

- (c) The said trust attaches only to the estate of the said Nanhu deceased.
- (d) Subject to the life interest of plaintiff the defendant takes a life interest in the property to which the trust attaches together with an interest in the whole estate absolutely contingent on his surviving plaintiff and his wife Bacheoni.
- (e) As the defendant does not take a life interest only, this question does not arise.
- ((f) The trust confers interest on the defendant as set out previously.
- (g) As the answer to (f) is in the affirmative, this question does not arise.
- (h) The interest taken by defendant is as set out in (d) above. Subject in the case of each of them to their surviving defendant, plaintiff and defendant's wife Bacheoni take an interest absolutely to the trust property as it exists at the death of defendant, each of them as to one half of the said property, or, if only one of them survive defendant, then such one as to the whole of the property.
- (i) The defendant has no power to dispose of the property which is affected by the said trust save under the sanction of the Court or with the consent of all parties interested under the said trust and being *sui juris*.

There remains the question of costs. I see no reason why the costs of both parties should not come out of the estate, and it is ordered accordingly.

R. v. JOSEPH RAMA.

[Criminal Jurisdiction (Seton, C.J.) October 15, 1946.]

Marriage according to Hindu custom performed in Fiji prior to April 1929—provisions of Marriage Ordinance (Cap. 118) as to registration etc. not complied with—subsequent ceremony of marriage during life-time of spouse—second ceremony in Christian church and all requirements of Marriage Ordinance observed—whether second ceremony bigamous—validity of first marriage in issue.

Joseph Rama, then a Hindu, and a woman Achamma went through a form of marriage in accordance with Hindu custom in Fiji prior to April 1, 1929. The ceremony was performed by a Hindu priest who was at that time not registered as a marriage officer and none of the requirements as to notices etc. were complied with. Rama went through a second ceremony of marriage during the life of Achamma with Toroca Tanvola, this ceremony being performed by a Wesleyan minister at Levuka in accordance with the Marriage Ordinance.

HELD.—(1) A marriage solemnised in Fiji prior to April 1, 1929 in accordance with Hindu custom and without observance of the formalities prescribed in the Ordinance is a valid marriage the consequences of which are regulated by the personal law of the parties.

Ibid: In the case of Hindus the personal law of the parties being not monogamous, a Hindu married according to Hindu custom prior to April 1, 1929 may contract a second marriage during the life of his spouse by such marriage without committing bigamy.

Cases referred to:—

- (1) *in re Sudamma* [1932] 3 Fiji L.R.
- (2) *R. v. Surajpal* [1934] 3 L.R.
- (3) *R. v. Sarjudei* [1937] 3 Fiji L.R.
- (4) *in re Dukhan* [1939] 3 Fiji L.R.
- (5) *R. v. Naguib* [1917] 1 K.B. 359; 86 L.J.K.B. 709; 116 L.T. 640; 81 J.P. 116; 25 Cox. C.C. 712; 12 Cr. Ap. 187; 11 Dig. 414.
- (6) *Baindail v. Baindail* [1946] 1 A.E.R. 343.
- (7) *in re Bozzelli's Settlement, Husey - Hunt v. Bozzelli* [1902] 1 Ch. 751; 71 L.J.Ch. 505; 86 L.T. 445; 18 T.L.R. 365; 11 Dig. 415.
- (8) *Harvie v. Farnie* [1881] 6 P.D. 35; [1882] 8 App. Cas. 43; 52 L.J.P. 33; 48 L.T. 273; 47 J.P. 308; 11 Dig. 429.
- (9) *Sinha Peerage Case* [1939] [1946] 1 A.E.R. 348.
- (10) *Rex v. Hammersmith Registrar of Marriage ex parte Mir Anwaruddin* [1917] 1 K.B. 634.
- (11) *Chetti v. Chetti* [1909] P. 67; 78 L.J.P. 23; 99 L.T. 885; 25 T.L.R. 146; 11 Dig. 416.
- (12) *R. v. Chapman* [1931] 2 K.B. 606.

[EDITORIAL NOTE.—See *Mehta v. Mehta* [1945] 174 L.T. 63 and *Srinivasau v. Srinivasau* [1946] P. 67; also *Law Quarterly Review* Vol. 48 p. 341 and Vol. 62 p. 116; *Law Times* January 5, 1946 Vol. 201 p. 5 (an article on the position of plural wives in intestacy) and May 25, 1946 Vol. 201 p. 248].

E. M. Prichard, for the Crown.

P. Rice, for the accused.

At the close of the Crown case *P. Rice*, for the accused, moved that there was no case to answer since on any view of the facts the first marriage was polygamous in character and therefore not recognised as valid by the law of the Colony. He referred to *R. v. Naguib*, *Bandail v. Bandail* and submitted that the decision in *R. v. Surajpal* was of no authority since in that case the polygamous nature of the marriage was not considered.

E. M. Prichard, for the Crown: There is a line of cases decided in this Court over a period of fourteen years to the effect that a marriage solemnised according to Indian custom prior to April 1, 1929 is a valid marriage for all purposes. The date April 1, 1929 is the date on which the repeal of a proviso to s. 63 of the Marriage Ordinance, 1918 became effective. (He referred to *in re Sudamma* [1932]; *R. v. Surajpal* [1934]; *R. v. Sarjudei* [1937]; *in re Dukhan* [1939]).

SETON.—In any of those cases was the point as to polygamous marriage considered?

E. M. Prichard: Speaking from memory I should say that it was not specifically considered but I cannot be sure; this line on the part of the defence was not anticipated and was not in my mind when I read the cases. However the decisions are clear to the effect that the ceremony does, according to the law of Fiji prior to April 1, 1929, constitute

a valid and sufficient form of marriage, and it is submitted that once this is determined the marriage cannot be polygamous. It is easy to be misled by the indiscriminate use of the word "marriage" to cover two quite different things—on the one hand the forms and ceremonies by which the union of a man and a woman are solemnised and on the other the status attached by law to the parties to such a union once it has been duly solemnised. If you have two persons of opposite sex and with the capacity to marry (determined according to their domicile) and they both willingly go through a form of solemnisation which is recognised by the law of the place where it is performed, you have without question a valid and binding marriage (*in re Bozzeli's Trusts* [1902] 1 Ch. 751; *Harvie v. Farnie* [1881] 6 P.D. 35 at p. 48). The resulting status is a creature of law and does not depend on the whims or fancies of the parties. The law which determines the incidents of the status is the *lex domicilii* (*ex parte Mir Anwaruddin* [1917] 1 K.B. 634). The Crown evidence is that this marriage took place prior to April 1, 1929 between parties capable of marriage and in a form recognised as valid by the law of this Colony at that time. Both *lex actus* and *lex domicilii* are those of Fiji and we cannot look outside the law of Fiji for the incidents of the status thereby acquired by the parties. If it was a polygamous status then the Courts will for many purposes refuse to treat it as a marriage because it is not a marriage as known to the law of England. *R. v. Naguib* was finally determined on other grounds—but had the Egyptian "marriage" been properly proved the Court would in all probability have refused to treat it as a marriage simply because the status resulting from it probably included the right to polygamy as one of its incidents; both *lex actus* and *lex domicilii* were Egyptian. *Baindail v. Baindail* [1946] 1 A.E.R. 343 and the *Sinha Peerage Case* [1939] reported 1946 1 A.E.R. 348 are in a similar category and do not assist the Court. In this case the law by which the status of marriage is to be determined is clearly the law of this Colony. This Colony might if it wished legislate in favour of attaching polygamy as an incident of marriage or of certain marriages—but has it done so? Remembering that our first body of law was English law—to which polygamy is abhorrent—one would expect to find any subsequent departure to be expressed only in unmistakable terms. (Supreme Court Ordinance Cap. 2 s. 35). Has any Ordinance in Fiji recognised polygamy as an incident of marriages performed in this Colony? From the earliest times it has set its face against the practice. (Indian Marriage Ordinance, 1892 s. 16)¹. It is submitted that not only was the ceremony in this case a valid marriage according to the law of this Colony but that the incidents attached to the status resulting from that marriage must likewise be determined according to the law of this Colony which does not recognise polygamy or any other incident which would make the resulting union something other than a marriage of the kind recognised and enforced by English law.

SETON, C.J.—Reserved his decision on this point, directing in the meantime that the evidence for the defence should be heard and a special opinion given by the Assessors on the issue of fact as to whether the marriage took place before or after April 1, 1929. The Court found

¹ Repealed.

that the marriage took place prior to April 1, 1929 and, the accused being a resident of Ba, the case was adjourned to the next Criminal Sessions to be held at Lautoka for further argument on the point of law should either party desire to be heard further and for judgment. Adjourned hearing at Lautoka.

P. Rice, for the accused: I agree that if the first marriage was valid it was monogamous and that the law of Fiji nowhere recognises plurality of marriage. But I submit that it was no marriage at all. (He quoted *Darling J.* at p. 645 in *Rex v. Hammersmith Registrar of Marriages* [1917] 1 K.B. 634). The marriage in *R. v. Hammersmith Registrar* was in form a valid English marriage; here we have only a Hindu ceremony. *R. v. Sarjudei* was wrongly decided—the Ordinance nowhere said that such marriages are valid—it went no further than to absolve priests who performed such marriages from certain penalties. That does not make such marriages “marriages under this Ordinance” (s. 12). He referred to ss. 15 (2) and 44, of the Ordinance (Cap. 118).

If the law is ambiguous the prisoner should have the benefit of any doubt (*R. v. Chapman*).

E. M. Prichard, for the Crown: My learned friend has completely shifted his ground since his first argument, which was to persuade the Court that he was raising a point outside the *ratio decidendi* of the line of cases already decided; he now says that his original argument is without validity and that the decided cases are wrongly determined. That is a line of cases which it is submitted were correctly decided after full argument and, apart from any other consideration, the maxim *stare decisis* should now prevail. Those cases decide that the form of marriage proved in this case was a valid form of marriage according to the *lex actus*—which may of course recognise a special form for special cases and which is the case here by virtue of the proviso to s. 63. It follows from the capacity and domicile of the parties that the marriage was for all purposes good and valid. I further wish to add that I previously misled the Court by stating my impression that in none of the previous cases in the Colony had the question of polygamy been specifically considered. I was wrong in that—the point was taken in *in re Dukhan*. Finally, there is a difference in wording (though it may be of no significance) between the definition of bigamy in s. 57 of the Offences Against the Person Act, 1861 (*Archbold* 31st Edition page 1,302) and s. 171 of the Penal Code (Cap. 5). Whatever may be said of the fundamental principles on which it is suggested this decision should rest, it seems difficult to read *Baindail v. Baindail* in conjunction with s. 171 of the Penal Code and emerge with a view of the law favourable to the case for the prisoner.

P. Rice, for the accused, in reply. There is no difference between English Law and s. 171 of the Penal Code. I have argued and am prepared to maintain that *R. v. Surajpal* was wrongly decided. I was not aware of *in re Dukhan* but would point out that it was not a decision in a criminal case.

SETON, C.J.—The accused is charged with having committed bigamy.

The facts found by the Court are as follows:—

- (1) That in May, 1928, a marriage between the accused and the witness, Achamma, was solemnized in Fiji in accordance with Hindu custom, such marriage being lawful in accordance with

the personal law of the parties, although none of the formalities prescribed in the Marriage Ordinance was observed and the marriage was never registered.

- (2) That on 26th December, 1945, a marriage between the accused and the witness, Toroca Tauvola, was solemnized in accordance with the law of Fiji by Ragama Vunikeci, a Wesleyan Minister at Levuka.

It was contended on behalf of the accused that the first marriage occurred some time after 1st April, 1929, i.e., after the coming into force of the Marriage (Amendment) Ordinance, 1928, but the Assessors were of opinion that this contention was unfounded and that in fact the marriage took place in May, 1928, as above stated. I am of the same opinion.

It was further contended on behalf of the accused that in order to establish the offence of bigamy there must be proved not only the solemnization of the first marriage but also the fact that the first marriage was monogamous. This second contention seems to be well founded (see *Archbold*, 31st Edition, p. 1,308 and the cases there cited).

The Marriage Ordinance in force at the date of the first marriage was that of 1918 as amended by the Marriage (Amendment) Ordinance, No. 13 of 1927.

A case on all-fours with the present was tried in 1934 (*Rex v. Surajpal*, No. 21 of 1934) when the first marriage was found to be a valid one and the accused was convicted of bigamy. That decision was followed in 1937 (*Rex v. Sarjudei*, No. 2 of 1937); the learned judge expressed no opinion on the legal aspect of the case but said that, the facts being exactly similar to those in *Rex v. Surajpal*, he felt bound to follow the previous decision. In neither, apparently, was the point taken that the first marriage must be proved to have been monogamous as well as valid.

With regard to the history of marriage legislation in Fiji, it would seem that upon the foundation of the Colony, the law governing marriage was the Common Law of England except in the case of the Fijian inhabitants where custom and usage controlled marriage until statutory provision was made therefor.

The position remained thus until the enactment of the Indian Marriage Ordinance (No. 2 of 1892) and the Marriage Ordinance (No. 10 of 1892), s. 2 of the latter expressly providing that its provisions should not apply to Indian immigrants or their descendants who did not profess Christianity.

S. 6 of the Indian Marriage Ordinance, 1892, provided that males and females, being Indian immigrants or their descendants, who "shall desire to be registered as married people" should signify their desire to the Stipendiary Magistrate who would call upon them to sign a notice according to the form contained in Schedule D of the Ordinance. This notice was to be read publicly in open Court upon each Court-day for three weeks, at the end of which time, in the absence of any valid objection, the Magistrate would grant a certificate and forward the same to the Agent-General who would enter the necessary particulars in his register, declare the parties to be husband and wife and give them each a certificate.

S. 16 provided as follows :—“ If any party whose marriage shall have been duly registered under this Ordinance shall during the lifetime of the other party to the same and before such marriage shall have been legally dissolved contract another marriage such first-mentioned party shall be guilty of bigamy.” There is no reference in the Ordinance to the marriage of Indians according to Indian custom.

The Indian Marriage Ordinance, 1892, and the Marriage Ordinance, 1892, were repealed by the Marriage Ordinance, 1918, which, from the time it was brought into force, constituted and still constitutes a comprehensive code on the subject of marriage. Part IV is entitled “ Of Marriage between Indians ” (references are to the revised edition of the Ordinances of Fiji published in 1925). S. 43 provides for the appointment of Indian Marriage Officers and s. 44 prescribes that in the event of any such Marriage Officer solemnizing any marriage he shall observe and fulfil all the formalities prescribed in Part I of the Ordinance and on failure to do so shall be liable to the penalties prescribed in the Ordinance for contravention thereof.

In Part VI headed “ Miscellaneous ” is s. 63 which reads as follows :—

“ Any person who shall knowingly and wilfully procure his or her marriage to be solemnized contrary to any of the provisions of this Ordinance shall be liable on conviction, in any such case where no penalty is otherwise provided, to a fine not exceeding two hundred and fifty pounds or to imprisonment for any term not exceeding two years. Provided that nothing contained in this section or in ss. 18, 26 and 27 of this Ordinance shall apply to the marriage of Indians according to Indian custom.”

The marginal note to s. 18 is “ penalty for solemnizing a marriage without production of certificate ”; to s. 26 “ penalty for solemnizing marriages without being registered ”; and to s. 27 “ penalty for omission to transmit certificate etc.”

It appears from the debate in the Legislative Council which preceded the passage of the Marriage Ordinance, 1918, that the proviso to s. 63 was inserted to meet the views of the Government of India and the learned Attorney-General of the time in the course of the debate made the following explanation (*Legislative Council Debates*, sessions of 1918, p. 79):—

“ I pass on to clause 60 (s. 63) ; the words at the end of that clause provide that nothing herein contained shall apply to the marriage of Indians according to Indian custom’. Those are the words that I have already referred to as being inserted in accordance with the wishes or views of the Indian Government ; in fact they have practically, as far as they could, made it a *sine qua non*. It came about in this way. The Bill had been criticised in regard to what I should call irregular marriages, that is, marriages between Indians by persons professing themselves to be priests who are not priests or receive no local recognition, and it was claimed that these marriages should be rendered valid within the Colony. The Committee had formed the opinion that, as this Bill offered so many facilities for marriage of Indians and other people, there was no reason why these irregular forms of marriage should be made valid or lawful, and

“ after receiving the memorandum I referred to, the Indian
“ Government gave way on the point, or the members of the
“ Government who wished to have such provision made in the
“ Bill gave way, and submitted that we should include in our
“ Bill provision that no prosecution should take place in the event
“ of any person performing these irregular marriages between
“ Indians. Personally I regret having to include any such words
“ in the Bill. I had hoped that we were going to wipe out once
“ and for all these irregular forms of marriage.”

Mr. H. M. Scott, K.C. (as he then was) taking part in the debate said (at p. 81):—

“ I should just like to say, Sir, with regard to clause 60 (s. 63),
“ to which the learned Attorney-General referred, it seems to me
“ that that is a very important one. The proviso contained therein
“ is not one recommended by the Committee, as pointed out by
“ the Attorney-General. If that proviso is allowed to go through
“ it means encouraging the religious as against the State marriage.
“ I thought that we had arrived at an agreement that once we got
“ this statute passed we would have the proper marriage law, in
“ other words, we would have State marriages and not recognise
“ what may be termed the “ religious ” form of marriage.”

Clause 60 (s. 63) came up for discussion again when the Bill was in Committee and attention is invited to the remarks of the Governor and Messrs. Scott and Hedstrom (as they then were) on that occasion, which will be found on pp. 95 and 96. From them and from what has already been quoted, it seems clear that the Government had hoped to have in the future nothing in Fiji but what Sir Henry Scott described as “ State marriages ” but events had been too strong for it and it had been obliged to agree that religious marriages should continue side by side with State marriages. The learned Attorney-General, however, seems to have thought that the Government had successfully resisted an attempt to make religious marriages valid and had only given way to the extent of agreeing that persons taking part in such religious marriages should not incur penalties for so doing. In Committee (p. 96) he referred to them as “ bogus ” marriages.

I cannot think, however, that he was right, although the view persisted in official quarters until the case of *Rex v. Surajpal* was decided. From the time when the immigration of Indians first began, they had been left to their own devices so far as marriage was concerned except for the passage of the Indian Marriage Ordinance 1892, which merely enabled them to register a marriage, if they wished to do so, but imposed no sort of compulsion. The Marriage Ordinance, 1918, as originally drafted, proposed a radical alteration; marriages according to Indian custom were to be abolished and the only form of marriage which would be recognized in the future would be one attended by all the formalities prescribed in Part I of the Ordinance. The Government of India objected. They thought, it may be assumed, that it would be a hardship if Indians were not allowed to contract marriages in accordance with their customs as they had been used to doing both in India and in Fiji. It is difficult to believe that the Government of India, having raised the point and having been very insistent in regard to it, would have been satisfied with an arrangement by which such marriages would

be permitted to continue but only upon condition that they would not be recognized as legal. If the learned Attorney-General thought that this was what had been agreed, he had an opportunity of making the matter clear when he drafted the proviso to s. 63, but unfortunately he did not avail himself of it.

In the year 1926, a Committee was appointed to consider and report upon the question of the amendment of s. 63 of the Marriage Ordinance, 1918, by the deletion of the proviso thereto. Its report was published as Council Paper No. 28 of 1927, and it will be seen from the following extract from the report that the members of the Committee shared the view of the learned Attorney-General in regard to the legal effect of marriages in accordance with Indian custom :—

“ The effect of the addition of the proviso was to render non-punishable a marriage performed according to Indian custom though without the formalities prescribed in the Bill (Ordinance) ; it did not make marriages registrable or valid under the law.”

The Marriage (Amendment) Ordinance, which was passed in 1928 as a result of the Committee's report, repealed the proviso to s. 63 and made provision for the validation by registration of marriages which had taken place according to Indian custom prior to 1st September, 1929. As a result of the repeal of the proviso, marriages celebrated in accordance with Indian custom after 1st April, 1929, ceased to have any legal effect unless the formalities prescribed in Part 1 of the Marriage Ordinance were duly observed.

In *Rex v. Surajpal* (supra) the Attorney-General appeared for the Crown and Mr. Grahame for the accused. Mr. Grahame contended that the accused's first marriage was not valid in the eyes of the law and that therefore on contracting a second marriage he was not guilty of bigamy. Mr. Grahame argued that from the date of the coming into force of the Marriage Ordinance, 1918, a marriage by Indian custom was only valid if the provisions of the Ordinance were fully complied with, i.e., the marriage must be by a priest registered as a marriage officer, the ceremony must be in accordance with the personal law of the parties and in other respects subject to the provisions of the Ordinance. In regard to the proviso to s. 63, he said that this merely dealt with penalties ; it exempted persons who married according to Indian custom and the priest who married them from penalties for non-compliance with the provisions of the Ordinance, but it did not make such a marriage valid.

The learned Attorney-General argued that the accused's first marriage was a valid one and he relied on ss. 15, 19, 56 and 63 of the Ordinance.

The learned Chief Justice seems to have based his judgment solely upon his view of the effect of the proviso to s. 63, for he said :—

“ The exemption (contained in the proviso to s. 63) from these sections of an Indian priest performing a marriage ceremony according to Indian custom provides in fact that the provisions of the Ordinance as regards certificates do not apply to such marriages as he may perform and that provided the parties to the ceremony really believe that a marriage is being solemnized between them the marriage is legal for all purposes.”

That was the basis of his judgment and with it I respectfully agree, except that for the words "provided the parties really believe that a marriage is being solemnized between them". I should substitute the words "provided that the marriage is valid in accordance with the personal law of the parties" and I should omit the words "for all purposes" at the end.

That a marriage may be valid for some purposes and not for others was pointed out in the recent case of *Baindail v. Baindail*, [1946] A.E.R. Vol. 1, 342, which was cited by Mr. Rice, who appeared for the accused. In this case, the husband, a Hindu, had married a Hindu woman according to Hindu rites in India and it was established that his marriage would be recognized by the Courts of British India. Subsequently he went through a ceremony of marriage with an Englishwoman in London, his Hindu wife being alive at the time. The Court of Appeal held that, having regard to the husband's marriage in India, the subsequent English ceremony of marriage was not valid. Lord Greene M.R., at the end of his judgment, said:—

"I may perhaps conclude by saying this, that the opinion which I have formed relates solely to the facts of the present case which are simply and solely the validity of the English marriage in the circumstances of this case. I must not be taken as suggesting that for every purpose and in every context an Indian marriage such as this would be regarded as a valid marriage in this country. Counsel for the appellant in his reply drew an alarming picture of the effect of our decision on the law of bigamy if we were to decide against him. He having said that, I think it right to say that nothing I have said must be taken as having the slightest bearing on the question of the law of bigamy which says under the statute 'Whosoever, being married, shall marry any other person during the life of the former husband or wife . . .'. On the question of whether a person is 'married' within the meaning of that statute (which is a criminal statute) when he has entered into a Hindu marriage in India I am not going to express any opinion whatever. It seems to me a different question in which other considerations may well come into play. I hope sincerely that nobody will endeavour to spell out of what I have said anything to cover such a question."

The Chief Justice did not refer at all in his judgment to s. 15 (2) of the Marriage Ordinance, 1918, but since it was relied on by both counsel in the case I think that I should state my view of it. This sub-s. provides that if any persons knowingly and wilfully intermarry without a certificate for marriage the marriage of such persons shall be null and void. S. 15 is contained in Part I of the Ordinance which is headed "Of Marriage". Marriage between Indians is dealt with in Part IV which is entitled "Of Marriage between Indians" but which I think should have been called "Of Marriage between Immigrants"; Part I has no application to Part IV except in so far as it is incorporated by reference. Such a reference occurs, for example, in s. 42 (which is in Part IV) where it is declared that in cases of male immigrants, sixteen years of age or upwards, and female immigrants, thirteen years of age or upwards, who desire to contract marriage, "it shall be lawful to solemnize marriage between them under any of the provisions of Part I of this Ordinance."

Again, in s. 44, there is a provision that "in the event of a marriage being solemnized by any Mohammedan, Hindu or any other Indian priest appointed as aforesaid such priest shall thereupon observe and fulfil all the formalities prescribed in Part I of this Ordinance to be observed and fulfilled by a minister of religion . . ."

These are the only two occasions where there is any reference to Part I of the Ordinance in Part IV, and in my view the provisions of s. 15 (2) have no application at all to a case of a marriage of Indians according to Indian custom. In fact, the only case I can think of where this sub-section would apply to a marriage of Indians would be if an Indian priest, appointed a marriage officer under s. 43 and purporting to observe and fulfil all the formalities prescribed in Part I, married two Indians who had no certificate for marriage. If both those Indians knew that they had no certificate for marriage but nevertheless wilfully inter-married, the sub-section would apply and their marriage would be void.

As I have said, I agree with the decision come to by the learned Chief Justice in *Surajpal's* case, namely, that the first marriage was valid, but I now have to consider a matter which apparently was not raised before him or before the judge who tried the later case of *Rex v. Sarjudei*, and that is what kind of a marriage was a marriage solemnized according to Indian custom in the days when such marriages were valid? The answer, I think, is clear; it was just the same kind of marriage as had been taking place ever since the immigration of Indians into Fiji first began, that is to say it was a marriage according to the personal law of the parties concerned. Consequently, if they were Hindus and were married according to Hindu custom, the marriage was a Hindu marriage and the consequences of the ceremony are regulated by Hindu law, or if they were Muslims and were married according to the law of Islam, the consequences are regulated by the provisions of that law.

The accused in this case and his wife, Achamma, are both Hindus and they were married in accordance with Hindu custom; it follows, therefore, that their marriage is regulated by Hindu Law as to which an extract from Mayne's *Treatise on Hindu Law and Usage* [1906] 7th ed., s. 92, was quoted in the case of *Chetti v. Chetti* [1909] P. 67 at p. 73 as follows:—

"It is now quite settled in the Courts of British India that a Hindu is absolutely without restriction as to the number of his wives, and may marry again without his wife's consent, or any justification, except his own wish."

I do not think that it can be said in the case of Fiji that the law only recognizes a monogamous marriage. S. 5 of the Indian Marriage Ordinance, 1892, provided that if any immigrant on arrival was found to be accompanied by more than one wife, the names of all his wives were to be duly recorded by the Agent-General, and this provision was repeated in the Marriage Ordinance, 1918, when the Indian Marriage Ordinance, 1892, was repealed, and is still in force to-day. Moreover, by recognizing Indian customary marriages which, in my view, was the effect of the proviso to s. 63 of the Marriage Ordinance, the Legislature recognized marriages which, in the case of Indian Moslems and Hindus, were known to be polygamous in character. Incidentally,

it may be remarked that the words "Indian" and "Immigrant" (where used as nouns) would seem to be synonymous terms for the purposes of the Marriage Ordinance, 1918. "Immigrant" is defined in s. 2 of the Ordinance and, having regard to the terms of the definition, I think that any question as to the domicile of the parties is excluded.

The conclusion to which I have come, therefore, is that the first marriage of the accused in this case was valid but, since it was contracted in accordance with Indian custom and the formalities prescribed in the Marriage Ordinance were not observed, the consequences of such marriage are regulated by the personal law of the parties. The parties being Hindus, the marriage so far as the accused was concerned was not monogamous. It follows, therefore, that in contracting a second marriage he did not commit the crime of bigamy. I express no opinion as to the validity of the second marriage.

The accused is acquitted.

KANTALI *ats.* IBRAHIM.

[Appellate Jurisdiction (Seton, C.J.) October 21, 1946.]

Moneylenders Ordinance Cap. 185—s. 15—defence raised in action for debt that plaintiff an unlicensed moneylender—onus of proof as to licence.

Kantali as executrix in the estate of Brijmohan deceased claimed moneys due under three promissory notes. The defence pleaded that the deceased Brijmohan was an unlicensed moneylender and proved that he was in fact a moneylender.

HELD.—The onus of proof that a person is not licensed as a moneylender is on the person asserting that he is licensed once it is established that he is in fact a moneylender.

Cases referred to :—

(1) *Ragudatt v. Ramautar* [1940] 3 Fiji L.R.

(2) *C. M. Patel v. Karpan* [1941] 3 Fiji L.R.

APPEAL against Magistrate's judgment for moneys due under promissory notes. The facts and arguments appear from the judgment.

S. B. Patel, for the appellant.

A. D. Patel, for the respondent.

SETON, C.J.—The plaintiff, as executrix of the estate of the late Brijmohan deceased claimed from the defendant the sum of £38 18s. od. being the balance of principal and interest due in respect of three promissory notes, all dated 5th January, 1939 (one dated 5th January, 1938, apparently in error) and a fourth promissory note dated 6th February, 1940. The defence was that the deceased was an unlicensed moneylender and in consequence the amount claimed could not be recovered by reason of the provisions of s. 14 of the Moneylenders Ordinance, 1938.