some length. The trial Judge found as a fact that the will was a genuine will and that neither the will nor the deeds are liable to be set aside on the ground of undue influence. He further found that Leong Chye was a Confucian and not a Buddhist at his death. He therefore dismissed the suit. It is against this order of dismissal that the present appeal is filed.

The question of the power to make a will is dealt with in Part VI of the Indian Succession Act. Section 58 excepts from the operation of this part succession to the property of any Hindu, Buddhist, Sikh or Jaina, but lays down that save as so provided or by any other law for the time being in force, the provisions of this part shall constitute the law of British India applicable to all cases of testamentary succession. It is not suggested that the deceased was a Hindu, Sikh or Jaina; nor is there any other law in force with regard to the estates of Confucians. Unless therefore it can be shown that the deceased was a Buddhist, the provisions of this part of the Act will apply to the estate of Leong Chye. If then the finding of the trial Judge on the two main questions of fact are correct, the suit was rightly dismissed.

The first question, that of undue influence, raises no difficulty. The matter has been argued at

considerable length before us but in our opinion the plaintiff has entirely failed to prove that there was any undue influence exercised over Leong Chye when he made the will or the two gifts. Leong Chye died on the 21st of May 1919. The will and the first deed of gift are dated the 2nd of April 1919. The second deed of gift is dated the 7th of May. Leong Chye was admittedly an old man when he died, probably about 78 years of age. But there is practically no evidence to show that his mental capacity was in any way impaired, except that of the plaintiff Maung Maung and of his first witness Hone Kyan. Hone Kyan is the son of Ah Foon, the eldest son of Leong Chye, and is therefore a highly interested witness. Further, owing to the unsatisfactory nature of his answers to certain questions relating to his visit to Moulmein shortly before Leong Chye's death, the trial Judge, who examined him, considered him to be an untrustworthy witness. Both these witnesses depose to Leong Chye's mind being affected before his death. But their evidence on this point is entirely unsupported by any independent evidence of any kind. On the other side we have the evidence of U Shwe Thwin and Dr. Kanga. U Shwe Thwin is a well-known advocate of this Court, who has practised in the Courts of Moulmein since the year 1878. He has recently borrowed money from Ah Choy, but we can see no reason whatsoever for not accepting him as a trustworthy and reliable witness. He and the other partners of his firm had been Leong Chye's legal advisers for many years. He says that he was called in by Leong Chye to draw all three disputed deeds. About the will and the first deed of gift, Exhibits D and E, he received instructions within a week of their execution. Leong Chye himself gave him the instructions, and the witness states: "There

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is no truth in the suggestion that Leong Chye was not in a sound state of mind when he executed the three abovementioned documents. Leong Chye was quite in his right senses when he gave me instructions in connection with Exhibits D, E and F and also when he executed them. As far as I know Ah Choy did not use any influence over Leong Chye to get him to execute these three documents." Exhibit F is the second deed of gift, for which also U Shwe Thwin says Leong Chye gave him instructions. His evidence is supported by that of Dr. Kanga who is a medical practitioner who has been practising in Moulmein for 25 years. He treated Leong Chye in his last illness up to the 14th of April. He witnessed the execution of all three deeds and says that the state of Leong Chye's mind at the time was perfectly sound and that if he had the slightest doubt as to the condition of Leong Chye's mind he should certainly not have put his signature on those documents.

The will, it is sought to upset, entirely disinherits the eldest son and gives the whole estate to Ah Choy, and many years before Leong Chye's death, Ah Choy had been managing his business. It has been suggested that these facts alone are sufficient to throw the burden on Ah Choy to show that there was no undue influence. We are unable to agree with this contention. The principles approved by their Lordships of the Privy Council in the case of *Bur Singh v. Uttam Singh* (1) show that considerably more than this is required to establish a *prima facie* case of undue influence. But even if the contention were correct and the burden were shifted on to Ah Choy to show that Leong Chye had executed the documents of his own free will and without any undue influence on the part of Ah Choy, we should

have no hesitation in holding that Ah Choy has discharged that burden. We are in entire agreement with the trial Judge that neither the deeds of gift nor the will can be set aside on these grounds.

The second question which was decided by the trial Court in favour of Ah Choy presents greater difficulty. In his will dated the 2nd of April 1919 the following recital occurs :—

"I am the son of Leong Ah Shi, *alias* Foong Hong and his wife Chin Shi, who were both followers of Confucius in the Sanning District of the province of Canton, and I was brought up in the faith of my parents. I have always strictly conformed to my duty as regards ancestral rites and forms of worship and I hereby declare that I am a follower of Confucius."

Two earlier wills of Leong Chye have been proved, one dated in the year 1910 and the other dated in the year 1914. Under both of these wills Ah Choy is made the sole heir, and both of them contain a declaration as to the religion of the testator similar to the declaration in the last will. It has been argued before us that these statements in the two wills are not admissible in evidence for the purpose of proving the deceased's religion. We have been referred to certain rulings to the effect that recitals in deeds cannot themselves be relied upon for the purpose of proving the assertions of fact which they contain. We do not think, however, that the cases cited are of any assistance in dealing with the present case. What we have to decide is not whether a recital in a deed as to any specific fact can ordinarily be admitted in evidence, but whether the statement of a dead man recorded in the form of document as to his religion is admissible for the purpose of proving what that religion is.

The fact in issue in the present case is the religion of the deceased. It is asserted by the

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appellant that he was a Buddhist within the meaning of the Indian Succession Act, and this is denied by the respondent. Buddhism is not a religion which requires any specific ceremony or public profession of faith for its adherents, and the question as to whether a man is a Buddhist or not can only be decided by considering his professions and his conduct during his life time. If it is shown that his profession of faith and his conduct are such as to justify an inference that he is a Buddhist, then the case of his status is made out, and in deciding on this point it seems to us quite impossible to disregard a solemn profession of faith made in formal documents. It is contended that the statements in question are not such statements as would be admissible under section 32 of the Evidence Act. That is quite correct. But in our opinion the statements in question are admissible, because the statements themselves are relevant facts independently of section 32. Section 14 of the Evidence Act lays down that facts showing the existence of any state of mind—such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling—are relevant, when the existence of any such state of mind, or body, or bodily feeling, is in issue or relevant. In paragraph 580, Volume I, Taylor on Evidence, the following passage occurs:—

“Whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence. If they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence, and often the only proof of its existence. And the question—whether they were real, or feigned, is for the jury to determine.”

It is quite obvious that the mental feelings of the deceased are highly relevant to the question of his religion, and the expressions of these feelings in a formal manner are to our mind valuable evidence as to their existence. The Indian Evidence Act is founded on the law of evidence in England, and in our opinion, if under no other section, the statements in question would be relevant under section 11 (2) of the Act. It is true that in the case of *Bela Rani and another v. Mahabir Singh and others* (1) it was laid down in general terms that if the terms of a deposition made by a person since deceased do not fall within the provisions of section 32 of the Indian Evidence Act, 1872, the provisions of section 11 of the Act will not avail to make such deposition evidence. With this general statement of the law as applicable to ordinary circumstances we are in entire agreement. In that case the evidence sought to be admitted was evidence of statements of certain persons as to the date of death not very long after the death of the person, that is to say they were statements not as to the condition of mental or bodily feelings of the person made at the time in question but as to outside facts which they could perceive by their senses. But in the present case the statements that are sought to be proved are statements as to the actual state of mind of the person making them, and as we have indicated, the only proof that could be given as to whether a man is a Buddhist consists of evidence of his public profession either by conduct or word of mouth. For these reasons we consider that any solemn declaration made by the deceased as to his religion would be relevant, and in this case the

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(1) (1912) 34 All. 341.

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declaration was accompanied in each instance by the making of a will and therefore would be relevant as an admission under the provisions of section 21 (2) of the Evidence Act. We are of opinion that the statements in the will in question are not only relevant and admissible in evidence but that they are entitled to very great weight indeed in the decision of the question before us. In the case of *Kyin Wet v. Ma Gyok and others* (1) the question for decision was whether a certain Chinaman was a Buddhist. Extracts from certain works on Chinese religion were cited, from which it appears that a Chinaman can be and very often is a Confucian Taoist and Buddhist at the same time. But it is certainly not laid down in that ruling nor could it be possibly maintained that every Chinaman is a Buddhist, and where in this case we have a Chinaman who has made a formal profession of his religion as that of Confucius, there must be clear evidence before us to prove that he was a Buddhist as well before we can accept his status as a Buddhist. In the case in question it is suggested that on enquiring whether a particular Chinaman is a Buddhist or not, one of the questions might well be whether he worships Kuan Yin. Kuan Yin is a Goddess or Bodhisat, who plays a very prominent part in Chinese Buddhism, and receives ~~probably~~ more general reverence than any other Buddhist Gods or Saint in China.

A considerable amount of evidence has been adduced in this case on the question whether the deceased Leong Chye did or did not worship Kuan Yin. Leong Chye was a Chinaman born in China, who came to Burma only after he was grown up. He was educated in China, and it is

(1) (1918) 9 L.B.R. 179.

proved by the evidence of the witness Ah She Shoke and the statement of the plaintiff's witness Chin Shi (I) that Leong Chye and his people in China were Confucian. Chin Shi (I) adds in re-examination that Leong Chye and his people in China worshipped Kuan I and Kuan Yin, but there is no satisfactory evidence that he really professed Buddhism in any way when he was in China. In Moulmein he married a Chinese wife who was admittedly a Buddhist. It is admitted that in the house in which they lived for many years there was in one part a Chinese God and in another part a Burmese Nyaung Ye O Zin. The plaintiff has attempted to prove that the Chinese altar contained in it an image of Kuan Yin. But in this, in our opinion, he has failed. The principal witnesses on this point are Maung Maung and Hone Kyan who were highly interested and whose evidence we have entirely discredited on the question of Leong Chye's state of mind before his death. Their evidence receives some corroboration from that of Ah Foon and the two Chin Shis, but there is no independent evidence in their favour on the point at all. Ah Choy says there was no image of Kuan Yin in the house at all, and he is supported by his witness Ah She Shoke who has no interest in the case. We do not consider that on this point the plaintiff has established that Leong Chye worshipped Kuan Yin in his house. It was admitted that Leong Chye was accustomed to worship at two Chinese temples in Moulmein, one a Cantonese temple and the other a Sinhein temple. The Cantonese temple includes, amongst other images, an image of Kuan Yin, and there is evidence that the deceased had at times, worshipped in that temple before Kuan Yin. It

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appears that the witnesses who give evidence on this point are testifying to what he did on public festival days, and we have it in evidence from the plaintiff's own witnesses that it is the custom of all Chinese people to worship before all the images on such days, whatever their own religion may be. In the Sinhein temple there is an altar of Kuan Yin with an inscription "In the year of Kee Hoy of Kong Swee presented by Leong Yaik Lee". It is suggested that this image must have been presented by Leong Chye himself. According to Ah Choy "Leong Yaik Lee" is the firm name of Leong Chye's business. There is no direct evidence as to how or when this altar was presented. It is probable that the money for this altar was provided by Leong Chye, but we do not think that this carries us very far. Leong Chye himself had a number of Buddhist employees and the mere fact that many years before his death he was willing on their behalf to make a donation for the purpose of providing a Buddhist altar does not prove that he himself professed the Buddhist faith. We do not consider that the evidence that has been adduced in this case really establishes that Leong Chye worshipped Kuan Yin at all, or if he did worship Kuan Yin he only joined in such acts of worship as were common to all the other Chinese Communities who attended this temple, whatever their religion.

The other principal points relied on to prove that Leong Chye was a Buddhist are connected with (1) the inscription on a *tazaung* in Moulmein, (2) the giving of land by going through a libation ceremony for the purpose of building a pongyi kyaung, (3) the shinbyuing of his three grand sons by Ah Choy, and (4) the issue of certain invitations on the death of Leong Chye's wife and on his own death.

As regards the *tazaung* the present inscription reads "Leong Chye and Daw Hlaing's son Maung Ah Choy and his wife Ma Maw Nwi do make this offering", and the date is given as the year 1257. Admittedly Ah Choy was not married till about 1900, that would be about the year 1262, and it has been suggested that originally the inscription must have shown Leong Chye and Daw Hlaing alone as the donors. It is amply proved that many years before his death Leong Chye quarrelled with his eldest son Ah Foon, and it may be that Maung Ah Choy and his wife Ma Maw Nwi were then substituted in place of Ah Foon's name. We do not see how we can presume that at any time this *tazaung* was the gift of Leong Chye and Daw Hlaing. But even if they did make this gift, that in itself would be of very meagre value to show that Leong Chye was professing Buddhism. As we have said Daw Hlaing was admittedly a Buddhist. It is claimed that Leong Chye was also a Buddhist, but it is not claimed that he was a Burman Buddhist, or that he ever attended Burman Buddhist Pagodas, and the gift by him to the Burman Buddhists would, therefore, by itself indicate anything more than that he was tolerant of and kindly disposed to the religion of his wife. The same remarks would apply to the gifts of the land for the building of the Pagoda. The evidence is to the effect that the builder of the Pagoda first of all purchased the land from Ah Foon for only Rs. 200 less than the actual value, and that on Leong Chye's hearing of it he himself paid the balance of the purchase price. It is further in evidence that he made over the land by going through a ceremony of libation of water. The pouring of water is a long established custom in parts of India, signifying the transfer of ownership of land, and we do not think

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that the fact that Leong Chye agreed to pour out water' on this particular occasion really indicates that he was a Buddhist. The next item, on which the plaintiff relies, is the shinbyuing of his grand sons by Ah Choy, and might be valuable evidence, if the question before us were the religion of Ah Choy. But that is not the question we have to decide. As Ah Choy's mother was admittedly a Buddhist, it would not be of any great help in this case if it were established that Ah Choy was a Buddhist.

Of Exhibits A and B, Exhibit A and invitation to Daw Hlaing's funeral ceremony were printed in Burmese. It is said that various religious ceremonies took place at the ceremony. As Daw Hlaing herself was a Buddhist, it would be natural for such ceremonies to take place. Exhibit B purports to be an invitation sent out by Leong Chye's children to Leong Chye's funeral, and the invitation specifically mentions that certain Buddhist religious ceremonies will take place. Ah Choy says he knows nothing of this. But even if he did, it would not have been of great help to us in establishing the religion of Leong Chye. It would not be unnatural for Daw Hlaing's children to show reverence to her religion on their father's death. There seems to be no doubt that whatever Buddhist ceremonies may have been performed, there was a large Chinese gathering in which Chinese ceremonies did take place.

That is practically all the evidence that has been adduced to show that Leong Chye was a Buddhist, and it seems to us to be inadequate for the purpose. There is no definition of the word "Buddhist" in the Indian Succession Act, and the word is wide enough to cover Chinese Buddhists as well as Burman Buddhists. But before it can be claimed that any person is excluded from the provisions of Part

VI of that Act as being a Buddhist, it must clearly be proved that he was professing Buddhism during his life time. In China the three religions of Buddhism, Taoism, Confucianism are largely observed, and in many cases the same person appears to profess all three religions. But in their origins the religions are not related, and amongst the educated class of Chinese Confucianism appears to be the chief religion. It may be that many Confucians are tolerant towards certain aspects of the two other religions which have so long played such a large part in China. Something more than a mere tolerance would be required to prove that a Chinaman who was formally professing himself to be a Confucian was also a Buddhist, and that evidence seems to us to be lacking in the present case. We are of opinion that the learned District Judge is right in holding that it has not been proved that the deceased Leong Chye was a Buddhist on his death.

The result is that we confirm the decree of the District Court and dismiss this appeal with costs. This appeal has been supported by the defendant respondent Ah Foon. His learned counsel supplemented the arguments advanced on behalf of the appellant at considerable length. In these circumstances we direct that Ah Choy's costs in this appeal be borne jointly by the appellant Maung Maung and the respondent Ah Foon.

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