APPELLATE CIVIL.

Before Mr. Justice Heald, and Mr. Justice Po Han.

MA E HMYIN AND THREE
v.
MAUNG BA MAUNG.*

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Feb. 11.

Buddhist Law—Inheritance—Claim by children of second marriage of the deceased against their mother on the father's death.

Held, that where a Burman Buddhist leaves him surviving his children by a former marriage and also his second wife and his children by her, the children of the second marriage do not upon his death become his heirs.

Ma Leik v. *Maung Nwa*, 4 L.B.R., 110; *Mi Chit Lu Ma* v. *Mi Win Ma U*, Civil Second Appeal 136 of 1915—*referred to.*

Ma Chan Mya v. *Mi Ngwe Yon*, 2 U.B.R., (1914-16), 174—*followed.*

Ma Ein Hlaing v. *Ma Shwe Kin*, 3 U.B.R., 272; *Ma Lay* v. *Tun Shwe*, 10 L.B.R., 10—*dissented from.*

Kinwun Mingyi's Digest, Section 229—*referred to.*

Chari—for the Appellants.

Burjorjee—for the Respondent.

HEALD AND PO HAN, JJ.—Respondent, who is widower of Ma E Zin a daughter of Po Thwe by his second wife, Ma Gun, sues that second wife and her other children by Po Thwe, who are the present appellants, for Ma E Zin's share of that part of the estate of Po Thwe which as he alleges was on Po Thwe's death allotted to the children of the second marriage.

The appellants' defence was that Ma E Zin could not be entitled to any share in Po Thwe's estate while her mother Ma Gun was alive.

On the pleadings the trial Court framed issues as to the share to which Ma E Zin would under Burmese Buddhist Law be entitled in the properties alleged to have been allotted to Po Thwe's children by Ma Gun, whether respondent was entitled to that

* Civil First Appeal No. 4 of 1922 against the Decree of the District Court of Thatôn in Civil Suit No. 7 of 1921.

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share, whether he can claim that share while Ma Gun is alive, whether the appellants were in possession of that property and what income they received therefrom, and what relief, if any, respondent was entitled to.

On these issues the Court found that the properties in suit were given to Po Thwe's four children by Ma Gun on Po Thwe's death, that Ma E Zin's interest in the immoveable property so given was one-fourth, that Ma E Zin's interest in the immoveable property in respect of which respondent claimed was one-tenth, that respondent was Ma E Zin's sole heir and as such was entitled to claim Ma E Zin's share in spite of the fact that her mother Ma Gun was alive, that the income which appellants had received from the immoveable property was Rs. 1000 a year, and that respondent was entitled to possession of a quarter share of the immoveable property, to Rs. 750 on account of the income from that property, to Rs. 400 as representing his wife's share of the moveable property and to his costs.

Appellants allege in appeal that the lower Court was wrong in finding that the immoveable property was given to Ma Gun's children, that in any case such a gift would be invaild because it was not made by registered deed, that it was not proved that the moveable property in suit was allotted to Ma Gun's children, that Ma E Zin could not be entitled to any share in her father's estate so long as her mother was alive, and that therefore respondent could not be entitled to anything.

It seems clear that unless Ma Gun's children were heirs of their father, Po Thwe, they were not joint owners of the estate with their mother and the children of Po Thwe's former marriage, and therefore that they could not acquire any title by succes-

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sion or partition. The first question for decision is therefore whether or not the children of the second marriage were heirs of their father while their mother was alive.

The ordinary rule of Burmese Buddhist Law is that the widow succeeds to her husband's estate to the exclusion of all her children (except the *auratha* if there is an *auratha*) and that so long as the mother is alive and remains unmarried no child of hers (except the *auratha*) can claim any share of the property left by their father.

But it has been held that there is an exception to that rule in cases where the father has been twice married, and that in such a case not only the children of the first marriage but also the children of the second marriage can claim a share, at any rate in the property brought by the father to the second marriage.

In the case of *Ma Lay* v. *Tun Shwe* (1), a single Judge of the Chief Court rejected the argument that the general rule applied in such a case and held, dissenting from a previous decision by a single Judge, that the child of a second marriage was immediately entitled to one-eighth of the property brought by the father to the second marriage, the widow being entitled to two-eighths and the children of the first marriage to five-eighths.

That ruling was followed in Upper Burma in the case of *Ma Ein Hlaing* v. *Ma Shwe Kin* (2) which similarly overruled a previous ruling (3) of the Upper Burma Court.

If these two rulings are correct, then it is clear that the children of the second marriage are heirs to their father even while their mother is alive, but

(1) (1918-1919) 10 L.B.R., 10. (2) 3 U.B.R., (1917-1920), 272.
(3) 2 U.B.R., (1914-16), 74.

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since they are in conflict with the general rule of Buddhist law and create an exception to that rule, their correctness may reasonably be doubted and it seems desirable that the matter should be further considered.

In the case of *Ma Leik* v. *Maung Nwa* (4), a bench of the Chief Court considered the law as embodied in the *Dhammathats* and in the previous rulings and came to the conclusion that on a partition claimed by the children of the first marriage against their father's second wife and the children of the second marriage, the children of the first marriage were entitled to a half share of any property inherited by the father after the death of the first wife and before his marriage to the second wife, and to three-quarters of the jointly acquired property of the first marriage, the second wife in each case being entitled to the remainder. The question whether the children of the second marriage were entitled to any share in their own right did not arise in that case, but the learned Judges who decided the reference, do not seem to have regarded them as being so entitled, and the learned Judge who made the reference said that he was not disposed to hold that the fact that there were children of the second marriage made any difference to the rule of partition.

In *Mi Chit Lu Ma* v. *Mi Win Ma U* (5), where a third wife and her children sued the children of the first and second marriages, the trial Court awarded a share to the third wife, but rejected the claim of her children. Those children appealed on the ground that they were entitled to a share in their own right, apart from the share awarded to their mother but a Judge of the Chief Court held that they were not entitled to a share while their mother was alive.

(4) (1907-1908) 4 L.B.R., 110. (5) Civil Second Appeal No. 136 of 1915. (1917) 10 B.L.T., 41.

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In the Upper Burma case of *Ma Chan Mya* v. *Mi Ngwe You* already mentioned (3) a child of a first marriage sued the widow and child of a second marriage and it was held that the child of a first marriage was entitled to three-fourths of the jointly acquired property of the first marriage, that the second wife was entitled to one-fourth and that the child of the second marriage was not entitled to any share, the reason for the exclusion of the children of the second marriage being that they would succeed to their mother's share on her death, that being the ordinary rule of Buddhist law.

At the time therefore when the case of *Ma Lay* v. *Tun Shwe* was decided it had been held in both Lower and Upper Burma that the ordinary rule that the survivor of a married couple is heir to the spouse who has died to the exclusion of all the children except the *auratha*, applied to the widow and children of a second marriage, even where there were children of a former marriage.

In *Ma Lay's* case however the learned Judge said that in his opinion where the *Dhammathats* give a definite share to the offspring of the second marriage in addition to the share given to their mother the offspring cannot be said to get a share as representatives of their mother. He went on to say "Four of the *Dhammathats* extracted in section 228 of the Digest, *viz.*, Kungya, Yazathat, Vinicchaya and Dayajja expressly give the children of the second marriage a share in addition to their mother's one-fourth share. Kungya and Vinicchaya give the children one-eighth and the Yazathat gives them one-fourth. The Dayajja has two contradictory texts. The first gives a share to the step-mother only. The second gives a one-fifth share to the step-mother

(3) 2 U.B.R., (1914-16), 74.

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and a one-fifth share to her children. Section 229 gives extracts from various other *Dhammathats* which allot a share in the property of the first marriage to the step-mother but do not mention her children. There is one *Dhammathat*, Manuyin, which expressly declares that none of the property of the first marriage is to be given to the offspring of the second union and it goes on to say that none of the property of the second marriage shall be given to the children of the former marriage."

The actual effect of the *Dhmammthats* cited in section 229 of the Digest is as follows :—

As regards property brought by the father to the second marriage Vilasa, Dhammathatkyaw, Vinnana Manuyin, Rasi, Manuvannana, Pakasani, Vicchidani, Rajabala, Panan, Payajya, Dhammasara and Kyetyo all give the children of the first marriage three-fourths and the second wife one-fourth. The Rasi Manuvannana, Pakasani and Dyajja make the shares four-fifths and one-fifth if the property was the " separate property of the father". Kungya and Vinicchaya apply to the property which the father brought to the second marriage the rule which nearly all the other *Dhammathats* apply to the jointly acquired property of the second marriage and so mention the children of the second marriage. Yazathat similarly applies to the property brought by the father to the second marriage the rule which Manu applies to the jointly acquired property of the second marriage. In both cases it seems probable that the compiler of the *Dhammathats* found the rule in an older *Dhammathat* and merely misapplied it. The alternative rule in the Dayajja which is found in no other *Dhammathat* seems to be merely an attempt on the part of the scribe to adopt the four-fifths and one-fifth rule mentioned above so as to

provide specifically for the children of the second marriage.

Most of the *Dhammathats* disregarded the children of the second marriage in deciding the shares in the property brought by the father to the second marriage, and regarded the children of the first marriage alone as being entitled to claim from the second wife their share of the property which their father brought to the second marriage. The reason for allowing this claim is obvious, since otherwise the property would pass to the step-mother who having no ties of blood with her husband's children by a former wife, might reasonably be expected to misappropriate their share if she were allowed to keep it. No such reason would apply in the case of the children of the second marriage who would under the ordinary rule have to wait till their mother's death before they could claim any share in their father's estate.

As for the jointly acquired property of the second marriage all the *Dhammathats* with only two exceptions give the shares as one-eighth to the children of the first marriage, five-eighths to the second wife and two-eighths to the children of the second marriage. The exceptions are Manu which gives the shares as one-quarter, one-quarter and two-quarters respectively, and Kyetyo which gives the shares as one-sixth, three-sixths and two-sixths. Vannana says also that if there are no children of the second marriage the shares of the children of the first marriage and the second wife shall be one-fourth and three-fourths.

The question to be decided is whether the mention of the share of the children of the second marriage in these rules warrants the inference that those children were entitled to claim that share from their own mother at once and in their own right. In our opinion it does not. Such an inference would

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create an exception to the general rule and would therefore need to be very strongly supported before it could be accepted. There is a reason why the children of the former marriage should be allowed to take their share but none why the children of the second marriage should have a similar right. In order to determine the share of the children of the first marriage it was necessaay to consider the interest, of the second wife and, her children and in our opinion that was why the interests of the second wife and her children were separately specified. Further if the second wife married again the children by her first marriage would be entitled to take their share and that would be another reason why their share would be specified. But it does not follow that that share could be claimed immediately on the father's death, and since it would be contrary to the ordinary rule that such a claim should be allowed, we would hold that no such claim can be made, and that the decision in the cases of *Ma Lay* v. *Tun Shwe* and *Ma Ein Hlaing* v. *Maung Shwe Kin* was mistaken. It follows that at the time of the alleged partition, Ma Gun's children were not heirs of Po Thwe, and that the parties to the partition were merely the children of Po Thwe's former marriage and Ma Gun. Ma Gun's children could therefore not have acquired any title by succession or partition, and no other method by which they could have acquired a valid title is suggested. We would therefore hold that so far as the immoveable property was concerned respondent's suit was bound to fail and must be dismissed. As for the jewellery the lower Court found that it was not proved that it was given to Ma Gun's children and we agree that that finding was justified.

Respondent's suit therefore fails entirely and must be dismissed with costs for appellants throughout.