

set aside by us in exercise of our revisional powers.

The respondent's advocate explained to us how the District Judge came to make the order, and we think that the explanation is correct. It appears to us that though the order is not strictly justifiable by the rules of procedure it is not at all improper, unjust or inequitable in substance. In these circumstances we do not feel called upon to exercise our discretion to interfere with it in revision.

In the result we dismiss the appeal with costs, advocate's fee two gold mohurs.

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HEALD AND  
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### FULL BENCH (CIVIL).

*Before Sir Gny Rullodge, Kt., K.C., Chief Justice, Mr. Justice Carr, Mr. Justice Maung Ba, Mr. Justice Mya Bu, and Mr. Justice Brown.*

MA NYUN                      MAUNG SAN THEIN  
MA SAW AYE              v.      U SHWE SOE AND SIXTEEN.\*

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June 10.

*Buddhist Law—Desertion—Divorce whether automatic after the lapse of three years or one year—Expressed act of volition whether necessary to effect dissolution.*

*Held*, that where a Burmese Buddhist husband deserts his wife and for three years neither contributes to her maintenance nor has any communication with her, the marriage is automatically dissolved on the expiration of the three years from the date of desertion; neither is any further and expressed act of volition on the part of the deserted party necessary to effect such dissolution.

*Hurpurshad v. Sheo Dyal*, L.R. 8 I.A. 259; *Ma Hnin Bwin v. U Shwe Gon*, 8 L.B.R. 1; *Ma Thei v. Ma San On*, 2 L.B.R. 85; *Ma Thin v. Maung Kyaw Ya*, 2 U.R.B., (1892-96) 56; *Maung Ko v. Ma Me*, S.J. 19; *Maung Po Me v. L.H.R.L.*

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*P. Nagalingam Chetty*, 2 U.B.R., (1892-96) 53; *Mi Kin Lat v. Nga Ba So*, 2 U.B.R., (1904-06) Buddhist Law, Divorce 3; *Mi Nu v. Maung Saing*, S.J. 28; *Nga Nwe v. Mi Su Ma*, S.J. 391; *Ramalakshmi Ammal v. Sivanaatha Perumal Sethurayar*, 14 M.I.A. 570—*referred to*.

*Thein Pe v. U Pet*, 3 L.B.R. 175—*overruled*.

This reference arose out of Civil Miscellaneous Appeals Nos. 56, 57 and 73 of 1926, where Carr and Maung Ba, JJ., not being satisfied that the law relating to divorce by desertion of one party laid down in *Thein Pe v. U Pet*, 3 L.B.R. 175, was correct, referred the matter to a Full Bench. The facts appear from the order of reference below :—

“The facts necessary for the purpose of this reference are short and open to very little doubt, though the evidence is so indefinite that precision in details is impossible.

Maung San Thein was at one time a *pôngyi*. He left the priesthood and lived in the house of Ma Hpaw, a widow very much older than himself. After a time San Thein and Ma Hpaw openly lived together as husband and wife in Ma Hpaw's house at Toungoo. How long this cohabitation continued it is impossible to say, but it must have lasted for some fairly considerable time. Both parties had been married before and we are satisfied that the circumstances of the cohabitation were sufficient to constitute a valid marriage.

Then San Thein left Toungoo and went to live in Rangoon where he remained until a short time after Ma Hpaw's death, when he returned to Toungoo and claimed to be Ma Hpaw's husband and sole heir. San Thein himself alleges that while he was in Rangoon Ma Hpaw frequently visited him there, but he admits that he can adduce no evidence in support of this allegation. He also says that on one occasion he met Ma Hpaw at Toungoo and they went together to the funeral of the Ledi Sayadaw at

Pyinmana, but this also is not proved. The time of San Thein's departure from Ma Hpaw's house cannot be fixed with any accuracy but it was certainly not less than four or five years' before Ma Hpaw's death, and probably very much more than that. There is no evidence of intercourse of any kind between San Thein and Ma Hpaw during at least that period.

The evidence as to the reason for the separation is also very scanty. San Thein himself says that he set up a shop for the sale of medicines in Toungoo but found trade there bad so removed to Rangoon and set up a similar shop there. He does not say that this was done with Ma Hpaw's approval, but seems to wish to imply that it was. There is no other evidence on this point. The witness Maung Zaw (p. 105), a halfbrother of Ma Hpaw, says that he and her other relatives disapproved of her union with San Thein and during its continuance had no intercourse with her. After San Thein's departure intercourse was resumed. His deposition closes with the statement that Ma Hpaw said then that she had made a mistake in taking San Thein as her husband.

On the evidence we can only find that San Thein left Ma Hpaw at least four or five years ago and removed to a distant place and that since then there is not shown to have been any kind of intercourse or communication between them.

The question arises whether on these facts San Thein was still Ma Hpaw's husband at the time of her death. The leading case on this subject is *Thein Pe v. U Pet* (1). It was decided by a Full Bench of three Judges but was a majority decision. It overruled an earlier decision of a Bench of two Judges in *Ma Thet v. Ma San On* (2), and decided that

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(1) (1906) 3 L.B.R., 75.

(2) (1903) 2 L.B.R. 85.

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desertion for the period mentioned in *Manugye V*, 17, does not of itself dissolve a marriage, but that some further and expressed act of volition on the part of either party to the marriage is required to effect such a dissolution.

This decision has not met with unqualified acceptance. The late U May Oung in his *Leading Cases* (1st edition, pp. 80 and 90 to 94) seems to accept it. But U Tha Gywe in his *Treatise on Buddhist Law* (I, pp. 118—127) very strongly supported the dissentient judgment of Fox, J. In his *Conflict of Authority in Buddhist Law* (pp. 114—120) he seems to turn to the opposite view.

In *Maung Shwe Sa v. Ma Mo* (1), Robinson, C.J., and Maung Kin, J., said that they were strongly inclined to the view 'that the position taken by Sir Charles Fox in his judgment was a correct exposition of the law.' We are ourselves inclined to agree with them. The judgment in *Thein Pe's* case (1) is not absolutely binding on us, but the question is one of such frequent occurrence and of such great importance that we think it should be definitively settled by a Full Bench of this Court.

We therefore refer the following question for decision by a Full Bench :—

When a Burmese Buddhist husband deserts his wife and for three years neither contributes to her maintenance nor has any communication with her is the marriage automatically dissolved on the expiration of the three years from the date of desertion, or is some further and expressed act of volition on the part of one party to the marriage necessary to effect such dissolution?"

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(1) Civil Miscellaneous Appeal No. 8 of 1921.

The reference came in due course before a Full Bench consisting of Rutledge, C.J., Carr, Maung Ba, Mya Bu and Brown, JJ.,

*Maung Gyee* and *Leong*—for Appellants.

*Thein Maung*—for Respondents.

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MAUNG BA, J.—The question referred to this Full Bench is as follows:—

“When a Burmese Buddhist husband deserts his wife and for three years neither contributes to her maintenance nor has any communication with her is the marriage automatically dissolved on the expiration of the three years from the date of desertion, or is some further and expressed act of volition on the part of one party to the marriage necessary to effect such dissolution?”

This reference was made by Carr, J. and myself as we doubted the correctness of the majority decision in the leading case of *Thein Pe v. U Pet* (1). That decision was that “desertion of the husband by the wife for one year or of the wife by the husband for three years, does not *ipso facto*, and without any further and expressed act of volition on the part of either party to the marriage, dissolve the marriage tie.”

In that case the dispute was between U Pet and his grandson Thein Pe as to who should be granted letters-of-administration to the estate of U Pet's deceased wife, Ma Min Gon. It was contended that the marriage tie between U Pet and Ma Min Gon had already been severed before Ma Min Gon's death.

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U Pet and Ma Min Gon were husband and wife and lived together in Tavoy up to 1872. In that year U Pet was appointed Myoôk of Thayetchaung. Ma Min Gon accompanied him there, but, as she did not like the place, she returned to Tavoy. U Pet being left alone took a lesser wife. Ma Min Gon was much incensed at this marriage and refused to have any intercourse with her husband. She lived on her own means in her own house at Tavoy and U Pet did not provide for her maintenance. She declined to go to his house or to receive him at hers. These relations continued down to the time of her death.

The Full Bench which considered that reference was constituted by Sir Harvey Adamson, Chief Judge and Fox and Irwin, JJ. The learned Chief Judge admitted that among the *Dhammathats* the most authoritative provision is contained in section 17 of Book V of the *Manugye*, which is translated by Mr. Richardson as follows :—

“Any husband and wife living together, if the husband saying he does not wish her for a wife, shall have left the house, and for three years shall not have given her one leaf of vegetable or one stick of firewood, at the expiration of three years let each have the right to take another wife or husband. If the wife not having affection for the husband shall leave the house where they were living together, and if during one year he does not give her one leaf of vegetable or one stick of firewood, let each have the right of taking another husband and wife. They shall not claim each other as husband and wife. Let them have the right to separate and marry again.”

In his view this section does not in anyway support the proposition that desertion is *ipso facto* a dissolution of marriage. In expressing that view he observed :—

“It merely asserts that desertion gives a right to dissolve marriage. I am unable to follow my learned colleague Mr. Justice Fox in regarding the section as containing a mandate of the

law giver enjoining a husband and wife who conduct themselves in the manner stated in the section not to consider or claim one another after the periods stated as husband and wife. In my view the section merely directs that the party in fault shall not claim the other against the other's wish. \* \* \* The right given is first to divorce and then to marry again. The right to marry again appears to have been introduced into the section merely as a visible symbol of the fact that the marriage tie has been dissolved. Whether the dissolution can be accomplished by a mere act of volition, as the section seems to imply, or whether it would require some more formal action, is a question which in the present case does not concern us. But it appears to me that the letter of the law requires that there shall be at least an act of volition. \* \* \* . In determining questions that come within the purview of section 13 of the Burma Laws Act, 1898, it should never be forgotten that the texts of the *Dhammalhats* are not the sole guide. These form the rule of decision only in as far as they are not opposed to any custom having the force of law \* \* \* . To my mind it brings an irresistible inference, that the dissolution of a marriage tie by desertion alone, without any act of volition on the part of one or other of the parties to the marriage, is inconsistent with the beliefs and customs of Burmans. I think therefore that even if the actual texts of the *Dhammalhats* supported the proposition that marriage is dissolved by desertion without any further act of volition, we would, on the inferences that arise from the evidence, be required by the provisions of section 13 of the Burma Laws Act to pause before deciding in accordance with the texts."

Mr. Justice Irwin, in accepting the view of the learned Chief Judge, observed "I agree with the learned Chief Judge that in section 17 of Chapter V of the *Manugye* the true translation of the most important sentence is 'Let them have the right to divorce and marry again,' and that part of the section at any rate neither indicates that desertion for a specified time operates to dissolve the marriage nor authorises a wife to marry again while the first marriage subsists."

Mr. Justice Fox held a different view. While admitting that any custom having the force of law

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would supersede the previous Buddhist law, he expressed his opinion that there was no such custom either proved or which otherwise could be taken notice of. He then quoted the views of their Lordships of the Privy Council in two cases to show what was meant by the words "custom having the force of law" and how such custom needed to be proved.

In *Hurpurshad v. Sheo Dyal* (1), their Lordships say at page 285 :—

"A custom is a rule which in a particular family or in a particular district has from long usage obtained the force of law. It must be ancient, certain, and reasonable, and, being in derogation of the general rules of law, must be construed strictly."

In *Ramalakshmi Annal v. Sivanatha Perumal Sethurayar* (2), their Lordships say :—

"Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular districts, and families in India, but it is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."

In my humble opinion such a custom does not exist in Burma, which should supersede the law expressed in the *Manugye*. I agree with Fox, J., that there being no such custom the decision must rest upon the proper construction of the text of the *Dhammathats*. Among the *Dhammathats* the paramount authority of the *Manugye* has been recognised by their Lordships of the Privy Council in the case

(1) (1876) L.R. 3 I.A. 259.

(2) (1872) 14 Moore's I.A. 570.



of *Ma Hnin Bwin v. U Swe Gon* (1), their Lordships held :—

“The *Manugye* has held a commanding position since the time of King Alompra and is still to be regarded as of the highest authority. Where it is not ambiguous other *Dhammathats* do not require to be referred to.”

The law in section 17 of the *Manugye* is clear and unambiguous. Though I will not go the length of saying that Richardson’s translation is incorrect, yet I would like to say that some of the words have not been given the force which they convey. For instance, the word ‘separate’ for the Burmese word ‘*ဆဲး*’ is wanting in force. The more appropriate translation will be ‘sever.’ The heading of section 17 should be translated thus “Law of severance of marriage tie between husband and wife for want of love.” The word ‘*ဆဲး*’ does not appear in the heading of section 16. That section deals with cases where the husband goes away for trading purposes and in search of knowledge. In those cases the wife is expected to wait for eight years before she takes another husband. Even in those cases a duty is imposed upon the husband “to send her a letter with something for food and clothes once in every three years.” But in section 17 the case is much stronger. At the very outset one of the couple must have ceased to love the other. After that party had deserted the other, there must have been no further intercourse between them. The husband upon whom the *Dhammathats* impose the duty of maintaining his wife must have refused or neglected to send her any maintenance. In such circumstances the law treats the relationship between them to have come to an end. The words used are as plain as can be. They read “At

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the expiration of three years, let both the husband and wife be at liberty to take another wife and husband." A few lines later similar words occur. Further on emphasis is given by the use of such other words as "They are not to say 'my husband—my wife.' Let them have the right to divorce and marry again." As regards the last phrase "let them have the right to divorce and marry again" I do not agree with the learned Chief Judge that it implies that either party has still got to do something to sever the marriage bond. In my opinion it simply means that dissolution of marriage has resulted and that they can take advantage of it.

The learned Chief Judge was also influenced by the consideration that the relationship should come to an end by mere desertion though one of the couple might not wish it or might not wish a divorce. The *Manugye* is not without a remedy for such cases. It penalises the party who wishes to separate, when there is no fault on either side. (Section 3 of Book 12). The *Dhammathats* expect the wife to remain faithful to her husband, but they do not expect her to wait for him for an unreasonable period of time, even in cases where there is separate living not amounting to desertion. In section 301 of the Kinwun Mingyi's Digest, the 13 *Dhammathats* mentioned therein are unanimous that the wife is free to marry again after three years' absence of the husband at his parents' house. Kaingsa, one of those *Dhammathats*, even says that the wife is at liberty to marry again at the end of three years, although the husband, before he went back to his parents, had promised to come back and had also "accommodated her with a house and provided her with property, slaves, food, etc. for her maintenance." From this it will be seen that even

where the husband left his wife not because he had no affection for her, still the wife acquired the right to marry again after three years, because in the words of another *Dhammathat* Vannadhamma, "for those three years she has shown much patience." The case dealt with in section 17 of the *Manugye* is much stronger. The party deserting has done so because he or she no longer loves the other and moreover the husband, whose duty it is to maintain his wife, has refused or neglected to maintain her. That such is his duty is to be found in the *Dhammathats* mentioned in sections 208 and 210 of the Digest.

So far I am dealing only with the *Manugye*. I may say that the *Manugye* is not the only authority on this point. Some of the *Dhammathats* mentioned in section 312 of the Digest support it. So the *Dhammathats* plainly show that desertion *ipso facto* dissolves the marriage tie and no further expressed act of volition is necessary. This principle was recognised as far back as 1874 by the special Court in the case of *Maung Ko v. Ma Me* (1). Mr. Sanford, Judicial Commissioner, in the course of his judgment at page 20, says "The law, when separation is to be inferred from absence, is to be found in the 5th book of *Dhammathat*, paragraphs 14 to 17. It will be seen that three years' absence with neglect on the part of the husband to provide the wife with the means of subsistence, is required to give the wife the right of remarriage."

This principle was again recognised 18 years later by a bench of the Calcutta High Court in the case of *Maung So Min v. Mah Htah* (2). The learned

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(1) Selected Judgments and Rulings, (1872-1892) 19.

(2) II Upper Burma Rulings, (1892-1896) 53.

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Judge after reproducing Richardson's translation of section 17 of Book V of the *Manugye* says :—

"It will be observed that in the case of a wife leaving the house of her husband, and in the event of the husband not supplying her with anything for one year the right to separate and marry again is created in either of the parties."

Two years later in 1894 in the case of *Maung Po Maung v. L.H.R.L.P. Nagalingam Chetty* (1), Mr. Burgess, Judicial Commissioner, who is one of the recognised authorities on Buddhist Law, adopted the same principle. At page 55, he says :—

"The rules of Buddhist law on the subject are to be found in section 17, Chapter V of the *Manugye Dhammathat* and in section 291 of the *Attathankepa*, and these rules have been discussed more or less, in the following cases, *Maung Ko v. Ma Me* (2), *Mi Nu v. Maung Saing* (3) and *Nga Nwe v. Mi Su Ma* (4). But the precise point which might arise here has not been definitely dealt with, though it seems to be implied that the union is naturally dissolved at the end of three years. The *Dhammathats* give liberty to take another wife or husband at the expiration of three years, and they make no provision for any communication with the former husband or wife, or for the taking of any formal proceedings for declaring the dissolution of the marriage bond. Apparently the severance of the conjugal tie is deemed to be sufficiently manifested by open separation for such a length of time. The actual taking of another wife or husband would, of course, make the state of affairs clearer and more public, but it does not appear to be absolutely necessary that this, or anything else, should be done to render the separation a complete divorce."

This interpretation of Mr. Burgess was accepted by Sir George Shaw, who is another authority on Buddhist Law. In the case of *Mi Kin Lat v. Nga Ba So* (5), the learned Judicial Commissioner at page 12 made these remarks :—

"I think it may fairly be argued that divorce by mutual consent is almost, if not, quite as much opposed to the rigid

(1) II U.B.R. (1892—1896) 53.

(3) S.J.L.B. 28.

(2) S.J.L.B. 19.

(4) S.J.L.B. 391.

(5) 2 U.B.R. Buddhist Law, Divorce, p. 3 (1904-06),

moral rule. So is the rule which provides for the dissolution of the marriage bond, by three (or one) years' desertion by the husband (or wife) without any communication or tender of maintenance. The texts are to be found in section 312 of the Kinwun Mingyi's Digest. This rule in my opinion, furnishes an important analogy, and sets in a clear light the attitude of the Buddhist law-givers towards divorce without adequate cause. Desertion is highly reprehensible, but having regard to the weakness of human nature, they provide for and allow it "subject to restraining conditions."

The same principle was accepted by Sir Herbert Thirkell White and Fox, J., in the case of *Ma The v. Ma San On* (1). The judgment of the bench was delivered by, Fox J. The learned Judge relied upon section 17 of Book V of the *Manugye* and held that "a divorce may be effected by the voluntary departure of the wife from the husband for a period of one year."

From the above it will be seen that many distinguished Judges have one after another interpreted section 17 of Book V of the *Manugye* to mean that desertion alone automatically dissolves the marriage tie. The first dissentient note was sounded by Mr. Copleston, Judicial Commissioner, in 1895 in the case of *Ma Thin v. Maung Kyaw Ya* (2). In that case the wife left her husband and the husband did not provide her with any maintenance for over a year. The learned Judge observed :—

"According to the strict letter of *Manugye*, V, 17, it may be argued that she can claim a divorce ; but I am not inclined to so interpret the law. First, it may be noted that the heading of the section states that this is the law when neither party have affection for each other, and there is no reason to believe that the husband has ceased to feel affection for the plaintiff. However, even if this be a straining of the meaning of the heading, so I think would it be a straining of the meaning of the section which follows to say that desertion by the wife without fault or cause given by

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(1) (1903) 2 L.B.R. 85.

(2) 2 U.B.R., (1892-96) 56.

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the husband, he not having given her a stick of firewood or a leaf of vegetable during a year, shall entitle her to a divorce against his will."

With all deference to the learned Judge the heading of that section does not imply that both the husband and wife must have ceased to feel affection for each other. This view of Copleston, J.C., was accepted by two of the Judges, in the leading case of *Thein Pe v. U Pet* (1).

The late U May Oung as well as U Tha Gywe, who have published Treatises on Buddhist Law, are in favour of the view taken by Fox, J., in that leading case. U May Oung, in his *Leading Cases on Buddhist Law* at page 86, says "Where a wife leaves her husband, and remains away for over a year, during which period the husband does not communicate with or maintain her, he is entitled to treat the marriage as cancelled. Similarly, where a husband has lived apart from his wife for three years and during that period neglected to maintain her, the circumstances may give the wife the right to marry another." But the learned author feels inclined to think that it rests with the party left behind to take advantage or not as he or she pleases of the permission to treat the marriage as dissolved. With due respect to the learned author I do not think that this interpretation is permitted by section 17 of Book V of the *Manugye* which he himself quoted. The sections plainly says that both parties are free to marry again.

U Tha Gywe expresses his approval of the view taken by Fox, J., in the leading case, in Volume I of his *Treatise on Buddhist Law* at page 127. There he remarked :—

"Perhaps, enough has been said and quoted to show that there is ample authority, both judicial and textual, for holding

that the union is dissolved *ipso facto* at the expiration of the prescribed periods."

But later in his Conflict of Authority on Buddhist Law, Volume I, at page 119 he appears to have veered round to the other view. He made these remarks :—

" It will thus be seen that although the view of the law taken by Fox, J., in his dissenting judgment seems to be in accord with the *Dhammathats* it is repudiated by two of his learned colleagues who differ from him regarding the interpretation to be placed on the texts bearing on the subject. But the *ratio decidendi* upon which the ruling of the majority of the Court proceeded rests, as has been seen, mainly on the fundamental principles of the marriage contract and the conduct of the contracting parties, and one ventures to think that it lays down a sound principle of law. The question, however, is one which is far from being free from doubt and difficulty. But notwithstanding these difficulties the liberal interpretations which the learned Chief Judge and Mr. Justice Irwin have put upon the *Dhammathats* are so consistent with the general principles upon which the matrimonial law in civilised countries should proceed that one has ventured to adopt their views, *though not without hesitation.*"

His doubt I may say appears to me quite justified. This doubt was shared by Sir Sydney Robinson and Mr. Justice Maung Kin in Civil Miscellaneous Appeal No. 8 of 1921, *Maung Shwe Sa v. Ma Mo and one*. The learned Judges expressed their opinion in these words :—

" We have been referred to the well-known case of *Thein Pe v. U Pet* (1), which lays down that mere desertion without any further or expressed act of volition would not be sufficient to dissolve the marriage tie. We do not think in this case that it is necessary for us to proceed on the grounds set down by the majority in that case, as we are strongly inclined to the view that the position taken by Sir Charles Fox in his judgment was a correct exposition of the law."

For the reasons given above I am of opinion that the principle adopted by Mr. Sanford, Judicial Commissioner, in 1874 is the correct one and is also in accordance with section 17. of Book V of

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the *Manugye* and other *Dhammathats* already mentioned.

My answer to the question referred is therefore that the the marriage is automatically dissolved on the expiration of the three years from the date of desertion<sup>s</sup> and no further expressed act of volition is necessary.

RUTLEDGE, C.J.—I concur.

CARR, J.—I concur.

MYA BU, J.—I concur.

BROWN, J.—I agree in the answer proposed to the reference by my learned brother Maung Ba, and in his interpretation of section 17 of Book V of the *Manugye*. Reference was made in the course of the argument before us to the case of *U Tun Aung Gyaw v. Ma Saw Kin and two* (Civil First Appeal No. 192 of 1923). I was a member of the Bench which decided that case, and we held that no divorce had taken place though there was evidence that the parties to the marriage had lived apart for more than three years. But the reason which led me to that conclusion was that in my opinion no desertion had been proved, my view being that mere living apart for the prescribed period would not necessarily prove desertion by either party. What amounts to desertion is not a question which arises on the present reference.

I agree that when there has been a desertion for the prescribed period, no further act of volition is necessary to affect a dissolution of marriage.