Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Abdool Razack v. *Aga Mahomed Jaffer Bindaneem, from the Court of the Recorder of Rangoon; delivered 10th March 1894.*

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

Hadjee Hoosain, who was a member of a Mahomedan family belonging to the Shiah sect and settled in Calcutta, traded as a merchant in Rangoon, made a fortune, and died there, married but without issue, in February 1890. He left a will by which he purported to dispose of all his property. Hadjee Hoosain had an only brother of the full blood called Abdul Hadee, who died before him in March 1886. He too was engaged in business in Rangoon for many years, but his career was less prosperous, and he returned to Calcutta a poor man some time before his death. The Appellant claims to be the lawful son of Abdul Hadee by a Burmese woman, and as such to be the heir or one of the heirs of Hadjee Hoosain and entitled therefore to a share in so much of his estate as he could not dispose of by will according to Mahomedan law. For the purpose of the present case it is conceded that the Appellant's claim is well founded, provided he can make out that he either is or is entitled to

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case. There is nothing in the evidence tending to show that Mah Thai made any profession of the Mahomedan faith before or at the time of the ceremony which is said to have constituted marriage. Mah Thai was a witness for the Appellant. She said that she knew nothing about the Mahomedan religion; all her life she lived and worshipped as a Burmese. While cohabiting with Abdul Hadee she worshipped as he did; she repeated his prayers. But she added that she did not understand the meaning of a single word. In re-examination she said that she ceased to be a Buddhist during her cohabitation with Abdul Hadee from the time of her marriage.

The learned Counsel for the Appellant then invited their Lordships to embark on a wider inquiry. They proposed to examine and discuss the tenets of Buddhism with the view of showing that Buddhists come under the same category as Jews and Christians, with whom undoubtedly Mahomedans may intermarry. But it was obviously impossible for their Lordships to entertain the question in the present case. In the Court below it was common ground that such a marriage would be invalid, and there was therefore no evidence before the Court directed to the point.

In the next place it was urged that every presumption ought to be made in favour of marriage when there had been a lengthened cohabitation, especially in a case where the alleged marriage took place so long ago that it must be difficult if not impossible to obtain a trustworthy account of what really occurred. There would be much force in this argument—indeed it would be almost irresistible—if the conduct of the parties were shown to be compatible with the existence of the relation of husband and wife. In cases like the present conduct is a very good test,

or any of Abdul Hadee's male relatives. At the end of about a year and a half, when she was far gone in pregnancy, she went back to her mother's home in Mangi. She was confined there of a boy, whom she indentifies as the present Appellant. When the child was born she sent a message to Abdul Hadee to tell him of the birth. His answer was that he was busy and could not come. He sent however money for expenses, and he sent a message to her parents to look after her. On two occasions afterwards he went to Mangi to visit her, re turning to Rangoon in the evening. The first visit was about six months, the second about twelve months, after the birth of the child. On the first occasion Mah Thai says she saw Abdul Hadee alone but nothing in particular was said. He wrote on a piece of paper a Mahomedan name for the child. Afterwards for fear it would be lost it was copied on a palm leaf. The name was never used. The paper and the palm leaf have disappeared. But Mah Thai says the name was "Abdool Razack" and that name has been reproduced or adopted in connection with this claim. On the second occasion, according to Mah Thai's statement, Abdul Hadee wanted to take the child to Rangoon, and wanted her to go with him. She said she was not well yet and that the child was not old enough. That was the last occasion on which Mah Thai saw Abdul Hadee. So far as appears she never even heard from him or of him afterwards. He was at that time apparently in prosperous circumstances, but he made no provision for her or for the child, and he left the child to be brought up as an unbeliever without so much as performing the primary rite of his religion. Mah Thai was very badly off, but she never applied to her alleged husband for assistance, nor did she make any attempt to see him, though she knew where he lived, and he

marriage, that it will not be out of place to quote a passage from it. After stating as a matter apparently not open to controversy that in order to constitute a valid marriage between a Mussulman and a Burmese woman, the woman must first apostatize and embrace Islam, the judgment proceeds as follows :—

"In a country like this, where a large number of Mahomedans from other countries have taken up their residence, and in very many cases their permanent abode, and when the natives have no race prejudices against alliances with foreigners, and whose religion offers no impediment to such, we find these mixed marriages everywhere existing among them, which have been duly celebrated according to Mahomedan rites; the wife having previously renounced her own religion and embraced that of her husband. Such an alliance is not regarded by either party as one of a temporary character, or in any way partaking of concubinage such as the *liaisons* which at one time prevailed here between Europeans and the women of the country, but as a formal and a binding marriage. It only requires a short experience of this country to know that these marriages are regarded amongst the Mahomedan community as being of as binding a character, and as conferring on the wife as honorable a position in the family as if she had been of Mahomedan descent: for she holds the same position as the husband's other wife does, if he happens to have another. The offspring likewise of these marriages are brought up in the Mahomedan faith, and are acknowledged by their father as his legitimate children, and at his death share in his property as such. The Burmese wife also takes the wife's share, if she is the only one, or divides it with the other or others as the case may be; and these rights both as regards the children and the wife are recognized by our Courts."

If this be a correct description of the position of a Burmese woman lawfully married to a Mahomedan settler in Rangoon it certainly would require a very violent presumption in favour of marriage to enable the Court to hold that Mah Thai was lawfully wedded to Abdul Hadee. It is tolerably obvious that neither Abdul Hadee nor Mah Thai regarded the ceremony which preceded their cohabitation in the light of a lawful and binding marriage. On this point their Lordships are glad to find

" previous acknowledgment of Defendant's " legitimacy, if such were made?" In the course of their judgment (p. 104) their Lordships comment upon that issue. It was, they said, " very correctly framed. It substitutes for the " ambiguous word 'sonship,' which might " include an illegitimate son, the word 'legiti- " macy,' and uses the word 'acknowledgment' " in its legal sense, under the Mahomedan law, " of acknowledgment of antecedent right esta- " blished by the acknowledgment on the " acknowledger, that is, in the sense of a " recognition, not simply of sonship, but of " legitimacy as a son." It is clear that it is in that sense that the term "acknowledgment" is used in a later passage of the judgment which has often been cited, where their Lordships say " a child born out of wedlock is illegitimate; " if acknowledged, he acquires the *status* of " legitimacy. When, therefore, a child really " illegitimate by birth becomes legitimated, it " is by force of an acknowledgment expressed or " implied, directly proved or presumed."

It cannot be contended that there was any acknowledgment of legitimacy in the present case. The so-called acknowledgment, even if the evidence on the part of the Appellant is accepted as true in every particular, comes to nothing more than an admission of paternity which was not intended to have the serious effect of conferring the status of legitimacy. A witness is produced who says he accompanied Abdul Hadee on his second visit to Mangi, and that Abdul Hadee told him that he was going to see his son. And there is some other evidence to the like effect. Then there is some evidence that Abdul Hadee, though he had no property, left a will, bequeathing everything to his brother Hadjee Hoosain, in which he mentioned that he had offspring in Burma. According to one