

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.

The evidence established that the deceased was a moneylender and there was no proof that he had taken out a licence as such for the year 1939. On the contrary according to the evidence of Ram Persad, who was called by the plaintiff and who used to keep the deceased's accounts, licences had been taken out for the years 1940 and 1941 but he knew of no licence having been obtained in respect of the year 1939. The Magistrate upheld the defence and dismissed the plaintiff's claim.

The plaintiff appeals and Mr. S. B. Patel has contended on his behalf that the evidence was insufficient to justify the Magistrate's finding that the deceased had no licence for the year 1939 and furthermore that the burden of proving that fact lay on the defendant and not on the plaintiff. He referred to two previous decisions of this Court, viz.:—*Ragudatt v. Ramautar* (Civil Action No. 12 of 1940) and *C. M. Patel v. Karpan* (Civil Action No. 106 of 1941).

In *Ragudatt v. Ramautar*, the Court held that the onus of proving that the plaintiff was a moneylender rested on the defendant but it was admitted in that case that the plaintiff had no licence and therefore it was unnecessary for the Court to decide on whom lay the burden of proving that fact, if it had been in issue.

In *C. M. Patel v. Karpan*, the plaintiff was a licensed moneylender and although there were a number of matters in dispute, none had reference to the onus of proof. It appears therefore that neither of the cases cited by Mr. Patel is of any assistance to him.

In this case, the burden of proving that the deceased was a moneylender rested on the defendant and he discharged it. Having done so, the burden of proof shifted and it was for the plaintiff to prove that the deceased had a licence ; this is in accordance with the general rule that the burden of proof lies upon the party who asserts the affirmative of the issue (*Phipson on Evidence*, 8th ed. p. 27).

The Magistrate came to a correct decision and the appeal will be dismissed with costs, without prejudice, however, to the right of the plaintiff to bring a fresh action in respect of the promissory note dated 6th February, 1940, if it be the fact that the deceased had a moneylender's licence for the year 1940.

RAGHUBAR *ats.* POLICE.

[Appellate Jurisdiction, (Thomson, J.) October 25, 1946.]

Distillation Ordinance, Cap. 193—s. 22—illicitly distilled spirits—whether spirits upon which the full duty has not been paid.

Illicitly distilled spirits were found on the premises of Raghubar who was convicted of the offence defined by s. 22 of the Distillation Ordinance which refers to spirits upon which the full duty has not been paid.

HELD.—Illicitly distilled spirits are spirits upon which the full duty has not been paid.

Bisnath ats. Police [1943] 3 Fiji L.R.