Present: Bertram C.J., Schneider J., and Jayewardene A.J.

GUNANANDA UNNANSE *v.* DEWARAKKITA UNNANSE.

500—D. C. Kandy, 30,403.

Buddhist ecclesiastical law—Sisya paramparawa—*Succession to incumbency—Rights of a fellow-pupil.*

Where the incumbent of a vihare dies leaving a pupil and a fellow-pupil, the pupil has the prior right of succession to the incumbency.

Siriniwase v. Sarananda [1] overruled.

APPEAL from a judgment of the District Judge of Kandy. The plaintiff and the defendant are Buddhist priests, and each claimed to be the lawful incumbent of a vihare in Kandy. It was admitted that one Indasara Unnanse who died many years ago was the incumbent of this temple. He died leaving three pupils: (1) Gunaratne Unnanse, (2) Gunananda Unnanse, the plaintiff, and (3) Dhammarakkita Unnanse. Gunaratne Unnanse, as the senior pupil, succeeded to the incumbency, and died in September, 1922. Since then the defendant assumed the office of incumbent. The plaintiff, as one of the pupils of Indasara Unnanse, claimed the incumbency as the fellow-pupil of the last incumbent in preference to the defendant who was the pupil of the last incumbent. The District Judge held that the defendant was the rightful successor to the incumbency.

H. V. Perera (with him *Navaratnam*), for plaintiff, appellant.

Samarawickreme (with him *D. B. Jayatileke* and *Chas. de Silva*), for defendant, respondent.

October 27, 1924. BERTRAM C.J.—

This case raises an important question with regard to pupillary succession. The problem is shortly this: If an *adikhari bhikshu*, or, as we call him, an "incumbent" of a vihare, dies, leaving a pupil and a co-pupil of his own, which has the prior right to succeed?

This question was considered in a very recent case (*Siriniwase v. Sarananda* (*supra*)), and there a Court of two Judges decided this question in favour of the collateral pupil and against the pupil in the direct line of succession. The learned District Judge in a very carefully framed judgment has felt himself bound to follow this recent decision, but distinguishes the present case on the ground that the

[1] (*1921*) *22 N. L. R. 318.*

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pupil who now claims the office does so not merely by virtue of succession, but also by virtue of a direct nomination by his tutor, the deceased *adikhari*, before his death. The learned Judge treats the above-mentioned decision as confined to a case in which the deceased *adikhari* has not appointed a successor. It is not necessary for us at this point to examine the soundness of the distinction thus made by the learned District Judge, because doubts have arisen as to whether the decision in *Siriniwase v. Sarananda* (*supra*) is itself in accordance with established principles. That decision is, in fact, in conflict with a series of earlier decisions, which have hitherto been treated as authoritative. There is no report of the argument in *Siriniwase v. Sarananda* (*supra*). The decisions in question are not mentioned in the judgment, and it is difficult to believe that they were adequately brought to the notice of the Court.

The first of these decisions was in the year 1874 (D. C. Kurunegala, 19,413 [1]). There Cayley C.J., sitting with Stewart J., and upholding the opinion of Mr. J. H. de Saram, then District Judge of Kandy (an office which Cayley C.J. had himself formerly held), declared that " the enforced limitation of succession to a priest's own pupils has never been questioned previously to this." A curious attempt was made to procure the recall of that decision (*quia improvide emanavit*) on the ground of the subsequent discovery of an *obiter dictum* in a District Court judgment (D. C. Kurunegala, 15,057 [2]), which had been cited in another case (D. C. Ratnapura, 9,040 [3]). This dictum was to the effect that it was competent to a priest to nominate as his successor a fellow-pupil in preference to his own pupil. Both cases went to appeal, and the judgments in both cases were affirmed, without any reported repudiation of this dictum. Cayley C.J. and Stewart J., however, refused to say that their decision *improvide emanavit*, and referred the applicants to the Privy Council.

In a subsequent case (*Dhammajoti v. Tikiri Banda* [4]) Cayley C.J. dispassionately reviewed and upheld his own decision, and this was fortified by an emphatic expression of opinion by Dias J., a Judge of great local experience. In a subsequent case (*Weligama Dhammajoti Unnanse v. Weligama Sarananda Unnanse* [5]) Dias J. repeated his opinion that a co-pupil could only succeed after the direct pupillary line had been exhausted.

It is true that Phear C.J., in a judgment of historical interest (*Ratnapala Unnanse v. Kewitigala Unnanse* [6]), intimated that the rule of *sisya paramparawa* was elastic enough to extend to a co-pupil, and that Dias J. has created a difficulty by his incidental reference to a supposed preference of the *ascending* over the collateral lines. See *Weligama Dhammajoti Unnanse v. Weligama Sarananda Unnanse*

[1] *(1874) 3 Grenier 66.*
[2] *Vand. App. F., p. li.*
[3] *Vand., p. 224.*
[4] *(1881) 4 S. C. C. 121.*
[5] *(1881) 5 S. C. C. 8.*
[6] *(1879) 2 S. C. C. 26*

(*supra*) and the comment in Mr. Hayley's book, *Sinhalese Laws and Customs, pp. 552,553.* Neither of these dicta, however, affects the prior right of a pupil as against a co-pupil of his tutor. From 1874 onwards, for a period of close on fifty years, there has been no decision or dictum opposed to the principles first authoritatively enunciated in the case in *Grenier's Reports*. I need not cite any of the above expressions of judicial opinion, as they are fully set out in the judgment of my brother Jayewardene.

As I have said, it is difficult to believe that these decisions were adequately pressed upon the attention of the Court in *Siriniwase v. Sarananda* (*supra*). Attention appears to have been concentrated upon the evidence set out in the *Appendix to vol. XX. of the New Law Reports*, and this was perhaps treated as putting the question of pupillary succession on a new footing.

There, certainly, are expressions in the course of that evidence which do suggest the idea of priority in the collateral lines—in particular, the answer of the witness Ratnajoti on p. 507: "(7) If a tutor has two or more pupils, they all succeed him in the order of seniority of their ordination." This opinion seems at first sight to be supported by a passage in a very early authority, viz., the opinion of the Malwatta priests, cited in 366, Agent's Court, Kurunegala [1]: "In the event of the original proprietor dying intestate, the priests who happened to be assembled at his death become entitled in common. Things which belong equally to two priests devolve wholly to the survivor." There is a dictum of my own which seems to tend in the same direction. "Similarly, if an *adikhari* makes no nomination, they (his pupils) would all succeed him singly and in rotation." *Saranankara Unnanse v. Indajoti Unnanse.*[2]

If this passage from the opinion of the Malwatta priests has the meaning which has been attributed to it, it must carry very great weight. If the Malwatta priests really meant to say that where an *adikhari bhikshu* of a temple dies leaving several pupils, but without making a special disposition in favour of any one of them, these pupils succeed in rotation to the exclusion of the pupils of the first of them who may leave pupils, and that it is only upon the exhaustion of this collateral succession that the claims of the next generation of pupils come into consideration, this is an opinion contrary to the authorities above summarized, and, if sound, would justify the decision in *Siriniwase v. Sarananda* (*supra*). In view of the antiquity of this opinion of the Malwatta priests, and in view of the fact that the case in which it is cited, 366, Agent's Court, Kurunegala (*supra*), has always been referred to as the leading case on the subject of pupillary succession, I thought it well to investigate the circumstances under which that opinion was given. I

[1] *Vand. App. D, p. xli.*

[2] *(1918) 20 N. L. R. 385 on p. 398.*

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regret that the result has not been very informing, but it may be well to place it on record for the assistance of any future investigations on the subject.

The case in which the opinion of the Malwatta and the Asgiriya Chapters was sought was not 366, Agent's Court, Kurunegala (*supra*), but an earlier case (*Dantura Unnanse v. The Government of Ceylon* [1]), which came before the Judicial Commissioner's Court on June 26, 1827. I have obtained the original record of that case. The subject-matter of that case had nothing to do with the question we are here discussing. It relates to another principle of Kandyan ecclesiastical law which appears now to be obsolete. Under that principle the Crown appears from time to time to have made grants of lands attached to a temple to a particular family. The Viharegama, as it was called, descended by inheritance, and it was incumbent on the persons through whom it descended "to keep in repair the temples thereon and to have the sacred duties duly performed." For this purpose a member of the proprietor's family was from time to time duly ordained as priest. The case of *Dantura Unnanse v. The Government of Ceylon* (*supra*) was concerned with a claim by a priest to a hereditary right on the part of his family to the Viharegama in question. The case was tried by the Judicial Commissioner, and he gave judgment on June 24, 1828. His decision then appears to have been referred to the Board of Commissioners for Kandyan Affairs, and these Commissioners, according to the procedure then in force, appear to have made a report of their own for the assistance of the Governor. It was then for the Governor to confirm or not to confirm the judgment of the Judicial Commissioner and the recommendations of the Board of Commissioners. In this case the Governor confirmed the judgment of the Judicial Commissioner on August 8, 1829. The opinion of the Malwatta and Asgiriya Chapters would appear to have been sought by the Board of Commissioners for Kandyan Affairs. That opinion was invited upon a written statement submitted to the two chapters (see the Malwatta opinion which commences: "It does not appear to us that the statement in the paper writing exhibited to us, respecting the *siwuru paramparawa* and the *sisya paramparawa* is correct"). Unfortunately, the record of the case does not contain that paper, nor does it contain the report of the Judicial Commissioners. It is possible that this gap will some day be supplied.

The opinion of the two chapters given in that case was subsequently referred to in 366, Agent's Court, Kurunegala. That case is briefly reported in *Vanderstraaten*, but the whole record is fully set out in the *Report of the Service Tenures Commission, 1870, pp. 376-384*. It there appears as an appendix to yet another

[1] *Vand. App. E, p. xli.*

case (*Indasara Unnanse v. Sobita Unnanse* [1]), D. C. Ratnapura, 9,040 (*supra*), which decided that the "incumbent" of a temple was a mere trustee and not an absolute proprietor.

Unfortunately, therefore, we are not acquainted with the precise proposition submitted to the two chapters. We are not, therefore, in a position satisfactorily to clear up certain obscurities in the Malwatta opinion.

The two opinions were in the course of 366, Agent's Court, Kurunegala (*supra*), submitted to a meeting of chiefs held in the Audience Chamber. These chiefs are said to have declared the Malwatta opinion to be more correct, and it has consequently been regarded as being more authoritative than the Asgiriya opinion. All that the chiefs meant was that they considered the opinion more correct on the particular point under discussion. There is a difference between the Malwatta and Asgiriya opinions on this point. The question on which this difference occurs had reference not to *sisya paramparawa*, but to *siwuru paramparawa*. The Asgiriya Chapter declined to recognise that this was a special form of succession. They regarded it simply as a form of *sisya paramparawa*. They refused to allow that for the purpose of this form of succession a layman may be nominated as the successor of an "incumbent," being first ordained for the purpose. The chapter held that if there was no qualified person in existence on the death of the "incumbent," the succession failed. The Malwatta Chapter, however, held that laymen members of an "incumbent's" family might be ordained for the purpose of continuing the succession. It was only on this point that the chiefs preferred the Malwatta opinion. It appears to me, if I may venture to say so, that the Asgiriya opinion is very much more lucid and enlightening than that of the Malwatta Chapter. With this preface, let us now analyse the propositions of the Malwatta opinion. It appears to me that those propositions are the following, and I state them in a somewhat different form from that adopted by my brother Jayewardene.

Where a vihare with lands, &c., attached is vested in a priest as the "original proprietor," he may take any of the following courses—

(1) If he has pupils (say five pupils) he may make an absolute gift to one of them. In that case the vihare with its lands devolves absolutely on that pupil. This pupil may make a similar donation to a pupil of his own. When this goes on uninterruptedly, this is called *sisya paramparawa*.

(2) The "original proprietor" may make a bequest common to all his five pupils. In that case all five succeed to the benefits of the vihare, but one is elected to the superiority, and this office passes in succession to all of the five to whom the bequest has been made. The last survivor may then make a gift in favour of any other person.

[1] (*1870*) *Service Tenures Commission Report, p. 376.*

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(3) The "original proprietor," instead of making a gift to a particular pupil, and thus starting a line of pupillary succession, or making a common bequest to all his pupils, may, if he likes, transfer his rights to any other person passing over his pupils.

(4) The "original proprietor" may, if he likes, do none of these things. He may elect to die intestate, without making any disposition of the temple and its lands. In that case (and here come the important words): "the priests who happen to be assembled at his death become entitled in common." The opinion adds these words: "things which belong equally to two priests devolve wholly to the survivor."

It thus appears that this opinion is not an attempt to codify the law of pupillary succession. It is dealing simply with the alternative courses open to an "original proprietor-priest." He may establish a rule of pupillary succession. He may make a joint bequest common to all his pupils. He may, if he likes, confer the temple upon a stranger. And finally, he may do nothing at all. In the light of this analysis, we are now in a position to interpret the words: "in the event of the 'original proprietor' dying intestate, the priests who happen to be assembled at his death become entitled in common." These words clearly do not mean that if any *adikhari bhikshu*, in whom in the course of time the temple may become vested, dies leaving more than one pupil, without making any special appointment, all his pupils become jointly entitled to the temple and its lands with benefit of survivorship. It may possibly be argued that this by analogy ought to be the rule, but this is not what the words say. Moreover, I think that they are capable of another interpretation, namely, that suggested by Mr. Samarawickreme in the course of the argument. According to this interpretation, what the words mean is that where the "original proprietor" dies without having done anything to establish the principle of pupillary succession, and without making any disposition of his rights in the vihare, the vihare being *sanghika* property vests, on behalf of the sangha in such members of the Buddhist clergy, as at his death may assemble as representatives of the *sangha*. This view is confirmed by an expression in the evidence of one of the witnesses, whose testimony is recorded in the *Appendix to vol. XX. of the New Law Reports on p. 507*. The witness is there dealing with the case where there are no pupils to succeed. He says: "If the chain of pupillary succession to a vihare dedicated in *sisyanusisya paramparawa* is broken, the vihare will revert to the whole body of priests of the college to which it belongs and become *sanghika*, in which case, according to the law laid down in the ancient books, a new 'incumbent' will be appointed by the unanimous vote of the priests who assemble for the purpose." If

this, as I would submit, is the true interpretation, it is apparent that these words have no bearing on the question of the rival rights of the pupils of a tutor and that tutor's own fellow-pupils. I would here note that Cayley J. in D. C. Kurunegala, 19,413 (*supra*), adopted the same interpretation. He takes the Malwatta opinion as laying it down that "the original proprietor may indicate the person through whom the line of succession is to pass." He expressed a similar opinion as District Judge in D. C. Kandy, 51,811, cited in the record in this case: "The original proprietor-priest, that is, I suppose, the original grantee under the king's *sannas*, had power to pass over his own pupils." I would interpret the final words: "things which belong equally to two priests devolve wholly to the survivor," not as indicating that the priests who assemble at the death of the proprietor take the vihare with benefit of survivorship, but simply as indicating that where there are two original joint proprietors, or possibly, where there are two or more persons entitled to the benefits of residence at the temple, they are entitled in due succession to benefit of survivorship.

I would, therefore, adopt this interpretation. I would hold that the expression of opinion by the witness Ratnajoti in *Appendix to vol. XX. of the New Law Reports on p. 507* has reference to a case where a tutor leaves (say) two pupils, and the one who first succeeds dies without leaving pupils of his own. My own dictum in *Saranankara Unnanse v. Indajoti Unnanse* (*supra*) above referred to was not intended as expressing any opinion on the question now at issue. All that it was intended to point out was that if two pupils of an *adikhari* succeed him, they must do so singly and in rotation, and not both together.

It appears to me, therefore, that there is nothing in any of the earlier authorities which is in conflict with the series of cases, the results of which I have summarized above, commencing with the case reported in *Grenier's Reports*.

But the case does not rest here. No evidence of religious custom was called in *Sirniwase v. Sarananda* (*supra*). The evidence printed in the *Appendix to vol. XX. of the New Law Reports* was treated as applying to the case. In the present case, however, there is express evidence of religious custom. The defendants cited three witnesses of experience and eminence. The first, who had been fifty-two years in robes, was a member of the Malwatta Chapter, the third had been for fourteen years a member of the Asgiriya Chapter, and the second was the High Priest of Colombo and Chilaw. The defendants thus followed the precedent of the evidence in the *Appendix to vol. XX. of the New Law Reports*, which was that of representatives of the two Kandy Chapters and the high ecclesiastical dignitary resident in Colombo. This evidence is very carefully and expressly given, and it is unanimous. The first witness says: "When a tutor has several pupils, on his death one

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succeeds as chief of the vihare. If the latter dies leaving his own pupils, one of these latter will now succeed. If at the time of the second death there is alive a pupil of the original tutor, I cannot say if that co-pupil should succeed as chief incumbent or not. I can only say there has been no such instance. The custom is that succession runs from pupil to pupil. . . . All I can say is that in my long experience I have not known a brother pupil to exclude a deceased's own pupils; to do so does not appear to me to be consonant with fairness." This is most judicially and carefully expressed, and carries far more weight than a mere enunciation of a dogma. What we require to know is what is the custom observed in actual practice. Another witness says: "I am aware of no case where a co-pupil has excluded one's own pupils." And he cites a case in this very vihare in which, on the contrary, a pupil took priority over a co-pupil of his tutor. All the witnesses had obviously carefully studied the opinion of the Malwatta priests given in the case above cited, and they treat what I have numbered above as the second alternative as having reference to the special and particular case of an *adikhari* nominating all his pupils to the succession jointly. As I have said, no serious attempt was made to contest this evidence, and even on the appeal it was obvious that counsel for the appellant had no definite instructions that contradictory evidence would be available, if an opportunity were given to present it.

In view, therefore, of the concurrence of early authority above pointed out, the absence of any contrary authority, the explicit evidence called in the present case, and the absence of any contrary evidence, I have come to the conclusion, after careful consideration, that it would be superfluous for us to remit the case for further inquiry. I would follow the original authorities above cited, and hold that whatever may be the rights of fellow-pupils of a tutor they only arise when that tutor has no pupils of his own, or when the direct line of succession is exhausted. What was in fact declared by those earlier authorities was that an incumbent could not appoint one of his fellow-pupils in preference to a pupil of his own. But it follows *a fortiori* that where there has been no such appointment of a fellow pupil, the direct pupils of the incumbent must have a prior right, particularly when, as in the present instance, it is the pupil who holds the express appointment. The learned District Judge is clearly right when he holds that the appointment of a pupil by an incumbent to succeed him is paramount. The right to make such an appointment has been affirmed from the earliest times, and it has never been suggested that that right is subject to any overriding rights in the incumbent's fellow-pupils.

I would note, before concluding, a point to which I have previously elsewhere drawn attention—the phraseology used with reference to these cases. When we speak of "incumbents," "deeds of gift,"

" bequests by last will, " we are using a dialect foreign to orthodox ecclesiastical ideas. *Adikhari bhikshus* are not " incumbents, " nor do they dispose of temples by deed or will. One of the witnesses in the present case gives us a useful reminder of the true position: " I do not understand what is meant by a ' last will.' If the tutor had written to the *sangha* that on his death he wished that the vihare and its endowments should go to his co-pupil, if the *sabha* accepted the letter, both would be heirs, and the two members arrange who must be *adikhari*. Otherwise the *sangha sabha* must decide. "

I would, therefore, uphold the decision of the learned District Judge, and dismiss the appeal, with costs.

SCHNEIDER J.—

I have read with much interest the learned judgments of my Lord the Chief Justice and of my brother Jayewardene. I agree with them in the decision of this case. In deciding *Siriniwase v. Sarananda* (*supra*), in which I took part, my brother Ennis and I proceeded upon the evidence set out in the *Appendix to vol. XX of the New Law Reports*. In the light of the evidence called in this case upon the express point arising for decision, and after further and fuller consideration of the authorities cited at the argument of this case, I am of opinion that the *ratio decidendi* of *Siriniwase v. Sarananda* (*supra*) is not sound.

JAYEWARDENE A.J.—

This case involves a question of considerable importance to the Buddhist priesthood—the order of succession to their incumbencies. The plaintiff and the first defendant are Buddhist priests, and each claims to be the lawful incumbent of a well-known vihare in Kandy, called the Niyamgampaya vihare. The second defendant is the trustee of the vihare. It is admitted that one Indasara Unnanse who died many years ago was the incumbent of this temple. He died leaving three pupils:—(1) Gunaratne Unnanse, (2) Gunananda Unnanse, the plaintiff, and (3) Dhammarakkita Unnanse. Gunaratne Unnanse, as the senior pupil, succeeded to the incumbency, and died in September, 1922. Since then the first defendant, as the senior pupil of Gunaratne Unnanse, has assumed the office of incumbent of the vihare. The plaintiff, as one of the pupils of Indasara Unnanse, questions his right to do so, and claims to be declared entitled to the incumbency, which he says has devolved on him as the fellow-pupil of the last incumbent according to Buddhist ecclesiastical law. The first defendant says he is the rightful successor to his tutor and last incumbent, Gunaratne Unnanse, according to the rule of *sisyanusisya paramparawa*, which governs the succession to this vihare. He also produces a deed granted by Gunaratne Unnanse appointing him his successor. The plaintiff relies on a decision of this Court in *Siriniwase v. Sarananda* (*supra*), in which the right of a co-pupil of the last incumbent to succeed him was upheld. But

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the learned District Judge has held that that case has no application here, as the first defendant is entitled to the incumbency by virtue of his appointment as incumbent by deed by Gunaratne Unnanse, his tutor. The learned District Judge also indicated his view that according to the rules regulating the succession to the vihare; the first defendant was the rightful successor, and that the decision in *Siriniwase v. Sarananda* (*supra*) did not lay down a general rule that a co-pupil has the preference over one's own pupil, but was a decision on the particular facts of that case. The claim of the plaintiff raises a difficult question. and, in my opinion, if he is the successor under the rule of *sisyanusisya paramparawa*, his right cannot be overridden by the appointment by Gunaratne Unnanse of one of his pupils as his successor to the incumbency. The origin of the rule of *sisyanusisya paramparawa* cannot be traced, but Sir John Budd Phear, who had been at one time a Judge of the Calcutta High Court and was Chief Justice of Ceylon, remarked that—

> "It is noteworthy that the law of property, which obtains with regard to the Hindu *math*, an institution which has many features in common with the Sinhalese *vihare*, and is characteristic of the *Bihar* (*or vihare*) district of Bengal from whence Buddhism sprung, is precisely that which has just been stated, and is founded on a text of the *Mitackhshera*, prescribing that the property of a *sanyasi* must descend to the selected pupil." *Ratnapala Unnanse v. Kewitigala Unnanse* (*supra*).

There is no reference to the *sisyanusisya paramparawa* in Buddhist ecclesiastical works, it has been in existence for about 500 years, and it is by a purely customary rule that a pupil inherits what his tutor possessed. In the year 1828 the priests of the Malwatta vihare and of the Asgiriya vihare were called upon to define the term *siyanusisya paramparawa* and *siwuru paramparawa*, and the priests of Malwatta gave an opinion which has been accepted as being more correct than that of the Asgiriya priests. See *Appendix D*, *Vanderstraaten's Report*, *xli*, *xlii*.

According to the opinion of the Malwatta prists—

(1) When a priest has several pupils, the temple property would devolve solely on that pupil to whom an absolute gift had been made.

(2) If the priest declares his bequest common to all his pupils, they will all become entitled thereto—one of them being elected to the superiority, the others only participating in the benefits. When the superior dies, the one next in rank will succeed to the superiority, and the superiority will devolve in this way until the last survivor, who will have the power to make a gift in favour of any other person.

(3) The original proprietor-priest may transfer his right to any other person passing by his own pupils.

(4) If the original proprietor-priest dies intestate priests assembled at his death become entitled in common.

(5) Things which belonged equally to two priests devolve wholly to the survivor.

This opinion is not complete or exhaustive, and some of these propositions have been considerably modified by judicial decisions. For instance, the third proposition which says that the original proprietor-priest may transfer his right to any other person passing by his own pupils would only apply where a priest founds a temple and becomes its incumbent without defining the mode of succession to it. It can have no application to a temple, the succession to which is regulated by the *sisyanusisya paramparawa* (*Dhammajoti Unnanse v. Paranatale*,[1] *Dharmapala Unnanse v. Medagama Sumana Unnanse*,[2] *Dhammajoti v. Sobita*,[3] *Indasoti v. Ratnasothi* [4]).

Again, the fourth proposition says that if an original proprietor-priest dies intestate, the priests assembled at his death become entitled to the temple in common. In such a case, according to the decisions, in the absence of definite terms attaching to the dedication, the rule of succession will be presumed to be the *sisyanusisya paramparawa* (*Dhammajoti v. Sobita* (*supra*) and *Sangharatana Unnanse v. Weerasekera* [5]).

This opinion does not help the plaintiff, although it might support the first defendant's claim on the deed of appointment. But the plaintiff's contention is that by the law of *sisyanusisya paramparawa* he is entitled to succeed his fellow-pupil to the exclusion of the incumbent's own pupil, and that it is not open to his fellow-pupil to divert the line of succession by the appointment of anyone else. He argues that as in a case where several persons are appointed by deed or will to an incumbency, the appointees succeed in rotation to the exclusion of the pupils of any of the persons appointed, so in the same way, in the absence of any such appointment, the pupils of the last incumbent succeed in rotation. In my opinion, the persons appointed to the incumbency by deed or will succeed in rotation, because it is not possible for them all to succeed to the incumbency at the same time or jointly—the office of incumbent being a single office which cannot be held jointly (*Dhammajoti v. Sobita* (*supra*) and *Saranankara Unnanse v. Indajoti Unnanse* (*supra*)).

The question for decision here was raised in an old case, D. C. Kurunegala, 19,413, reported in *3 Grenier's Reports, p. 66*, and the District Judge said :—" This declaration that Karewelagala Unnanse was the testator's fellow-pupil is conclusive, and from the leading

[1] *(1881) 4 S. C. C. 121.*
[2] *(1910) 2 C. L. R. 83 current.*
[3] *(1912) 16 N. L. R. 408.*
[4] *(1915) 4 Bal. 39.*
[5] *(1903) 6 N. L. R. 313.*

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case on the right to succession to vihares (366, Agent's Court, Kurunegala) it is clear that Kotagame Unnanse could not bequeath his trust, and will away his temple and its endowments to his fellow-pupil to the exclusion of his pupil, the first defendant. "

In appeal it was contended that it was competent for Kotagame Unnanse to bequeath to his fellow-pupil to the exclusion of his own pupil. But Cayley C.J. (then Cayley J.) who heard the case with Stewart J. interposed saying:—

> " It has always been the accepttd rule of law in this Court that when once a gift was made by a *sannas*, or otherwise, of lands for the purpose of future priestly succession by *sisya paramparawa*, the original proprietor-priest might indicate the person through whom the line of succession was to pass, but that thereafter the succession was always to continue therein strictly limited to the pupils of each successive incumbent. "

And in the course of the argument the same Judge again remarked:—

> " The enforced limitation of succession to a priest's own pupils has never been questioned previously to this, and as it has always been accepted and acted upon, our judgment must be given in accordance with it. "

In the result the judgment of the District Court was affirmed without counsel for the respondent being called upon. On a subsequent date counsel for the appellant drew the attention of the Court to another judgment of the Supreme Court in D. C. Ratnapura, 9,040 (*supra*), affirming a judgment of the District Court, in which the District Judge had said that an incumbent might even bequeath his trust to a co-pupil or brother scholar of the original sacerdotal line of pupils to the exclusion of his own pupil, but not to a stranger-priest, and asked that the judgment be recalled *quia improvide emanavit*, but the Supreme Court thought that its judgment had not *improvide emanavit*, and told counsel that, if the judgment was erroneous, he might have it brought up in review for the purpose of an appeal to the Privy Council. It is significant, however, this step was never taken, although the temple was a very valuable one. In *Dhammajoti Unnanse v. Paranatale* (*supra*) a similar question arose. There the incumbent had granted the vihare and its endowments to a fellow-pupil to the exclusion of his own pupils, and it was held (Cayley C.J. and Dias J.) that the incumbent was not entitled to do so. Cayley C.J. said :—

> " It was urged in appeal that plaintiff and Ratnapala (the elder) were co-pupils, each having been a pupil of Mahala, and that the deed of 1849 did not confer any right upon a stranger, in the event, which happened, of plaintiff surviving the other grantees, plaintiff himself being within the original pupillary line. The second defendant admits

that plaintiff and Ratnapala (the elder) were both pupils of Mahala. The question then arises whether an incumbent has power to limit the succession to the incumbency first to a co-pupil jointly with a pupil of his own, and then, after the death of the pupil, over to the co-pupil, to the exclusion of the pupil's pupil. I am not aware of any precise decision in point. It was held by the District Judge of Kurunegala in case No. 19,413 (*supra*) that an incumbent could not by will confer a temple and its endowments upon a co-pupil to the exclusion of his own pupils, and this decision was affirmed by the Supreme Court. This case would seem to show that, when an incumbent has pupils of his own, he cannot interrupt the regular chain of succession from pupil to pupil, though, no doubt, when in any case an incumbent has several pupils, he may make a selection from among them. The decision of the District Judge in the Kurunegala case is based upon the well-known case No. 366 of the Agent's Court, Kurunegala (*supra*), but this case does not strictly decide the point. The Supreme Court, however, judging from the reported *obiter dicta* of the Judges, would seem to hold that an incumbent cannot, if he has pupils of his own, break the line of succession by appointing a co-pupil. "

And Dias J. said:—

" In this case I fully concur in the judgment which has just been delivered by my Lord the Chief Justice, but as the point of law involved in the case is one of some importance, I shall state my reasons for the opinion which I have formed. The vihare in question was founded by a Sinhalese king, and the *sannas* on which it was founded is a document of the usual kind, and the tenure created thereby is the well-known tenure of *sisyanusisya paramparawa*, which means " pupillary succession, " or " succession from pupil to pupil. " The second word " *anu* " means " each by each " or " orderly, " and the effect of that word seems to me to limit the succession to the descending line, to the exclusion of both the ascending and the collateral lines. Thus we see that, according to the strict grammatical meaning of the words *sisyanusisya paramparawa*, the line of succession is limited to pupils of the descending line. "

And towards the conclusion of his judgment, he added—

" And as I have already remarked, the plaintiff as a co-pupil of Ratnapala is not in the line of succession by descent, but in the collateral line, which, in my opinion, is inconsistent with the line of succession contemplated by the tenure of *sisya paramparawa*.

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"With regard to the several cases referred to by the learned Judge such of them as go to support the view that a co-pupil of the last incumbent who left pupils of his own can be placed in the line of succession to the exclusion of the pupils of the last incumbent are opposed to the succession which results from the tenure of *sisya paramparawa*, and I am of opinion that the case referred to by my Lord (*Grenier's Reports, 1874, p. 68*) lays down the law on the subject more correctly and consistently with the practice which prevails among Buddhists."

It is to be noted that the case in *3 Grenier, 66*, was referred to and followed in this case.

In the case of *Sumana Terunnanse v. Kandappuhamy*,[1] it was held that under the *sisyanusisya paramparawa*, if the last incumbent leaves no pupil and has nominated no successor by deed or will, the incumbency can pass to his co-pupils only if their common tutor was himself in the line of succession from the original proprietor-priest or incumbent of the vihare. Lawrie J. thought that where a priest becomes entitled to an incumbency from a priest who is not his tutor, his co-pupils would not succeed him if he dies having no pupils, unless they were also pupils of the priest who granted the incumbency. The learned Judge in the course of his judgment referred to a passage from the judgment of Phear C.J. in *Ratnapala Unnanse v. Kewitigala Unnanse* (*supra*) where the learned Chief Justice had said:—

"Subsequent cases determined by the Supreme Court have recognized that the *sisya paramparawa* has some elasticity, and is not rigidly restricted to the actual pupils of the deceased incumbent; it may comprehend his fellow-pupils, or the pupils of an institution with which he stood in intimate relation; and the selecting authority in reference to these need not necessarily be the deceased himself, but may be some other sacerdotal person or personage, or college, variously defined.

"In some instances, too, under this *paramparawa*, the deceased has a discretion to appoint joint successors." (*Ram. (1863-68), 280 ; Vand. p. li.*)

Lawrie J., commenting on this passage, said :—

"I do not understand the latter part of this sentence, nor have I discovered any authority for it, but, for the first part of the sentence, Sir John Phear quotes the case I have just referred to in *Ram. (1863-68), 280*, I venture to think that this expression of the law, which in the circumstances was obiter, is not correct."

[1] *(1898) 3 C. L. R. 14.*

The judgment of the Supreme Court in the case reported in *Ram. (1863-68), p. 280,* has no bearing on the question raised, but Lawrie J. was referring to an admission by counsel in the District Court that when a priest died without having a pupil of his own, the pupils of his deceased tutor (co-pupils) would be entitled to succeed to the vihare, which he thought was a legitimate admission only if their tutor was descended from the original incumbent.

The admission is, however, of some importance, as disclosing what was then understood to be the rule regulating the right of succession, namely, that a co-pupil of an incumbent can succeed him only if the latter had no pupil of his own.

We next have a case of great importance (*Saranankara Unnanse v. Indajoti Unnanse (supra)*). In this case the plaintiffs claimed to be entitled jointly with the defendants to the incumbency of a vihare. The first defendant and one Ratnapala were fellow-pupils of Pinguwa Unnanse; the first defendant, his senior pupil, became the incumbent. Ratnapala left a pupil, Sri Sumana Unnanse, to whom he conveyed certain rights by deed. The third plaintiff claimed to be the pupil of Sri Sumana, and as such to succeed to a " share " in the incumbency and to be joint incumbent with the first defendant.

Among the questions propounded for decision was the following:—

" (iii) Does every pupil obtain the right of pupillary succession to his tutor, if so, in what order ; if not, which pupil obtains the right ? "

My Lord the Chief Justice in an instructive judgment dealt with the historical aspect of the question and discussed the effect of pupillary succession in establishing a special office in connection with viharés—that of a presiding officer—and in regulating the succession to this office. He came to the conclusion that the officer, who in Ceylon decisions and Ordinances is referred to as the " incumbent, " was an officer different from the special officers referred to in the *Vinaya*, and was called in Sinhalese *adikhari*, meaning a person " in authority. "

The *adikhari* was appointed by nomination by his predecessor, or by selection by the persons in the line of pupillary succession. By custom the right was generally determined by seniority. The office of *adikhari* was single and indivisible, an *adikhari* might nominate all his pupils to succeed him, but they could only succeed one at a time; and at page 398 the learned Chief Justice said:—

" Similarly if the *adikhari* makes no nomination they would all succeed him, but they would succeed him singly in rotation. "

This remark might be cited in support of the contention that the succession to an incumbency when an incumbent dies having several pupils is regulated in the same way as when he appoints more than

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one pupil to succeed him by deed or will. But that it was not the intention of the learned Chief Justice to lay down any such rule is clear from a subsequent passage in the same judgment where he says:—

> "The question as to the order in which persons belonging to the pupillary succession may be eventually entitled to succeed to the incumbency is an extremely obscure one. It has not yet been properly elucidated; I doubt myself whether it is capable of full elucidation. The question, however, does not arise here; it is sufficient to say that the pupils of an *adikhari* and the pupils of those pupils are entitled to maintenance and residence at the vihare of which he is or was the *adikhari*."

The Chief Justice has, in my opinion, left the question arising for decision here entirely open, and the observation, which I have quoted above, cannot be regarded as a considered statement of the law, as in that case no question had arisen between an incumbent's pupil and a co-pupil, and the authorities bearing on the subject had not been referred to or discussed.

Referring to this case Shaw J. in his judgment in *Gunaratne Unnanse v. Dharmananda* [1] said:—

> "In the recent case (*Saranankara Unnanse v. Indajoti Unnanse* (*supra*)) the right of pupils in the collateral line to succeed on failure of the direct line was recognized in the judgment and decree in the case, although there was no decision on the point that is raised in the present case. As I understand the rules of *sisyanusisya paramparawa*, there is no failure in the succession so long as there remain direct pupillary successors to any previous incumbent."

Then we come to the case of *Siriniwase v. Sarananda* (*supra*), on which, as I said, the plaintiff strongly relies, and it is, undoubtedly, a clear authority in his favour. There the facts were that one Kukulupone Sonuttara Unnanse had been incumbent of the vihare in dispute. He had a pupil, Ratnapala, who succeeded him, and died leaving a pupil, the defendant. The plaintiff who was also one of the pupils of Kukulupone contested the defendant's right to the incumbency. It was held by this Court that as the plaintiff was senior by ordination to the defendant and senior in proximity to the founder, he was entitled to the incumbency, and that the defendant was only entitled to reside in the vihare and to be maintained from the income. This judgment appears to be based on *Dammaratna Unnanse v. Sumangala Unnanse* [2] and *Saranankara Unnanse v. Indajoti Unnanse* (*supra*), and the evidence recorded in the first case in answer to certain questions framed by this Court and printed as an *Appendix to vol. XX of the New Law Report at page 506.*

[1] *(1921) 22 N. L. R. 276 (280).*

[2] *(1910) 14 N. L. R. 400.*

On a consideration of the answers given to some of the questions, Ennis A.C.J., who delivered the judgment of this Court, concludes that on the death of the chief incumbent more than one person could succeed to the right to remain in the vihare and to be maintained out of the income, and that the right to be the chief incumbent or the person in authority in the temple depended upon seniority, or appointment, or experience, or election, or cleverness. That as regards the pupils of a founder or priest incumbent, the succession was regulated by seniority of ordination. But, as between pupils of these pupils, the seniority of their tutor might confer some seniority, and as the plaintiff was senior by ordination to the defendant and senior in proximity to the founder he was entitled to the incumbency. It may be pointed out that the questions framed in that case do not touch the question of the competing claims between an incumbent's pupil and co-pupil, and none of the replies, so far as I can see, provide an answer to the question. Seniority, appointment, experience, election, and cleverness seem to be matters to be taken into consideration by the pupils in choosing one of themselves to be the incumbent. See the answers given to questions (3) and (7). The selection has to be from among the pupils of the deceased incumbent, and not from his co-pupils who seem to have no voice in the matter.

I do not think the answers can be construed as recognizing the right of a co-pupil to succeed an incumbent, however senior he may be in ordination or in proximity to the founder, for a co-pupil would be always the latter and almost always the former.

Neither do the judgments of this Court in *Saranankara Unnanse v. Indajoti Unnanse* (*supra*) when read as a whole lend any support to this view.

The decision in *Siriniwasa v. Sarananda* (*supra*), therefore, stands by itself, and no authority can be cited in support of the rule enunciated in it. It is contrary to the meaning of the very name given to the rule, as explained by Dias J. in *Dhammajoti Unnanse v. Paranatale* (*supra*). The adoption of such a rule would, in my opinion, lead to confusion, for it may be asked who is to succeed on the death of the last of the co-pupils? Is the incumbent to be chosen from all the pupils of the co-pupils, or only from the pupils of the last incumbent? In cases where several persons are appointed by deed, there is an established rule that the pupils of the last incumbent succeed, but there is no such rule applicable to cases where succession is not by appointment. While, on the other hand, the rule requiring the transmission of the incumbency from senior pupil to senior pupil produces certainty and creates a sort of "primogeniture" which is easily understood and applied. In my opinion the judgments of this Court since 1874 have clearly recognized the right of a pupil to succeed to the incumbency, although there may be co-pupils of the last incumbent, and the right is so

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well established that the incumbent cannot take it away by nominating one of his co-pupils.

Furthermore, in this case we have a strong body of evidence from expert witnesses whose statements of the law or custom regulating the succession to incumbencies stands uncontradicted. They all agree in saying that according to Buddhist ecclesiastical law as prevailing in this country, an incumbent is succeeded by his pupil and not by his fellow-pupils.

As a rule, the senior pupil has the right to succeed the incumbent, and this has been recognized and enforced by our Courts, although, in theory, the selection of a pupil is based on the consent of all the pupils of the last incumbent.

As Bertram C.J. pointed out in *Saranankara Unnanse v. Indajoti Unnanse* (*supra*):—

> "By custom the right to succeed is determined by seniority (though it would appear from the evidence recorded in the case of *Dammaratna Unnanse v. Sumangala Unnanse* (*supra*) that the right attaching to seniority is not so unqualified as some of our decisions appear to suggest. See *Sumana Terunnanse v. Kandappuhamy* (*supra*). When, therefore, in such cases, our Courts declare that any person is entitled to succeed to an "incumbency," what they, in effect, decide is that the person in question, by virtue of seniority (or such other qualification as the Court may determine to govern the matter), is by custom entitled to be selected for the office by the other priests in the line of pupillary succession."

In my opinion the rule laid down in D. C. Kurunegala, 19,413 (*supra*) and in *Dhammajoti Unnanse v. Paranatale* (*supra*) should be regarded as the correct one.

It may perhaps be useful to summarize the rules regulating the succession to temples and vihares as laid down in the authorities:—

(*a*) Succession to an incumbency is regulated by the terms of the original dedication. *Sangharatana Unnanse v. Weerasekera* (*supra*), *Dharmapala Unnanse v. Medagama Sumana Unnanse* (*supra*), and *Unnanse v. Unnanse*.[1]

(*b*) If the original dedication is silent as to the mode of succession, then the succession is presumed to be in accordance with the rule of *sisyanusisya paramparawa* or pupillary succession, to the exclusion of even the succession known as *siwuru paramparawa*, and the grantors or dedicators cease to have any control over it. *Ratnapala Unnanse v. Kewitigala Unnanse* (*supra*), *Weligama Dhammajoti Unnanse v. Weligama Sarananda Unnanse* (*supra*), *Dharmapala Unnanse v. Medagama Sumana Unnanse* (*supra*), and *Unnanse v. Unnanse* (*supra*).

[1] *(1921) 22 N. L. R. 323.*

(*c*) The general rule of succession is the *sisyanusisya paramparawa*. *Dhammajoti v. Sobita* (*supra*).

(*d*) If an incumbent dies leaving several pupils, the senior pupil succeeds. The selection of the incumbent, however, rests with the pupils, and the right of the senior pupil might, in certain circumstances, be disregarded. *Saranankara Unnanse v. Indajoti Unnanse* (*supra*).

(*e*) The incumbent can appoint or nominate one of his pupils to succeed him, the pupil so appointed or nominated, if a junior, succeeds to the exclusion of the senior pupils. *Vand., App. F, p. li., Sumangala Unnanse v. Sobita Unnanse* (*supra*), and *Rewala Unnanse v. Ratnajoti Unnanse*.[1]

(*f*) He can appoint by will or deed more than one pupil to succeed him; in such a case these pupils, although called jointly, succeeds singly in rotation according to seniority. The pupil who succeeds last can appoint one of his pupils, and, in the absence of such an appointment, his senior pupil will succeed him to the exclusion of the pupils of the previous incumbents.

(*g*) An incumbent cannot deprive his pupils of their right of succession by appointing a fellow-pupil or stranger by deed or will. *Dhammajoti v. Sobita* (*supra*) and *Indasoti v. Ratnasoti* (*supra*).

(*h*) It is only where an incumbent dies having no pupils that his fellow-pupil succeeds him. *In re Polwatte Jananda Terunnanse*,[2] D. C. Kurunegala, 19,413 (*supra*), *Dhammajoti Unnanse v. Paranatale* (*supra*), but a fellow-pupil cannot succeed unless he is in the line of pupillary succession to the vihare. *Sumana Terunnanse v. Kandappuhamy* (*supra*).

(*j*) If an incument dies leaving no pupil or fellow-pupil entitled to succeed, his tutor or other priests descending in the pupillary line from an incumbent of the temple succeeds. *Vand., App. F, p. li.; Weligama Dhammajoti Unnanse v. Weligama Sarananda Unnanse* (*supra*) where Dias J. said:—

"I always understood the rule to be that after exhausting the descending line you must resort to the ascending line, such as the tutor of the deceased incumbent, and, failing him, the fellow-pupils of the deceased incumbent."

[1] (*1916*) *3 C. W. R. 193.*

[2] (*1857*) *3 Lor. 143.*

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In *Sumana Terunnanse v. Kandappuhamy* (*supra*) Lawrie J. questioned the correctness of this view:

> " I confess I do not understand this. The descending line cannot be exhausted if there be an ancestor or a collateral qualified to take. The descent is from a founder or original grantee, and the line of his succession is not exhausted so long as there are persons alive who descend in the pupillary line from him. But when that line is exhausted, there is no ascending line to which you can resort. Any other line is a line of strangers to whom the incumbency cannot go. " *Gunaratne Unnanse v. Dharmananda* (*supra*).

(*k*) On the death of the last of the line descending from tutor to pupil from the original incumbent, the *sisya paramparawa*, the connected chain, ends. There is no sacerdotal descent left. And the vihare becomes *sangika*, or common, according to some authorities, to the priests who attended the deathbed of the last incumbent, or to all ordained priests subject to the nomination of a priest by the Mahanayake of Malwatta or Asgiriya. *Sumana Terunnanse v. Kandappuhamy* (*supra*), *Dharmaratne Unnanse v. Sumangala Unnanse* (*supra*), and *Dharmapala Unnanse v. Sumana Unnanse* (*supra*).

(*l*) All priests who are pupils of a previous incumbent and pupils of such priests are entitled to reside in the vihare and to be maintained from the income: *Saranankara Unnanse v. Indajoti Unnanse* (*supra*) and *Siriniwase v. Sarananda* (*supra*).

The learned District Judge has, in my opinion, come to the right conclusion, and the appeal must be dismissed, with costs.

Appeal dismissed.

Present : Jayewardene A.J.

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155—C. R. Gampola, 6,257.

Muslim law—Wife's right to maggar—*Vesting of right—Consummation of marriage—Subsequent adultery—Desertion—Husband's claim for double the value of* maggar—*Muhammadan Code, ss. 80-86.*

Under Muslim law when a marriage has been consummated, the wife's right to *maggar* is confirmed, and is not lost by her subsequent apostasy or adultery.

Sections 80-86 of the Code deal with the subject of divorce by *khula*, *i.e.*, divorce at the instance of the wife. If in Ceylon a husband grants his wife such a divorce, he would be entitled to demand from her double the value of the *maggar*. She would, however, have the right to set off against it the *maggar* due to her. If the husband can prove before a Court of competent jurisdiction that his wife persists in her refusal to be reconciled to him, he can claim to have restored to him double the value of the *maggar* without proving that all the requirements of sections 80-84 have been complied with. A divorce must precede or accompany the liability to restore double the value of the *maggar* under section 86.

APPEAL from a judgment of the Commissioner of Requests, Gampola. The plaintiff, the wife of a Muslim, sued her husband for the recovery of a sum of Rs. 280.40, of which a sum of Rs. 179.40 represented *maggar* and the balance *kaicooly*. Her right to *kaicooly* was admitted, but the husband contested his liability to pay the *maggar*, on the gound that the plaintiff separated herself and left his house without any reason, although he was willing to live with her. In consequence of such desertion, he claimed to be entitled to recover double the value of the *maggar* according to the law prevailing among the Muslims of Ceylon. At the trial no evidence was led, but it was admitted on behalf of the wife that she refused to live with the defendant. The Commissioner of Requests held that the facts relied upon by the defendant did not constitute a defence to the plaintiff's claim for *maggar*.

J. S. Jayewardene, for defendant, appellant.

Garvin, for plaintiff, respondent.

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This is an action between Muslim parties in which the question, whether a wife, who refuses to live with her husband who is prepared to receive her, is entitled to claim her *maggar*, arises

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for decision. In this case the wife claimed a sum of Rs. 280.40 from her husband, Rs. 179.40 as *maggar* and the balance Rs. 101 as *kaicooly*.

Her right to the *kaicooly* is admitted ; but the husband contests his liability to pay the *maggar*, on the ground that the plaintiff separated herself and left his house without any cause or reason whatsoever, although he was and is willing to live with her ; and in consequence of such desertion, he not only denied his liability to pay the *maggar*, but he also claimed to be entitled to recover double the value of the *maggar* according to the customs and laws prevailing among the Muslims in Ceylon. In support of his claim to double the value of the *maggar*, reliance is placed on section 86 of the Muhammadan Code of 1806, which declares a wife liable to pay double the value of the *maggar*, if she persists in her refusal to be reconciled to her husband.

At the trial no evidence was led, but it was admitted on behalf of the wife that she refused to live with the defendant.

The learned Commissioner after hearing argument held that the facts relied on by the defendant did not constitute a defence to the plaintiff's claim for *maggar*.

He based his decision on the judgment of this Court in *Pathumma v. Cassim*.[1]

As regards the claim for double the value of the *maggar*, he said :—

> " The provisions of the Muhammadan Code do not appear to have been followed, and besides they are hedged in with so many conditions that to take advantage of them, defendant must prove that all the necessary steps to bring about a settlement have been taken. "

He accordingly held the plaintiff entitled to the *maggar*. The judgment of the learned Commissioner is, in my opinion, right, although I do not agree with the reasons given by him for holding that section 86 has no application.

In *Pathumma v. Cassim* (*supra*), the plaintiff—the wife—claimed both *maggar* and *kaicooly*. There, too, the husband raised the defence that, as his wife had wilfully separated herself from him and refused to return to him, she had forfeited her right. But counsel for the husband conceded that so far as the *maggar* was concerned, the wilful separation and refusal to return did not constitute a defence to her claim, and the Court held that *kaicooly* was governed by the same principles as *maggar*, and decreed the wife's claims. The correctness of this admission is contested in the present case.

Strictly speaking, that case cannot be regarded as an authority for the proposition that *maggar* can be claimed by a wife in the circumstances stated above, as it proceeds on an admission made by

[1] (*1919*) *21 N. L. R. 221.*

counsel. But counsel's admission seems to be quite correct according to Muhammadan Law. *Maggar* or *Maskawien* as it is sometimes called in the Muhammadan Code (see sections 76, 77, and 86) is the same as the " *mahr* " of the Muhammadan Law. In English it is termed " dower."

Maggar, mahr, or dower has been defined to be " the property which it is incumbent on a husband, either by reason of its being in the contract of marriage or by virtue of the contract itself, to give in exchange for the usufruct of the wife."

It is not the exchange or consideration given by the man to the woman for entering into the contract ; but an effect of the contract imposed by the law on the husband as a token of respect of its object—woman.

The usufruct of the wife being another of its effects, one of these (dower) is said to be exchanged for the other (usufruct), and marriage becomes, in the language of the law, a contract of exchange, though, in popular parlance, it is only a contract of union. The right to *maggar* is in danger of being lost altogether by the apostasy of the wife, or her kissing her husband's son with desire, but this danger is removed by consummation which is an actual delivery of the exchange for the *maggar.* Hence *maggar* is said to be confirmed and made binding by consummation, or by its substitute a valid retirement (according to the Hanafi doctrine), or by death which by terminating the marriage puts an end to all the contingencies to which it is exposed. *Bailie's Digest of Muhammadan Law, pp. 91, 92; Vanderstraaten's Reports (1869-71), 196; Umma v. Marikar.*[1]

The *maggar* generally remains in the hands of the husband and under his control and management until it is demanded from him by the wife, and it forms a settlement intended for her exclusive benefit. It is payable to her heirs at her death, and forms a first charge on her husband's property. She is entitled to it, if her husband divorces her, and it may be demanded by her at any time, even during the subsistence of the marriage, when the dower is " prompt " and not " deferred." *Amir Ali's Muhammadan Law, vol. II., ch. 12 sec. 2, p. 503 ; Vanderstraaten's Reports, 162.*

When dower or *maggar* has once been confirmed or perfected as stated above, the wife does not lose her right to it by any conduct on her part. Bailie in his *Digest of the Muhammadan Law, p. 101* thus states the law on the subject:—

> " When dower has once been perfected, it does not drop, *though a separation should afterwards take place for a cause proceeding from the wife* as, for instance, her apostatizing or consenting to the son of her husband, after he had consummated or retired with her ; but before dower is perfected, the whole fails by reason of any separation proceeding from the wife."

[1] *(1912) 15 N. L. R. 316.*

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And *Amir Ali, vol. I., at p. 390,* says:—

> "When the right to the dower has once vested in the woman, it is not defeated or lost by any conduct on her part. For example, when the marriage has been consummated (according to the Sunnis as well as the Shiahs), or a valid retirement has taken place (according to the Hanafis), the woman's right to her dower is not lost by her subsequent apostasy or adultery; but it would be otherwise, if the apostasy or misconduct occurred before the right vested in her. In such a case, the entire dower would fall to the ground. The right once vested is not lost, even if the woman were to murder her husband."

Other writers on Muhammadan law lay down the law in similar terms. *Tyabji's Muhammadan Law, p. 115.*

The passages I have cited negative the right of a husband to refuse his wife her *maggar* because of her separation from him and her unreasonable refusal to live with him. In fact, the passage from *Bailie* deals with the very case that has arisen here. I would, therefore, hold that the wife refusal to live with the defendant does not justify him in refusing to pay her the *maggar*. But in such a case, it is argued that under the Muhammadan Code, the wife becomes liable to pay to the husband double the value of the *maggar*. It is said that the Muhammadan Code, sections 80-86, confer on the husband such a right. It is necessary, therefore, to ascertain the circumstances to which sections 85 and 86 apply. Having considered sections 80 to 86 of the Code and the commentaries on the Muhammadan Law, it seems to me that section 86 applies to cases where the wife obtains a divorce from the husband.

Under Muhammadan Law there are three kinds of divorce which have specific names:—

(*a*) "When the dissolution of the marriage tie proceeds from the husband, it is called "*talak*" or "*Tollek.*"

(*b*) When it takes place at the instance of the wife, it is called "*khula.*"

(*c*) When it is by mutual consent, it is called "*mubarat.*" *Amir Ali, vol. II., ch. 14, pp. 567-568.*

Divorce by the husband by giving *talak* or letters of divorce is dealt with in sections 87 to 90 of our Muhammadan Code.

Sections 80 to 86, in my opinion, refer to a divorce at the instance of the wife, or *khula*; and section 79 to divorce by the mutual consent of both, or *mubarat.*

Sections 80 to 85 lay down the procedure to be adopted when a husband and his wife disagree and live in continued dissensions with one another and *wish to be divorced.* In such a case, under section 81, the priest and the commandants on both sides are to inquire into the matter and try to reconcile the parties. If the wife

is opposed to a reconciliation, and the husband desires a divorce, parties are to be separated, each living with his or her relations (section 82). Then a meeting of the priests and the officers of the company is to be convened for the investigation of the matter in dispute a second time, and an attempt made to reconcile the parties (sections 83 and 84). If the parties cannot be reconciled even then, the matter must be brought before the sitting Magistrate (section 85). If the wife should still oppose the reconciliation, she must pay to the husband twice the value of the *maggar* (section 86), and then, I presume, she obtains the divorce, which the parties wished for and which is referred to in section 80.

A reference to the works on Muhammadan Law shows that section 80 gives the grounds for which a *khula*—divorce may be obtained. Bailie (p. 30) cites the following passage from the "*Fatawa Alamgiri*" which follows the *Hedaya*:—

> "When married parties disagree and are apprehensive that they cannot observe the bounds prescribed by Almighty God (or, in other words, perform the duties incumbent on them by the marriage relation), there is no objection to the woman ransoming herself from her husband with property, in consideration of which he is to give her a *khula;* and when they have done this, one irrevocable separation or divorce takes place, and she is liable for the property."

See *Amir Ali's vol. II., ch. 14, p. 567*, where he observes that "where the wife owing to her aversion to the husband, or her unwillingness to fulfil the conjugal duties, is desirous of obtaining a divorce, she may obtain a release from the marital contract, by giving up either her settled dower (*maggar*) or some other property. Such a divorce is consequently called *khulâ.*" For a *khula* to be effective, particular forms have to be observed. *Amir Ali* (*p. 568, et seq*) gives the procedures adopted in different countries, and they appear to vary. Thus in some countries, "in case of habitual discord between husband and wife, an impartial woman, called *hakimâ*, is selected by the *Hâkim-ush-shar'a* (or *Kâzi*) to try and effect a reconciliation between them"; in others, "the *Kâzi* has the right to proceed himself to effect the reconciliation." "Among the Shâf'eïs (whose principles apply in Ceylon) and Hanafis, in countries where the Islâmic law is in force, the *Kâzi*, in case of a disagreement between husband and wife, appoints two females—one on the woman's behalf the other on the husband's, to arbitrate between them, and to endeavour to bring about a reconciliation."

"If the cause of dissension continue, or if the attempts to reconcile the parties are unavailing, then they are allowed to dissolve their marriage by any of the procedures indicated above." According to another system all cases of this kind must be submitted to the Judge for a divorce. The Muhammadan Code has laid down

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a procedure of its own, and the attempts at reconciliation must be made by the priests, the commandants, and the officers of the company, and lastly by the Judge himself. When a wife obtains a divorce in this way, that is by *khula*, the wife has to pay compensation to the husband which is generally the value of the *maggar* if she has received it, or if she has not received it, she forfeits her right to it.

Although compensation in excess of the *maggar* is considered to be harch and improper, it is not illegal ; the amount is usually fixed by mutual agreement, and section 86, in my opinion, fixes the compensation payable by wife at double the value of the *maggar*. It proceeds on the assumption that *maggar* has already been paid to the wife, as the word used is " restore." It seems to me clear from what I have stated above that sections 80—86 deal with the subject of divorce by *khula*, and if, in Ceylon, a husband grants his wife such a release from her matrimonial tie, he would be entitled to demand from her double the value of the *maggar*. She would, however, be entitled to set off against it the *maggar* due to her. In this case the learned Commissioner seems to think that owing to the failure of the husband to follow all the provisions of sections 80—85 and fulfil the conditions therein, he is disentitled to exact double the value of the *maggar* under section 86. At the present time it is impossible to follow the provisions of these sections, for it is not possible to convene a meeting of " priests," " commandants," and " officers of companies," as required by those sections, to settle the difference of Muslim spouses. Provisions similar to these appear in other sections of the Code dealing with matrimonial affairs, but they are regarded as having fallen into disuse and become obsolete, as the machinery for their observance no longer exists. See *Nell's Muhammadan Laws of Ceylon, pp. 42 and 43*, and the judgment of De Sampayo J. in *Rabbia Umma v. Saibu.*[1] But, if any of these sections confer a right on any person, that right can be enforced through the machinery now available. Thus it was held in *Petchi Umma v. Modelyatchy* [2] that in the absence since British rule of an official corresponding to the " commandant," the recording of *talak* under section 90 was no longer required, and the fact of divorce might be proved by oral evidence. It may be that in view of section 85 a " *khula* divorce " must be granted or confirmed by a Judge. That can be done even at the present day. For it has been held that " the sitting Magistrate " or " competent Judge " of the Court corresponds to the District Judge of the present day: *Agesha Umma v. Abdul Carim.*[3] In my opinion, therefore, if a husband can prove to the satisfaction of a Judge that his wife persists in her refusal to be reconciled to him, he can claim to have restored to him double the value of the *maggar* without

[1] *(1914) N. L. R. 338 (341).*

[2] *(1850) 3 Lor 251.*

[3] *(1880) 4 S. C. C. 13 (14).*

proving that all the requirements of sections 80 to 84 have been complied with. In the present case, the husband has claimed double the value of the *maggar*, and I think he is entitled to have his right inquired into in the light of what I have stated above, provided the Court has jurisdiction to do so.

The liability of the wife to pay the value of the *maggar* is, as pointed out above, based on the fact that the marriage is dissolved by a *khula* divorce, and such a divorce must, in my opinion, precede or accompany the liability to restore double the value of the *maggar* under section 86. In an action to enforce the provisions of section 86, therefore, the Court has to inquire into a matrimonial matter, that is, the dissolution of the marriage. But Courts of Requests have no jurisdiction to take cognizance of matrimonial matters (section 77, Courts Ordinance); District Courts alone have the right to do so (section 64, Courts Ordinance). The defendant's claim cannot consequently be tried in the present action. I would accordingly dismiss the appeal, with costs.

Appeal dismissed.