

## APPELLATE CIVIL.

*Before Mr. Justice Carr.*

MAUNG AUNG THIN AND THREE

v.

MA NGWE U AND EIGHT.\*

1928

Mar. 13.

*Buddhist Law—Step-children's claim in the estate of the grandparent and step-grandparent—Claim against step-uncles and aunts and half-uncles and aunts.*

*Held*, that at Burmese Buddhist law, the step-children (as also step-grand-children), when in competition with *atet* children of the step-parent and the issue of the step-parent with the common parent, who predeceased the step-parent, are entitled to a fifth of the *lettetpwa* of the marriage of the step-parent with their parent; and that the *atet* children of the step-parent are also entitled to a like share.

*Ma Htay v. U Tha Hlaing*, 2 Ran. 649; *Ma Nan Shwe v. Ma Sein*, 2 Ran. 514; *Ma Nyein E v. Maung Maung*, 3 Ran. 549; *Ma Thauing v. Ma Than*, 5 Ran. 175; *Ma Toke v. Ma U Le*, 1 Ran. 487, *Maung Po Aung v. Maung Kha*, Civil Reference 9 of 1927; *Maung Po Kin v. Maung Tun Yin*, 4 Ran. 207; *Maung Shwe Ye v. Maung Po Mya*, 3 Ran. 464—referred to.

*San Pe v. Ma Shwe Zin*, 9 L.B.R. 176—dissented from.

*Lambert* for the appellants.

*Maung Kun* for the respondents.

CARR, J.—U Aing, by his first wife, Ma Da Li, had one daughter, Ma Lay. Ma Hmwe, by her first husband, U Po, also had one daughter, Ma Shwe Me. Both Ma Da Li and U Po having died, U Aing married Ma Hmwe and by her had three sons, one of whom died before Ma Hmwe, leaving three children.

Ma Lay had four children, Maung Aung Thin, Ma Sein Yin, Ma The Hmyin and Maung Hla Gyaw. Of these, Ma The Hmyin died before Ma Lay, leaving a son, Maung Myat Maung.

Ma Shwe Me also had three children, Ma Ngwe U, Maung Po Kin and Maung Aung Din, all of whom survive.

\* Special Civil Second Appeal No. 495 of 1927.

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U Aing died about 25 years ago and Ma Hmwe about five years ago, leaving the piece of land in suit, which is admittedly *lettetpwa* of the marriage of U Aing and Ma Hmwe.

After the death of U Aing and before that of Ma Hmwe, both Ma Lay and Ma Shwe Me died.

The plaintiffs in this suit are the children and grandson of Ma Lay. They claim a one-fifth share of the land abovementioned. The first three defendants are the children of Ma Shwe Me. Defendants 4 to 7 are the children and grandchildren of U Aing and Ma Hmwe and the 8th and 9th are purchasers of the land from these four.

The relationship of the parties is set out in the form of a genealogical table annexed to this judgment.

It was alleged by the defendants that the plaintiffs' mother, Ma Lay, had received her share of inheritance when her father married Ma Hmwe. It was also alleged that, although the defendants did not admit the right of the plaintiffs to any inheritance now, they had, out of pity, given them the sum of Rs. 400, which the plaintiffs had accepted in full satisfaction of any claim that they might have against the estate. But both these allegations had been found not to be proved, and I think the finding is correct. These allegations, therefore, need no further consideration.

The only real question for decision is whether the plaintiffs are now entitled to any share in the estate, and, if so, to what share?

The Subdivisional Judge applied the case of *Sein Tun v. Mi On Kra Zan* (1), and held that the share of one-eighth, which was to go to *atet* grandchildren, should be equally divided between the children of Ma Lay on the one hand and those of Ma Shwe Me on the other. He accordingly allotted

(1) (1905-06) 3 L.B.R. 219.

one-sixteenth to the first three plaintiffs collectively. He held that the 4th plaintiff, as an out-of-time great-grandchild, was not entitled to any share at all.

As regards the 4th plaintiff, I have no doubt that his decision is correct.

In the case of *Maung Shwe Ye v. Maung Po Mya and others* (1), I considered the question of the right to inherit of great-grandchildren and held that they were entirely excluded by either children or grandchildren. I see no reason to modify the view I then took, and on that decision the 4th plaintiff is clearly excluded by the 1st, 2nd and 3rd plaintiffs. It is, therefore, not necessary to consider whether he would be excluded by children or grandchildren of the second marriage. But as regards the share of the first three plaintiffs, I do not think that the Subdivisional Judge was right. He has omitted to notice that the case relied upon by him was a case where the grandchildren of the first marriage were claiming partition as between themselves and the step-grandmother and her child by her marriage with the plaintiffs' grandfather.

The principal difference in the present case is that the step-grandmother also is dead, and the claim is one for partition between the plaintiffs and their half brothers and sisters by their father's second marriage.

The District Judge took a different view of the case, relying on what is said on page 260 of U May Oung's Buddhist law. He held that the plaintiffs, as step-grandchildren of Ma Hmwe, were not her heirs and, therefore, had no right to inherit her estate. So far I think he is right. But in actual fact, the plaintiffs are not claiming to inherit Ma Hmwe's estate. What they claim is the share of the

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*lettetpwa* of their grandfather's marriage with Ma Hmwe.

The District Judge next considered the right of the plaintiffs as heirs of their grandfather, U Aing. Here he held that their claim was time-barred. Referring to page 253 of U May Oung's Book, he said that on the death of U Aing, Ma Lay, or her children, the plaintiffs, would have been entitled to a one-fifth share. Here again, he is wrong. Ma Lay could have claimed on the death of her father; had she done so, her share would have been not one-fifth but one-eighth of the *lettetpwa* of the second marriage. The latest case on that point is *Ma Nyein E v. Maung Maung and two* (1). That was a Full Bench decision, and it laid down that, where the *atet* children claim, on the death of their parent, partition as against their step-parent, their share of *lettetpwa* property of the second marriage would be one-eighth, if there were issue of the second marriage. That again was a case in which the claim was against the step-parent. But the District Judge went on to hold that, although Ma Lay would have had such a claim on the death of her father and her right would have devolved upon her children, the plaintiffs, that claim was time-barred, since Ma Lay's father, U Aing, had died 25 years before the suit. He would have been quite right had the claim been one for partition upon the death of U Aing. I should say that he relied upon the case of *San Pe v. Ma Shwe Zin* (2). That decision, although the case was not exactly the same, did justify the District Judge's finding. But I am clearly of opinion, for reasons which I will give later, that the learned Judges in that case were wrong in deciding that the claim to

(1) (1925) 3 Ran. 549.

(2) (1917-18) 9 L.B.R. 176.

share in the *lettetpwa* of Ma Ke's second marriage was time-barred.

It seems desirable to review the rights of children by the first marriage when their surviving parent has remarried. I propose to deal only with the latest cases.

The first right that the children have after the death of one parent when the surviving parent remarries is to claim a partition immediately. This has been laid down in *Maung Po Kin v. Maung Tun Yin* (1). This right is further recognized in *Ma Toke v. Ma U Le* (2), *Ma Htay v. U Tha Hline* (3), and in the Privy Council case of *Ma Thaung v. Ma Than* (4). Where there has been such a partition on marriage, the children of the first marriage have no further claim to inherit as against their step-parent, or, after the death of their step-parent, against the direct descendants of that step-parent. Secondly, if the children of the first marriage have not made a claim on the remarriage of their parent, they have a right to claim a share, on the death of their parent, from the surviving step-parent, whether there are or are not children by the second marriage. This is recognized in *Ma Nyein E v. Maung Maung* (5), above cited. And thirdly, if the children of the first marriage have not made any claim on either of the two occasions abovementioned, they have a further right to partition on the death of the step-parent. This right is dealt with in sections 237 and 238 of the Kinwun Mingyi's Digest of Buddhist Law, Volume I.

The question of the applicability of the rule given in section 237 has recently been considered in *Maung Po Aung v. Maung Kha* (6). The particular

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(1) (1926) 4 Ran. 207.

(2) (1923) 1 Ran. 487.

(3) (1924) 2 Ran. 649.

(4) (1927) 5 Ran. 175.

(5) (1925) 3 Ran. 549.

(6) Civil Reference No. 9 of 1927.

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question raised in that reference was whether the rule set out in section 237 was applicable when the parent of the claimants had died before their step-parent. It was held that the rule was applicable.

Leaving aside for the present the fact that the plaintiffs are not U Aing's children but his grandchildren, and considering the case as it would be if Ma Lay and Ma Shwe Me were still alive, the present case would come under section 238 of the Digest, and *Ma Nyein E's* case last mentioned is sufficient authority for holding that the rules of that section would be applicable. Under that rule, Ma Lay's share would be one-fifth ; Ma Shwe Me's one-fifth ; and that of the children and grandchildren of the marriage of U Aing and Ma Hmwe collectively would be three-fifths.

In view of the fact that there are three different rules for partition ; first, on the re-marriage of the surviving parent ; secondly, on the death of the surviving parent after re-marriage ; and thirdly, after the death of the step-parent, it must, I think, be held that in each of these cases there is a fresh cause of action arising either from the re-marriage or from the death in question. Consequently, since Ma Hmwe died only about five years ago, the claim in the present suit cannot be held to be time-barred ; and for similar reason, I think that the Bench which decided *San Pe's* case (1) was wrong in holding that the first part of the claim in that case was time-barred.

There remains only the question of what is the right of the plaintiffs who are not step-children but step-grandchildren of Ma Hmwe. I can find no authority dealing expressly with this particular case ; but in the case of *Ma Nan Shwe v. Ma Sein* (2),

(1) (1917-18) 9 L.B.R. 176.

(2) (1924) 2 Ran. 514.

it was held that on a competition between children by one marriage and grandchildren by another marriage (their parents having predeceased the common ancestor), the rule of division was the same as obtaining between children of different marriages; and that the ordinary rule by which the share of out-of-time grandchildren is reduced to one-fourth of the share which their parent, if living, would have taken is not applicable. This last decision cannot be held to be very firmly established; but I cannot at present see sufficient reason for withdrawing from the view I took in that case, and I think that the rule, as there laid down, should be applied.

The result, therefore, is that the first three plaintiffs collectively are entitled to the same share that Ma Lay would have taken had she been still alive, and, in accordance with the rule laid down in section 238 of the Digest, her share is one-fifth.

I, therefore, set aside the judgment and decree of the District Court and instead give judgment for the first three plaintiffs collectively for partition and possession of a one-fifth share of the property in suit. The respondents will pay the costs of the appellants in all Courts.

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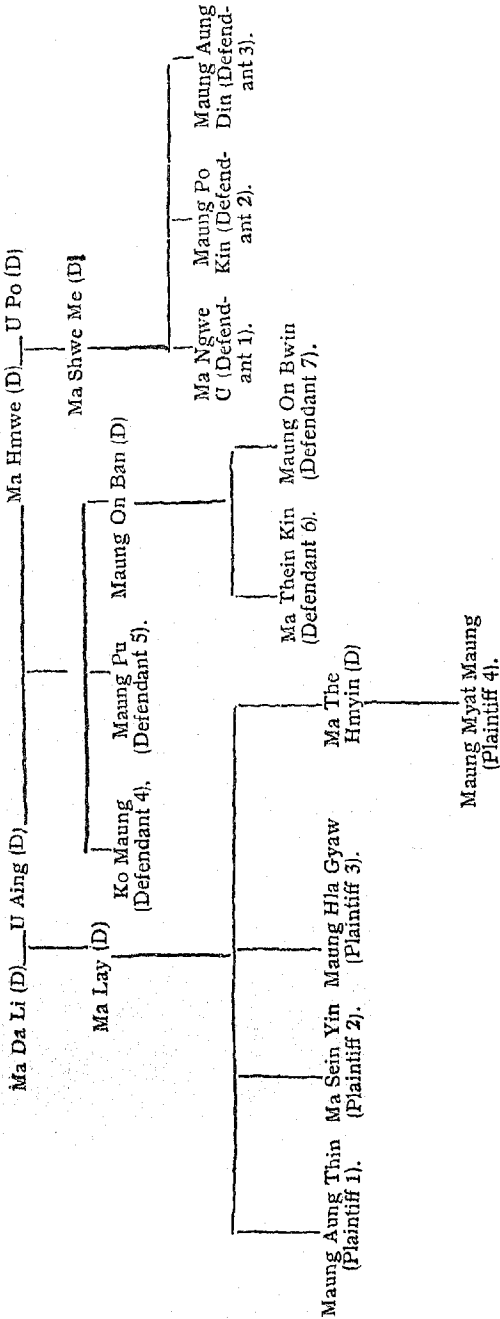
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Defendants 8 and 9 are purchasers of land in suit from Defendants 4, 5, 6, 7.