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which she would have had to pay if she had not been allowed, first, to sue and, secondly, to appeal as a pauper.

MOSELY, J.—I agree. As May Oung points out in his Buddhist Law (page 135, 2nd Edition) the "foundling" is the *chatabhatta* not the *apatitha* child.

APPELLATE CIVIL.

Before Hon'ble E. H. Goodman Roberts, Chief Justice, and Mr. Justice Mya Bu.

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April 29.

U ZAWTIKA
v.
U KALYANA.*

Burmese ecclesiastical law—Poggalika *property—Death of* poggalika *owner, effect of*– Sanghika *property*—Aramika *and* Ganika sanghika—*Oral Death-bed gift of* poggalika *property—Leasehold converted by monk in charge to freehold—Benefit of freehold—Trust in favour of* sangha.

On the death of a *poggalika* owner of a monastery the property becomes *sanghika* property and belongs to the *sangha* in general. It is either *Aramika sanghika* (*i.e.* property for the use of the *sangha* dwelling in a particular locality) or *Ganika sanghika* (*i.e.* property for the use of the *sangha* of a particular sect). The power of control of the property in the former case vests in the presiding monk of that locality, and in the latter case in the leading monks of the sect or one of them.

A Buddhist monk O was the *poggalika* owner of two *kyaungdikes*, and lived in one of them along with another monk S. On O's death his nephew, the plaintiff-respondent, claimed that the deceased monk had made an oral gift of the two *kyaungdikes* to him on his death-bed, and that he had placed S in charge of one of the *kyaungdikes*, the subject matter of the suit. When S died the defendant-appellant, also a monk, was residing in the *kyaungdike*. S had collected moneys from his followers to meet the cost of obtaining a freehold grant of the land which at the time was a leasehold. After his death the plaintiff succeeded in obtaining the grant in his own name. The plaintiff sought to eject the defendant on the ground of his being the *poggalika* owner of the property. He alleged no misconduct or breach of discipline on the part of the defendant. The trial Court allowed the claim ; the defendant appealed.

Held, that (1) O's alleged gift in favour of the plaintiff having failed for want of a registered instrument, on O's death the property became *sanghika*

* Civil First Appeal No. 18 of 1936 from the judgment of this Court on the Original Side in Civil Regular No. 316 of 1935.

property ; (2) having regard to the circumstances of the case S received the *kyaungdike* not as *poggalika* property of the plaintiff but from him as one who had the right of control or management of the property ; (3) the action of S and of the plaintiff in obtaining a freehold grant of the land must be deemed to be on behalf of or for the use of the *sangha* in general and the grant must be deemed to be held by the plaintiff in trust for the *sangha* ; and (4) in the absence of a claim by the plaintiff to exercise disciplinary powers as the presiding monk, the plaintiff could not evict the defendant from the premises.

In re Biss, (1903) 2 Ch. Div. 40 ; *Keach v. Sandford*, Selected Cases in Chancery 61—*referred to.*

Hla Tun Pru for the appellant.

Tun Aung for the respondent.

MYA BU, J.—This is an appeal against the judgment and decree passed by the Original Side of this Court in favour of the respondent, who sued the appellant for ejectment from a *kyaungdaik* known as "Kanyon *Kyaungdaik*" in Bahan, Rangoon. The parties to this appeal are Buddhist monks, and the property from which the respondent sought to have the appellant evicted is religious property, but in this case intricate rules of the *Vinaya* are not involved.

The facts of the case are that the *kyaungdaik* in question was the *poggalika* property of a monk known as U Oktama. U Oktama used to reside in another *kyaungdaik* known as Kantha *Kyaungdaik*, which was situated at a short distance from the *kyaungdaik* in dispute. That too, it is common ground, was his *poggalika* property. U Oktama died about 15 years ago. At the time of his death a monk by the name of U Satkeinda was residing in the same monastery as U Oktama. U Oktama died after a very short illness. He took ill about 8 o'clock one evening and died about 3 o'clock the following morning. It is the case for the plaintiff-respondent, who according to lay relationship was U Oktama's nephew, that although he was at the time living at Yandoon, which

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is about 12 hours' journey by launch from Rangoon, U Oktama during his short illness and while nearing his death made an oral declaration of his transfer of both the *kyaungdaiks* by way of gift to him, *i.e.*, the plaintiff-respondent. After the death of U Oktama the plaintiff-respondent came to Rangoon and placed U Satkeinda in charge of Kanyon *Kyaungdaik* and another monk in charge of Kantha *Kyaungdaik*. Since then he has apparently done nothing in connection with Kanyon *Kyaungdaik* which would have amounted to an express assertion of authority either as a monk having control over the *kyaungdaik* or as an owner thereof. It is conceivable that while U Satkeinda was exercising his control over Kanyon *Kyaungdaik* and was residing therein according to the ordinary rules of conduct and the rules of monastic discipline it would not be necessary for the plaintiff-respondent to do anything at all in assertion of his authority in whatever capacity it might be over Kanyon *Kyaungdaik*. About two years ago U Satkeinda died. At that time the only other monk who was living in the *Kyaungdaik* was the defendant-appellant, U Zawtika. Before his death U Satkeinda had taken steps to have a freehold grant of the land issued to him by the Rangoon Development Trust as this land had hitherto been, since the time of U Oktama, merely leasehold property, in respect of which periodical rent had to be paid to the Rangoon Development Trust. That lease which existed since the time of U Oktama in U Oktama's name continued to remain in U Oktama's name till, as a result of the application of U Satkeinda, a freehold grant was issued in respect thereof. It is common ground that before U Satkeinda's death he had already paid Rs. 1,200, made up of collections from his lay followers, towards the Rs. 1,500 which had to be paid in order to get the grant issued. After

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U Satkeinda's death the plaintiff-respondent continued the application, and had the grant issued in his name. At or about the time of the issue of this grant the plaintiff-respondent told the defendant-appellant to reside in the *kyaungdaik* in a proper manner, observing the rules of conduct and of monastic discipline, but the defendant-appellant filed a suit, being Civil Regular No. 599 of 1934 of the Original Side of this Court, for a declaration that the *kyaungdaik* belonged to him, which I take it meant that the *kyaungdaik* was his *poggalika* property. The ground on which the claim was made was that it was made over as a gift to him by U Satkeinda before U Satkeinda's death. That suit failed, and, after the failure of that suit, the suit from which this appeal has arisen was instituted by the plaintiff-respondent.

Facts constituting breaches of the rules of conduct and of discipline were alleged in the plaint to have been committed by the defendant-appellant as the grounds upon which the defendant's liability to eviction was based. But during the trial of the case in the Original Side as well as in the course of this appeal the case of the plaintiff-respondent was confined only to this, *viz.*, that the plaintiff-respondent was the owner of Kanyon *Kyaungdaik*, and that, therefore, he was entitled to have evicted therefrom the defendant whom he did not desire to continue in residence in that *kyaungdaik*. There is no doubt authority for the proposition that a *poggalika* owner of a *kyaungdaik* can expel any person from the premises belonging to him without alleging or establishing any misconduct or breach of discipline on the part of the latter; see *Aletawya Sayadaw and others* v. *U Pateikpanna and others* (1).

(1) (1934) I.L.R. 12 Ran. 455.

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The trial proceeded, therefore, upon the two main issues, namely, whether the plaintiff-respondent is the *poggalika* owner of the *kyaungdaik* in question and, if so, whether he had the right to eject the defendant from the *kyaungdaik*. Evidence was led in proof of the oral declaration of gift by U Oktama in favour of the plaintiff-respondent. In addition to this, evidence was led to prove that the plaintiff-respondent, after U Oktama's death, placed U Satkeinda in charge of Kanyon *Kyaungdaik*, and that after U Satkeinda's death the plaintiff-respondent placed the defendant-appellant in charge of the *kyaungdaik*. These circumstances together with the plaintiff-respondent's success in getting the grant issued by the Rangoon Development Trust in his name have been brought forward to establish the *poggalika* title which the plantiff claims in this suit. The sole question for determination, therefore, is whether the issue of the grant by the Rangoon Development Trust in the name of the plaintiff-respondent either with or without the other circumstances narrated above establishes the plaintiff's claim that he was the owner of the property. In my opinion, it does not. In the first place it is indisputable that the alleged gift by U Oktama in favour of the plaintiff-respondent is invalid in law, and on the death of a *poggalika* owner of a monastery or a monastic institution the property becomes *sanghika* property (that is property belonging to the *sangha* in general) and *sanghika* property either of the kind known as *Aramika sanghika* or of the kind known as *Ganika sanghika* (*Aramika sanghika* meaning *sanghika* property for the use of the *sangha* dwelling in a particular locality and *Ganika sanghika* meaning *sanghika* property for the use of the *sangha* of a particular sect). In this case, therefore, on the death of U Oktama, Kanyon *Kyaungdaik* became either *Aramika*

sanghika or *Ganika sanghika*. The right of use in such property vests in the monks residing in the particular locality or in the *sangha* of the sect, but, for the sake of convenience, the power of control resides, in the case of *Aramika sanghika* property, in a particular monk such as the presiding monk of that locality or, in the case of *Ganika sanghika* property, in the leading monks of the sect or one of them. It does not appear in the evidence that at the time of U Oktama's death any particular monk or monks were dwelling or residing in Kanyon *Kyaungdaik*. The probability then is that the plaintiff-respondent in virtue of his lay relationship with U Oktama and of the wishes of the deceased *poggalika* owner of Kanyon *Kyaungdaik* assumed control over it. This probability is the only one which is consistent with the existence of the invalid gift and the fact, as to which there is sufficient evidence, that the plaintiff-respondent did take steps to have U Satkeinda placed in charge of Kanyon *Kyaungdaik* and another in charge of Kantha *Kyaungdaik*. The fact that U Satkeinda was placed in charge of the *kyaungdaik* in question by the plantiff-respondent, however, does not necessarily show that U Satkeinda received this *kyaungdaik* as *poggalika* property of the plaintiff-respondent to be in permissive occupation thereof. But the fact that for about 15 years, *i.e.* during the lifetime of U Satkeinda after the death of U Oktama, he apparently had the sole charge of this *kyaungdaik* without any interference from the plaintiff-respondent and before his death he took steps to have the leasehold right in the land converted into a freehold grant at the expense not of the plaintiff-respondent but of his own, which he met by collections from his lay followers, tends to show that U Satkeinda received the *kyaungdaik* not as *poggalika* property of the

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plaintiff-respondent but as from one who had the right of control or management of the *kyaungdaik*. We have not been shown the grant itself, but from certain documents filed in case No. 599 of 1934 it appears to us that all that U Satkeinda did in applying for the grant was in the nature of a step to get the leasehold rights converted into a freehold grant but not for the purpose of getting a title in any particular individual monk established. Consequently when on the death of U Satkeinda the plaintiff-respondent continued to act in the proceedings and succeeded in getting the grant out from the Rangoon Development Trust it could not be but that he acted as a monk having control over the *kyaungdaik* for the purpose of getting the leasehold rights converted into a freehold grant. It follows then that the step that he took by prosecuting the unfinished proceedings started by U Satkeinda does not show that he did so in the assertion of his sole right of ownership to the property in respect of which the grant was subsequently issued. The construction to be put on the acts of U Satkeinda and by the plaintiff-respondent in getting the grant issued resembles, in principle, that which is ordinarily put on the renewal of the lease by a tenant for life of a leasehold, on his own account, where the renewed lease enures to the benefit of those who were interested in the old lease, and a constructive trust occurs. See *Keach* v. *Sandford* (1). In the case of the renewal of a lease the new lease is deemed to be a graft upon the old one [*In re Biss* (2)]. In the present case the grant is a graft on the prior lease of which the rights belonged to the *sangha* in general when steps were taken to have the grant issued. In the result the

(1) Selected Cases in Chancery p. 61. (2) (1903) 2 Ch. Div. 40.

obtaining of this grant must be deemed to be the obtaining of property on behalf of or for the use of the *sangha* in general. In these circumstances, the issue of the grant in the name of the plaintiff-respondent, does not establish his claim to the sole ownership of the *kyaungdaik* because, as I have already remarked, the grant must be deemed to have been taken out in trust for the general body of the *sangha*.

Now, there is evidence to show that at or about the time of the issue of this grant the plaintiff-respondent sent for the defendant-appellant, and what happened is described by the plaintiff-respondent himself thus :

" I sent for the defendant to Kantha *Kyaung* after U Satkeinda's death and admonished him and that was the first time I saw him. I warned him to look after the Kanyon *Kyaungdaik* on my behalf, as my representative, observing the precepts properly. "

U Tezawsara stated :

" On the death of U Satkeinda, I saw the plaintiff in Rangoon. He came here on his way to Tavoy. The defendant was given charge of Kanyon *Kyaung* after the death of U Satkeinda."

In none of these statements is there any clear indication of assertion on the part of the plaintiff-respondent or of acknowledgment on the part of the defendant-appellant, of the plaintiff-respondent's ownership of the *kyaungdaik*, as distinct from mere right of control as a monk of the sect to the use of which the *kyaungdaik* had fallen as *sanghika* property. It is quite manifest that the defendant-appellant did not come into possession of the *kyaungdaik* by virtue of what was alleged to have taken place on that occasion, and therefore the latter part of section 116 of the Indian Evidence Act, which

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deals with the principles of estoppel of the licensee of a person in possession, does not apply to the case; nor do the facts narrated above bring into play the general principles of estoppel enunciated in section 115 of the Indian Evidence Act against the defendant-appellant.

The case turns solely on the question whether the plaintiff-respondent is the *poggalika* owner of the *kyaungdaik*. If he is the *poggalika* owner of the *kyaungdaik*, he would, it is granted for the purpose of this case, have the right to have the defendant evicted from the *kyaungdaik*; but it is clear that he has failed to establish this fact. The question as to whether the plaintiff-respondent is in the position of a presiding monk or of a monk who has the legal authority or control over the *kyaungdaik* does not arise directly in this case. The observations which I have made in that regard are merely observations for the purpose of showing that the facts alleged in the evidence regarding the plaintiff-respondent's part in placing U Satkeinda in charge of Kanyon *Kyaungdaik* on the death of U Oktama do not show that the plaintiff-respondent's *poggalika* ownership was specifically acknowledged by U Satkeinda. Whether or not he was in the position of a presiding monk of, or of a monk who had authority or control over, the *kyaungdaik* and had the legal right to have the defendant-appellant evicted therefrom in the event of his being able to establish breaches of rules of discipline or of conduct does not arise in this case, and we do not decide these questions here. This case, undoubtedly, fails completely, upon the bases on which it was fought during the trial. I would allow the appeal and direct that the decree of ejectment passed by the Original Side be set aside, the

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plaintiff-respondent to pay the costs of the defendant-appellant in both courts.

GOODMAN ROBERTS, C.J.—I agree.

ORIGINAL CIVIL.

Before Mr. Justice Braund.

1936

June 4.

D. I. ATTIA AND ANOTHER
v.
M. I. MADHA AND OTHERS.*

Charitable trust—Legal meaning of "charity" in English law—Divisions of charity—Income of trust for the benefit of poor relations in England—Charity in Mahomedan law—Wakf—Public and private trust—Trust for the benefit of the poor members of settlor's family—Suit for its administration—Sanction of Government Advocate—Meaning of "public purposes of a charitable nature"—Distinction between suit claiming "under" a trust and one claiming "adversely" to the trust—Civil Procedure Code (Act V of 1908), s. 92.

In England, "charity" in its legal sense comprises four principal divisions; trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community.

The Commissioners for Special Purposes of the Income-tax v. *Pemsel*, (1891) Ap. Ca. 531—*referred to.*

A trust, the income of which is to be applied in perpetuity for the benefit of poor relations or poor descendants of a testator or settlor, is "charitable" in English law.

Attorney-General v. *Price*, (1810) 17 Ves. 371; *Browne* v. *Whalley*, (1866) W.N. 386; *In re De Carteret* v. *De Carteret*, (1933) 1 Ch. 103; *Gillam* v. *Taylor*, 16 Eq. 581; *Isaac* v. *Defriez*, (1754) Amb. 595; *White* v. *White*, (1802) 7 Ves. 423—*referred to.*

English judicial decisions have given to the definition of "charity" a very generous construction in order to save the benefactions of testators from being disappointed by the rules against perpetuities and uncertainty, and for avoiding income-tax.

In re Good Harington v. *Watts*, (1905) 2 Ch. 60; *In re Gray. Todd* v. *Taylor*, (1925) 1 Ch. 362; *In re Grove-Grady*, (1929) 1 Ch. 557; *In re Lopes*, (1931) 2 Ch. 130; *In re Robinson*, (1931) 2 Ch. 122—*referred to.*

How far the expression "public purposes of a charitable nature" in s. 92 of the Civil Procedure Code can be construed by reference to the English meaning of "charity" discussed.

* Civil Regular No. 275 of 1935.