for the unpaid services of the Stewards of the Club. He admits that their services contribute very greatly to the Club, but, as he finds it impossible to calculate what the value of those services is, he allows nothing for them. Had we been in his position we should have been inclined to make a generous allowance in respect of those services, and we hope that at the next assessment he may reconsider this point. But, as we have already said, we do not think that this is such a question of principle as to come within the jurisdiction of this Court.

The appeal, therefore, fails and is dismissed with costs, ten gold mohurs.

PRIVY COUNCIL.

J.C.* 1927

Nov. 21.

MA SAW KIN AND OTHERS (*Defendants*)

v.

MAUNG TUN AUNG GYAW (*Plaintiff*).

(On Appeal from the High Court at Rangoon.)

Burmese Buddhist Law—Divorce—Desertion—Pleadings—New case—Manugye, V, s. 17.

In a suit in which in 1923 a Burmese Buddhist claimed as heir to his deceased wife, the defendants pleaded that the plaintiff and his wife had been divorced in 1916, and alternatively that the plaintiff had deserted his wife for over three years and entered into a second marriage, and that thereby there had been a dissolution of the marriage. There were concurrent findings by the Courts in Burma that there had not been a divorce by mutual consent. On the issue as to desertion the Appellate Court found that there had been only a living apart by mutual consent, or if there had been any desertion, it was by the wife; they accordingly made a decree for the plaintiff. The Judicial Committee agreeing that the effect of the evidence was as above stated:—

Held, that the appeal failed as the defendants had not established the allegations upon which they had gone to trial, and it was not open to them to set up a fresh case, namely that there had been a living apart which under *Manugye*,

* PRESENT:—VISCOUNT SUMNER, LORD SINHA, SIR JOHN WALLIS and SIR LANCELOT SANDERSON.

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Chap. V, s. 17, resulted in a dissolution of the marriage on the expiration of the period therein mentioned.

No decision therefore was given whether as held by the Full Bench in *Ma Nyun* v. *Maung San Thein*, (1927) 5 Ran. 537, the circumstances stated in *Maungye*, V, s. 17, caused a dissolution of the marriage automatically, or whether, as had been held by a majority of the Full Bench in *Thein Pe* v. *U Pet*, (1906) 3 L B R. 75, there must be further some act of volition.

Provisions dealing with such a serious matter as the severance of the marriage tie must be construed strictly and fully complied with. In *Maungye*, V, s. 17, unless the two conditions therein referred to exist, the text gives the wife no right to remarry, and the marriage must be considered as subsisting.

Mah Nhin Bwin v. *U Shwe Gone*, (1914) L.R. 41 I.A. 121, and *Ma Hmon* v. *Maung Tin Kauk*, (1923), 1 Ran. 722—*also referred to.*

Decree of the High Court affirmed.

Appeal (No. 25 of '1926) from a decree of the High Court (Jaunary 23, 1925), reversing a decree of the District Court of Thayetmyo (August 20, 1923). The suit was instituted in the District Court in 1923 by the respondent who claimed to recover from the appellants possession of the property of his deceased wife, Ma Thet She. The defendants pleaded that the plaintiff and his wife had been divorced in 1916, and alternatively that the plaintiff had deserted his wife for over three years and had remarried and that the marriage was thereby dissolved.

The facts appear from the judgment of the Judicial Committee.

The District Judge found that there had been no divorce by mutual consent. In his view the circumstances amounted to desertion by the plaintiff continuously for upwards of three years ; after considering the authorities he held that there had been a dissolution of the marriage. Accordingly he dismissed the suit.

On appeal to the High Court the decree was set aside, and a decree made for the plaintiff.

The learned Judges (Young and Brown, JJ.) agreed with the finding that there had been no divorce by

mutual consent. In their view there had been no desertion by the plaintiff, only a mutual living apart which, in their opinion, did not amount to a desertion.

1927, *October* 24 *and* 25. *DeGruyther*, *K.C.*, and *E. B. Raikes* for the appellant. The evidence established the conditions which under *Manugye*, Chap. V, s. 17, result in a dissolution of the marriage tie. Under that section it is not necessary that there should be a desertion in the sense in which that word is used in English law; the word "deserted" does not occur in Richardson's translation. Nor was it so used in the amended written statement. At the trial the amendment was taken as based upon *Manugye*, Chap. V, s. 17. For the purposes of that section it is sufficient if there has been, as there was in this case, a living apart and a failure by the husband for the prescribed period to maintain his wife. Having regard to the conduct of the plaintiff his wife was justified in excluding him from her house. The Full Bench rightly held in *Ma Nyun* v. *Maung San Thein* (1), reversing the majority decision in *Thein Pe* v. *U Pet* (2), that the conditions prescribed in the text result in an automatic dissolution of the marriage. Reference was made also to *Nga Nwe* v. *Mi Su Ma* (3), *Po Maung* v. *L.H.R.L.P. Nagalingam Chetty* (4), *Ma Yi* v. *Ma Gale* (5), *Maung Shwe Sa* v. *Ma Mo* (6), and to *Manugye*, Chap. X, s. 3.

Pritt, *K.C.*, and *A. W. Roskill* for the respondents were not called upon.

November 21. The judgment of their Lordships was delivered by Sir John Wallis—

This is an appeal from a decree of the High Court at Rangoon reversing a decree of the District

(1) (1927) 5 Ran. 537.
(2) (1900) 3 L.B.R. 175.
(3) (1886) S.J.L.B. 391.
(4) (1892-96) 6 U.B.R. II, 53.
(5) (1912) 6 L.B.R. 167.
(6) (1922) 1 B.L.J. 24.

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Court of Thayetmyo. The suit was brought by the plaintiff, Maung Tun Aung Gyaw, claiming as heir of his deceased wife, Ma Thet Shay, against the three defendants, her sister and her sister's husband, Ma Saw Kin and Maung Shein, and Maung Aung Pe, his son by his deceased wife, for a partition of the properties inherited by the sisters Ma Thet Shay and Ma Saw Kin from their father U Hle, and also of properties acquired by the joint exertions of the plaintiff, his decesaed wife and her sister Ma Saw Kin, the first defendant.

The defendants pleaded that the plaintiff and his wife were divorced in or about Tabaung, 1277 (March, 1916), and that the plaintiff was not entitled to any share in the property of U Hle, his deceased wife's father. They also denied that any property had been acquired by the joint exertions of the plaintiff, his wife and the first defendant, or that they were in possession of any properties to which he was entitled. Issues were then settled, the first issue being: "Was the plaintiff divorced from Ma Thet Shay, as alleged by the defendants?" Subsequently the defendants were allowed to amend their pleadings by inserting the following plea: "In the alternative, these defendants plead that the plaintiff having deserted Ma Thet Shay for over three years and contracted a second marriage, the parties had thereby become divorced."

An additional issue was framed on this amendment: "Was there a desertion as alleged in the written statements in or about Tabaung, 1277, and does such desertion operate as a divorce?"

On the first issue the defendants gave evidence of a divorce by mutual consent but this evidence was disbelieved both by the District Judge and the High Court, so that there are concurrent findings that there was no divorce by mutual consent. On the additional

issue as to the alleged desertion by the husband in March, 1916, and its operating as a divorce, the District Judge did not find that there had been any actual desertion by the husband, as it was clearly proved that the separate living was against his will, but he held with reference to certain decisions of the Burmese Courts that the plaintiff's conduct having, as he found, justified his wife in living apart from him, their separation for three years might be treated as desertion for that period by the husband, and accompanied as it was by his openly living with his junior wife Ma Ngwe Yon, might be treated as having dissolved the marriage.

On appeal the learned Judges of the High Court, whilst agreeing with the Trial Judge that there had been no divorce by mutual consent, held that the desertion, if any, was by the wife and not by husband, and that on the facts proved there had been no divorce.

As to the plea that the parties had become divorced by reason of the plaintiff's having deserted his wife for over three years and taken another wife, their Lordships have come to the conclusion that the finding of the High Court, in which they concur, that there was no desertion by the husband, amounts to a finding for the plaintiff on the additional issue, and is sufficient to dispose of the appeal, as the appellants have failed to prove the grounds of divorce on which they went to trial, and cannot now be allowed to set up a fresh case.

According to the ruling of their Lordships in *Ma Nhin Bwin* v. *U Shwe Gone* (1), the Burmese law in this and similar questions is to be determined by the *Manugye* or Damathat of the Laws of Menoo, with such assistance as may be derived where necessary

(1) (1913) 41 Cal. 887 ; L.R. 41 I.A. 121.

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from the other Damathats. As regards the question of divorce, there have been considerable differences of judicial opinion in Burma both as to the proper interpretation of the texts themselves and as to whether some of them should not be considered obsolete. Thus the question whether either party has a right to divorce without fault of the other on giving up all share in the joint property in accordance with *Manugye*, XII, sect. 3, has given rise to conflicting decisions, which are cited in the case of *Ma Hmon* v. *Maung Tin Kauk* (1).

In the present case their Lordships are only concerned with the question of divorce as grounded on desertion, which is dealt with in *Manugye*, V, ss. 14—17. Ss. 14—16, which may or may not be obsolete, deal with the right of the wife to remarry in case of the husband's absenting himself for purposes of trade or in search of knowledge, or on military service. In the first two cases the wife's right to remarry only arises where the husband, in addition to being absent for the period mentioned, has failed during that time to send her letters and presents. If he has, the texts give her no right to remarry. The present case is governed by the next section, 17, which has the following caption: "The law when a husband and wife having no affection for each other separate." The material part of the section is 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 vegetables or one stick of firewood, at the expiration of three years, let each have the right to take another wife and husband. If the wife not having affection for the husband, shall leave the house and where they were living together, and, if during one year he does not

(1) (1923) 1 Ran. 722.

give her one leaf of vegetables or one stick of firewood, let each have the right of taking another husband or wife; they shall not claim each other as husband and wife; let them have the right to separate and marry again."

The section goes on to provide that if the wife remarries without waiting for the three years, or if the husband remarries without waiting for the one year, the party so wrongfully remarrying is to forfeit all the joint property of the first marriage,

"and if (the person in fault) comes to the house of the other, the person not in fault may turn (the other) out, but not accuse each other of taking a paramour or seducing husband or wife."

In their Lordships' opinion, provisions of this kind dealing with such a serious matter as the severance of the marriage tie must be strictly construed and fully complied with. There has been much difference of opinion in Burma, and two Full Benches of the High Court have arrived at opposite conclusions, on the question whether, when the husband or wife has left the home, the marriage is put an end to by the fact of the husband's omitting to send the wife anything for three years or one year, as the case may be, or whether there must be some further act of volition showing an intention to determine the marriage relation, such as remarriage or a suit for divorce (1).

Their Lorships express no opinion on that question, because it only arises under the terms of the section where there has been desertion on the one side or the other and failure on the part of the husband to provide the wife with any maintenance for the specified period. Unless both conditions are satisfied, the text gives the wife no right to remarry, and the marriage tie must be considered as subsisting.

(1) See *Ma Nyun* v. *Maung San Thein*, (1927) 5 Ran. 537 reversing *Thein Pe* v. *U Pet*, (1906) 3 L.B.R. 75.

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In the present case the plaintiff was married to Ma Thet Shay in 1887, and, as observed by one of the learned Judges, lived with her more or less amicably until the year 1916, a period of nearly thirty years. By that time marital relations between the parties had ceased for some years, and the plaintiff had taken a junior wife, for whom he provided a separate residence, whilst continuing to reside with the senior wife. Prior to 1916, when the divorce by mutual consent was said to have taken place, there were quarrels between the husband and wife. Ma Thet Shay and her sister Ma Saw Kin, the first defendant, who had inherited considerable property from their father, in which their husbands were entitled to share, lived with their husbands at 171, Main Road, until, in consequence of an evil omen, they all moved to No. 17. Not long afterwards Ma Thet Shay and her sister went to live in another house, leaving the plaintiff in No. 17, but they continued to send him his food until 1918, when it stopped. He then began to live openly with the junior wife, to whom he had long been married.

As Ma Thet Shay had inherited considerable property from her father, and then was in an advanced stage of tuberculosis, of which disease she died in 1922, it was obviously the plaintiff's interest to resist a divorce which might affect his rights of inheritance in his wife's estate. In these circumstances he appears to have acquiesced in his exclusion from his wife's house, to the extent of not suing for restitution of conjugal rights, or himself suing for divorce, but the evidence shows that he always repudiated the notion that there had been any divorce, and that he continued to make unsuccessful efforts to communicate with his wife until she died.

Errata et Corrigenda.

I.L.R. Rangoon, Volume VI, Part II, page 87 and Index, page ii, in the case of N.P.A. Chettiar Firm *v.* H. C. Sharma, *delete* the second and third paragraphs of the headnotes beginning with the words "Held, that the maxim" and ending with the words "for construction" and *substitute* the following paragraph:—

"*Held*, that an unpaid builder in India has no lien in law upon the building in his possession for the balance due to him under the contract for

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In these circumstances their Lordships agree with the learned Judges of the High Court that the effect of the evidence is that there was only a living apart by mutual consent, or, if there was desertion at all, it was desertion by Ma Thet Shay. That is not the case set up here.

For these reasons their Lordships agree with the learned Judges of the High Court that the defendants have failed to prove that the plaintiff was divorced from Ma Thet Shay, and are of opinion that the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants :—*Sanderson, Lee & Co.*

Solicitors for respondent : —*Holmes, Sen & Pott.*

ORIGINAL CIVIL.

Before Mr. Justice Otter.

1927

Dec. 1.

N.P.A. CHETTIAR FIRM.

v.

H. C. SHARMA.*

Lien—An unpaid builder whether entitled to a lien on the building—The maxim quicquid plantatur solo, solo cedit *how far applicable in India.*

Held, that the maxim, *quicquid plantatur solo, solo cedit*, (whatever is affixed to the soil belongs thereto) applies to chattels affixed to the land in India unless by customary or local law such application is prohibited. As a matter of equity, the maxim would not apply in India to tenants who make improvements or to *bonâ fide* transferees where improvements were made under circumstances that the owner of the land ought not to benefit thereby.

Held, that an unpaid builder *as such* has no lien upon the building in his possession for the balance due to him under the contract for construction.

Beni Ram v. *Kundan Lal*, 21 All. 496 ; *Dunia Lall Seal* v. *Gopi Nath Khetry and others*, 22 Cal. 820; *Ismail Khan Mahomed* v. *Jaigun Bibi*, 27 Cal. 570 ; *Juggat Mohinee Dossee* v. *Dwarka Nath Bysack*, 8 Cal. 582, *Parbutty Bewan* v. *Woomatara Debee*, 14 Beng. L.R. 201 ; *Russickloll Mudduck* v. *Lokenath Kurmokar*, 5 Cal. 688 ; *Shib Doss Banerjee* v. *Bamun Doss Mookerjee*, 15 W.R. 360.

* Civil Regular Suit No. 246 of 1926.