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YAN LIN
v.
MYAT SAN.

DARWOOD, J.

Procedure Code applied, the parties aggrieved could not question the correctness of the order or of the finding on which it was based. This ruling supports the view set out above.

Reference may also be made to the case of *Syed Khan* v. *Syed Ebrahim* (1), in this connection.

In view of the plain terms of section 105, clause (2), of the Civil Procedure Code, I am of opinion that the appellant is precluded now from going into the question of limitation.

Though there are concurrent findings as to the value of the cattle attached and the damages sustained by the respondent for their wrongful attachment, the appellant urges that the lower Courts failed to appreciate the real evidence and to base their conclusions on hypotheses and opinions which are not evidence.

[His Lordship held that the plaintiff-respondent was entitled to Rs. 910 only and costs on that amount.]

APPELLATE CIVIL.

Before Mr. Justice Das and Mr. Justice Doyle.

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May 21.

MAUNG BA THWIN

v.

MAUNG PO HTI.*

Buddhist Law—Child of divorced parents—Absence of arrangement for custody and disposal of children—Filial conduct when necessary to be proved.

Held, that where a Buddhist couple on divorcing each other have come to an agreement as to the disposal of the children in a manner not opposed to the principles of natural justice (and which agreement would have the effect o giving away the children in adoption), the children are bound thereby.

Held, therefore, that where a child by agreement or acquiescence of the parents at the time of the divorce is allotted to one or other of the separating parties, the child must be regarded in law as having severed filial relations with the other; and where that child sets up a subsequent claim to the estate of the

(1) (1928) 6 Ran. 169.

* Civil Second Appeal No. 630 of 1927.

parent who abandoned the child to the care of the other at the time of the divorce, the onus is on the child to show that filial relations have been resumed.

Ma Ngwe Kin v. *Ma Hme*, 1 Ran. 42 ; *Ma Pon* v. *Maung Po Chan*, (1897-01) II U.B.R. 116 ; *Ma Shwe Ge* v. *Nga Lan*, (1872-92) S.J.L.B. 296 ; *Ma Tin U* v. *Ma Ma Than*, 5 Ran. 359 ; *Ma Yi* v. *Ma Gale*, 6 L.B.R. 167 ; *Mi San Mra Rhi* v. *Mi Than Da U*, 1 L.B.R. 161 ; *Mi Thaik* v. *Mi Tu*, S.J.L.B. 184 ; *Po Cho* v. *Ma Nyein Myat*, 5 L.B.R. 133—*referred to*.

Thein Maung for the appellant.

P. B. Sen for the respondent.

DAS and DOYLE, JJ.—Maung Ba Thwin, a boy of 14, sued his step-father, Maung Po Hti, for the administration of the estate of his mother, Ma Thein Ngwe, deceased.

The defence pleaded was that, when Maung Ba Thwin was four months' old his mother and father divorced, and Ba Thwin has since that time lived with his father without maintaining filial relations with the mother.

The Court of first instance dismissed the suit on its finding that Maung Ba Thwin had not maintained any filial relations with his mother prior to her death, and this finding was upheld by the lower appellate Court.

The lower appellate Court Judge quoted in support of his ruling the remarks in *Ma Tin U* v. *Ma Ma Than and two* (1), that "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," and in *Mi San Mra Rhi* v. *Mi Than Da U and two others* (2), that "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

(1) (1927) 5 Ran. 359, at p. 366. (2) (1900-02) 1 L.B.R. 161, at p. 167.

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minors are bound by the choice of their parents in this respect."

The facts elicited in the Court of first instance are roughly as follows :—

Ba Thein, the father, was divorced in 1914 from Ma Thein Ngwe when the plaintiff-appellant was two years old, the mother remaining in Thabya, the father moving to Thabyechaung, some miles away, Ma Thein Ngwe paying him Rs. 450, consisting of Rs. 300, half the *hnapazon* property, and a debt of Rs. 150, which he had borrowed from her mother, and which apparently, having little hope of recovering, she forgave him. The child remained with the mother, but after a month the father took it away without the knowledge and consent of the mother and refused to return the child unless Ma Thein Ngwe came to Thabyechaung for it. The mother, after waiting for eight months, returned to the father and stayed some days with him, hoping to recover the child. The father, who was using the child as a lever to get his wife to return to him, accompanied her to Thabya and left the child with her, but again took away the child after the lapse of a month.

The above facts are elicited from Civil Regular No. 196 of 1914 of the Township Court of Launglon, in which Maung Ba Thein sued his wife for restitution of conjugal rights within a year of the divorce, the evidence in which case has presumably—although the diary of the original trying Judge is not explicit on the point—been admitted by consent to the record. That the mother did not make more strenuous efforts to get the child brought back to Thabya is explained by the fact that it did not thrive there. She had already lost four children, and this child was the sole survivor. Even in the proceedings for restitution of conjugal rights, Maung Ba Thein admitted

that, on the two occasions when he took the child back to Thabyechaung, the child had been ailing in Thabya, so that the silence of the mother on this point, which impressed the learned District Judge on appeal, does not disprove the case now set up, that the reason that the child remained undisturbed in Thabyechaung was the belief that Thabya did not agree with it. In Thabyechaung the child lived in the house of Ma Nu Yin, its paternal aunt, with its father. Two years after the divorce, the father re-married and went to Mergui, leaving the child behind, and has since apparently taken no interest in the welfare of the child. The mother, on the other hand, paid its school expenses and used to visit it at Thabyechaung.

Two years after the marriage of the father, Ma Thein Ngwe re-married, and after her re-marriage, although the intercourse between mother and child was not entirely interrupted, her visits became very rare. When she died the child attended her funeral, and apparently obtained an admission from the step-father that it had some claim on her property, the greater part of which, it is admitted, was obtained during her second coverture.

At the time of the divorce, there appears to have been no agreement whatsoever as to the future of the child ; but it is clear that, at the time of the divorce, the mother was determined that the child should stay with her, that her divorced husband attempted to trap her through her affection for the child—after extracting his half of the *hnapazon* property—into a reconciliation ; that she acquiesced subsequently in the arrangement by which the child stayed with Ma Nu Yin, that the father left the child behind with Ma Nu Yin and did not concern himself in any way about the child after his re-marriage, that

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the mother took an interest in the child, although, possibly, a waning one and that, after her re-marriage, her intercourse with the child practically ceased and Ma Nu Yin was left to take the entire responsibility of the child.

There would thus appear to be three stages in the relations of the mother and child :—

(i) Immediately after the divorce, when the clear intention of the mother was to have the custody of the child ;

(ii) An acquiescence in the leaving of the child, originally for reasons of health, with Ma Nu Yin at Thabyechaung, the mother visiting the child and contributing to his keep ; and

(iii) A stage when, having contracted new relations, the mother left the child almost entirely in the hands of Ma Nu Yin.

It is contended in appeal that there was no rupture of relations established, such as would throw the onus of proving that filial relations were maintained.

It will be necessary to consider the law applicable to the set of circumstances just detailed. The earliest judgment dealing with the problem of the status of the child of divorced parents is that in *Mi Thaik* v. *Mi Tu* (1), where Jardine, J., remarks—after a discussion of the *Dhammathats* :—

"I endeavour to show distinct authority in the books for the proposition that when a divorce takes place by mutual consent the rule propounded for general guidance is that the mother should take the daughters. * * * I further endeavour to show * * * that, in the absence of special contract or conduct equivalent to contract, the girl who goes off with the mother and clings to her and to the mother's new husband has, according

(1) (1872-1892) S.J.L.B. 184, at p. 188.

to the principles of the Buddhist family law, become a member of a new family and lost her rights in the old."

He agrees with the view in Sparks' Code that children should be regarded in the *Dhammathats* as liable to be sold, but adds :—

"It is also known to all students of these books that much attention is always paid to the proportion between benefit and burden; the children may not be turned out to starve, and the parent who retains the house and furniture would naturally keep them. * * * The young children are supposed to have their interests protected by guardians, and if either parent thinks it necessary, they can when contracting divorce make their own arrangements for the children. The grown-up children come under the protection of parental feeling and if they like can use their influence in making the arrangements."

Later in *Ma Shwe Ge* v. *Nga Lan and Nga On* (1), it was held that "the children of a divorced wife are not entitled to any share in the property of their deceased father, acquired after his marriage with a second or third wife, unless they have continued after their mother's divorce to live and to plan and work with their father." In that particular case the children were grown up, and the property of the marriage, of which they were the offspring, had already been divided among them. The learned Judge laid down the rule just quoted as a principle of Buddhist equity without quoting specific authority.

In *Ma Pon and two others* v. *Maung Po Chan and two others* (2), Thirkell White, J.C., considered 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," adding as an extension of the rule in *Mi Thaik's* case (3), that "daughters of a divorced wife

(1) (1872-1892) S.J.L.B. 296. (2) (1897-01) U.B.R. (Civil), 116, at p. 121.
(3) (1872-1892) S.J.L.B. 184, at p. 188.

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who live with their mother and do not maintain filial relations with their father, but live entirely separate from him, are not entitled to a share in his estate when there has been a division of property at the time of the divorce."

The law was reviewed in great detail by a Bench of the late Chief Court in *Mi San Mra Rhi* v. *Mi Than Da U and two others* (1), in the course of which Birks, J., remarked :—

"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 in this respect, but if brought up by the mother, as is usually the case, they can rejoin the father's family when they attain years of discretion."

In the same judgment Copleston, C.J., after pointing out that the ruling in *Ma Shwe Ge* v. *Maung Lan and one* (2) could not apply to children of tender years, approved the ruling in *Ma Pon and others* v. *Maung Po Chan and others* (3), and concluded that the fact of a father helping to educate or maintain a child did not revive rights lost in law and intention by his mother's divorce (the son at the time of divorce receiving part of the property).

This ruling was referred to and approved in *Po Cho* v. *Ma Nyein Myat and others* (4). In *Ma Yi* v. *Ma Gale* (5), the case law was again reviewed at length, and the conclusion affirmed that in a case of divorce where the children are of tender years it is the will of the parents which decides the disposition of the children; and that children lose the right to inherit the property of the parent who has abandoned them unless filial relations are resumed.

(1) (1900-02) 1 L.B.R. 161, at p. 167. (2) (1872-1892) S.J.L.B. 296.
(3) (1897-01) U.B.R. (Civil), 116, at p. 121. (4) (1909-10) 5 L.B.R. 133.
(5) (1911-12) 6 L.B.R. 167.

In *Ma Ngwe Kin* v. *Ma Hme and three* (1), the first relevant reported case of the Rangoon High Court, MacColl, J., whose knowledge of Buddhist Law was undisputed, remarked :—

"There are, as far as I know, no texts in any of the *Dhammathats* that lay down when a child of a divorced wife can inherit from his father and when he cannot. But it may be taken as settled law that if a child on the divorce of his mother accompanied by partition of property goes to live with her and ceases to be a member of his father's household he is debarred from inheriting from his father."

Later he remarked :—

"There is so far as I know no provision in the *Dhammathats* enabling a father to disinherit his child except by giving him away in adoption to another, * * *"

And concluded that mere separate living, especially in the case of a child of tender years, cannot be regarded as evidence of filial neglect.

In *Ma Tin U* v. *Ma Ma Than and two* (1), a Bench of this Court stated as a general principle :—

"Where 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."

And applying this principle to the particular case before that Court, Pratt, J., remarked :—

"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."

While Mya Bu, J., remarked :—

"The ordinary conception of child being taken by one parent and abandoned by the other at the time, or in consequence of, their divorce, is entirely absent, * * *."

and held consequently that the ruling in *Ma Yi* v. *Ma Gale* (3), did not apply ; that mere living apart

(1) (1923) 1 Ran. 42. (2) (1927) 5 Ran. 359, at p. 365.
(3) (1911-12) 6 L.B.R. 167.

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did not imply a severance of filial relations; and that there was no ground for requiring proof of the resumption of filial relations.

Were we studying as *res integra* the problem of the rights of the inheritance of the children of a divorced couple, we should, as a matter of equity, lay down the proposition that, where the couple divorcing have come to an agreement as to the disposal of the children, not opposed to the principles of natural justice, the children are bound thereby; and where, therefore, a child by agreement or acquiescence of the parents at the time of the divorce is allotted to one or other of the separating parties, the child must be regarded in law as having severed filial relations with the other; and where that child sets up a subsequent claim to the estate of the parent who abandoned the child to the care of the other at the time of divorce, the onus is on the child to show that filial relations have been resumed.

The case-law above quoted is not in conflict with the equitable principle now enunciated.

In the case now under appeal, there was no agreement whatsoever and the circumstances surrounding the divorce did not warrant the conclusion that the mother intended to abandon the child to the father, and, therefore, both the lower appellate Court and the Court of first instance were wrong in requiring the child to prove that it has maintained filial relationship in the absence of evidence that the mother at the time of the divorce intended to sever relationship.

There cannot be the slightest doubt that the mother for at least a year after the divorce, intended the child to remain with her and made efforts to recover custody of the child; the father, on the other hand, merely used the child as a weapon to induce his wife

to return to him. If the subsequent conduct of the mother is to be interpreted as evincing a desire to discontinue relationship with the child, the attitude of the father in going to Mergui, leaving the child to be brought up as best as it might by a Ma Nu Yin, was one of total abandonment.

If the child, in these circumstances, must establish the maintenance of filial relationship with its mother, much more would it be necessary for it, as a preliminary to obtaining any share in the father's property, to establish the maintenance of filial relationship with the father, and the logical consequence of shifting the onus of proof under the existing circumstances would be that the child would be *sans famille*, orphaned in the life-time and at the instance of its parents. That its mother later in life, when she contracted new relations and came in contact with new surroundings, should have lost touch with the child is not surprising—the history of Cinderella is not peculiarly western.

We would reiterate the dictum of MacColl, J., in *Ma Ngwe Kin* v. *Ma Hme and three* (1), that there is no provision in the *Dhammathats* enabling parents to disinherit their children, except by giving them away in adoption to another, and, applying it in this case, hold that the plaintiff-appellant, Maung Ba Thwin, not having been disinherited by his mother, is entitled to maintain a suit for partition of his mother's property.

We would remand the case to the Court of first instance for disposal according to law in the light of this finding.

Costs to follow the final result.

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(1) (1923) 1 Ran. 42.