Privy Council Appeal No. 58 *of* 1938

Tan Ma Shwe Zin and others - - - - *Appellants*

v.

Koo Soo Chong and others - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT RANGOON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND JUNE, 1939

Present at the Hearing:
LORD RUSSELL OF KILLOWEN
SIR GEORGE RANKIN
MR. M. R. JAYAKAR

[*Delivered by* SIR GEORGE RANKIN]

The suit out of which this appeal has arisen was brought on the 7th March, 1934, by the first respondent, Khoo Soo Chong, in the High Court at Rangoon in its original civil jurisdiction. The purpose of the suit was to establish that the plaintiff is the sole heir to the estates of his uncle, Khoo Boon Tin, and of Tan Ma Thin, this uncle's widow, either (1) as their adopted son, or (2) as the former's nephew. It has been held in the High Court, both at first instance and on appeal, that the plaintiff failed to prove that the alleged adoption was in fact made, and though this issue has been raised again before the Board, their Lordships see no reason to disturb the concurrent findings on this point.

The facts which bear upon the plaintiff's claim as nephew may be shortly stated. His uncle, Khoo Boon Tin, was the eldest of four sons of a Chinaman who lived in Burma. The family professed the Buddhist religion, and Khoo Boon Tin married Tan Ma Thin, also a Chinese and a Buddhist. He died in 1906 childless. Of his three brothers, the second son had predeceased him leaving no children. The third Khoo Htwa Khan survived till 1917 and died leaving three sons of whom the plaintiff is the eldest having been born on 31st March, 1905. The fourth son Khoo Hine Htow was alive at the time of the present suit and gave evidence at the trial for the plaintiff.

On the death of Khoo Boon Tin in 1906, his widow, Tan Ma Thin, entered into possession of his property, obtained letters of administration to his estate from the Chief Court, carried on his business and engaged in other business. She died on 14th April, 1929, having made a will dated 29th June, 1927. Her estate was sworn at over two lakhs of rupees. Probate was obtained of the will from the High Court on 24th August, 1929. By it she had made a number of charitable and other bequests, including a legacy of

Rs.2,000 to the plaintiff, but she had made no residuary bequest and part of her property was not disposed of by her will. If the Indian Succession Act applied to her will, the charitable bequests were invalid under section 118 thereof, as the will had not been deposited in accordance with the terms of that section.

On the 24th November, 1930, her sister, the first appellant, sued on the Original Side of the High Court for administration of her estate claiming that the present appellants (that is, herself, her sister and her brother) were the only heirs and that the charitable bequests were invalid. The present plaintiff was not impleaded and the suit proceeded against the other sister of the testatrix, her brother and her executors. The trial Judge upheld the charitable bequests on the ground that the will was governed by English law and not by the Indian Succession Act; but on appeal Page C.J. and Cunliffe J. [*Tan Ma Shwe Zin* v. *Tan Ma Ngwe Zin* (1932) I.L.R. 10 Rangoon 97] held that the law to be applied to "Chinese Buddhists" was Chinese Customary law and remanded the case. On remand it was held by Sen J. (11th July, 1933), that the charitable bequests were valid and that each of the present appellants was entitled to one-third of the property not disposed of by the will.

Thereafter on 7th March, 1934, some 28 years after the death of his uncle and about five years after the death of his aunt, the respondent by his plaint in the present suit claimed that he was sole heir to both, on the footing that Chinese Customary law governed inheritance and succession to Chinese Buddhists in Burma and that in any case the widow had only a limited interest in her husband's estate and had no right to dispose of it. In the High Court both the trial Judge (Sen J.) and the Division Bench (Robert C.J. and Leach J.) on appeal from him, held that Chinese Customary law governed the case. But the trial Judge was not satisfied that under that law a childless widow had no rights in her husband's estate or in her own personal estate acquired after the death of her husband. By his decree dated 3rd June, 1930, he dismissed the suit.

The Division Bench, however, proceeding largely upon Jamieson's "Chinese Family and Commercial Law", held in favour of the plaintiff that on the death of his uncle the plaintiff should have been adopted by the agnates and was entitled to the inheritance: that a wife is entitled to no estate of her own as all she brings to her husband or receives vests in her husband's family; but that, as she is entitled to be in control of the inheritance during her life, time did not run against the plaintiff till the death of Tan Ma Thin in 1929. The result of this decision was an order that an account be taken to ascertain what the plaintiff was entitled to, with a direction that the only property to be excluded as property of Tan Ma Thin to which the plaintiff was not entitled, was "ornaments and jewellery and valuables of the like nature together with silk stuffs and all property of whatever kind as [*sic*] may have been given by her husband to her in his lifetime".

The plaintiff can maintain this decree only if he establishes (1) that Chinese Customary law governs the succession, (2) that under it the eldest son of the younger brother of the propositus takes in preference to his widow if he died childless, and (3) that in her lifetime the widow is entitled to possession of the estate so that her possession is not adverse to the nephew. By this appeal the two sisters and the brother of the widow, challenge each of these propositions.

The first question is as to the law to be applied by the High Court at Rangoon to determine the person or persons entitled to succeed to the property in Burma of a Chinaman who was a Buddhist and who was domiciled in Burma at the date of his death. This question depends upon the true construction and effect of section 13 of the Burma Laws Act (XIII of 1898):—

> "(1) Where in any suit or other proceeding in Burma it is necessary for the Court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution—
>
> (*a*) the Buddhist Law in cases where the parties are Buddhists,
>
> (*b*) the Muhammadan Law in cases where the parties are Muhammadans, and
>
> (*c*) the Hindu Law in the cases where the parties are Hindus,
>
> shall form the rule of decision, except in so far as such law has by enactment been altered or abolished, or is opposed to any custom having the force of law.
>
> (2) Subject to the provisions of sub-section (1) and of any other enactment for the time being in force, all questions arising in civil cases instituted in the Courts of Rangoon shall be dealt with and determined according to the law for the time being administered by the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction.
>
> (3) In cases not provided for by sub-section (1) or sub-section (2), or by any other enactment for the time being in force, the decision shall be according to justice, equity and good conscience."

This section is in similar terms to those of sections 6 and 7 of Act VII of 1872, sections 4 and 5 of Act XVII of 1875, and section 4 of Act XI of 1889. These enactments introduced into Burma a distinction which arose in Bengal as regards the law applied to Indians (1) throughout the province by the Company's Courts and (2) within the town of Calcutta by the Supreme Court. Subsections (1) and (3) of section 13 above set forth correspond to the provision first made by Warren Hastings in 1772, later incorporated in s. 15 of Regulation IV of 1793, and now to be found in section 37 of the Bengal, Agra and Assam Civil Courts Act, 1887. This prescribed the law to be applied by the civil courts throughout the province of Bengal; it had special reference to what may be called family law and religious institutions leaving other matters to the general principles of justice; it contemplated two classes only—Mahomedans and Hindus. In applying it to Burma the Indian Legislature put Buddhists on the same footing as Mahomedans and Hindus and "the Buddhist law" on the same level as the Mahomedan and Hindu laws. It introduced at the same time an express

saving for custom which the Bengal enactments had never contained. Subsection (2) above cited points to the provision made by section 17 of 21 Geo. III, c. 70, whereby jurisdiction within Calcutta was given or confirmed to the Supreme Court over Indians, but the law of England which would otherwise have been the general rule of decision applied by the Court within Calcutta was excluded in favour of the Hindu or Mahomedan law so far as regards the matters mentioned in the section. This provision when re-enacted in 1915 in the Government of India Act, section 112, was generalised and is not now limited by any specific reference to particular races or religions. It was never at any time confined to family and religious matters: it included " all matters of contract and dealing between party and party ".

That these two different methods should have existed side by side for so long and should from 1872 have been applied to Burma is a remarkable fact—only in part explained by the consideration that over a wide field express legislation has in the interval superseded both: statutory codes like the Indian Contract Act and the Transfer of Property Act having provided for many matters a law common to all races and religions. As the present suit was instituted in the High Court, if not concluded by the provisions of sub-section (1) it will fall to be decided if possible under subsection (2).

In the application of sub-section (1) of section 13 above cited, difficulty has arisen out of the immigration into Burma of Chinamen some of whom profess the Buddhist faith. It does not appear that there is any Chinese form of Buddhist law, and as regards succession and inheritance the Chinaman who is a Buddhist is in China governed by customs or laws which are not connected with the religious beliefs of Buddhists and are applied equally to Chinamen who are not Buddhists. This is referred to as Chinese Customary law, though it would seem that in or about 1930 a new code was introduced in China and that parts of the " Customary law " have from of old been codified. For a number of years the Courts in Burma have been in doubt as to the effect to be given to subsection (1) in these circumstances. In 1881 the difficulty was noticed by Sir John Jardine in *Hong Ku* v. *Ma Thin* (Select Judgments, Vol. I, p. 135, 144).

> " We all know that the Courts apply different systems of both Hindu and Mahomedan law to people belonging to different races, countries or sects. I doubt therefore whether it is obligatory on our Courts here to apply the Burman Buddhist law to Buddhists from Ceylon or China."

In *Fone Lan* v. *Ma Gyee* (1903) 2 L.B.R. 95, Sir Charles Fox considered that by the words Mahomedan law and Hindu law the legislature meant " the laws applicable to such Mahomedan and Hindu parties whencesoever such laws may be derived " and that " the terms Buddhist law must be read in the same way—namely as meaning the law of succession, inheritance, marriage, etc., applicable to the Buddhist parties in the case ". " The personal law ", he held, " is left to all who are exempted from the operation of the Indian Succession Act ". Accordingly he applied the Chinese Customary law to the claim of the plaintiff to be an adopted

daughter and to succeed to the estate of a Chinese Buddhist. This view was followed in a considerable number of cases though it had been dissented from in *Apana* v. *Ma Shwe Nu* (1907) 4 L.B.R. 124. In *Man Han's* case (1926) I.L.R. 4 Rangoon 111, 114, Chari J. considered that Chinese Customary law had been applied as equity under subsection (3): he doubted the equity of this but agreed that Burmese Buddhist law should not be held applicable.

> "The provision of the Burma Laws Act that Buddhist Law shall apply in cases where the parties are Buddhists presupposes the existence of a Buddhist Law applicable to the particular class of Buddhist before the Court."

In the case of *Ma Yin Mya* (1927) I.L.R. 5 Rangoon 406, Maung Ba J. referred to a Full Bench the question of the law to be applied to marriages in Burma between Chinese Buddhists. The question seems to have related to the form or ceremonial of marriage and the discussion was to some extent clogged with questions as to mixed marriages between Chinamen and Burmese women. It was held that the Burmese Buddhist law was applicable as the *lex loci contractus* and that to escape from it a Chinaman must prove a custom contrary thereto. Thereafter the Division Bench which dealt with *Man Han's* case on appeal [(1927) I.L.R. 5 Rangoon 443] applied Burmese Buddhist law to the question whether a judgment creditor of a Chinese Buddhist could levy execution on the wife's share of their joint property.

In *Chan Pyu* v. *Saw Sin* (1928) I.L.R. 6 Rangoon 623, Pratt J. regarded the Full Bench decision as applicable to the "law of marriage" only and not to the "law of inheritance" and agreed with what Sir Charles Fox had said in *Fone Lan's* case which he regarded as settled law. Cunliffe J. disagreed with the Full Bench decision but thought it binding though only as to marriage. He appears to have considered that "Buddhist law" could not mean Burmese Buddhist law unless "Buddhists" was confined to Burmese Buddhists.

Thereupon in *Phan Tiyok* v. *Lim Kyin Kauk* (1930) I.L.R. 8 Rangoon 57 there was referred to a Full Bench the question: Does Burmese Buddhist law govern the succession to the estate of a Chinese Buddhist born in China but who was domiciled and died in Burma? All five members of the Full Bench answered this question in the negative; but they varied in opinion as to the law which does govern such succession. The suit in that case had been brought in the District Court of Amherst. Otter J. considered that Chinese Customary law was to be applied though a Chinese Buddhist was just as much a Buddhist as a Burmese Buddhist. Heald A.C.J. and Chari J. thought that Chinese Buddhists were not Buddhists within the meaning of the section or of the exceptions to the Indian Succession Act and that the Indian Succession Act applied to them *proprio vigore*. Maung Ba J. and Brown J. thought that the Chinese

Buddhist is a Buddhist within the section but that the provisions of the Indian Succession Act applied to him as a matter of justice, equity and good conscience under subsection (3).

In 1932, as already mentioned, the suit brought by the first appellant in the High Court to administer the estate of her sister Tan Ma Thin came before Page C.J. and Cunliffe J. The appeal was from Dunkley J. who had held that English law must govern the succession as a matter of justice, equity and good conscience under subsection (3). The Division Bench did not regard itself as bound by the Full Bench decision in *Phan Tiyok's* case to apply the English law or the rules of the Indian Succession Act as the only question referred to the Full Bench had been the question whether Burmese Buddhist law applied. Page C.J., with whom Cunliffe J. agreed, held that a Chinese Buddhist is a Buddhist within the meaning of the Burma Laws Act and the Indian Succession Act and that the case fell accordingly within the first subsection of section 13. Applying subsection (1) he proceeded on the ground that it was a fundamental principle of British policy that the particular habits and customs of the various communities under British rule should be recognised and respected.

> " But the language in which the section is couched is unfortunate for there is no law by which all Hindus or all Mahomedans are governed, and in the strict sense of the term no Buddhist law at all. The system of law applicable to Sunni Mahomedans differs from that to which Shiah Mahomedans are subject; Hindus who follow the Benares school are governed by the Mitakshara, those who follow the Bengal school by the Dayabhaga; while in the religious system known as Buddhism no rules of law concerning secular matters are laid down or prescribed. Bearing in mind the object that the Legislature had in view, however, the meaning and effect of the expressions ' Buddhist Law ', ' Mahomedan Law ' and ' Hindu Law ' in section 13, in my opinion, is plain and section 13 (1) must be construed as laying down that in ' any question regarding succession, inheritance, marriage or caste or any religious usage or institution ' where the parties profess the Buddhist or Mahomedan or Hindu religion the rule of decision shall be the personal law that governs the community or religious denomination to which the parties belong, except in so far as their personal law in Burma ' has by enactment been altered or abolished or is opposed to any custom having the force of law '. In my opinion it would be neither reasonable nor feasible to construe the section in any other sense."

This decision was regarded by both of the tribunals in India who dealt with the present case as settling the law in the sense that Chinese Customary law must in Burma govern the succession to a Chinese Buddhist. Had there in fact been a settled course of judicial decision in Burma upon the question, their Lordships would have been loath to disturb it. But from their review of the decisions it is abundantly clear that the important question now before the Board cannot be answered upon the mere principle of *stare decisis*. At the highest it may be said that there is a substantial preponderance of opinion against applying Burmese Buddhist law to the case of a Chinaman who is a Buddhist. As to the consequences of this opinion—the choice between Chinese Customary law and the principles of English law

or the Indian Succession Act—the decisions are not settled but conflicting. The matter must now be determined upon the words of section 13 as a question of construction.

Their Lordships are in agreement with Page C.J. that a Chinaman who is a Buddhist comes within the term "Buddhists" in clause (*a*) of subsection (1) of section 13, and cannot be excluded therefrom either on the ground that he is not a Burmese Buddhist or because the law which governs him in China is not a specifically Buddhist or even a religious law. The same is true of the word "Buddhist" in the Indian Succession Act, 1865 and in the present Act of 1925. It follows from this view, as the learned Chief Justice noticed, that subsection (1) must be applied to such a case as the present. There would be little difficulty, were it shown that different schools of Buddhist law obtained in different places or among different peoples, in applying to Buddhist law the principle that in each case the appropriate school of law is that to which the propositus or the persons concerned owned allegiance. As regards Hindu law indeed this principle has never been in doubt. Ample authority for it is to be found in decisions of the Board—as regards Mahomedan law in *Rajah Deedar Hossein* v. *Ranee Zuhooroon-Nissa* (1841) 2 Moo. I.A. 441; as regards Hindu law in *Rutcheputty Dutt Iha* v. *Rajunder Narain Rae* (1839) 2 Moo. I.A. 132; *Surendra Nath Roy* v. *Hiramani Barmani* (1868) 12 Moo. I.A. 81; *Parbati Kumari Debi* v. *Jagadis Chunder Dhabal* (1902) I.L.R., Cal. 433; *Balwant Rao* v. *Baji Rao*, I.L.R., 48 Cal. 30.

But this principle does not justify the Court in applying as Buddhist law a law which is not Buddhist at all, merely because it is applied generally in China to Chinamen without any special exception for Buddhists. The law which is described in the statute as "the Buddhist law" is like the Hindu and Mahomedan law intended to be applied by the Court as a law known to the Court, and administered by the Court of its own skill and competence. If the phrase *lex fori* be used in this sense the Buddhist law, as Sir John Jardine observed in *Hong Ku's* case (*supra*, at p. 143 of the report), becomes under the Act one of several *leges fori*. It cannot be confounded or identified with a foreign law which has to be proved as matter of fact in each case by the appropriate evidence. It is doubtless true of the provisions made for Buddhists, Hindus and Mahomedans by the subsection, as it was of the parallel provisions for Hindus and Mahomedans previously in force in Bengal, that the general intention of the legislature is that persons coming within these classes should be governed by their own law. That is the intention which has always been attributed to Regulation IV of 1793, and to the Civil Courts Acts which took its place. It was never, perhaps, better stated than by Sir William Jones advocating the passing of such a Regulation:—

> "Nothing could be more obviously just than to determine private contests according to those laws, which the parties themselves had ever considered as the rules of their conduct and

engagements in civil life: nor could anything be wiser than by a legislative Act, to assure the Hindu and Mussulman subjects of Great Britain, that the private laws which they severally hold sacred, and violation of which they would have thought the most grievous oppression, should not be suppressed by a new system, of which they could have no knowledge, and which they must have considered as imposed on them by a spirit of rigour and intolerance." [Lord Teignmouth's Life of Jones, p. 106.]

And in *Munshee Buzloor Ruheem* v. *Shumsoon-nissa Begum* (1867) 11 Moo. I.A. 551, this Board said:—

" They can conceive nothing more likely to give just alarm to the Mahomedan community than to learn by a judicial decision that their law, the application of which has been justly secured to them, is to be over-ridden upon a question which so materially concerns their domestic relations."

The same principle is at the root of the decisions, already referred to, applying to Hindus and Mahomedans the school of law applicable to their particular family or sect. Baron Parke, in a Hindu case, based this construction of s. 15 of Regulation IV of 1793 on the consideration that " the law of succession of the *Hindoos* partakes greatly of their religious opinions and is part of their system " [*Rutcheputty Dutt Jha* v. *Rajunder Narain Rae* (1839) 2 Moo. I.A. 132, at 167] and in a Mahomedan case said:—

" Such is the natural construction of this Regulation, and it accords with the just and equitable principle upon which it was founded, and gives effect to the usages of each religion, which it was evidently its object to preserve unchanged." [*Rajah Deedar Hossein* v. *Ranee Zuhoor-von-Nissa* (1841) 2 Moo. I.A. 441 at 477.]

The principle was most succinctly stated by Sir Erskine Perry in the well-known *Cutchi Memon* case, 1847 [Perry's Oriental Cases, 110] with reference to similar provisions in the statute establishing a Supreme Court at Bombay and Madras (37 Geo. III c. 142, s. 13) as " the principle of *uti possidetis*."

But while the policy or general purpose of the Legislature in prescribing " the Buddhist law in cases where the parties are Buddhists " is not in doubt, and has full effect upon the general population of Burma, it is not open to the Courts to adopt some other law for particular classes of Buddhists by reason that the prescribed method will not in such cases attain the desired result. The statute has made such exceptions to the enforcement of Buddhist law as were considered necessary, including a highly important saving as to custom, and it does not admit of being interpreted in such a sense that Buddhist law is only to be applied to Buddhists if it be the law prevailing in the country of their origin. The historical considerations to which their Lordships have alluded do not suggest that the intention of the sub-section is to prescribe for each Buddhist whatever law is found to govern him, but rather that all Buddhists shall be governed by a religious law which is deemed to be theirs as Buddhists. This assumption may be in some respects ill-founded. The influx of Chinese into Burma may not have been anticipated or the relation between religion and law in China may have been imperfectly understood in 1872 when the rule now contained in the statute of 1898 was first introduced, or in 1865 when Buddhists were excepted from certain provisions of the Indian Succession Act. There may

be difficulty and inconvenience in applying to Chinese Buddhists a law which is different from that which is applicable to them in China. It may therefore be that there is something here for reconsideration by the legislature. But it is a problem *de lege ferenda* and is not to be solved by interpreting the section in a sense of which it does not admit. Nor is a true construction of the section advanced by entertaining doubt whether the Buddhist law as it obtains in Burma really deserves so to be described in view of its Indian origin and of the indirectness of the influence of Buddhism thereon.

Some assistance is to be derived from the view taken by the Board in *Abraham* v. *Abraham* (1863) 9 Moo. I.A. 199, which was distinguished in *Jowala Baksh* v. *Dharum Singh* (1866) 10 Moo. I.A. 511). In the former case, before the Indian Succession Act of 1865, a Hindu family converted to Christianity had no law of inheritance imposed on them by statute and as a matter of equity and good conscience its members were held to be governed by the law and usages which they had either retained or adopted. But it was held in the later case that this reasoning did not apply to a Hindu family which had embraced Islam because " the written law of India has prescribed broadly that in questions of succession and inheritance the Hindu law is to be applied to Hindus and the Mahomedan law to the Mahomedans" (p. 537). Hence Hindu law could not be applied to them save on proof of special usage controlling the Mahomedan law which was not in that case forthcoming.

Their Lordships find themselves in agreement with the view which was taken by the Judicial Commissioner, Mr. Burgess, in the case of a Buddhist native of Chittagong who had settled in Burma, that "*prima facie* as a Buddhist deceased would come under the Buddhist law of the country at large, and the burthen of proving any special custom or usage varying the ordinary Buddhist rules of inheritance would be on the person asserting the variance" [*Ma Tin* v. *Doop Raj Bavna Chan Toon,* L.C., Vol. I, p. 370]. In *Fone Lan's* case (*supra*) Sir Charles Fox cited these words and added, " If by the words 'country at large' he meant 'the province of Burma' I venture to doubt the proposition "; but their Lordships think that the proposition is well founded. As a question of construction this view is greatly to be preferred to the view that there is really no such law as Buddhist law but only Burmese Buddhist law; and the consequences which it entails are not less reasonable or convenient than are arrived at by applying to a Chinese Buddhist in the name of justice, equity and good conscience, those English principles of succession from which the Indian Succession Act exempted Buddhists.

To what extent and on what conditions the provision as to custom may enable a Chinaman who is a Buddhist to retain the usages of his country of origin as regards matters mentioned in the subsection are questions of considerable moment upon this construction of sub-section (1). As observed by Sir Lawrence Jenkins delivering the judgment

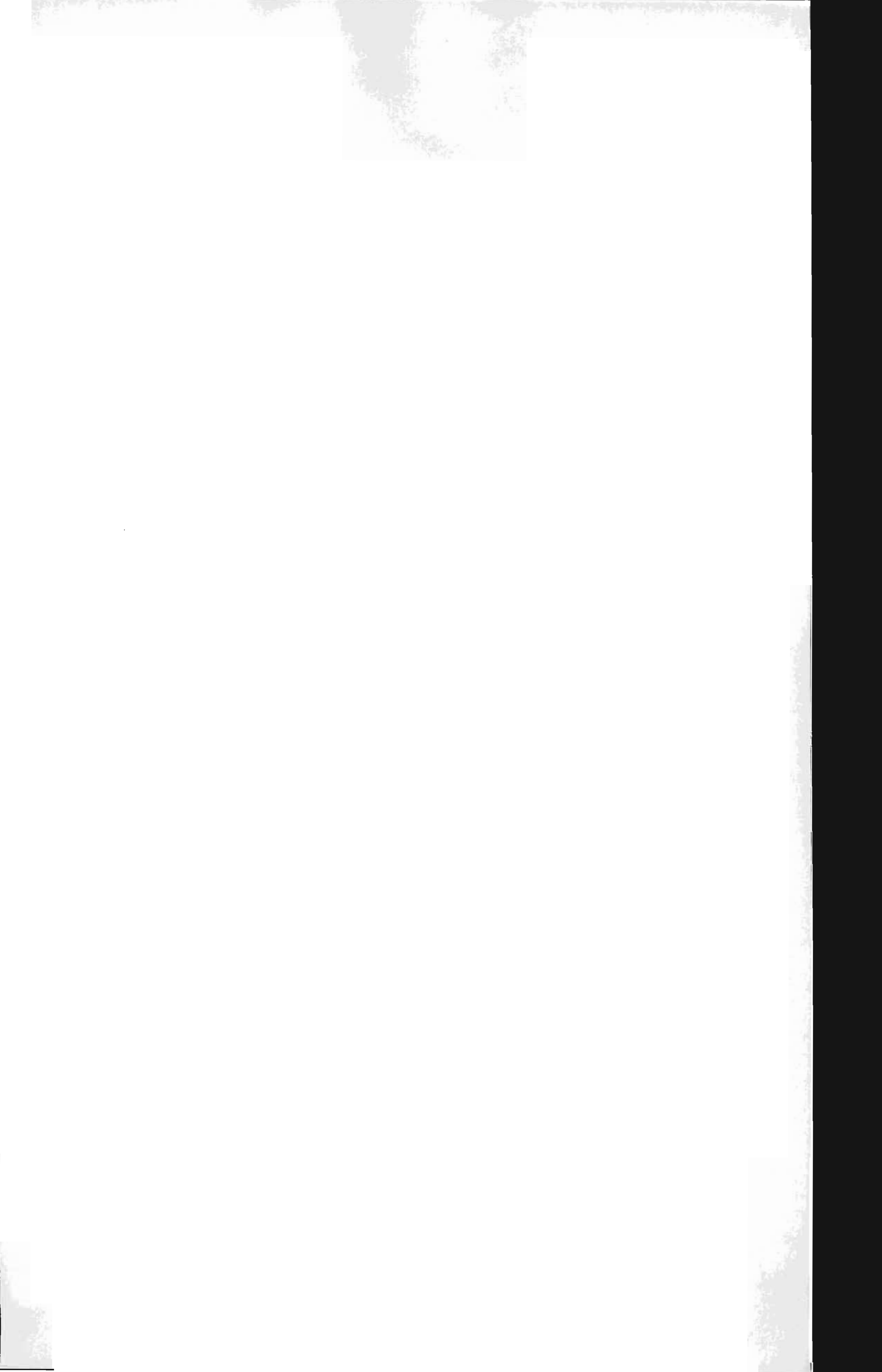
of the Board in a case under the very similar provision of section 16 of the Madras Civil Courts Act (III of 1873) " In India custom plays a large part in modifying the ordinary law" (*Mohammad Ibrahim Rowther* v. *Sheik Ibrahim Rowther* (1922) I.L.R. 45 Madras 308, 314). The importance of *kulachar* or family custom in the case of Hindus has given rise to a line of decisions by British Indian Courts applicable to migrating families. Some of these have already been mentioned in this judgment and *Mailathi Anni* v. *Subbaraya Mudaliar* (1901) I.L.R., 24 Madras 650, may be added as an instance of migration from without into British India. There are, moreover, cases of Hindu converts to Islam where it has been held that Hindu law " had been engrafted as a custom on the Mahomedan law " [per Lord Dunedin in *Khatubai* v. *Mahomed Haji Abu* (1922) L.R. 50, I.A. 108, at 112] and the effect of migration as to these was considered by the Board in *Abdurahim* v. *Halimabai* (1915) L.R. 43, I.A. 35, 41. Such matters require special consideration of the individual facts of each case as well as of the nature and character of the laws or usages of the country of origin. The tenacity of customs of succession even under the strain of migration has been repeatedly recognized. " An adherence to family usages is a strong Oriental habit: it is in most places not a weak one " [per Sir James Colvile in *Surendra Nath Roy's* case (*supra* at p. 96 of the report)].

In the present case it is not in dispute that the propositus Khoo Boon Tin and his wife Tan Ma Thin were Chinese Buddhists and that unless the plaintiff can show that the law applicable in Burma to them in questions of succession is Chinese customary law his suit cannot succeed. Their Lordships are of opinion that the Burmese Buddhist law is the law applicable to them, and it is not contended that according to that law the plaintiff has any claim to be the heir of either.

Their Lordships are further of opinion that on the evidence adduced in the present case it is not proved that according to Chinese customary law the plaintiff as nephew would be entitled although not in fact adopted to succeed as heir of Khoo Boon Tin in preference to the widow. No reliable expert witness was called to speak to this question, and though the book relied on by the Division Bench may have been admissible under section 60 of the Indian Evidence Act the conclusion drawn from its contents is drawn precariously and from material both obscure and inadequate. The order of succession which is essential to the plaintiff's case is not established by the evidence either as matter of foreign law or as a custom and his suit must fail.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decree of the Division Bench be set aside and that the decree of the trial Judge, including his direction as to costs, be restored. The plaintiff will pay the appellants' costs of the appeal to the Division Bench and of this appeal.

(17096—3A) Wt. 8075—41 140 7/39 P. St. G. 338



In the Privy Council

TAN MA SHWE ZIN AND OTHERS

v.

KOO SOO CHONG AND OTHERS

DELIVERED BY SIR GEORGE RANKIN

Printed by His Majesty's Stationery Office Press,
Pocock Street, S.E.1.

1939