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Their Lordships will accordingly humbly advise His Majesty that the decree of the High Court should be varied to this extent but should otherwise be affirmed.

Solicitor for appellants : *J. E. Lambert.*

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Mya Bu.

Before Mr. Justice Heald and Mr. Justice Otter.

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Feb. 7.

Apl. 25.

MA ON THIN
v.
MA NGWE YIN AND ANOTHER*

Buddhist law—Inheritance—Children who have partitioned on remarriage of one parent, right of—Property inherited by that parent between two covertures—Necessary parties to an appeal—Party against whom no relief is claimed and against whom no relief need be claimed—joinder of parties by appellate Court.

Held, that where the children have taken their share of inheritance in the joint property of their parents on the remarriage of one parent, after the death of the other, they are not entitled to further interest in the property inherited by that parent between the two marriages or in the *letletpwa* of the subsequent marriage.

Held, further, that where on appeal no relief is claimed against one of the parties to the decree appealed from and the respondent in the appeal does not derive his interest through the party who is not so joined, the appeal is not bad for non-joinder of parties.

Ma Thaung v. *Ma Than*, 5 Ran. 175 (P.C.)—*followed.*

Jawahar Bano v. *Shuaat Husain Beg*, 43 All. 85 ; *Maung Po San* v. *Maung Po Thet*, 5 Ran. 438 ; *Shwe Ywet* v. *Tun Shein*, 11 L.B.R. 199—*referred to.*

V.P.R.V. Chokalingam Chetty v. *Seethai Acha*, 2 Ran. 54, 6 Ran. 29—*distinguished.*

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* Civil First Appeal No. 237 of 1928 from the judgment of the District Court of Hanthawaddy in Civil Regular No. 56 of 1927.

The appeal was heard in the first instance before a Division Bench of this Court composed of Heald and Mya Bu, JJ., when a preliminary objection as to non-joinder was taken. The objection being overruled, the appeal was heard on the merits by a Bench composed of Heald and Otter, JJ., the judgments on both hearings are reported.

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Ba Thein (1) for the appellant.

Hay for the respondents.

1929, *February* 7. HEALD and MYA BU, JJ.—The learned counsel for the respondents has raised a preliminary objection contending that the appeal is incompetent for non-joinder of a necessary party and should therefore be dismissed.

The appeal is against the preliminary decree in an administration suit filed on behalf of a minor plaintiff named Ma Htwe Sein (now deceased) against the appellant, Ma On Thin, and the respondents, Ma Ngwe Yin and Ma Nyun, for administration of the estate of U Mya, deceased.

The respondents are the issue of U Mya's first marriage. After the death of their mother Ma Thaw, U Mya gave them half of the properties of the first marriage. He then married his second wife Ma The Myit and the plaintiff Ma Htwe Sein was born to them. Ma The Myit also predeceased U Mya. Thereafter U Mya married the appellant and died a few months later on the 5th July, 1927, leaving the appellant enceinte and she subsequently gave birth to a son.

In the lower Court there was no dispute as to the heirship of the parties.

The only issue was: "To what shares are the parties respectively entitled in the estate of U Mya deceased?"

In view of the partition between U Mya and the respondents of the properties of the first marriage, the Court held on the authority of the rulings in the cases of *Ma Toke and* four *others* v. *Ma U Le* (1) and *Ma Htay* v. *U Tha Hline* (2), that the respondents

(1) (1923) 1 Ran. 487. (2) (1924) 2 Ran. 649.

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were not entitled to any share either in the remaining properties of the first marriage or in the joint properties of the second and third marriages. The Court went on to fix the shares of the plaintiff and the appellant respectively in these properties; and in the absence of any dispute and practically in accordance with the unanimous opinion of the Court and the counsel appearing for the respective parties, the Court found that the three parties as representing three families were entitled to one-third each in the properties inherited by U Mya after the death of his first wife.

The preliminary decree made in accordance with the judgment declared :—

(1) that the plaintiff was entitled to three-fouths share in the properties of the first and second marriages, one-eighth, share in the properties, if any, of the third marriage and one-third share in the inherited properties of U Mya;

(2) that Ma On Thin, 1st defendant (now appellant) was entitled to one-fourth share in the properties of the first and second marriages, seven-eighths share in the property, if any, of the third marriage and one-third share in the properties inherited by U Mya; and

(3) that Ma Ngwe Yin and Ma Nyun, second and third defendants (now respondents) were entitled to one-third share in the properties inherited by U Mya.

It was ordered that a commissioner be appointed to find out *inter alia* what the inherited properties were and what the properties of the first, second and third marriages respectively were. This decree bears the date 30th June 1928.

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The appellant filed the present appeal on the 12th September 1928 only as against the respondents merely objecting to the declaration in the preliminary decree in the latter's favour, valuing the appeal at Rs. 2,000 " being one-third share in the inherited property " but without joining the plaintiff either as an appellant or as a respondent.

It may be pointed out that the minor plaintiff, Ma Htwe Sein, died on the 1st of August 1928, that is, after the preliminary decree and before the filing of the appeal.

In support of his contention, the learned counsel for the respondents urges that the legal representatives of Ma Htwe Sein were necessary parties to this appeal and should have been joined as such, that the appellant's omission to join Ma Htwe Sein's legal representatives has deprived his clients of their right to take, if they chose, cross-objection adversely affecting the interest of Ma Htwe Sein or her legal representatives; that the time limited for an appeal against Ma Htwe Sein having expired neither she nor her legal representatives can now be joined; and that the whole appeal has for these reasons become incompetent.

The learned counsel quotes the rulings in the cases of *V.P.R.V. Chokalingam Chetty and one* v. *Seethai Acha and others* (1) and *V.P.R.V. Chokalingam Chetty* v. *Seethai Acha and others* (2). They refer to the same case, the former being a decision of a Bench of this Court and the latter being a decision of the Privy Council on appeal arising out of the same case. In that case the plaintiff having bought from the Official Assignee property which had belonged to the insolvent sued several defendants for recovery of the property alleging that the transfer

(1) (1924) 2 Ran. 541. (2) (1928) 6 Ran. 29.

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by the insolvent to the first defendant and transfers by the first defendant and other defendants to one another successively were all invalid. When the suit was dismissed, the plaintiff appealed against the dismissal without joining the 1st defendant as a respondent; at the time of the hearing of the appeal, which took place after the expiry of the period of limitation for such appeal, the plaintiff applied to join the 1st defendant in whose absence the appeal could not succeed. The application was refused on the ground that as the 1st defendant held a decree against which an appeal was barred so far as he was concerned, he was not interested in the result of the appeal within the meaning of Order 41, rule 20.

It was also pointed out that under Order 41, rule 33 an Appellate Court could add a defendant as respondent for the purpose of making a decree against him.

In the present case the position of the plaintiff who has not been joined as a party to this appeal is quite different from that of the 1st defendant mentioned in the above rulings. Neither the appellant nor the respondents derived their claim in respect of the dispute in this appeal from the plaintiff as the respondents in those appeals did from the 1st defendant. From the nature of the appeal itself, it is quite evident that either the success or failure of the appeal will in no way injure the interest acquired by the plaintiff under the preliminary decree and that therefore any such order as this Court may pass in this appeal may be passed without adversely or injuriously affecting the interest held by the plaintiff. For these reasons the plaintiff cannot in our opinion be said to be a necessary party to this appeal.

We have not been shown any authority for the view that it was incumbent on an appellant to join

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in an appeal a party who is unnecessary for the purpose of the appeal itself, in order to enable the respondent or respondents to take cross objection which may affect the interest of such party. The objection raised on behalf of the respondent does not appear to us to possess any merits. We consider that the appeal may finally be heard and decided as it stands.

The learned counsel for the appellant, however, has no objection to bringing on record in this appeal the legal representatives of the deceased plaintiff for the purpose merely of satisfying the respondents.

As pointed out above the nature of the appeal does not indicate any likelihood of a decree in this appeal affecting injuriously the estate of the deceased plaintiff acquired under the preliminary decree and at the present stage it is too early for us to say whether the decision in this appeal will affect the deceased plaintiff's estate beneficially. If the decision does affect such estate beneficially, the provisions of Order 41, rule 33 may safely be taken advantage of. [See *Jawahar Bano and another* v. *Shujaat Husain Beg and others* (1)]. At this stage we do not consider it necessary or expedient to order the joinder of the deceased plaintiff's legal representatives in this appeal. We overrule the objection raised on behalf of the respondents and direct that the appeal be heard on its merits.

1929, *April* 25. HEALD, J.—Respondents are children of one Maung Mya by his first wife, Ma Thaw, who died about 20 years ago. There is also a daughter, Ma Twe Sein, by Maung Mya's second wife, Ma The Myit, who died about three years ago. Appellant was Maung Mya's third wife.

Ma Twe Sein, the daughter by the second wife sued for administration of Maung Mya's estate, and the

(1) (1920) 43 All. 85.

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Court made a preliminary administration decree declaring that she, Ma Twe Sein, was entitled to three-quarters of the properties of the first and second marriages and to one-eighth of the property of the third marriage, and was further entitled to a one-third share of certain property which was inherited by Maung Mya, that appellant Ma On Thin, the surviving widow was entitled to a quarter of the properties of the first and second marriages, to seven-eighths of the property of the third marriage, and to one-third of the inherited property, and that respondents, the children of the first marriage, who had admittedly received the share of inheritance in respect of the first marriage to which they became entitled by reason of their father's second marriage, were entitled to one-third of the inherited property only.

Neither of the parties to this appeal contests the correctness of the shares allotted to Ma Twe Sein, the daughter of the second marriage, but appellant says that respondents ought not to have been given any share in the inherited property, and that the share allotted to them ought to have been allotted to her, that is to say, she ought to have been given two-thirds of that property and respondents ought not to have been given any share of it.

It is common ground that the properties in dispute were inherited by Maung Mya after the death of his first wife Ma Thaw who was respondent's mother, but it does not appear whether they were inherited before or after the date of the second marriage. It is however said to have been agreed in the lower Court that it should be assumed that they were inherited in the interval after the death of the first wife and before the marriage with the second.

The learned Judge in the trial Court said that the learned advocates who appeared for the parties

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were of opinion that each of the three sets of heirs, that is the children of the first marriage, the child of the second marriage, and the surviving third wife, should each be entitled to a one-third share of those properties, and he gave judgment accordingly.

Appellant now says that the opinion of the learned advocates was mistaken, and that under Burmese Buddhist law the children of the first marriage who had taken their shares of inheritance on the occasion of the second marriage have no claim to inheritance in respect of property inherited by their father after the first marriage had come to an end.

There is so far as I know no judicial authority directly on the point, the nearest approach to a decision on the matter being the case of *Ma Thaung* v. *Ma Than* (1), which was not cited to us by either side. In that case their Lordships of the Privy Council quoted a passage from *Dhamathatkyaw* as saying—

"After the death of the husband, the wife partitions the property with her children and marries again. On her death the children of her former marriage cannot claim from their step-father any property which she took to the second marriage, because they have already obtained their shares. The same rule applies when after the death of the wife the husband marries again after having given the children their respective shares."

Their Lordships accepted that rule and applied it to a case, where before the second marriage the father had made a partition of the properties of the first marriage and after the second marriage had carried on the family business, which was the subject-matter of the partition, in partnership with the children of first marriage so far as concerned the shares which the children of that marriage received at the partition. Their Lordships said that although there was no definite separation between the father and the

(1) (1927) 5 Ran. 175.

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children of the first marriage, the new menage was carried on quite independently and separately from them. A verbal translation of the passage cited by their Lordships runs as follows:—

"If after the death of the husband the wife divides the properties that there are into son's share and daughter's share and taking her own share marries another husband and then dies, and if the children say we ought to get the properties which went with our mother, let them not say so. The later husband and children should have them because they (the children of the first marriage) have already been given their own share If the mother die, and the father give (their shares) to the children and take a second wife and die in the time of the second wife, in the same way the children af the first marriage shall not be entitled to the property which went with their father."

That passage, which as I have said, was accepted by their Lordships of the Privy Council as a rule of Burmeses Buddhist law, would seem to settle the matter in controversy in the present appeal, since on the assumption that the property in dispute was inherited by the father after the mother died and before the second marriage, that property would clearly be property which "Went with the father" to the second marriage, while if in fact the property was inherited after the second marriage it would be *lettetpwa* property of that marriage in which the children of the first marriage could have no share.

But it is sought to distinguish the present case on the ground that the children of the first marriage did not separate from their father, but lived with him and their step-mother. There is no allegation to that effect in the pleadings on which, apparently by consent, the preliminary decree was passed, but even if it were established that the children of the first marriage did continue to live with their father after the second marriage, I do not think that that fact would be sufficient to distinguish the case from *Ma Thaung's* case, where, as I have said, their Lord-

ships pointed out that there was no definite separation between the father and the children of the first marriage.

Reliance is placed on an *obiter dictum* of mine in the case of *Po San* v. *Po Thet* (1), where I said :—

"I have no doubt that under the old law joint-living, that is a continuance in the family, was necessary for a continuance of rights in the family property, and that a child who took his share and separated himself from the family was regarded as having no further interest in the family property. *Manussika* and *Dyajja* in dealing with the right to partition between children and the step-parent on the death of the parent make the right of the children of the first marriage to share in the property of the second marriage dependent on their having assisted in the acquisition of that property, that is not having left the family, and *Vanuana* says that if the children of the first marriage have taken their share on their parent's remarriage they have no interest in the property of the second marriage, while the *Dhammathats* cited in section 214 of the Digest enunciate a similar principle. But it has been held in many cases and very recently by the Privy Council in *Maung Dwe* v. *Khoo Haung Shein*, [(1925) 3 Rangoon 29], that the requirement of joint-living is now relaxed and that in the absence of actual separation from the family the right of inheritance subsists. It would seem to follow that even if the *auratha* has taken his share on the death of a parent or on the remarriage of the surviving parent, he is still entitled to claim a share on the death of the surviving parent or on the death of the step-parent unless separation is proved or is to be presumed."

Those remarks it will be noted applied to the share of the *auratha* son, in whose case no question of separation from the family arose under the old law since he took the father's place in the family, and they would not apply with equal force to children who have taken their share of inheritance on the surviving parent's remarriage, since in the case of such children there is some initial presumption of an intention to separate and not to regard themselves

(1) (1925) 3 Ran. 438 at p. 441.

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as members of the family of the second marriage, and in any case such an *obiter dictum* carries no weight against a decision of the Privy Council.

Reliance is also placed on the second "manner of partition" mentioned in *Manugye* (X-2) but that passage is corrupt, *vide* my judgment in the case of *Shwe Ywet* v. *Tun Shein* (1), and it does not refer to a case where the children of the first marriage have already received their shares

I know of no authority either in the *Dhammathats* or in the cases for the proposition that children of a first marriage, who have already received their shares of the property of the marriage of their parents on the re-marriage of the surviving parent are entitled to claim from the step-parent after the death of the surviving parent any share of property inherited by the surviving parent after the death of the parent either before or after the second marriage, and as the decision of the Privy Council in *Ma Thaung's* case seems to me to warrant a finding that respondents, who are the children of the first marriage have no claim as against appellant, who is the step-mother, in respect of property inherited by their father after the death of their mother, I would allow the appeal with costs and would alter the preliminary decree passed by the lower Court so as to give appellant Ma On Tin two-thirds of the inherited property and to omit the part of the decree which says "It is further ordered that Ma Ngwe Yin and Ma Nyun, 2nd and 3rd defendants, are also entitled to one-third share in the properties inherited by their father U Mya (deceased) after the death of their mother Ma Thaw." I would note that the reference in the decree to the properties of the first marriage is of course to the properties

(1) (1921) 11 L.B.R. 199 at 201.

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of that marriage which were left after the children of that marriage had received their shares.

OTTER, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Mya Bu.

MAUNG PO MYA v. MA HLA AND OTHERS.*

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Apl. 29.

Buddhist law—Orasa, *who has taken his quarter share on death of one parent—No subsequent right as against* kanitha *children on the death of the surviving parent.*

Held, that the *orasa* who has taken the quarter share on the death of one parent is not entitled as against the *kanitha* children to participate in the division of the estate on the surviving parent's death.

Ma Hnin Bwin v. *U Shwe Gon*, 8 L.B.R. 1 ; *Ma Sein Ton* v. *Ma Son*, 8 L.B.R. 501 ; *Ma Tok* v. *Ma U Le*, 1 Ran. 487 ; *Maung Po San* v. *Maung Po Thel*, 3 Ran. 438—*referred to.*

Maung Hmu v. *Maung Po Thin*, 1 L.B.R. 50—*followed.*

Ba Maw for the appellant.
Po Han for the 1st respondent.
On Thwin for the 2nd and 3rd respondents.

MYA BU, J.—Appellant Maung Po Mya was the eldest born child of a Burman Buddhist couple U Pu and Ma Gyi who had two younger children Ma Hla, the first respondent, and Maung Than, the father of the second and third respondents. U Pyu died in 1920 and Po Mya claimed and obtained his quarter share in the estate of the parents as the *orasa* son. Maung Than died in 1923. In 1928 Ma Gyi died. Maung Po Mya now sues for administration

* Civil First Appeal No. 273 of 1928 from the judgment of the District Court of Hanthawaddy in Civil Regular Suit No. 34 of 1928.