

## PRIVY COUNCIL.

P. C.\*  
1907  
Nov. 5, 6  
Dec. 2.

MA WUN DI

v.

MA KIN.

[On appeal from the Chief Court of Lower Burma.]

*Marriage—Presumption of marriage from cohabitation with habit and repute in Siamese Shan States—Presumption different in different countries—Proof of repute—Entry of “wife” in Consular Certificate of nationality given to British subjects in Siam—New point taken on appeal.*

A domiciled Burman having a residence and a wife in Moulmein went on business to the Siamese Shan States where he lived for many years with the first appellant and died there leaving her and her son (by him), the second appellant, both of whom claimed a share of his property from his wife in Moulmein who was his administratrix, on the ground that a presumption of marriage arose from the above cohabitation with habit and repute whereby she had acquired the status of a legitimate wife:—

*Held*, that the habit and repute which alone is effective must be habit and repute of that particular status which in the country in question was lawful marriage. Among English people open cohabitation without marriage is so uncommon that the fact of cohabitation in many classes of society of itself sets up as a matter of fact a repute of marriage. But that is not the case in countries where customs are different, and where there exist connexions between the sexes not reproached by opinion but not constituting marriage.

*Held* in the circumstances of, and evidence in, this case, that there was no proof of repute, which required some body of neighbours, or some sort of public, nor was there any tangible evidence of the recognition of the first appellant in her quality of wife by people external to the house and independent of it. The only evidence pointing to marriage was the use of the word “wife” by some of the witnesses which showed that they applied it to persons whose status was not matrimonial.

A certificate of nationality as a British subject proposing to travel in Siam given to the deceased by the British Consulate was produced in which the first appellant was described as his “wife,” and another female relation as his “sister-in-law,” as to which it was contended that the first appellant could only be entitled to be so named in it if by marriage she had acquired the deceased’s certified nationality:—

*Held*, that the certificate was not evidence of repute at all; and any value it might have had was taken away by the insertion of the name of the sister-in-law who on no theory was a British subject.

\* *Present*: LORD ROBERTSON, LORD COLLINS, and SIR ARTHUR WILSON.

The facts of the existence of the lawful wife in Burma who was ignorant that any such connexion existed between her husband and the first appellant, that polygamy though allowed in Siam was considered disrespectful, and that concubinage was customary, were against any such presumption of marriage. No presumption, therefore, arose that the first appellant had acquired the status of a wife.

A contention that the second appellant, even if a valid marriage was not proved, was entitled by Burmese law to a share in his father's estate, not having been raised in the pleadings nor taken in the Courts below, was not entertained by the Judicial Committee on appeal.

APPEAL from a judgment and decree (March 19th 1906) of the Chief Court of Lower Burma on its Appellate side, which affirmed a decree (June 27th 1905) of the Court of the District Judge of Amherst.

The plaintiffs were the appellants to His Majesty in Council.

The suit out of which this appeal arose was brought on 27th January 1903 for a half share of the estate of one Maung Gale a Burmese Buddhist, who died at Chiengmai in Siam in July 1894, the plaintiffs claiming to be the second widow of the said Maung Gale, and his legitimate son by her.

Maung Gale was a native of and domiciled in Burma. Up to 1887 he resided in Moulmein with his wife Ma Kin, the first defendant, and his five children, the remaining defendants. In that year he went to Chiengmai in the Siamese Shan States, and with the exception of expeditions into the teak forests and occasional visits to Moulmein he lived there until his death. His estate was taken possession of by the British Consul in Siam, by whom it was made over to Maung Gale's brother Tha Huyin. In 1898 Maung Gale's wife, Ma Kin, was appointed administratrix of her husband's estate by the Courts in Burma, and shortly afterwards she brought a suit against Tha Huyin to recover the property left by Maung Gale which was taken, on appeal, to the Privy Council and was eventually compromised by the payment on 1st July 1902 of Rs. 53,000 by Tha Huyin to Ma Kin.

The plaint stated that the suit was brought against Ma Kin as administratrix of Maung Gale's estate; that the first plaintiff was lawfully married to Maung Gale at Chiengmai in 1887, where she lived and cohabited with him and assisted him in his business until his death, and that the second plaintiff (who sued by his mother as his guardian) was the only child of Maung Gale and

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the first plaintiff. The relief prayed was a declaration that the plaintiffs were respectively a widow and son of Maung Gale, and entitled as such to a half share of his estate, and for the relief consequent thereon.

The defence was that Ma Wun Di and her son were not the legal wife and legitimate son of Maung Gale; that Ma Wun Di was one of numerous concubines taken from time to time by Maung Gale during his stay in Siamese territory; that most of these concubines had been discarded by Maung Gale, and that Ma Wun Di would also have been discarded had Maung Gale not died before he could carry out his intentions; and that it had been the custom for many years past for Moulmein foresters when visiting and residing in Siamese territory to take to themselves women of the country and to discard them when they returned, but that the children of such women by such men were never considered legitimate children entitled to inherit. The defendants put the plaintiff, Ma Wun Di, to strict proof that the second plaintiff was her son by Maung Gale, and denied that the plaintiffs were entitled to any share of the estate of Maung Gale.

The material issues were (i) whether Ma Wun Di was the legally married wife of Maung Gale? (ii) Whether the second plaintiff was the legitimate son of Maung Gale? and (iii) whether either or both plaintiffs were entitled to a share in the estate left by Maung Gale, and if so, to what share? Two documents were mainly relied on by the plaintiffs, namely, exhibit A which was a certificate of nationality issued from the British Consulate at Chiangmai under the hand and seal of the Vice Consul to Maung Gale as a British subject, which was renewed in 1891 wherein Ma Wun Di is described as "wife," and none of the other women were so described, and another woman of the household was described as "sister-in-law"; and exhibit B which was a copy of the judgment in a suit in the International Court at Chiangmai carried on to the Court of Appeal at Bangkok in which Maung Gale and Ma Wun Di were sued as joint defendants and as husband and wife: the judgment on appeal was dated 20th October 1894. On the other hand, for the defendants a letter, exhibit I, from Maung Gale to his wife Ma Kin was produced in which he tells her that he "had cast off three Shan ladies and when I have

finished my work I shall cast off all " to show that Maung Gale considered Ma Wun Di only a temporary mistress or " monkey wife." 1907  
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On the evidence, the District Judge after referring to a decree of the Siamese Government setting out the manner in which a valid marriage can be contracted in Siam, and treating the burden of proof as being on the plaintiffs, said that the laws and customs on the subject appeared to him to be exactly the same as those prevailing amongst Burmese Buddhists and that although no special ceremony was necessary to constitute a valid marriage, and polygamy, though not approved of, was at any rate recognized, he was not satisfied that any marriage ceremony took place. He considered the evidence as to the conduct and relationship of Maung Gale and Ma Wun Di as showing marriage by habit and repute; and while admitting that all the witnesses said that Maung Gale acknowledged Ma Wun Di as his wife and that she was regarded as such by the neighbours and friends, yet, having regard to the circumstances under which she lived, namely, that she did not dress like the wife of a wealthy man but had to do menial work and was subordinate to a servant like the witness, Maung Bin, coupled with her conduct in not asserting her rights after Maung Gale's death, the District Judge held that not only was Ma Wun Di not regarded by the public as the legal wife of Maung Gale, but that even she herself did not consider herself as such. Further, he held that Maung Gale's letter, exhibit I, proved clearly that he only regarded Ma Wun Di as a temporary mistress or "monkey wife" whom he meant to discard like the others when he left Siam for Moulmein. He thought that, under the circumstances of the case, little or no importance was to be attached to exhibits A and B or to the fact that Ma Wun Di was described in them as "wife" of Maung Gale. He therefore decided the first two issues in the negative, namely, that Ma Wun Di was not the legally married wife of Maung Gale, nor was the second plaintiff his legitimate son. He also said that on the finding on these two issues it was unnecessary to go into the other issues; and dismissed the suit with costs.

On appeal the Chief Court (Sir H. Adamson, Chief Judge, and Mr. Justice Fox) affirmed the decision of the District Judge.

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The material portion of the judgment of the Chief Judge with which Mr. Justice Fox agreed was as follows: After stating that it was not alleged that Ma Wun Di was not fully aware that Maung Gale had a wife in Burma, the judgment continued—

“The learned Advocate for appellants has referred to the well-known principle, that the presumption of marriage arising from cohabitation with habit and repute can be rebutted only by the clearest and most satisfactory evidence. It would in my opinion be quite unreasonable to allow this presumption to arise or have any weight in the case of a woman who enters into a union with a man with her eyes open to the fact that the man has already a legally married wife. It is not forbidden to a Burman Buddhist to have two wives at the same time; but it is universally conceded that the leading principle of Buddhism is rather monogamy than polygamy, that polygamy is rare and that it is considered disrespectable. On the contrary I should be inclined to say that if a woman cohabits with a Burman whom she knows to be the lawful husband of another woman, the presumption is that she is a mistress and not a wife; and I would add that the presumption is strengthened, if, as in the present case, the cohabitation is behind the back and without the knowledge of the first wife.

“The alleged marriage between the first appellant and Maung Gale occurred in Siam, and it is necessary to consider the marriage law of that country. The appellants, throughout the case, have assumed that the marriage law of Siam is exactly the same as the Burman Buddhist law of marriage. The respondents have produced a decree of His Majesty the King of Siam, dated 1898, defining the principles of marriage contract in Siam, and the manner in which foreigners residing in Siam may obtain proof of marriage. The latter part of the decree need not be considered, because it was passed long after the union of the first appellant and Maung Gale. But the first part of the decree is important, as it shows that marriage is governed by exactly the same principles in Siam and in Burma. Marriage is a contract in both countries.

“The witnesses produced by the appellants are four from Moulmein and seven who were examined by commission in Siam.

“The most important of the Moulmein witnesses is Maung Nyein. He accompanied Maung Gale to Siam, lived with him there, and was present when Ma Wun Di and Maung Gale came together. He states that they were married on the ground that they lived together, ate together and slept together. It is quite clear from his evidence that there was no marriage ceremony. He states that the girl was asked for by Maung Gale's Burman friends who had accompanied him from Moulmein. No Shan officials were present and there was no real ceremony. Had there been any marriage ceremony, he must have known it, and as he was a witness hostile to the respondents, he would not have failed to mention it. Now Maung Gale was a wealthy man. He was a man of considerable importance in Siam, and it is stated that he lived like a prince. A man of such importance, if he had been entering into a real marriage, would have done it with show and ceremony.

“Besides Ma Wun Di, three concubines lived in Maung Gale's house. Each of the four had separate rooms. This condition of affairs is also somewhat inconsistent with the theory of marriage.

"The next Moulmein witness, Shwe La, lived for some time with Maung Gale in Siam. He states that Maung Gale had Ma Wun Di and three lesser wives in the house. He sometimes ate with all of them, but he did not eat with any of them when he had visitors. Ma Wun Di was not dressed so well as the wives of Siamese with the same wealth as Maung Gale.

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"The next witness, Maung Bin, does not help the appellant much. He was a servant in Maung Gale's house, but he appears to have held all these women in considerable contempt. The last Moulmein witness, Shwe On, is important. He was in the house with Maung Gale and Ma Wun Di when Maung Gale died. He wrote to Maung Gale's relatives in Moulmein, but apparently did not think it worth while to mention that Maung Gale had a wife in Siam. He informed the British Consulate of the death. The Consul took charge of the property, without any objection being raised by Ma Wun Di. A relative from Moulmein subsequently took out Letters of Administration at the British Consulate without any objection being raised.

"The Moulmein witnesses state that Ma Wun Di superintended Maung Gale's house, and kept his keys. But this is not inconsistent with the supposition that she was his head concubine.

"I attach little weight to the evidence of the witnesses examined on commission in Siam. There was no means of cross-examining them or of testing their evidence in any way. They say that Maung Gale and Ma Wun Di lived together, and borrowed money together, and were regarded as being man and wife. Some of them talk of a ceremony of marriage, at which there was a reception of Shan elders. But in the face of Maung Nyein's statements it is impossible to believe this evidence.

"The appellants place much reliance on two documents. One is a certificate of nationality as a British subject of Maung Gale, in which under the heading 'Names of female relations living with Maung Gale' is entered 'Ma Wun Di, wife.' The other is a decree of a Siamese Court for money against Maung Gale, husband, and Ma Wun Di, wife. I do not think that these documents offered a very strong inference that the relation of husband and wife actually existed.

"On the whole I think that the evidence is quite as consistent, and in fact more, consistent with concubinage than with marriage. The conduct of Ma Wun Di subsequent to the death of Maung Gale, raises the strongest inference that she did not regard herself as having the status of wife. She allowed the whole of Maung Gale's property to be taken possession of first by the British Consul, and then by Maung Gale's relations from Moulmein, without raising a protest. Though Maung Gale died in 1894, and though a law suit was going on about his estate for many years, she never intervened, and it was not till 1902, eight years after Maung Gale's death, and after she had herself married again, that she took any steps to assert her rights as a married woman or to obtain a share of his estate.

"As regards Maung Gale, it is very clear from his letter to his wife in Moulmein Exhibit I--which was written in 1890, three years after he had united with Ma Wun Di, that he did not regard Ma Wun Di as having the status of a wife.

"There is much evidence on the record that shows that it is customary for Burman foresters from Moulmein, who have to spend long periods in Siam on business, to take concubines in that country. One witness states that these girls

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can be got for Rs. 5 or 10 each. Maung Gale was a special sinner in this respect. At the same time he would have five or six concubines, all under the age of 16. Several of these lived in the same house as Ma Wun Di, and the evidence does not convince me that she differed in any way from them, except that she may have been the head of the harem.

"If anything more is wanting to discredit the appellant's case, it is to be found in the circumstances under which the suit was brought. The respondents had a protracted litigation with Tha Huyin, the brother of Maung Gale, which ended in Tha Huyin compromising the case by paying Rs. 53,000. Within few days after the compromise, a claim was made on behalf of the appellants for a share in Maung Gale's estate. It is Exhibit II. Ma Wun Di states that it was made without her authority or knowledge. Ma Wun Di has had to admit, after much provarication, that she is financed for the purposes of this suit by Tha Huyin and his son, U Baw. The stamp for Rs. 900 which is on the plaint is endorsed by the treasury officer as having been sold to U Baw. It is therefore pretty clear that in this suit Ma Wun Di is only the tool of Tha Huyin who is grieved because he lost Rs. 53,000 in the previous suit.

"For the reasons stated above, I agree with the lower Court that Ma Wun Di was not the legally married wife of the deceased Maung Gale."

On this appeal,

*Roskill K. C., J. W. McCarthy and T. E. Forster*, for the appellants, contended that from the undisputed fact of cohabitation with habit and repute there arose a presumption of marriage between the first appellant and Maung Gale; the onus therefore should not have been placed upon the appellants of proving the marriage, but upon the respondents to prove there was no marriage; and there was no evidence to rebut the presumption. Reference was made to *Sastry Velaidar Aronegary v. Sembecutty Vaigalie*(1). Such a presumption of marriage from cohabitation with habit and repute arose, it was submitted, even in a country or district where concubinage was not considered immoral. Polygamy was allowed by the Burmese Buddhist law which was similar to that of the Siamese Shan States where polygamy was extensively practised amongst the higher classes, but was controlled in the case of the poor by the fact that they were not allowed to have more wives than they could afford to keep. No registers were signed, and no official record of marriages was kept. No disgrace of any kind was attached to the condition of a subordinate wife, though she did not hold so high a position as the head wife. Reference was

made to "In the Kingdom of the Yellow Robe" by Earnest Young late of the Education Department Siam (Constable, 1898) pages 95, 98, 99; and "Siam in the 20th Century" by J. G. D. Campbell (1902).

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The evidence was gone into to show that the first appellant was known as the wife of Maung Gale; and exhibits A and B were especially relied upon for that purpose, it being contended with regard to the former document, which was a certificate of nationality from the British Consulate given to Maung Gale when travelling on business in Siam as a British subject, that the fact that the first appellant was named in it as "wife," proved that she also was a British subject, to which description she had no right unless she was the lawful wife of Maung Gale. If she were not a British subject she could not be sued in the British Courts.

It was also contended that even if no valid marriage between Maung Gale and the first appellant were proved, the second appellant was still entitled under the Buddhist law to a share of Maung Gale's estate. [*Cowell* objected that that point was not raised in the pleadings nor taken in the lower Courts.] The third issue\* was referred to as showing that it was a question in issue in the case. [Their Lordships held that they were unable to entertain the point.]

*Cowell*, for the respondents, was not heard.

The judgment of their Lordships was delivered by

LORD ROBERTSON. The question in this appeal is one of fact; and it has been decided against the appellants by two Courts. The case, however, deserves attention, for there has been a strong appeal made to the general presumption of marriage arising from cohabitation with habit and repute.

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It is necessary, before applying this presumption, to make sure that we have got the conditions necessary for its existence. It is not superfluous to suggest that, first of all, there must be some body of neighbours, many or few, or some sort of public, large or small, before repute can arise. Again, the habit and

\* Ante, page 234.



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repute, which alone is effective, is habit and repute of that particular status which, in the country in question, is lawful marriage.

The differences between English and Oriental customs about the relations of the sexes make such caution especially necessary. Among most English people, open cohabitation without marriage is so uncommon that the fact of cohabitation in many classes of society of itself sets up, as matter of fact, a repute of marriage. But, in countries where customs are different, it is necessary to be more discriminating, more especially owing to the laxity with which the word "wife" is used by witnesses in regard to connexions not reprobated by opinion, but not constituting marriage.

In the present case the broad facts are these: a domiciled Burman, Maung Gale, has his house and wife at Moulmein in Burma; his business took him to Siam, and there he lived for years with various other women, and with the principal appellant, Ma Wun Di, who, for shortness, will be called the appellant. The appellant has maintained that, while the other women were concubines, she was a wife, taken as a second wife, the first wife being all the time in Burma. The opposite contention is that, while the appellant was older than the other women (who all lived in the same house) and had, for that reason and also for reasons of choice, a stronger hold on the man, yet she has not made out the status of a wife. It is a noticeable feature of the case that the appellant, in her own evidence and in the evidence of other witnesses examined for her, endeavoured to set up a marriage ceremony as having inaugurated the connexion; but her counsel in the appeal declined to maintain this part of her case, which was represented as resting on habit and repute. Now the first difficulty is that apparently this is a part of the world where there are not many people at all to act the part of neighbours or the public; and at all events there is no tangible evidence of recognition of this woman, in her quality of wife, by people external to the house and independent of it. What evidence she has is that of the people who either speak to the abandoned marriage ceremony or distinguish her position in the house as one of more consequence, and her stay in it as of longer duration, than those of the other women. In truth, when all is said, there is little more pointing to marriage than the use of the

word "wife" by some of the witnesses; and the most cursory, as well as the most careful, examination of the evidence shows that it is applied to persons whose status is not matrimonial.

Nor has the appellant, in evidence or in argument, faced the grave difficulty which arises from the existence of the lawful wife in Burma. The following observations of the Chief Judge are apposite and weighty:—

"It is not forbidden to a Burman Buddhist to have two wives at the same time; but it is universally conceded that the leading principle of Buddhism is rather monogamy than polygamy, that polygamy is rare and that it is considered disrespectful. On the contrary, I should be inclined to say that if a woman cohabits with a Burman, whom she knows to be the lawful husband of another woman, the presumption is that she is a mistress and not a wife; and I would add that the presumption is strengthened if, as in the present case, the cohabitation is behind the back and without the knowledge of the first wife."

There remains to be noticed one point which the appellants' counsel treated as part of his case of habit and repute, and which seemed to be regarded as the most substantial item of it. Maung Gale, in 1887, obtained a certificate of nationality as "a British subject, proposing to travel in Siam." In 1891 he renewed it; and as part of the docket of renewal, which is signed by the Acting Vice-Consul, are the words: "Names of female relations living with Maung Gale: (i) Ma Wun Di, wife; (ii) I Mun, sister-in-law." The argument upon this document is that the appellant could only be entitled to be named in this certificate of nationality if, by marriage, she had acquired her husband's certified nationality. On this, however, it is to be observed, first, that this is not evidence of repute at all; the Vice-Consul is not proved to have had any personal knowledge of these people at all, and the most it comes to is that, on this occasion, Maung Gale said that Ma Wun Di was his wife. But, further, any value or relevance which this writing has in the present case is entirely taken away by the addition of the sister-in-law, who on no theory was a naturalised British subject. The truth probably is that the entry is put in merely as an item of information identifying

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Maung Gale, in addition to those given in the body of the certificate.

The appellants' counsel endeavoured to raise the question whether the second appellant, who is the son of the first appellant by Maung Gale, was not entitled to a share of Maung Gale's estate, even assuming no marriage to be proved. Whether the third issue in the suit was, in its terms, susceptible of the wider construction thus suggested for it or not, the parties, by their conduct of the case, have construed it in the narrower sense of assuming the existence of a marriage; and the point urged by Mr. Roskill having been submitted in the conduct of the case to neither Court, their Lordships are unable to entertain this question.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed. The appellants will pay the costs of the appeal.

*Appeal dismissed.*

Solicitors for the appellants: *Bramall & White.*

Solicitors for the respondents: *Gregory, Day & Co.*

J. V. W.