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MA E KHIN v. MAUNG SEIN.

DUCKWORTH AND GODFREY, JJ.

a day for three days' full hearing under Rule 3, High Court Notification dated the 27th September 1923 in addition to costs calculated under Rule 1.

The appeal of the defendant-appellants is dismissed with costs.

NOTE.—The words "two khans" have been used in this judgment for the sake of brevity and convenience. Khan literally means "a room". It is used in Mandalay to denote a section of a pucca building one room wide. In the sense in which it has often been used in this judgment, it also includes the land though it does not properly do so.

APPELLATE CIVIL.

Before Mr. Justice Young and Mr. Justice Carr.

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July 18.

MA NAN SHWE AND OTHERS
v.
MA SEIN AND ONE.*

Burmese Buddhist Law—Inheritance—Division between children and grand-children by different marriages—Joint living not essential for the grand children to inherit.

Held, that on a competition between children by one marriage and grand-children by another marriage (their parents having predeceased the common ancestor), the rule of division was the same as obtaining between children of different marriages.

Held, also, that by separate living the grandchildren were not barred from inheritance.

Ma Min Sin v. *Ma Kyaw Thin*, P.J.L.B., 361; *Ma Pu* v. *Ma Le*, 1 L.B.R. 93; *Sein Tou* v. *Mi On Kra Zan*, 3 L.B.R., 219—*referred to*.

Aihasankhepa, 225; *Manukye*, X, 15, 20, 21; *May Oung's Leading Cases on Buddhist Law*—*referred to*.

Halker—for the Appellants.

Tun Byu—for the Respondents.

CARR, J.—The facts of this case are as follows. U Nge was divorced from his first wife and there are no children by that marriage. He then married

* Civil First Appeal No. 64 of 1923 against the decree of the District Court of Pegu in Civil Suit No. 46 of 1922.

Ma Shwe Thet and had by her one son, the original defendant, Po San Dun, since deceased and now represented by the appellants, his widow and minor children. Ma Shwe Thet died while Po San Dun was very young and U Nge then married Ma Shwe Ywet. By her he had one daughter, Ma Mya, who married and died before either of her parents, leaving two children, who are the plaintiffs. Next Ma Shwe Ywet died and U Nge married a fourth wife, Ma Thein Me. Next U Nge died, and since his death Ma Thein Me has also died, leaving no children.

On the death of U Nge the defendant, who had been for many years living in Upper Burma, came back and took possession of the estate. He alleges that he then partitioned the estate with Ma Thein Me, but this is denied and he has made no attempt to prove it.

The plaintiffs, the grandchildren of U Nge and Ma Shwe Ywet, sued for their share of the estate, which they claimed to be two-thirds, on the ground that the whole estate was the jointly acquired property of U Nge and Ma Shwe Ywet. Po San Dun contested this allegation of fact but the District Court has found against him and this question has not been raised in this appeal.

Two minor points may be dealt with first. It is alleged that Ma Shwe Ywet died and U Nge remarried eighteen years ago and that the plaintiffs' right to claim a share of the inheritance accrued then, and that the suit is therefore time-barred, I do not think it necessary to discuss the question whether the plaintiffs had a right to claim a share at the time of the remarriage of their grandfather after the death of their grandmother. What they are claiming now is their share of the estate of U Nge and since he died only five years or so ago the suit is clearly

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not barred. That the amount of their share may depend on the joint ownership of their grandmother does not seem to me to affect the question of limitation at all.

The fifth ground of appeal is that "the learned Judge ought to have appointed a Commissioner to go into the question of assets and liabilities of the deceased, specially when the property is encumbered with a mortgage."

There is not in the trial record any mention of a mortgage. The assets and liabilities of the estate were set down in schedules annexed to the plaint and the correctness of these was admitted. There was, therefore, no need to go to the expense of appointing a commissioner.

The important question in the suit is what, on the facts set out, are the respective shares to which the plaintiffs and the defendant are entitled?

This resolves itself into the question whether the general rule that in a division between children and grandchildren the latter take only one-fourth of the share to which their parent would have been entitled if alive, is applicable when the children on the one hand and the grandchildren on the other are the offspring of different marriages.

In *Ma Min E* v. *Ma Kyaw Thin* (1), the estate in question was that of U Yauk, who had had three wives. There was a grandchild by the first wife but she was not a party to the suit. The plaintiff was a daughter by the second wife. The defendants were grandchildren by the third wife, and their mother had died before either of her parents. It was found that all the property had been acquired during the third marriage. The Judicial Commissioner held that

(1) (1893-00) P.J.L B., 361.

the share of the children by the marriage during which the property was acquired was double that of the children of any other marriage. He accordingly gave the defendants one half and the plaintiff one-quarter.

It was contended that the defendants, as out of time grandchildren, were entitled to only one-fourth of their mother's share, under the rules in Manukye, X, 15. This contention was disallowed, but no reason was given beyond that in the Judicial Commissioner's opinion those rules apply only to descendants of the same parents.

In *Ma Pu* v. *Ma Le* (2), the deceased U Po had had three wives. The plaintiff was his child by his first wife, Ma Si. Her mother had died before U Po, but it is not clear whether she died before Ma Sai or not. There is a slight indication that Ma Si died first, but this can hardly be relied upon and the question is not very important.

The defendants were the children of U Po by his third wife, who died before her husband.

The Courts below gave the plaintiff three-fourths of the *payin* property and one-eighth of the *letletpwa*. Birks, J., held that those would have been her shares had she not been an out of time grandchild, but applied the rules in Manukye, X, 15, and gave her only one-fourth of those shares. He did not refer to *Ma Min E's* case.

Thus there are two directly contradictory decisions, neither of which gave any real basis for an answer to the question before us.

May Oung (3) favours the view taken in *Ma Min E's* case submitting that Manukye, X, 21, contains the principle applicable.

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(2) (1901-02) 2 L.B.R., 93. (3) Leading Cases, 250-251.

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Manukye, X, 20, provides for the case of the grandmother marrying again, after the death of the grandfather, and herself dying without issue of the second marriage. It provides that if she has any children they are to take three-fourths and the step-grandfather one-fourth of her separate property. But if she has only grandchildren they take only one half of the separate property, the step-grandfather taking the other half.

Section 21 deals with the same case where there are children by the second marriage. Then the step-grandfather takes one-fourth, the children of the second marriage two-fifths of three-fourths, or six twentieths, and the grandchildren three-fifths, of three-fourths or nine-twentieths.

Thus the share which was then in the first case is reduced to nine in the second which is only a very slight reduction. The fact remains, however, that the share of the grandchildren is considerably less than would be given to children, though the reduction falls far short of that provided for in section 15. On the other hand it is noticeable that the grandchildren by the first marriage get a larger share of the separate property of their grandmother than do her own children by the second marriage. The Burmese word that I have rendered as "separate" is *payin*, which I take to mean merely property brought by her to the second marriage. It may or may not have been *letletpwa* of the first marriage.

The case of a division between the grandchildren by one marriage and the children by another I cannot find dealt with anywhere. It is impossible, however, to suppose that in such a case the children of the second marriage would be entitled to a larger share than they and their father together would have taken had their father been alive.

The conclusion I draw, therefore, is that the rule contained in Manukye, X, 15, is not applicable where the division is between the children of one marriage and the grandchildren of another. There are indications that in such a case the grandchildren would have received a smaller share than would have been given to their parent if alive, but I can find no material for a decision as to the extent to which their share would have been reduced. I think therefore, that the only course open to us now is to give them unreduced the share of their parents. It may be noted that *Attasankhepa*, 225, which gives firstly the same rule as Manukye, 20, for division between the grandchildren and step-grand-parent, adds an alternative rule under which the grandchildren would take four-fifths and the step-grandparent only one-fifth. And while Manukye X, 20, makes it necessary that the grandchildren should live with the grand-parents in order that they should be entitled to inherit at all, this requirement is absent from both sections 225 and 226 of *Attasankhepa*. This requirement is, I think, now obsolete. In any case it could hardly apply in the present case, where neither the son nor the grandchildren lived with the deceased.

The case of *Sein Tun* v. *Mi On Kra Zan* (4) may also be mentioned. This was a case of partition between a grandchild of the first wife on the one side, and the second wife and her child on the other. Sections 226 of *Attasankhepa* and 271 of the Digest were directly applied and it was held that the grandchild was entitled to nine-twentieths of the *atetpa* property of the second marriage and one-eighth of the *letteipwa*. The learned Judge remarked: "The

(4) (1905-06) 3 L.B.R., 219.

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question of the grandchildren being out of time cannot arise, because the section provides specifically for grandchildren whose parents predeceased one of the grand-parents." Nothing was said about joint or separate living.

I hold that the plaintiffs are entitled to the share to which their mother would have been entitled had she been living and that this has been correctly assessed as two-thirds.

But in view of the difficulty and obscurity of the question of law involved I think that it is just that the costs of both parties should be charged to the estate.

I would therefore slightly modify the decree of the District Court and give a final decree directing (1) that the defendants do deliver to the plaintiffs two-thirds of the lands in suit, as set out in Schedule A to the plaint, and (2) that from the net amount of moveable assests as set out in Schedules B and C to the plaint, *viz.*, Rs. 6,726-6-0, there be deducted the sum total of the costs of both parties in all Courts, and that the defendants do pay to the plaintiffs two-thirds of the balance remaining *plus* the costs of the plaintiffs as so deducted.

YOUNG, J.—I concur.