ORIGINAL CIVIL.

Before Mr. Justice Braund.

1938

Mar. 2.

U THITA AND ANOTHER

v.

U ARESEINNA AND OTHERS.*

Burmese Buddhist ecclesiastical law—Poggalika *owner of* kyaungdike—*Appointment of successor*—*Power given to* kyaungtaga *to appoint successor*—*Failure to appoint*—Kyaungdike *vesting in* Sangha—*Limited ownership of* poggalika *owner*—*Appointment by appointor*—"*Transfer*" *of property*—*Transfer not a gift*—*Registered instrument unnecessary*—"*Voluntarily*"—*Transfer of Property Act, ss. 5, 122, 123.*

According to the opinion of the *Thathanabaing*, the *poggalika* owner of a *kyaungdike* has a right to surrender to the donor of the *kyaungdike* the power to appoint on his death his *poggalika* successor to the *kyaungdike*. If the original *poggalika* owner has not either himself appointed his successor or conferred the right to appoint a successor on a third party, the *kyaungdike* on his death vests in the *Sangha*.

Poggalika ownership confers upon the owner an interest in the property carrying with it a certain measure of beneficial enjoyment during his lifetime but it falls short of the interest of a full beneficial owner.

U Ahdeiksa v. *Ma San Me*, I.L.R. 7 Ran. 617; *U Pandawun* v. *U Sandima*, I.L.R. 2 Ran. 131; *U Zayanta* v. *U Naga*, 9 L.B.R. 258, referred to.

The transmission of a *kyaungdike*, effected by the appointment of a successor by a *kyaungtaga*, may be a "transfer" within s. 5 of the Transfer of Property Act. But it is not a "gift" within ss. 122 and 123 of the Act and does not require a registered instrument. The word "voluntarily" in s. 122 denotes the exercise of an unfettered free will. An appointor in the case of a *kyaungdike* has *ex hypothesi* no choice but to appoint without consideration and by way of gift and such appointment is accordingly not "voluntary" in the sense in which that word is used in s. 122 of the Transfer of Property Act.

Art Union London v. *Overseers of the Savoy*, (1894) 2 Q.B. 609; *Attorney-General* v. *Ellis*, (1895) 2 Q.B. 466; *Churchwardens of the Poor* v. *Shaw*, 10 Q.B. 869; *In re Wilkinson*, (1926) 1 Ch. 842, referred to.

Chan Htoon for the plaintiffs.

E Maung for the defendants.

BRAUND, J.—This is a case which raises at the outset an interesting and difficult point. The suit is brought by two *pongyis*, U Thiha and U Kothala, as plaintiffs for the ejectment of three other *pongyis* from

* Civil Regular Suit No 236 of 1936.

a *kyaungdike* called the Athiti Kyaungdike. There are a number of facts which are not, I think, in dispute, which can be stated quite briefly.

The Athiti Kyaungdike was originally dedicated some forty years ago by two Burmese gentlemen, Dr. U Nyo and U Ba Nyunt. It was dedicated by them to a *rahan* named U Paduma as his *poggalika* property. U Paduma occupied it, as the *poggalika* owner, for many years until April 1929, when he died. So much is not in dispute.

The plaintiffs' story is that shortly prior to his death U Paduma surrendered to the original donors, Dr. U Nyo and U Ba Nyunt, the power to appoint his successor and that, in pursuance of that power of appointment, Dr. U Nyo and U Ba Nyunt appointed the two plaintiffs to be the *poggalika* owners and presiding monks of the Athiti Kyaungdike in succession to U Paduma.

To put the rest of the plaintiffs' story shortly, the plaintiffs complain that in October or November, 1935, they were virtually ejected from the *kyaungdike* by the defendants and their followers, or at least intimidated into leaving, and they now claim to be re-instated. That puts the essential parts of the plaintiffs' case in the briefest possible way.

The pleadings as they stand raise serious questions of Burmese Buddhist ecclesiastical law in connection with the right of a *poggalika* owner to appoint a successor. The course adopted—I venture to think it was a sensible course—was to refer to the *Thathanabaing* such questions of pure Burmese Buddhist ecclesiastical law as emerged from the case and the parties, very sensibly, upon those issues, agreed to be bound by the edicts of the *Thathanabaing*.

The questions referred to the *Thathanabaing* and the answers he has given are set out below. In setting

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out the answers of the *Thathanabaing* I have set out only what the parties have agreed to be their effect.

Questions.	*Answers.*
1. Has the *poggalika* owner of a *kyaungdike* any power, according to Burmese Buddhist law, to confer the right to nominate his successor upon the donor of the *kyaungdike*?	1. Yes. He has the right to surrender to the donors the power to appoint his successor as *poggalika* owner of the *kyaungdike*.
2. If so, does the successor so nominated by the donor become the lawful *poggalika* owner and presiding *rahan* of the *kyaungdike*?	2. Yes.
3. Alternatively, does the ownership of the *kyaungdike* on the death of the original *poggalika* owner vest in the *Sangha* at large?	3. Yes, if the original *poggalika* owner has not either himself appointed his successor or conferred the right to appoint a successor on a third party.
4. If so, does the right to nominate a successor to the original *poggalika* owner as presiding monk belong to the donor or ought such successor to be elected by the surviving resident *rahans* of the *kyaungdike*?	4. In view of the answer to (1) above, this does not arise upon this part of this case.
5. If a successor of the original *poggalika* owner ought not to be nominated or elected as presiding *rahan* in any of the above ways, how and by whom ought such successor as presiding *rahan* to be nominated or elected?	5. In view of the answers to the previous questions, this does not arise in this case.

It is satisfactory, therefore, to be in a position to begin the consideration of this case from the agreed

starting point that, according to the Burmese Buddhist ecclesiastical law which is to be applied by consent of the parties, U Paduma must be taken to have been entitled to surrender to the original *kyaungtagas* the power to nominate his successor as *poggalika* owner of the *kyaungdike*. That, of course, is the foundation of the plaintiffs' claim.

In those circumstances, it appeared to me that three comparatively simple issues arose. They are these :

1. Did U Paduma, before his death, validly confer upon Dr. U Nyo and U Ba Nyunt the right to nominate his successor as the *poggalika* owner of the Athiti Kyaungdike ?
2. If so, did the said Dr. U Nyo and U Ba Nyunt validly exercise the said right to nominate the successor of the said U Paduma as the *poggalika* owner of the said *kyaungdike* by appointing the plaintiffs to be the *dwithantaka* owners of the said *kyaungdike* ?
3. Is it open to the plaintiffs to prove any such appointment as is mentioned in issue No. 2 in view of the prohibitions contained in section 123 of the Transfer of Property Act ?

It is obvious that if the third of those issues is to be answered in the negative the case can go no further, because the plaintiffs will be precluded from establishing any title at all to the *kyaungdike* whether as *poggalika* owners or as presiding monks and, accordingly, it falls first to consider the third of the three issues which I have settled in this case. And it is that issue which, in my view, raises a question which is both important and interesting.

The defendants' case, upon this issue, is that, by virtue of section 123 of the Transfer of Property Act, the plaintiffs cannot be heard to prove the

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appointment of the *kyaungdike* to them. For the defendants say that what is alleged on the face of the pleadings to have happened amounts to a "gift" and section 123 precludes the proof of any "gift" which has not been effected by a registered instrument.

Section 123 of the Transfer of Property Act runs thus :

> "For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses."

It is clear, therefore, that, if the transmission of the *kyaungdike* effected by the "nomination" or "appointment" by the *kyaungtagas* which is pleaded amounts to a transfer by way of "gift", then it cannot be proved in this suit in the manner in which it is proposed to be proved. And it falls to me to consider whether what has happened amounts to a "gift."

That there has been a technical "transfer" I shall for the moment concede, though it has been suggested—and there is a good deal in the suggestion—that this is a case of devolution and not of transfer at all. But I shall concede it, without deciding the point. If, then, it be a "transfer", it is a transfer of a very peculiar character. A "transfer of property" is defined by section 5 of the Transfer of Property Act as being "an act by which a living person conveys property, in present or in future, to one or more other living persons * * *." It is to be particularly noticed that this definition does not require that the "living person" who conveys should necessarily be the same person as he who owns, or owned, the property conveyed. All that is required is that there should be an act of conveyance by some living person. It is, therefore, to my mind, quite clear that it is within the contemplation

of section 5 that there may be a "transfer" by a person exercising powers over the property of another. That is, I think, made still more clear when the definition of "a person competent to transfer", contained in section 7 of the Act, is taken into account. For, it is there obviously contemplated that a transferor may be a person who is not himself the owner of the property but is merely "authorized to dispose of or transfer property not his own." Instances of that would arise in the case of transfers by agents, guardians, managers of joint Hindu families and so forth. And, in my judgment, it arises equally in a case in which the donee of a power of appointment, having a power to appoint a beneficial interest in property, exercises that power.

I do not want, in this judgment,—though I cannot say that I think the Burmese Buddhist law in this respect to be in a very satisfactory condition—to discuss at great length the nature of *poggalika* ownership. I am not quite satisfied with the position of the law upon this subject as it stands. But it is clear that, while a *poggalika* interest in both religious property (such as a *kyaungdike* and its site) and in lay property (such as a paddy field) confers upon the *poggalika* owner certain of the incidents of beneficial ownership such as a right of possession during life, it falls, nevertheless—in the case, at any rate, of religious property—far short of full beneficial ownership. For instance, in the event of a *poggalika* owner dying without having disposed of the subject matter of his *poggalika* ownership in one of the ways in which he is entitled to dispose of it, it passes to the *Sangha* in general. It is not transmissible to his heirs, because a *rahan* can have no heirs. In the event of a *poggalika* owner leaving the priesthood, the same effect follows. It is, I think, extremely doubtful if a *poggalika* owner of a religious property, such as a *kyaungdike*, can exercise, for his own benefit, such of

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the ordinary incidents of ownership as the effecting of a lease, mortgage, or sale of the property in question. When I say, "for his own benefit", I mean that I doubt whether he could apply the proceeds beneficially for his own purposes. While it must be conceded that *poggalika* ownership confers upon the *poggalika* owner an interest in the property carrying with it a certain degree of beneficial enjoyment during his lifetime, it is equally clear to my mind that it falls short of the interest of a full beneficial owner. I have referred to a number of authorities upon this question. But I do not want to embark in this judgment upon an exhaustive discussion of them, as I feel it will lead me somewhat away from the main point in this case. [See : May Oung's "Leading Cases on Buddhist Law, Second Edition, pages 194 to 197 ; *U Zayanta* v. *U Naga* (1), *U Pandawun* v. *U Sandima* (2) and *U Ahdeiksa* v. *Ma San Me* (3).]

I venture to suggest that a true view of this question may possibly be that a "poggalika" owner of religious property stands upon much the same footing as, prior to the law of Property Act 1926 and the Settled Land Act of 1926, an English tenant for life of property with a power of appointment over on death stood in relation to settled property and that, while there are present some of the incidents of beneficial ownership during his lifetime, they do not amount to full beneficial ownership. That is in conformity with the view of the law which has been propounded by the *Thathanabaing* and which, for the purposes of this case, I am, by agreement of the parties, bound to accept, namely, that it is possible for a *poggalika* owner, upon his death, to confer upon a third party the power to appoint a successor and that only in default of such appointment

(1) (1918) 9 L.B.R. 258. (2) (1924) I.L.R. 2 Ran. 131.
(3) (1929) I.L.R. 7 Ran. 617.

is there a remainder to the *Sangha* in general. In my view, in this case, the exercise by the two *kyaungtagas* of the power conferred upon them,—if, in fact, it was so conferred—by U Paduma, falls to be considered upon lines analogous to those of the exercise of an ordinary special power of appointment.

As I have pointed out, the act of conveyance must, under section 5 of the Transfer of Property Act, be the act of a "living" person. In the particular case before me the act of conveyance was obviously the act of nomination by the two *kyaungtagas*. It was only upon that "act" that any property passed. The "transfer" cannot have been the act of delegation to them by U Paduma, because upon that no property passed and at the time U Paduma died there had been, of course, no act of conveyance. Accordingly, the only possible act of conveyance to constitute the transfer by a "living" person must be that of the two living donees of the power. To appreciate that is, to my mind, of some little importance.

It is now possible to consider, somewhat more closely, the question whether what has happened in this case amounts to a "gift" under section 123. In my judgment, it does not. A "gift" is defined by section 122 of the Transfer of Property Act in this way :

> "'Gift' is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.
>
> Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.
>
> If the donee dies before acceptance, the gift is void."

I have conceded that there is, or may be, here a "transfer" of immoveable property by a living person (that is to say, the two *kyaungtagas*) to the plaintiffs.

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But the question remains whether the transfer was made "voluntarily and without consideration." Those words require to be very carefully considered.

To a lawyer, the word "voluntary" has a peculiar technical meaning. It is applied to such things as "voluntary transfers", "voluntary settlements" and "voluntary dispositions" In those contexts, it has the peculiar and technical meaning of "without consideration." There is no lawyer who sees the words "voluntary settlement" without instinctively taking it to mean "a settlement made without consideration." That, however, in my view, cannot be the meaning of the word "voluntarily" as used in section 122. The words are, "voluntarily and without consideration" and it is quite clear that in that context "voluntarily" must mean something different from "without consideration", as otherwise it would amount merely to a senseless repetition. I have come to the conclusion that in section 122 of the Transfer of Property Act the word "voluntarily" bears its ordinary popular meaning, denoting the exercise of an unfettered freewill and not its technical meaning of "without consideration."

I have been able to find no Indian authority which touches this point. But I have considerable support by way of analogy from various English authorities which I have been able to discover. In the case of *Attorney-General* v. *Ellis* (1), the question of the meaning of the word "voluntarily" arose in connection with the Customs and Revenue Act of 1881. For reasons no more cogent than those which apply in this case the Court came to the conclusion that the word "voluntarily" was not in that statute used in the sense of "without consideration" but bore its ordinary sense

(1) (1895) 2 Q.B. 466.

and that sense Lord Russell of Killowen defined as being "freely", "without compulsion", and "not under any obligation."

The question was again considered in *In re Wilkinson: Page* v. *Public Trustee* (1), where Lord Tomlin observed thus :

"'Voluntarily' means, obviously, the doing of something as the result of the free exercise of the will. In *Attorney-General* v. *Ellis* (1895 2 Q.B. 466), which was a revenue case, Lord Russell, when dealing with the meaning of 'voluntarily' in connection with a voluntary transfer, said: 'We are, however of opinion that in the section under consideration the word 'voluntarily' is not used in the sense of 'without consideration' but in its ordinary sense of freely, without compulsion and not under any obligation.' So, too, I think in this will the phrase is used to refer to an act done as the result of the exercise of the lady's own freewill, in circumstances in which there is nothing in the nature of a legal duty or obligation requiring her to take a particular course."

In the case of *Art Union London* v. *Overseers of the Savoy* (2), the meaning of the word "voluntary" came under the consideration of a Court of Appeal consisting of Lord Esher M.R., Kay L.J. and A. L. Smith L.J. in relation to the words "voluntary contributions", and Lord Esher and Kay L.J. there again attributed to the word a meaning implying the exercise of free will. See, too, *The Churchwardens and Overseers of the Poor of the Parish of Birmingham* v. *Shaw and Melson, Esquires, and Williams* (3).

I do not mean to imply that these English cases are by any means upon all fours with the present case. They do, however, assist, first of all, in showing that both in statutes and elsewhere the words "voluntary" and "voluntarily" are susceptible of proper use in

(1) (1926) 1 Ch. 842. (2) (1894) 2 Q.B. 609.
(3) 10 Q.B. 869.

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their popular sense as distinct from their technical sense and that that popular sense implies that the person whose action is required to be voluntary must be not only free from compulsion and free from any particular obligation or duty but also in possession of the exercise of his free will in the matter.

Applying that to the present case, can it be said that the donee of a mere special power of appointment, in exercising that appointment, does so voluntarily and without consideration? He certainly does it without consideration. But does he do it voluntarily? If the power in this case is exercised at all, then it must necessarily be exercised by way of "gift" and in no other way. The power to appoint being a power to appoint by way of gift, then *ex hypothesi* no choice between a gift and any other mode of disposition is open to the appointor. If he appoints at all, he is under both a duty and an obligation to appoint without consideration and by way of gift. He has no other choice, and, in my judgment, it can no more be said that a man, who is under an obligation to give, makes a gift "voluntarily", than it can be said that a man "voluntarily" walks straight on when he has not the opportunity to turn either to the right or to the left.

For those reasons, in my judgment, the appointment, if one was made by the *kyaungtagas* in favour of the plaintiffs, though it may have been a "transfer", did not amount to a "gift", and, accordingly, I must proceed to hear this suit upon its facts.

I have already related most of the relevant facts. The two issues which remain before the Court to deal with are, first, the issue whether U Paduma, before his death, validly conferred upon Dr. U Nyo and U Ba Nyunt the right to nominate his successor as the *poggalika* owner of the Athiti Kyaungdike, and, secondly, whether in fact, if that be so, Dr. U Nyo and

U Ba Nyunt did validly appoint the plaintiffs as *poggalika* owners.

As regards the first of those issues, the Court is happily relieved of its task, because the parties have, upon the evidence, agreed that it must be accepted that U Paduma did, upon his death bed, bestow upon Dr. U Nyo and U Ba Nyunt, the original *kyaungtagas*, the power to appoint his *poggalika* successor. The only issue, therefore, that remains is to consider whether in fact Dr. U Nyo and U Ba Nyunt validly exercised that power in favour of the plaintiffs.

[His Lordship found that the accounts of the two donors, though *bona fide*, as to what took place at the ceremony of dedication, two years after the death of U Paduma, were conflicting and that in fact the donors did not exercise their power to appoint a *poggalika* successor. One of them purported to dedicate the *kyaung* to the plaintiffs as joint temporary holders, the other as *Sanghika* property. His Lordship continued :]

Now, the power vested in Dr. U Nyo and U Ba Nyunt was, as I have already said, in my judgment, in the nature of a special power of appointment. It is clear from the answers that the *Thathanabaing* has given that the power which a *poggalika* owner has is a power either himself to nominate his *poggalika* successor or to invest someone else with a power to appoint his *poggalika* successor for him and I desire particularly to point out that what is done by the deceased owner in the first case, or is to be done by the donee of the power in the other case, is to appoint another *poggalika* owner and not merely to appoint a presiding monk. It is true that the *poggalika* owner who eventually succeeds becomes *ex officio* the presiding monk. But what he is appointed to be is *poggalika* owner and not

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presiding monk. Moreover, it is accepted as good Burmese Buddhist ecclesiastical law and is confirmed by the fourth answer given by the *Thathanabaing* that where religious property has become for whatever reason *Sanghika* property, then the right to appoint the presiding monk belongs, not to any individual, but to the *Sangha* in general.

In those circumstances we have to consider what the position is. The power which was vested in Dr. U Nyo and U Ba Nyunt was a special power to make the appointment of a *poggalika* owner to succeed U Paduma and nothing else. It is elementary that if a power is to be validly exercised both the terms of the power must be strictly complied with and the objects in whose favour it is exercised must be strictly defined. In my judgment, I am unable to find in the accounts which have been given by U Ba Nyunt and Dr. U Nyo a valid exercise of the special and particular power which was vested in them. In the first place, according to their own accounts, they were not even agreed in the matter. If I reject the story of one of them and accept the story of the other, then in neither case would it, I think, be a strict exercise of their power. If I accept U Ba Nyunt's version, then the appointment was not of a *poggalika* owner but of a *tava kalika* or temporary incumbent. If I accept the version of Dr. U Nyo, then the appointment was not an appointment of a *poggalika* owner. The power was a "joint" power and upon no footing was it exercised jointly, for one made one appointment and the other made another. I have come to the conclusion, not without reluctance, that I must hold in this case that the exercise of the power was wholly defective. Mr. Chan Htoon who, if I may say so, has said everything that can be said on behalf of his clients, has argued with force that even if this appointment were to fail as a *poggalika* appoint-

ment it ought to take effect as an appointment of presiding monks. But I cannot accept that, because, if there be a failure of appointment to *poggalika* ownership in succession to U Paduma, then the *kyaungdike* must have become *Sanghika* property and, in that event, as I have already pointed out, the appointment of presiding monks would rest not with the nominees of U Paduma at all but with the *Sanghas* in general. And that, too, is in accordance with the opinion of the *Thathanabaing*.

The defendants in this case are in possession of the *kyaung* and, accordingly, the onus lay upon the plaintiffs of establishing in themselves a title sufficient to displace the *prima facie* right of the defendants by virtue of their possession. I am, for the reasons I have given, unable in this case to find that the plaintiffs have established a title in themselves as *poggalika* owners or otherwise and, accordingly, I am not able to make an order for possession of the *kyaungdike* in their favour or for ejecting the defendants.

The suit, therefore, must fall to be dismissed. No order for costs is asked for.