imposes on the husband and wife liabilities established by custom in regard to their property out of which they cannot contract themselves by agreement at the time of their marriage. The introduction of the remedy prescribed by Order 21, Rule 49, would be a negation of the principle on which our general conclusions are based that joint property is indivisible during marriage, its application would be difficult and would frequently involve the party whose share was not sold in great hardship and unnecessary litigation ; it would probably allow a spendthrift husband by a bogus alienation of a small part of his *payin* to realise his share of the joint property ; finally it would act inequitably by lowering the value of the share of the partner whose share was not sold up.

APPELLATE CIVIL.

Before Mr. Justice Pratt and Mr. Justice Mya Bu.

1927
Feb. 14.

MA TIN U

v.

MA MA THAN AND TWO.*

Buddhist Law—Inheritance—Child of divorced parents—Child living with maternal grandmother—Separate living not sufficient to exclude—Maintenance of filial relationship.

The parents of the plaintiff separated without effecting a formal divorce. Later the mother remarried but the father did not remarry. The plaintiff did not live with either parent after the divorce but lived with her maternal grandmother, who was a cousin of her paternal grandmother. She used to visit her father occasionally and expressed her willingness to live with her father, if her grandmother agreed. Her father used to give her small money presents.

Held, that separate living would not be sufficient in itself to exclude the plaintiff from her father's inheritance.

Held, further, that she not having gone away with her mother into her new family, and having visited her father and there being no proof of rupture of relationship, either by partition of property or filial neglect, the plaintiff was not excluded from inheritance to her father.

* Civil First Appeal No. 84 of 1926 (at Mandalay).

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Ba Kyu v. *Zan Pyu*, P.J. 299 ; *Ma Pon* v. *Maung Po Chon*, U.B.R. (1897-01) II, 116 ; *Ma Sein Nyo* v. *Ma Kywe*, U.B.R. (1892-96) II, 159 ; *Ma Shwe Ge* v. *Nga Lon*, S.J. 296 ; *Ma Yi*, v. *Ma Gale*, 6 L.B.R. 167 ; *Mi San Mra Ri* v. *Mi Than Da U*, 1 L.B.R. 161 ; *Mi Thaik* v. *Ma Tu*, S.J. 184—*referred to.* *Maung Dwe* v. *Khoo Haung Shein*, 3 Ran. 29 ; *Maung Sein Thwe* v. *Ma Shwe Yi*, 10 L.B.R. 397—*followed.*

U Tha Gywe, Conflict of Laws, Part II—*referred to.*

A. C. Mukerjee—for the Appellant.

N. M. Mukerjee—for the Respondents.

PRATT, J.—Plaintiff Ma Tin U, a minor, sued by her next friend the Pinya Minthami, her maternal grandmother, for possession of immoveable property being the estate of her deceased father Maung Hla Baw.

The legitimacy of plaintiff, her right to inherit, and the fact that the suit properties belonged to Maung Hla Baw were challenged and in issue.

The trial Court found that plaintiff was the legitimate daughter of deceased, but that she was the child of divorced parents, who had gone with her mother's family and was not therefore entitled to inherit. The Court further found that the suit property belonged to and was in possession of first defendant.

The suit was accordingly dismissed.

There can be no doubt on the evidence that the finding that Ma Tin U was the legitimate issue of Maung Hla Baw and Ma Nyo Nyo, born in lawful wedlock, is correct. The evidence shows that Maung Hla Baw and Ma Nyo Nyo eloped and a few days later first defendent Ma Ma Than, mother of Maung Hla Baw approached the Pinya Minthami with a view to the union being regularised by marriage.

The Minthami agreed; but stipulated that there should be no elaborate ceremony, and the young couple took up their residence at the house of first defendant, where plaintiff was born about two years later.

It is clear that there was a valid marriage, and as the learned District Judge pointed out no ceremony is necessary under Buddhist law.

The reason for the absence of ceremony was clearly that the bride's mother was not pleased with the match, but accepted the position, as the contracting parties had forced her hand by an elopement. It is obvious that had there been no marriage defendant would not have countenanced her son living with Ma Nyo Nyo in her house or even in a separate house in her compound.

The most difficult point in the case is whether under the circumstances Ma Tin U has forfeited her right of inhertance.

There are a large number of reported cases on the right of the children of divorced parents to inherit, but in none are the circumstances similar to those of the present case.

There was no formal divorce.

Ma Nyo Nyo left her husband, apparently because she and her mother-in-law could not agree, and took her child with her. This did not itself constitute a divorce.

Plaintiff and her mother lived with Pinya Minthami. They went to India with the Minthami, and resided with her at Ratnagiri for three years.

They returned to Mandalay and about three years later the Minthami took plaintiff to live with her at Syriam leaving Ma Nyo Nyo at Mandalay.

Somewhere about this time, apparently in 1916, Ma Nyo Nyo married a second husband.

This marriage operated as a divorce and dissolved the marriage tie between Ma Nyo Nyo and Maung Hla Baw. Plaintiff did not go with her mother on her remarriage, and never lived with her thereafter, but always with the maternal grandmother, the Pinya Minthami.

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Plaintiff used to visit her father occasionally in Mandalay and received small monetary presents from him.

Her mother died, when she was 14, and she came to Mandalay for the funeral.

Her father came and saw plaintiff and asked her to live with him. She told him she would let him know after the funeral.

Her paternal grandmother sent for her and advised her to live with her (plaintiff's) father, and plaintiff expressed her willingness, but asked her to obtain her maternal grandmother's consent.

Apparently this step was never taken. Plaintiff returned to her grandmother at Syriam, and lived with her till her father's death in 1925.

In the interval she paid a visit to Mandalay and been to see her father, who gave her a small money present.

The learned District Judge seems to have been of opinion that the marriage between Maung Hla Baw and Ma Nyo Nyo was dissolved as from the time of the final rupture between them, and that is why he held that plaintiff went with her mother or her mother's family.

But it is clear that there was no divorce in law, until the further act of volition by Ma Nyo Nyo, when she took a second husband.

As already pointed out plaintiff did not live with her mother after the divorce, and it should be noted that her maternal grandmother with whom she lived, was a cousin of Maung Hla Baw's mother.

Maung Hla Baw never set up a separate household after his wife left him and did not remarry.

The rule for partition of property and children on divorce of separation by mutual consent is given in the *Manugye*, Book XII, Chapter III.

There is an equal partition of property, the father takes the male children and the mother the female.

It is clear that at that time the children were regarded as chattels, absolute property of the parents, whose right to sell them is recognised.

This is not in accordance with modern ideas, but the general rule holds good that on divorce the sons follow the father and the daughters their mother, and ordinarily lose the right of inheritance from the parent with whom they cease to live.

In the early case of *Mi Thaik* v. *Ma Tu* (1) it was held by the Judicial Commissioner, Lower Burma, that, where a husband and wife divorced by mutual consent, and the young daughter remained in her mother's house and the house of her mother's husband till her father's death, and did not renew filial connection with her father, and there was no special contract to the contrary at the time of the divorce, the daughter was not entitled to a share of the joint property acquired by the father and the second wife. A similar view was taken in *Ma Shwe Ge* v. *Nga Lan* (2).

In *Ba Kyu* v. *Zan Pyu* (3), however, Aston, J.C., held that the fact that the son after the divorce of his parents lived during his minority with his mother did not deprive him of the right to a share in his father's estate, for which he sued, when he was still a minor.

This ruling is in favour of plaintiff's claim in the present suit.

In *Ma Sein Nyo* v. *Ma Kywe* (4), however, Burgess, J.C., held that a daughter, who had gone with her mother on divorce and remained with her, when she was remarried, was not entiled to inherit her father's estate in the absence of any conduct on the father's

(1) S.J. 184.
(2) S.J. 296.
(3) P.J. 299.
(4) U.B.R. (1892-96) II, p. 159.

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part indicating an intention to regard her as one of his heirs.

In the later Upper Burma case of *Ma Pon* v. *Maung Po Chan* (5), a similar view was taken. In both these cases the failure of the daughter to maintain filial relations with her father was one of the main grounds for deciding against her right to inherit.

In the later case it was remarked by the learned Judicial Commissioner, that the intention of the law seems to be, that on divorce separate households should be constituted and that the members of each household should not retain the right of sharing in the estate of the other. The dictum of Mr. Jardine in *Mi Thaik's* case (1), that the principle applied to an adopted son runs more or less through the whole law of inheritance was quoted with approval.

The view of Aston, J.C., in *Ba Kyu* v. *Zan Pyu* (3), was dissented from, however, by a bench of the Chief Court of Lower Burma in *Mi San Mra Ri* v. *Mi Than Da U* (6). In that case the facts were that a son and daughter lived with their mother after she had been divorced from their father.

There was division of property at the time of the divorce and further property was assigned to the children. At the time of the divorce the children were six and eight years of age, and were eleven and thirteen, when the father died. They did not and could not of their own accord renew filial relations with their father. Their father took an active interest in their education and helped towards their support. He did not take them into his own family.

It was held that both children were excluded from inheriting the father's estate

It should be noted that in that case not only was there a division of propety on divorce but property was

(5) U.B.R. (1897-01) II, p. 116. (6) 1 L.B.R. 161.

assigned to their children, whereas in the present case there was no division of property, and no provision for the daughter, nor did the daughter join her mother's family after divorce.

It was remarked by Birks, J., in *Mi San Mra Ri* that the family tie is severed by divorce, and the rights of the children of a divorced pair seem to depend upon the arrangements made at the time of the divorce as to which branch of the two families they shall belong to.

The children while minors are bound by the choice of their parents, but if brought up by their mother, as is usually the case, they can rejoin the father's family, when they attain years of discretion.

The value of Copleston, J.'s judgment in that case is diminished by the fact that it is based upon a mis-translation of the passage at the end of *Manugye*, Book X, which led him to state that the children of separated parents are included among those children who cannot inherit.

It is pointed out by U Tha Gywe at page 191, Volume II of his Conflict of Authority that the correct translation is "children, who have separated" and not "the children of separated parents," and as a matter of fact the children of divorced parents are not included among the children not entitled to inherit in the *Manugye*.

In the latter case of *Ma Yi* v. *Maung Gale* (7), it was held that the marriage of parents who had separated was dissolved when the wife remarried, and that children lose the right to inherit the property of the parent who has abandoned them unless filial relations are resumed. It was further held that it is the will of the parents which decides the disposition of the children.

The general principles are plain.

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(7) 6 L.B.R. 167.

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When there is a divorce the children ordinarily go with one or other of the parents and lose the right to inherit from the parent with whom they cease to live, unless they maintain or resume filial relations with that parent.

As pointed out by U Tha Gywe a divorce of the parents does not *per se* extinguish the rights of inheritance of their children.

It is a question of continuance or discontinuance of filial relations after the divorce which is the deciding factor in all such cases. (Conflict, Volume II, page 125.)

On consideration of the passages in *Manugye* dealing with the subject, and the principles enunciated in the various rulings cited, it seems to me impossible to hold that Ma Tin U has forfeited her right of inheritance under the peculiar circumstances in evidence.

Plaintiff's mother Ma Nyo Nyo left her husband Maung Hla Baw voluntarily taking her infant child with her. There was no formal divorce.

When subsequently Ma Nyo Nyo contracted a second marriage her action *ipso facto* dissolved the first marriage, but she did not at that time take her daughter with her into her second husband's house.

Ma Tin U was already at the time not living with her mother, but with her maternal grandmother. There can be no doubt that the arrangement was one which suited both parents.

Ma Nyo Nyo did not want to take the child into her new household, whilst Maung Hla Baw had no separate household and doubtless did not want the trouble of bringing up a small daughter. The child's maternal grandmother was his mother's cousin and looked upon as an aunt from the Burmese point of view. The father would naturally regard the

Minthami as a suitable guardian for his daughter. The fact that after the mother's death Maung Hla Baw asked plaintiff to come to live with him and that his mother made the same suggestion indicates that there was no rupture of filial relations. The girl's reply that her grandmother's consent should be obtained was very natural. She had been living with her grandmother from infancy and was still a minor.

Maung Hla Baw's failure to ask the grandmother's consent cannot be construed as indicating a severance of paternal relations. There is no reason to doubt that plaintiff again visited her father and maintained filial relations with him.

The probability is that Maung Hla Baw, a widower, did not care to take the responsibility of having his daughter to live with him till she attained her majority, and was of opinion that her maternal grandmother was the right person to take care of her during her minority.

Mere living apart under the circumstances cannot be considered unfilial conduct on the part of the minor.

As observed in *Maung Sein Thwe* v. *Ma Shwe Yi* (8) [quoted with approval by their Lordships of the Privy Council in *Maung Dwe* v. *Khoo Haung Shein* (9)], "mere separate residence does not nowadays and by itself prove or even set up an inference of a breach of filial relations such as would deprive a child of his rights."

This is not a case where on divorce the father abandoned his child, and she went to live with her mother and joined the new family.

She has been throughout in what might be described as neutral guardianship.

(8) 10 L.B.R. 397. (9) (1925) 3 Ran. 29.

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I would hold therefore that plaintiff did maintain filial relations with her father and was entitled to inherit his estate.

It remains to be considered whether the properties in suit belonged to the estate of Maung Hla Baw. There is no question that first defendant Ma Ma Than and her children, Maung Hla Baw, deceased and the 2nd and 3rd defendants, executed a deed of settlement dividing up her property between them and herself and that the suit property fell to the share of Maung Hla Baw under that settlement.

Delivery of possession was not necessary to make title pass.

The learned District Judge's reasons for holding that the property did not pass to Maung Hla Baw are not sustainable.

He remarks that "the circumstances under which the deed of settlement came to be executed and registered indicate that Ma Ma Than was worried by an undutiful son Maung Ba Sin and in order to get rid of him she signed and registered the deed of settlement. Further Ma Ma Than says, and I see no reason to doubt it that Maung Hla Baw refused his share saying that the distribution had been inequitable."

The mere fact that Ma Ma Than divided up her property amongst her children, reserving a share for herself in order to escape the importunities of a son who was clamouring for his share, does not invalidate the settlement. The evidence shows that the document was made after mature consideration and signed by all parties including Maung Hla Baw. Ma Ma Than was defendant and her statement that Maung Hla Baw refused his share is not worthy of credit. There was every reason on the contrary to doubt it.

Ma Ma Than was a notably untruthful witness. When called upon to produce the deed of settlement she filed a statement (at page 21 of the trial record) in which she said that she tore it up, because Maung Hla Baw was dissatisfied with his share and refused to accept it. In her evidence she stated (page 52 reverse) the deed was cancelled in the following Thadingyut by mutual consent, and later on deposed, "I have looked for the deed but I could not find it."

Obviously no reliance can be placed on her statement that Maung Hla Baw refused his share.

There is no document alleged to be in existence cancelling the settlement.

The second defendant admitted that Maung Hla Baw obtained possession of his share.

It is noteworthy that in all the maps filed by plaintiff, with the exception of one, the name of Maung Hla Baw appears after his mother's, and in the exception is the name of the original owner.

It is clear that the legal title to the suit property was vested in Maung Hla Baw.

Plaintiff as daughter is sole heir as against the parent, brother and sister.

I would set aside the decree of the lower Court and grant plaintiff a decree as prayed with costs in both Courts.

MYA BU, J.—The divorce between Maung Hla Baw and Ma Nyo Nyo was brought about by the latter's second marriage after desertion for more than the prescribed period of one year. It was effected by operation of law. There was no express arrangement as to who should take Ma Tin U, the only child of the marriage. Even before the second marriage, Ma Tin U lived with Ma Nyo Nyo's mother, the Pinya Minthami, who was the first cousin of Maung

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Hla Baw's mother. While they were living at Syriam Ma Nyo Nyo contracted the second marriage at Mandalay and subsequently died there during that coverture without ever having got Ma Tin U to live with her.

While the evidence is silent as to friendly relations between Ma Tin U and her mother after the second marriage, it shows that such relations subsisted between her and her father after the mother's death.

The ordinary conception of a child being taken by one parent and abandoned by the other at the time, or in consequence of, their divorce is entirely absent, and the circumstances show that if Ma Tin U was abandoned by one of her parents that parent was Ma Nyo Nyo. This takes the relation between Ma Tin U and Maung Hla Baw out of the purview of the case in *Ma Yi* v. *Ma Gale* (1), in which divorce between the parents having been effected by separation for more than the prescribed periods and their respective remarriages the child was taken and brought up by one parent in the new family under circumstances justifying the inference of abandonment by the other. As in this case it is impossible to conceive that there ever was a severance of filial relations between Maung Hla Baw and Ma Tin U either before, or at the time of, or after, the divorce,—mere separate residence *per se* not being such severance, [vide *Maung Sein Thwe* v. *Ma Shwe Yi* (2) and *Maung Dwe and other* v. *Khoo Haung Sein and others* (3)], there is no ground for requiring her to show resumption of filial relations between her and her father.

I concur in the view of my learned brother that the plaintiff-appellant never lost her right of inheritance in her father's estate. She is clearly the only descendant of Maung Hla Baw and is therefore his

(1) 6 L.B.R. 167. (2) 10 L.B.R. 397. (3) (1925) 3 Ran. 29.

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sole heir. As Maung Hla Baw had acquired legal title to the property in suit at the time of his death the plaintiff-appellant is entitled to a decree as prayed for in her plaint.

I agree that this appeal be allowed and decree of the lower Court be set aside and plaintiff's suit decreed with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Pratt and Mr. Justice Mya Bu.

1927

Feb. 18.

MAUNG THU KA AND ONE
v.
U THUNANDA AND ONE.*

Buddhist Law—Disposal of property by a document, in form as of gift, whether and when void as being testamentary in nature—Deferring the vesting of the property till the death of settlor.

Where a document by which property was disposed of under the guise of a deed of gift or trust was in reality an attempt to dispose of the owner's property after death in order to defeat the operation of the ordinary laws of inheritance, *held*, that the document being a will is void if executed by a person subject to the Buddhist law.

Ma Thin Myaing v. *Ma Gyi*, 1 Ran. 351—*followed*.

Tha Gywe and S. Mukerjee—for Appellants.
Mitter—for 1st Respondent.

PRATT AND MYA BU, JJ.—Plaintiff, U Thunanda, a Buddhist monk, sued for a declaration of title with regard to certain trust property, a house and land, for possession, mesne profits and a decree for administration of the trust by himself or by the Court.

The property originally belonged to Ma Shin, a Burmese Buddhist lady who died in 1924.

* Civil First Appeal No. 49 of 1926 (at Mandalay).