FULL BENCH (APPELLATE CIVIL).

Before Sir Ba U, Acting Chief Justice, Mr. Justice E Maung and Mr. Justice Kyaw Myint.

MAUNG SAN BWINT AND ONE (APPELLANTS)

v.

MA THAN SEIN (RESPONDENT).*

1947

Nov. 3.

Burmese Buddhist Law—Divorce by mutual consent—One of the parties previously married—The other not previously married—Atetpa *property of the former—If divisible.*

Held by the Full Bench : That on divorce by mutual consent between a Burmese Buddhist couple, one of whom was previously married and the other had not been so married, the *atetpa* property of the party previously married, should be divided on the principle of *nissaya* and *nissita* provided that no property had been acquired by the couple after their marriage.

Ma E Nyun v. *Maung Tok Pyu*, 2 U.B.R. (1897—1901) (Civ.) 39 ; *Ma Ngwe Hnit* v. *Maung Po Hmu*, 11 L.B.R. 52, followed.

C.T.P.V. Chetty Firm v. *Ma Tha Hlaing*, I.L.R. 3 Ran. 322 ; *Maung Hme* v. *Ma Sein*, 9 L.B.R. 191 ; *N.A.V.R. Cheltyar Firm* v. *Maung Than Daing*, I.L.R. 9 Ran. 524 at p. 539 ; *West Ham Union* v. *Edmonton Union*, L.R. (1908) A.C. 6 ; *Stourbridge Union* v. *Droitwich Union*, L.R. 6 Q.B. 769, 774 ; *Ma Dun Mai* v. *Maung San Tun*, (1938) R.L.R. 229 ; *U Sin* v. *Ma Ma Lay*, (1941) R.L.R. 14, referred to.

Per E MAUNG, J.—The rule should not be extended to a divorce which is not in fact by mutual consent but which for the purposes of partition on divorce is by a legal fiction deemed to have been as if by mutual consent.

The following order of reference was made by Mr. Justice E Maung on the 10th July 1947 :

E MAUNG, J.—This appeal arises out of a suit instituted by the plaintiff-respondent for recovery of a piece of land, a house and a granary with the sites on which they stand, one bullock and a cart. Though the plaintiff-respondent indignantly disclaims all

* Civil Reference No. 6 of 1947 of the High Court of Judicature at Rangoon arising out of Civil 2nd Appeal No. 27 of 1947.

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relationship with the 1st defendant-appellant it is clear that the 1st defendant-appellant's case that at some time previous, he and the plaintiff-respondent had been husband and wife according to the Burmese Buddhist Law is fully established.

There is indisputable evidence on the record that almost immediately following the death of U Po Ye, the 1st husband of the plaintiff-respondent, she eloped with the 1st defendant-appellant and that they lived together as husband and wife for about five years treating each other and being treated by the neighbours in the village as such. There is clear evidence of reputation necessary for a valid marriage.

The 1st defendant-appellant before he eloped with the plaintiff-respondent was for several years an employee of the 1st husband U Po Ye and the plaintiff-respondent. Before the plaintiff and the defendant became husband and wife, the defendant was a bachelor. He did not bring any property to the marriage. All the property brought to the marriage was the " Atetpa " property of the plaintiff such property being inherited by her from her 1st husband.

About the end of 1944 or the beginning of 1945, the parties seemed to have disagreed for some reason or other. The 1st defendant claimed that the differences between them arose from his discovery of the fact that the wife had contracted an illicit liaison with one Maung Po Chein (D.W. 7). The wife who throughout the proceedings repudiated the allegation of marriage between herself and the 1st defendant-appellant naturally did not give her version of how the disagreement arose. But it is clear that whatever the cause of the disagreement may have been there was, in January 1945, a separation by mutual consent followed by the 1st defendant-appellant taking to himself the 2nd defendant-appellant as his wife and the respondent taking to herself Maung Tun (P.W. 5) as her husband. The separation of the parties being by mutual consent out of Court it is not material for the purposes of this appeal to determine the question whether the origin of the quarrel was the respondent entering into illicit relations with Maung Po Chein or not. The decisions of this Court in *Ma Me Hla* v. *Maung Po Thon* (1), *Ma Dun Mai* v. *Maung San Tun* (2) and *U Sin* v. *Ma Ma Lay* (3), are quite clear on the point. Still it would not be out of place for me to say

(1) I.L.R. 7 Ran. 98. (2) (1938) R.L.R. 229.
(3) (1941) R.L.R. 14.

that on materials on the record the view taken by the lower Appellate Court that the allegation of adultery with Maung Po Chein has not been satisfactorily established appears justified.

Following the separation by mutual consent which had been accepted by both the husband and the wife as affecting a dissolution of the marriage, there was what the 1st appellant claimed to be a partition of the joint estate by free consent of the parties. The respondent, however, claims that the transaction relied upon by the 1st appellant was nothing but an act of arbitrary and high handed disposition by a Japanese military officer then residing in the area. I should have said that this took place just on the eve of the Japanese evacuation of the area which had been in enemy occupation. This Japanese officer, it is clear on the evidence, was on friendly terms with the 1st appellant and that it was by exercise of coercion and abuse of his authority that he managed to impose on the parties what had been described by the 1st appellant as a partition of the property of the marriage. I am in full agreement with the lower Appellate Court in accepting the plaintiff's version of this matter in dispute. The evidence of Tun Shein (D.W. 6) who acted as the interpreter to this Japanese military officer clearly supports the finding arrived at by the lower Appellate Court.

The result is that on the facts I must hold that in 1940 the plaintiff, a widow and the 1st defendant, a bachelor became husband and wife under the Burmese Buddhist Law ; that to that marriage the husband brought nothing ; and that the wife brought to it " Atetpa " property which she had inherited from her 1st husband who had died very shortly before her re-marriage ; that early in 1945 they effected a divorce by mutual consent ; and that there has not been a partition of property between the erstwhile husband and wife at the date of the suit now under appeal. It is on these facts that the question arises if the plaintiff is entitled to sue for the suit properties taken away by the 1st defendant as a consequence of the act of interference by the Japanese military officer. In this form the case neatly raises the question whether, where an *eindaunggyi* marries a bachelor or a spinster as the case may be, the bachelor or the spinster on a divorce by mutual consent is entitled to a share in the " Atetpa " of the *eindaunggyi* husband or wife. The earliest case on this point is that of *Ma E Nyun* **v.** *Maung Tok Pyu* (1). The decision

(1) 2 U.B.R. (1897—1901) (Civ.) 39.

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in this case was followed in the later case of *Ma Ngwe Hnit* v. *Maung Po Hmu and others* (1). These two cases were referred to by the two learned Judges of this Court in *C.T.P.V. Chetty Firm and others* v. *Maung Tha Hlaing and others* (2). At page 328 of the Report in the *Chetty Firm*'s case (2), Maung Gyi J. after referring to the two previous cases and without any further consideration of the point at issue merely said, "This is, I think, settled law." Carr J., on the other hand, at pages 346-347 of the Report after a short discussion of the point, stated that he was not satisfied with the law as laid down in the two cases above referred to.

In *Ma E Nyun*'s case (3) the husband who was an *eindaunggyi* at the time of the marriage executed a deed whereby he bound himself to abstain from drinking and gambling and made over all his property to the spinster wife as "kanwin." The deed, however, was not registered and it was on this ground only that the disposition of the property as "kanwin" could not be proved and what was clearly intended to be made "kanwin" remained the husband's "Atetpa." The husband after the marriage ill-treated the wife and relapsed into his former bad habits as a drunkard and gambler. It was on these facts that Thirkell White, Judicial Commissioner, took the view that "it would obviously be inequitable that a wife driven to seek a divorce by her husband's ill-treatment, should be entitled merely to a bare divorce because there happen to be no jointly acquired property." In the course of his judgment, the Judicial Commissioner further stated the proposition which formed also the basis of the decision in *Ma Ngwe Hnit*'s case (1) that "it is certainly unjust to give the husband the benefit of his previous marriage and to deprive the wife of the benefit of her previous maidenhood." From these considerations the learned Judicial Commissioner deduced the rule: "It may, however, be laid down with certainty that the decision is within the law, that the rules regulating the divorce of a husband and wife not previously married should be applied to cases in which one of the parties to the marriage has been previously married and the other has not been married before."

In *Ma Ngwe Hnit*'s case again (1), when negotiations for a marriage between U Ma La, an old man of 70 years of age, who had been previously married and Ma Ngwe Hnit, a spinster,

(1) 11 L.B.R. 52. (2) I.L.R. 3 Ran. 322.
(3) 2 U.B.R. (1897—1901) (Civ.) 39.

aged 38, were in progress, it appeared to have been agreed that a substantial " kanwin " should be settled on the wife. On the day of the marriage, however, the original promise to give 40 acres of paddy land was not implemented and U Ma La merely sent over Rs. 450. On this the bride objected and the elders who arranged the marriage went to U Ma La and obtained from him a document purporting to transfer about 44 acres of paddy land to the bride in consequence of which the marriage took place. This document, however, was not registered and it was held in the case that the wife could not rely on this document for any purpose. It was against this background that when subsequently following a divorce on mutual consent, the wife claimed a share in the " Atetpa " of the husband a Bench of the late Chief Court of Lower Burma, adopting the principle enunciated by Thirkell White, Judicial Commissioner, in *Ma E Nyun*'s case (1) allowed the wife a share in the " Atetpa " of the husband on the basis of the rule of *nissaya* and *nissita*. In both these cases the learned Judges took the view that the *Dhammathats* did not provide for partition on divorce between the parties to a marriage one of whom had been previously married and the other has not been so previously married.

In *C.T.P.V. Chetty*'s case (2) Carr J., again on page 346 of the Report, assumed that " the intermediate case in which one has been married before and the other has not, is not dealt with in the *Dhammathats*." He went on to say that " where the rule in the two extreme cases is the same, there is no difficulty in holding that it applies also to the middle case." The learned Judge then proceeds,

> " I wish to say that I am not satisfied that where the rules differ the one to be applied to the intermediate case is that for the case where neither party has been previously married. That has been held in *Ma E Nyun* v. *Maung Tok Pyu* (1), but the reasoning of Sir H. Thirkell White in that case seems to me to be based on a misconception of the reason for the differences in the rules. This decision was followed in *Ma Ngwe Hnit* v. *Maung Po Hmu* (3), but there were special circumstances in that case which rendered the decision at least equitable."

(1) 2 U.B.R. (1897—1901) (Civ.) 39. (2) I.L.R. 3 Ran. 322.
(3) 11 L.B.R. 52.

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Earlier in the same case, Carr J. at page 343 said in respect of the rules in the *Dhammathats* relating to partition,

> " They thus disclose a very strong community of interest in the case of a first marriage and indicate that all property is joint, though the respective interests may vary in amount. This is entirely in accord with present day Burmese sentiment, which regards the union of a couple neither of whom has been married before (*nge lin nge maya*) as much more perfect and intimate than any other marriage."

Later, at pages 345-346 the learned Judge distinguished the case of a previously married couple from that of a previously unmarried couple and assigned reasons which, if I might be permitted to say so, are very cogent :

> " It is to be noticed that these rules indicate a much lower degree of community of interest than in the case of a previously unmarried couple. This may be accounted for in part by the sentiment already mentioned, but there are other obvious reasons for the difference. In the case of a first marriage there are no interests to be considered other than those of the husband and wife and of their children. But when either or both has been married before, it is likely that there will be children of the first marriage and their interest also have to be considered. That is a very good reason for not giving to each spouse the same rights in the *payin* property of the other as are given on a first marriage."

The actual decisions in *Ma E Nyun*'s and *Ma Ngwe Hnit*'s cases [(1) and (2)] may have been on the special facts equitable. The representation by a wealthy *eindaunggyi* bride-groom to the impecunious maiden bride that he would give her a part of his " Atetpa " property as " kanwin " and the failure to implement the representation by a registered document coupled in *Ma E Nyun*'s case (1) with the fact that because of cruelty which forced the wife to seek relief in a divorce may be justification for denying the husband a share of the " Atetpa " but the further principle deduced from the hard facts that the rules of division applicable to a virgin couple also apply to the intermediate case is, in my

(1) 2 U.B.R. (1897—1901) (Civ.) 39. (2) 11 L.B.R. 52.

opinion, not justified. Whilst at the bar I had occasion to appear in a suit where an impecunious adventurer who had been married before got himself married to an elderly spinster of some wealth and the husband by taking another wife against the will of his wealthy wife and supporting that new wife out of the funds provided by his senior wife—forced the wife to sue for a divorce. The divorce in such a case would be as laid down in the case of *Maung Hme* v. *Ma Sein* (1) on the basis of one by mutual consent. To accept therefore the rule in *Ma E Nyun's* case (2) or *Ma Ngwe Hnit's* case (3) would be to allow the husband to have the benefit of the wife's previous maidenhood.

On the text it appears to me that sections 261 and 262 of Kinwun Mingyi's Digest, Volume II, contain clear provisions for the intermediate case in so far as the division of the "Atetpa" of the *eindaunggyi* husband or wife is concerned. In the official translations of the texts, in section 267 I consider that the words "to repudiate" is not quite a proper translation of the corresponding Burmese terms. It is quite clear from the Burmese version of the Digest that in sections 261 and 262 the *Dhammathat* texts were dealing with divorce. It appears to me clearly deducible from these texts that in the intermediate case of a couple, one of whom only had been married previously, the "Atetpa" of the *eindaunggyi* should not be partitioned but that if there had not been any *letletpwa* property of the marriage an obligation is imposed on the *eindaunggyi* to give a reasonable portion to the other spouse.

In this state of authorities, it seems to me that an authoritative decision is desirable. I therefore refer to a Bench or Full Bench as my Lord the Chief Justice may direct the following question :

> "On divorce by mutual consent between a Burmese Buddhist couple one of whom had been previously married and the other has not been so married, is the 'Atetpa' property of the party previously married divisible and, if so, in what proportion ?"

Kyaw Thoung for the appellants.

Respondent was not represented.

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(1) 9 L.B.R. 191. (2) 2 U.B.R. (1897—1901) (Civ.) 39.
(3) 11 L.B.R. 52.

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BA U, A.C.J.—The question referred to this Bench is :

" On divorce by mutual consent between a Burmese Buddhist couple one of whom had been previously married and the other had not been so married, is the 'Atetpa' property of the party previously married divisible and, if so, in what proportion ?"

This is not the first time that this question arose for solution. Over 47 years ago this question arose for consideration in Upper Burma in the case of *Ma E Nyun* v. *Maung Tok Pyu* (1) before Sir Herbert Thirkell White and the learned Judicial Commissioner made the following observations :

" Again, there is a fair amount of authority as to the case in which a previously married man, not long after his marriage with a maiden, divorces her before any property has been acquired. According to section 396 of the *Attathankepa*, the wife is entitled to compensation and similar rules are to be found in section 261 of the Digest. In the case of such a marriage, it would obviously be inequitable that a wife driven to seek divorce by her husband's ill-treatment, should be entitled merely to a bare divorce because there happen to be no jointly acquired property.

It would, I think, be an equitable rule and in accordance with the spirit of the law to allow the wife, in a case of this kind, somewhat more favourable terms than in the case where either party has been married before. It is certainly unjust to give the husband the benefit of his previous marriage and to deprive the wife of the benefit of her previous maidenhood. Nor is there any warrant for so doing. But, without assuming the province of the Legislature, it is not possible for this Court to say what more favourable terms should be conceded to the wife in this case. It may, however, be laid down with certainty that the decision is within the law, that the rules regulating the divorce of a husband and wife not previously married should be applied to cases in which one of the parties to the marriage has been previously married and the other has not been married before."

(1) 2 U.B.R. (1897—1901) (Civ.) 39.

About 20 years later, a similar question arose in Lower Burma in the case of *Ma Ngwe Hnit* v. *Maung Po Hmu and others* (1) and the learned Judges, Sir Sydney Robinson C.J. and Sir Benjamin Heald J., who dealt with the case, accepted the law as laid down by Sir Herbert Thirkell White as good law. Sir Sydney Robinson who wrote the main judgment gave the following additional reasons why that law should be followed :

"It appears to me that there is considerable force in the suggestion of Sir George Shaw that the rule laid down in the *Manukye* as regards persons both of whom had been previously married was based on the assumption that both brought property to the marriage. Further, there seems to be no justification for applying a different rule where the relation of *nissaya* and *nissita* existed in the case of a woman who had not been married before because the husband had been previously married. Under section 261 of the Digest a provision is made for the case of a man who had previously married marrying a spinster and divorcing her not long after the marriage and before there was time for any property to have been jointly acquired by them. It allows the wife compensation, and it appears to me that all these provisions point to a recognition of the necessity of making a husband, who is able to do so, provide for a wife who comes to the marriage with nothing."

Three years after the establishment of this Court, a similar question arose indirectly for discussion in the case of *C.T.P.V. Chetty Firm and others* v. *Maung Tha Hlaing* (2). In that case Maung Gyi J., with whom Sir Sydney Robinson C.J. agreed, accepted the law as laid down in the cases cited above as good law but Carr J. struck a discordant note. The learned Judge said :

"The intermediate case, in which one has been married before and the other has not, is not dealt with in the *Dhammathats* ;

(1) 11 L.B.R. 52. (2) I.L.R. 3 Ran. 322.

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but where the rule in the two extreme cases is the same, there is no difficulty in holding that it applies also to the middle case. It is not necessary, therefore, to decide which of two different rules is to be followed, but I wish to say that I am not satisfied that where the rules differ the one to be applied to the intermediate case is that for the case where neither party has been previously married. That has been held in *Ma E Nyun* v. *Maung Tok Pyu* [U.B.R. (1897—1901) (Divorce) 1939], but the reasoning of Sir H. Thirkell White in that case seems to me to be based on a misconception of the reason for the differences in the rules. This decision was followed in *Ma Ngwe Hnit* v. *Maung Po Hmu* (11 L.B.R. 52), but there were special circumstances in that case which rendered the decision at least equitable."

Because of the doubt thus thrown by Carr J. over the correctness of the decisions given in the Upper Burma case of *Ma E Nyun* (1) and the Lower Burma case of *Ma Ngwe Hnit* (2), this case was referred to this Bench.

In spite of Carr J.'s doubt, the law as laid down in the above-mentioned two cases is still good law and it has stood the test of time for nearly half a century in Upper Burma and nearly 30 years in Lower Burma. People know and understand it. To change it now, without having strong and compelling reasons for doing so, would be to introduce chaos and uncertainty into the family, social and commercial life of the Burmese people. Are there now strong and compelling reasons to change the law ? Carr J. said " . . . I wish to say that I am not satisfied that where the rules differ the one to be applied to the intermediate case is that for the case where neither party has been previously married." In the absence of any rule applicable to the intermediate case, what rule is then to be applied if the rule applicable to the case where neither party has been previously married is not to be applied ? The only rule left to be applied is the rule applicable to the

(1) 2 U.B.R. (1897—1901) (Civ.) 39. (2) 11 L.B.R. 52.

case where both the parties had been previously married. If such a rule applies, then the position would be that on divorce by mutual consent the parties would take back his or her *atetpa* property, if there be any, on the division of property ; but, then Carr J. did not say so. On the contrary, what he said with regard to the decision given in the Lower Burma case of *Ma Ngwe Hnit* (1) was that the decision applying the rule relating to the case where neither party had been married before was an equitable decision. Why it was equitable, according to the learned Judge, was because of the special circumstances of the case. The special circumstances were that an old widower of 70 years of age asked a spinster, young enough to be his daughter, to marry him promising that he would give her 40 acres of land as *kanwin* property. The promise was never kept and he made the life of the young wife somewhat unhappy. The wife was subsequently granted a divorce and one-third share of the *payin* property. Now, interpreting the remarks of the learned Judge in the light of these circumstances what appears to me, with great respect to the learned Judge I say it, is that in hard cases the rule applicable to the divorce of a virgin couple should be applied but in others the rule applicable to the case of *eindaunggyis* should be applied. This would make the confusion, again I say with great respect to the learned Judge, worse confounded.

Burmese Buddhist Law is to be found in the *Dhammathats* and these *Dhammathats* were compiled some hundreds of years ago. Even the most authoritative of the *Dhammathats*, the *Manukye*, was compiled some 200 years ago. They were framed and compiled in accordance with the customs and habits of the people then prevailing in those days ; but the customs

(1) 11 L.B.R. 52.

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and the habits of the people have been through the process of change almost everyday. The Burmese Buddhist Law has accordingly to be moulded and adapted to suit the changing conditions of Burmese society, keeping the fundamental principles as enunciated in the *Dhammathats* intact. This was well recognized by some of the European Judges who had made a special study of Burmese Buddhist Law and the customs, habits and manners of the Burmese people. Sir John Jardine says : " We cannot apply the principle or practice of the *Dhammathats* to the changed society without modification ; and in the moulding of the law, it is of great importance that the Judges should modify the old rules in the line of present customs and opinion than in that of a bygone day." *See* May Oung's Buddhist Law, page 102.

Rigg J. in a Full Bench case of *Maung Hme* v. *Ma Sein* (1) said : " The law to be administered is the Burmese Buddhist Law as laid down in the *Dhammathats* unless such law has been clearly modified by custom or is repugnant to equity, justice and good conscience." In the case of *N.A.V.R. Chettyar Firm* v. *Maung Than Daing* (2) Page C.J. made the following most pertinent and, if I may say so, wise remarks :

" Now, the customary law of the Burmese Buddhists is the common law of Burma, and a fundamental and wholesome characteristic of the common law is that it is not rigid and inelastic like a Code, but can be moulded to conform to the customs and needs of the people as they change from age to age. It appears to me that the progress of the Burmese nation along the road to civilization has been so rapid in recent years that the conventions and habits of the people have outrun the principles of law and rules of conduct which embody the customary law of the Burmans, and by which in times gone by Burman Buddhists were content to be governed and controlled. That, no doubt, is

(1) 9 L.B.R. 191. (2) I.L.R. 9 Ran. 524 at p. 539.

a healthy sign of the times, for in the life of a nation as in the life of an individual to stand still is to retrograde. But as Burma progresses the common law should be 'broad-based upon her people's will' and 'from precedent to precedent' adapted to meet new conditions as they arise."

That is exactly what the learned Judges did in deciding the cases of *Ma E Nyun* and *Ma Ngwe Hnit*. They knew of the existence of the rule relating to the intermediate case in sections 261 and 262 of U Gaung's Digest but the rule propounded therein was so obsolete and archaic that it could not be applied to the modern conditions of life. For instance, the *Rajabala*, one of the *Dhammathats* cited in section 261 states, *inter alia*, as follows :

"A previously married man marries a spinster, and before any property is yet acquired and without any cause of complaint against her, desires to divorce her. If he is inferior (in rank) to her, he shall give her a pair of earrings, because her parents gave her to him notwithstanding their knowledge of his position and circumstances. If they are equal in rank, he shall give her the slaves who accompanied the marriage procession, the sedan chair, elephants, ponies, etc., used in the ceremony, and the clothes and ornaments worn at the time of marriage. If there is no such property, he shall give her a male slave. If she is pregnant, he shall give her sufficient money to defray the expenses of her accouchement and a female slave to serve as nurse. If they are related by blood to each other, he shall give her a male and a female slave whether she is pregnant or not.

If, on the other hand, the wife says, that she desires to repudiate the husband although he is in no way blameworthy, she shall give him a suit of man's clothes consisting of a *paso*, coat and turban, and a male slave attendant. If they have no property, let them separate as if they had each been married previous to the present union."

Other *Dhammathats* cited therein laid down the law more or less in a similar strain. Now such a rule of law as pointed out above cannot be applied to the

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modern condition of life. Therefore it must be moulded so as to make it conform thereto. How is it to be moulded? As what the *Dhammathats* intended to provide against was that if before any property had been acquired by the couple the party who had not been married before were to be driven out of the house, without any fault on his or her part, he or she—as the case may be—should not be driven out without having any means provided for his or her maintenance. The Judges who dealt with the aforesaid two cases knew this intention of the *Dhammathats* and moulded the law accordingly. In so moulding it they followed the most fair and equitable method of dividing the *atetpa* property by applying the rule of *nissaya* and *nissita*.

This method of division was also attacked indirectly by Carr J. by making the following observations :

> " It is to be noticed that these rules indicate a much lower degree of community of interest than in the case of a previously unmarried couple. This may be accounted for in part by the sentiment already mentioned, but there are other obvious reasons for the difference. In the case of a first marriage there are no interests to be considered other than those of the husband and wife and of their children. But when either or both has been married before, it is likely that there will be children of the first marriage and their interests also have to be considered. That is a very good reason for not giving to each spouse the same rights in the *payin* property of the other as are given on a first marriage."

In making these observations the learned Judge, with due respect to him, has, in my opinion, gone entirely wrong in overlooking the vested rights of *atetpa* children. If an *eindaunggyi* who has children by his previous marriage marries a spinster then his children acquired a vested right in the property acquired by their father and deceased mother on the remarriage of

their father. Therefore their share will not be subject to partition on the division of the *atetpa* property between their father and his wife, their step-mother, on divorce by mutual consent. If the *eindaunggyi* has no children by his previous marriage then the whole of his *atetpa* property will be subject to partition. The same rule applies in the case of an *eindaunggyi* marrying a bachelor. Therefore I am strongly of opinion that without taking into account hard and exceptional cases, the law as laid down in *Ma E Nyun*'s case and *Ma Ngwe Hnit*'s case is still good law ; but it requires a slight modification. The learned Judges who decided those cases gave a clear indication of when and under what circumstances the *atetpa* property of an *eindaunggyi* should be divided. They said that if no property had been acquired after marriage by an *eindaunggyi* and his or her spouse who had not been previously married the *atetpa* property of the *eindaunggyi* should be divided on the principle of *nissaya* and *nissita*. This is exactly what sections 261 and 262 of U Gaung's Digest and section 396 of the *Attasankhepa* say.

For all these reasons I would give the following answer to the question propounded :

"On divorce by mutual consent between a Burmese Buddhist couple, one of whom had been previously married and the other had not been so married, the *atetpa* property of the party previously married should be divided on the principle of *nissaya* and *nissita*, provided that no property had been acquired by the couple after their marriage."

E MAUNG, J.—In the order of reference in Civil 2nd Appeal No. 27 of 1947, I have given an indication of the views tentatively held by me on the point referred to the Full Bench. I have since heard U Kyaw Thoung on behalf of the applicant and also have had the advantage of reading the judgment which has just been delivered by my Lord.

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With great respect, I must say that if the matter had been *res integra* I would have had no difficulty in coming to the conclusion that where an *eindaunggyi* married a bachelor or a spinster the *payin* of either does not form part of the joint property of the marriage and that such *payin* is not divisible on a divorce between the couple.

The scheme of the *Dhammathats* on the subject of division of property on divorce seems to me to be clear and consistent. Where neither the husband nor the wife had been married before property brought by either to the marriage or acquired subsequently by either or both form the joint property of the marriage. As such these properties are all divisible on dissolution of the marriage. The shares falling to each spouse may vary according to the origin or the nature of the property and the circumstances under which the dissolution of the marriage was brought about.

Where both the husband and the wife are *eindaunggyis* the *payin* of neither goes into the joint property of the marriage. The *payin* even of a wife found guilty of adultery, the supreme matrimonial fault for a wife, is not forfeited and the wife in default takes it back.

It is against this background that the provisions in sections 261 and 262 of Kinwun Mingyi's Digest, Volume II, deserve to be studied. The texts deal with the extreme case of a divorce at caprice where the party desiring the divorce cannot point to any fault on the part of the unwilling party. Instead of divesting the party desiring the divorce of all his, or her, interest in the *payin* as would have happen if the couple had been a virgin couple and also instead of allowing that party to take back his, or her, *payin* unimpaired as would have happened in the case of an *eindaunggyi* couple,

the *Dhammathats* sought a *via media* which is perfectly intelligible and logical.

I have, however, to remember, as my Lord has pointed out in his judgment, that *Ma E Nyun*'s case (1) was decided over 47 years ago and that the decisions of the Courts in Burma to this day had been in the same sense on this particular point : *Communis error facit jus.*

The Earl of Halsbury in the case of *West Ham Union* v. *Edmonton Union* (2) has said :

"The only difficulty is that one has to consider a decision of as long ago as the year 1842. I do not think that is an absolute reason against a reversal of that decision, but undoubtedly it is an undesirable thing to upset any canon of construction or principle of law which has been settled for so long that people may be supposed to have acted according to it for a considerable time."

The Lord Chancellor in the same case has enunciated the same principle in a slightly different form :

"Great importance is to be attached to old authorities, on the strength of which many transactions may have been adjusted and rights determined. But where they are plainly wrong and especially where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which they were based and practical injustice in the consequences that must flow from them, I consider it is the duty of this House to overrule them, if it has not lost the right to do so by itself expressly affirming them."

Lord Blackburn in *Stourbridge Union* v. *Droitwich Union* (3) expressed himself as follows :

"The case is governed by a long series of decisions from *Reg* v. *Tipton* (3 Q.B. 215) to *Reg* v. *St. Martin, New Sarum* (9 Q.B. 241). Looking at the reasons for those decisions, I think they were founded on a mistake, but we ought not lightly to overrule them."

(1) 2 U.B.R. (1897—1901) (Civ.) 39. (2) L.R. (1908) A.C. 6.
(3) L.R. 6 Q.B. 769, 774.

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E MAUNG, J.

Applying these tests it seems to me that though, in my opinion, the rule enunciated in *Ma E Nyun*'s case (1) was founded in error, I would not be justified in differing from the rule enunciated. This decision has been acted upon for nearly half a century and upon the basis of the rule rights have been regulated and arrangements as to property made.

I am not satisfied that I can bring this case within the exception contemplated by the Lord Chancellor in *West Ham Union* v. *Edmonton Union* (2). It does seem to me that the earlier decisions were based on faulty reasoning but I cannot say that "practical injustice in the consequences that must flow" from them is such as to counterbalance the dislocation that will be caused by the law being enunciated in a different sense after a passage of 50 years.

I must, however, enter a caveat. The rule in *Ma E Nyun*'s case and the later cases which followed it are in terms enunciated in respect of a partition where the divorce had been in fact by mutual consent. The rule cannot and should not be extended to a divorce which is not in fact by mutual consent but which for the purposes of partition on divorce is by a legal fiction deemed to have been as if by mutual consent.

With this reservation I am content to accept the answer propounded by my Lord.

KYAW MYINT, J.—I have had the advantage of reading the drafts of the judgments intended to be delivered by my Lord the Acting Chief Justice and my learned brother E Maung J. I have nothing to add to their observations and agree that the answer to the question referred should be as propounded by my Lord.

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(1) 2 U.B.R. (1897—1901) (Civ.) 39. (2) L.R. (1908) A.C. 6.