NOTES ON BUDDHIST LAW

BY THE JUDICIAL COMMISSIONER, BRITISH BURMA.

Jardine, Sir John.

1.—MARRIAGE

1.—How contracted.

2.—Its incidents.

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IN THE COURT OF THE JUDICIAL COMMISSIONER, BRITISH BURMA.

Circular Memorandum No. 28 of 1882.
[NOT TRANSLATED.]

Dated Rangoon, the 17th July 1882.

THE Judicial Commissioner herewith distributes copies of a note on the modes in which marriage may be contracted among Burmese Buddhists. It is meant as much to awaken criticism and discussion as for information or guidance. It sums up the whole law of the Dhammathat on the subject and incorporates the very few judicial decisions I have been able to find.

2. The idea of a Manual of Buddhist law was suggested to me by Colonel Munro, the Deputy Commissioner of Bassein, who pointed out that want of precision and proper classification which renders the Dhammathat a most inconvenient book of reference. It is clear that a set of institutes are required incorporating the judicial interpretations for the use of the Courts and Advocates.

3. The present note deals with only one part of the law of marriage ; and yet the difficulties attending the compilation of institutes present themselves at once. The Dhammathat and its translation are ambiguous ; the business of modifying its rules to suit the changed times has hardly been begun by Judges ; and on some points, for example, prohibited degrees, there are no authorities available.

4. If I waited for new translations and the editing of new authorities, the Judges and Magistrates would also have to wait without getting any guide to the intricacies of the Dhammathat, or to the relation of that Code to the penal laws about marriage. *Ars longa vita brevis.* For a long time the Buddhist law will not be settled : we must wait until it has been interpreted by decisions. At present the Judges are in a like position to the Judge described in the Dhammathat who has to decide like a blind man feeling his way with his staff and taking the way that is best. But that seems to me to make it more the duty of the Judicial Commissioner to smooth the way of the other Judges as much as possible by supplying even an imperfect guide.

5. In this endeavour I have been aided by the advice of Mr. Gillbanks and Mr. Sen on some disputed points ; and I am in hopes of adding notes on the incidents of marriage and the modes of dissolving the contract.

JOHN JARDINE,
Judicial Commissioner, British Burma.

NOTES ON BUDDHIST LAW.

I.

MARRIAGE—HOW CONTRACTED.

By John Jardine, Esq., Bo.C.S., Judicial Commissioner of British Burma.

THE Burma Courts Act, XVII of 1875, section 4, makes the Buddhist law the *lex fori* of our Courts in questions regarding succession, inheritance, marriage or caste, or any religious usage or institution, incases where the parties are Buddhists, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to any custom having the force of law in British Burma.

2. The Buddhist law is to be found in the Dhammathats. In this note on marriage I have used Richardson's edition, and have occasionally examined Maung Tet Too's edition of the Menu Woonana Dhammathat. The custom of the country is superior to the religious law, but there are no authorities on doubtful points of customary law, and the paucity of judicial decisions is very remarkable.

3. According to the Menu Kyay Dhammathat (Bk. 5, s. 24, p. 146, of Richardson's 2nd edition) there are three ways of becoming man and wife. In Book 12, p. 336, they are thus defined :—"Amongst "men there are only three ways of becoming man and wife, which "are as follows : 1st, a man and woman given in marriage by their "parents, who live and eat together ; 2nd, a man and woman brought "together by the intervention of a go-between, who live and eat to-"gether ; 3rd, a man and woman who came together by mutual "consent, who live and eat together."

4. These distinctions are important with regard to the voidability of the marriage and the rights of the children, the *auratha* or eldest son of a couple given in marriage by their parents having superior rights (Bk. 10, ss. 15, 35, 50, and 53, pp. 276, 285, 292, and 293) over other sons born in marriage, as well as over illegitimate children who in the absence of legitimate offspring are entitled to inherit (*see* the case at page 11 of Mr. Justice Sandford's Rulings on Buddhist law). The sentiment of the Dhammathat in favour of the child born in the first kind of wedlock is clearly displayed in the cases of the snake-child and the son of the slave girl (Bk. 10, ss. 39 and 73, pp. 287 and 307)

5. It is necessary to remark that in the two passages defining the second kind of marriage the word *go-between* does not occur as a noun ; the meaning seems to be a marriage arranged or negotiated by other than the parents, and perhaps, I may add, by other than one parent or than the person whom Richardson calls indiscriminately the guardian or protector. The case at page 162 (Bk. 6, s. 25) of a master giving a slave in marriage at first sight seems to come within the second definition. I am informed that the negotiator of marriage is a person known in the Burmese society ; but if, after his intervention, the parents consented and got the marriage transacted, it would seem to fall within the first definition.

6. The third class would include the marriages of persons emancipated from parental control (Bk. 6, s. 28, p. 164) and those contracted by consent after rape described in the same section, with which compare Exodus 22, 16, and Deuteronomy 22, 28.

7. The parents and guardians have in a specified order a power to give in marriage an unmarried maiden not exceeding 20 years of age, and if they object, the ceremony or cohabitation with such a maiden effected without their consent is invalid to constitute a marriage (Bk. 6, ss. 21, 22, 28, pp. 161 and 166). "If a young man runs "off with a daughter living under the protection of her parents and "she shall return to them, refusing to live with him, he shall have no "right to claim her as his wife." "If when ordered to make compen- "sation, he offer to live with her, he shall not retain her if she does "not consent : let her be released from all obligation as his wife" (Bk. 6, s. 22, p. 161). In s. 21 of Bk. 6 it is even said that the parents may separate such a pair even if they have had ten children the alleged reason for such a doubtful power being that the daughter belongs to her parents. To many such cases, however, as we shall presently see the doctrines of previous acquiescence and subsequent ratification are applied so as to make the connection a valid marriage.

8. For example, in a case stated in s. 22, p. 161 : "If a young "woman runs off with a young man not approved of by her parents, "and having concealed herself for some time shall return to the village "or neighbourhood in which her parents live and have two or three "children, or live there five or ten years with the man, after the "parents have seen and known (of her being there), they shall not, "have the power to cause the separation." Nor when the lover serving in her parents' house on condition of marrying the daughter has connection with her with their knowledge, the case stated in s. 20, p. 161.

9. The Dhammathat does, however, give the virgin whose age does not exceed 20 years a qualified power of renouncing the man to whom her parents or guardians have given her and of selecting a man of her own choice. The age of 20 years is not altered by the Indian Majority Act, IX of 1875. In Bk. 6, s. 15, p. 158, the following rule applies to cases where consummation has not taken place :—

"If after betrothal and before consummation, there being no other man in the case, she not liking the man to whom she is betrothed, shall run off to her parents, let her be restored to the person to whom she is betrothed three times. If she persists in refusing to remain with him, let her parents keep all presents made to them, &c." S. 16, p. 159, deals with cases of scandalous infidelity of the bridegroom before consummation. In s. 19 will be found a case of a girl being allowed *by her parents* free choice among several suitors.

10. As a maiden may show her persistent refusal of a bridegroom selected for her by running away from him three times, so she may show her deliberate preference of a man by returning to him three times, as in s. 23 of Bk. 6, p. 162 : "If a young woman shall be "taken away from her parents with her own consent, let the young "man restore her to them three times : as the young woman is

"consenting, it shall not be called theft." Again: "In cases where "a young woman has been returned three times, no action will lie "against the young man or his parents. Why is this? Because the, "owners of the daughter could not control her."

11. It will afterwards be argued that this reason applies to other cases of deliberate refusal or choice of a husband by a virgin not exceeding 20 years of age, and that the elopement thrice repeated is merely evidence, symbolical or otherwise, of deliberate intention of which a Court may satisfy itself by other evidence. This equitable extension of this rule was not, however, adopted by the Special Court in Civil Miscellaneous Appeal No. 3 of 1878, decided on the 28th September 1878, where the Judges ordered the female minor to be restored to her grandmother, who objected to a cohabitation in which consummation had taken place. There was proof of persistent intention on the part of the girl but not of the three elopements.

12. The person entitled to the control of minor virgins are specfied in section 28. While the father is alive he alone can dispose of her; failing him, the mother; and failing both parents, the brothers and sisters. If there are no such near relations, other relations, have apparently a similar right if the girl is actually under their care and protection, *viz.*, grandmother, grandfather, maternal aunts and uncles, and paternal uncles and aunts. The Governor or head of a town is also mentioned as a protector The Dhammathat does not specify which of these more distant relations is entitled to priority of guardianship; but its meaning as expressed in section 28 appears to be that the person actually taking care of the girl has a right to control her marriage: and it might be argued that a guardian appointed by the Civil Court under Act XL of 1858 would have the same right as he is saddled with as much responsibility as the Governor or head of a town.

13. A widow or divorced woman is emancipated from all control of parents or guardians, as to marriage: "If a woman be a widow, "or divorced from her husband, and she marry the man of her choice, "parents, guardians, or relatives have no right to interfere to prevent "it: let the woman who has already had a husband take the man of "her choice. If she has never had a husband, she shall have no "right to take one without the consent of her parents or guardians" (Bk. 6, s. 30, page 168).

14. After these recitals from the Dhammathat we are in a position to inquire what the essence of the marriage contract is and whether consent of the parties is essential or otherwise.

15. The Dhammathat, besides dealing with distinctions between greater and lesser wives and wives of different classes, regulates the relations with concubines and slaves as well as the inheritance of the children of the latter (Bk. 6, ss. 40 to 43, page 288), and even punishes a man for seducing the concubine of another (Bk. 6, s. 37, page 176). The more one studies the parts of the book which deal with these connections, and considers the general case with which the status of marriage may be assumed, dissolved, and contracted again, the more impressed one becomes with the difficulty of applying the analogies of the long-settled law of England to these connections.

It may certainly be predicated that many of the contracts which in dealing with the law of Burmese Buddhists we call marriage, and treat as such in our Courts, are contracted with hardly any ceremony or formal evidence of the contract; its proof in such cases depends more on admission or on repute and conduct than on anything else; and the more one considers the Dhammathat the greater becomes the difficulty of laying down any precise rulings as to what fact is essential to constitute the status of marriage, when that status begins, and when the contract is complete.

16. In Richardson's Dhammathat the words *ṭaiṅa* and *temya* are sometimes translated as giving in marriage and sometimes as betrothal; and the words *husband and wife* are used where the Burmese words leave it doubtful whether the *young man* or *young woman* has entered on that status or not. Accordingly, for arriving at any reasonable knowledge of the meaning of the Burmese original the translation must be examined word by word: even then there may be doubts whether the Burmese correctly expresses the meaning of the original Sanskrit or Pāli. Supposing, however, the English translation is made verbally correct, then begins the duty of putting a legal interpretation on the words; and to do this the general scope of the law and the nature of the society in which it arose must be constantly borne in mind.

17. The question is whether this giving, betrothing, or promising of the maiden to a man, however we may translate it, does in itself operate to produce the status of marriage, 1st, without further ceremony, and, 2nd, without the consent of the girl. The question may arise any moment not only in disputes about property, but in criminal prosecutions for adultery and claims for maintenance. It is remarkable that such important points should not yet have been settled judicially: at any rate I connot find any rulings on the subject in any of the superior Courts either as to the law of the Dhammathat, or as to the established custom of the people which overrules the Dhammathat.

18. As regards the Dhammathat, I do not find in the definitions of the three kinds of marriages or elsewhere any requirement that a ceremony should take place: although certain acts rather than ceremonies are here and there spoken of, *e.g.*, the receipt of clothes, the vow with the hands in water (Bk. 6, s 28, p. 166), or the setting up of a house, which Richardson sometimes translates as marrying. These acts, as well as other acts of endowment or cohabitation, may well be evidence relevant to the question whether the status of marriage has been acquired; but I am not aware of any passage in the Dhammathat mentioning any ceremony as essential; and any such precision would, in my opinion, be contrary to the view of sexual relations apparent throughout the book.

19. As already observed, I know of no binding judicial decision to the effect that any ceremony is requisite by established custom of the present day.

20. On the point whether the consent of the minor girl is essential I believe that a decision in the affirmative would alone accord with the manners and customs of Burman Buddhists at the present

time, as it is notomous that young women do exercise a choice and marry the man they prefer. As already pointed out, the Dhammathat, while putting forth as a principle that the girl belongs to her parents, does, as a matter of practice, give authority to the girl to defeat the intention of her parent or guardian by running away three times from the man to whom he has given her. She has the same authority to marry the man of her own choice if she elopes with him three times. She has a third way expressly provided for her of asserting her own over her parent's will by waiting till she is 20 years old.

21. I would hazard an opinion that the procedure by elopment may, in the old society, have been the best way of allowing the girl to exhibit a deliberate choice, there being no general use of Court or writing and less regard for chastity than now. It is important, too, to notice that such choice was allowed in an age when many of the wives were really owned, *i.e.*, were slaves. It is difficult to control such a procedure in the present times ; but if the Courts shut up the relief by elopment, they must either allow some other means of expressing deliberate intention, or leave the girl in a worse position than girls enjoyed in a more barbarous age.

22. If it be held that the girl's consent is not essential, then, no ceremony nor registration being required we must hold that the marriage is complete, and that the status of wife begins when the parent or lawful guardian gives the girl to the man. We deprive her of the right of volition before the marriage and allow it to her after. It might fairly be argued that such interference with personal liberty and such degradation of the notion of marriage are inconsistent with equity on the one hand and public policy on the other. If the parent or suitor used force or deceit to lead the girl to the suitor's house, he might apparently be convicted under section 366 of the Penal Code, and the girl would have a right to resist him in her private defence against the abduction. We cannot apply the principle or the practice of the Dhammathat to the changed society without modifications ; and in the moulding of the law it is of great public importance that the Judges should modify the old rules in the line of present customs and opinions rather than that of a bye-gone day.

23. After such consideration as I have been able to give to the subject, I am inclined to think that consent of both parties is essential to the contract of marriage and that no ceremony is essential either by the Dhammathat or by established custom. But that the public banquet or the joining of hands may be some evidence of the consent, although that sort of evidence may be overruled by proof that there was no consent nor acquiescence, as for example, by showing that immediately afterwards the girl repudiated by quitting the man. Doubtless the laws which dispense with ceremony and registration leave the door open for uncertainty, mistake, and fraud ; but in this respect other civilized nations have to encounter the same evils, and the only remedy is by legislation. On these grounds I would submit for discussion that consent is the essence of the contract, and that it may be proved to have been given by the usual sort of evidence, *viz.*, of express consent or acquiescence or

repute and conduct. Moreover, as Mr. Mayne points out in his instructive commentary to section 494 of the Penal Code, the marriage may be established by preponderating repute and conduct even though the repute is divided. "Every fair pre-"sumption will be made in favour of the marriage where both "the parties have *bond fide* believed themselves to be married." Mr. Mayne cites the following instance:—"Where it appeared that the parties had lived together for five years in Virginia and had been received in society as man and wife, and that by the law in force in Virginia at the time the cohabitation began no religious ceremony was necessary to the validity of the marriage, nor was any registry of marriages required to be kept, it was held that this constituted sufficient evidence of a marriage."

24. The foregoing principles will help up to say whether, in the following cases, the status of husband and wife has or has not occurred :—

(*a*) When before consummation the maiden breaks the engagement by persistent refusal or by intercourse with another man (Bk. 6, s. 15, p. 158).

(*b*) When before consummation or living together the man repudiates the engagement (s. 15).

(*c*) When before consummation the man commits scandalous acts of infidelity and the woman repudiates (s. 16).

(*d*) When before consummation or living together the man discovers that the woman is a leper, deformed, dumb, imbecile, deaf, mad, or a fool, and repudiates her (s.18).

25. In these four cases, as they are stated in the Dhammathat, the parents have given or promised to give the girl. But in the two first one of the young people refuses consent before aught else has happened ; and in the other two also the consent is withdrawn before they have had time to show by repute and conduct that they are man and wife. The ambiguous word ***giving*** occurs in these sections ; but as Mr. Gillbanks has noticed in discussing the subject, this *giving* took place in cases of concubines as well as wives ; and both wives and unmarried girls were sometimes given in expectation of a return (Bk. 6, s. 30, p. 169, and Bk. 8, s. 3, p. 238). Compare this custom with the lower form of marriage called "Usus" in ancient Rome described by Sir Sumner Mayne (Ancient Law, p. 155) as originally amounting in law to little more than a temporary deposit of the woman by her family, and co-existent with the higher forms of marriage under which the woman passed from the power of her father into that of her husband.

26. Polygamy is allowed by the Dhammathat as well as by established custom of Buddhists in British Burma. This point was settled by the Special Court in Civil Reference No. 1 of 1880,* "Mah Ing Than *vs.* Maung Tsan Hla," the leading case. The ruling was as follows :—"At Buddhist law, "where no special custom exists, a husband who, "in the lifetime of his first wife, married a second wife, without the "first wife's consent, does not thereby commit a fault against the "first wife."

* Published in the Judicial Commissioner's Circular Memorandum No. 8 of 1881

27. This ruling only applies to communities where there is no special custom forbidding polygamy, and does not apply to christians and Parsees, to whom polygamy is forbidden by law. With regard to the law applicable to Chinese people living in British Burma, see the judgment of the Judicial Commissioner in Civil Appeal No. 4 of 1881 in the Special Court, published in Judicial Commissioner's Circular Memorandum No. 12 of 1881.

28. The Dhammathat, in Book 5, page 135, and more fully in Book 12, page 335, describes the wives of different kinds, and discusses their rights and duties. It is unnecessary to do more than refer to these books as the following passage in my judgment in Mah Ing Than's case shows that many things customary in the age when the Dhammathat was written are neither customary nor legal now in British Burma :—

"The Dhammathat continually recognizes the custom of polygamy, and assumes the existence of a society in which it is so common as to require definite regulation. The society displayed in this book is archanic and peculiar, and many of its circumstances seem to resemble those of the nation for whom the Mosaic law was framed. There was not only plurality of wives, but concubinage also existed, slaves were taken in war and for the payment of debts ; there is also provision for a wife purchasing a husband as well as for a husband purchasing a wife. When a husband went away on some trading voyage, the wife sometimes marries some one else ; facile rules are laid down for both divorce and reclamation. The seizure of wives at the sack of towns and when hiding from the enemy in the jungle is also contemplated : men grew enamoured of their slave girls, and sometimes wives were given them by the king."

29. The marriage may easily be dissolved by the Burmese custom and contracted again with great facility. It is thus of great importance that all the Courts should understand the law which treats some kinds of cohabitation as marriage and others as mere concubinage. Hence the Superior Courts make some inquiry into the fact of the marriage where they have to determine cases of adultery and kindred offences under Chapter 20 of the Penal Code. In a case of adultery tried by the Judicial Commissioner it was ascertained that the woman had been divorced by the complainant a few days before the sexual act with which the accused was charged ; and though the complainant and the woman re-married a few days after the divorce, it was held that during the days she remained divorced she was not the wife of complainant, and thus the charge fell to the ground.

30. On the subject of prohibited degrees and the void or voidable character of particular connections I find nothing in the Dhammathat, and believe that there is as yet no judge-made law. Major Sparks gives a list of prohibited degrees in his Code of Burmese law and makes the following statements, but without indicating any authority for them :

"The degrees of consanguinity and affinity are the same as under "the English Canon Law, except in the case of wife's sister and a "brother's widow, marriage with whom is permitted by Burmese law.

"A man may even marry his wife's sister during the lifetime of his "wife, but such marriages as well as marriages with a brother's widow "at any time, though not illegal, are opposed to public opinion and "not considered respectable; marriage with a deceased wife's sister is considered, on the contrary, a most natural and becoming union." I imagine that an issue as to whether any particular alliance was lawful, voidable, or void from the beginning would have to be determined on evidence about existing custom, as shown in particular instances known to the witnesses and not on mere expressions of unlearned opinion.

31. Where a particular connection is only voidable, not void, it would be held to be marriage until set aside as in the case of marriage with a deceased wife's sister contracted by East Indians domiciled in India, to whom certain statutes expressly rendering such marriages void do not, in Mr. Mayne's opinion, apply. Such a marriage he says, is good until set aside, and cannot be questioned after the death of either of parties to it.

32. At pp. 139, 140, 174, and 253 of Richardson's Dhammathat occur rules for determining cases of a woman marrying again during a prolonged absence of her first husband, and of a man taking as wife a woman who already has a living husband. Such cases may well be left for future judicial decision; but the Burmese law on the subject should not be overlooked in the decision of cases among Burmans under s. 494 and similar sections of the Penal Code.

33. The present uncertain state of the law leads to unhappiness and quarrelling in many Burman households, as the parties themselves often dispute about status, the man saying the woman is his wife, the woman denying it. I may conclude this elementary discussion of this intricate subject by referring to the case Empress *v.* Pitambar Singh (5 Indian Law Reports, Calcutta, p. 566). The question referred to a Full Bench was whether, in a case of adultery, the Court was justified in accepting as proof of the marriage the mere statement of the prosecutor, "she is my wife by marriage," and that of the woman, "I am married to the prosecutor." The referring Judges remarked: "We cannot see that any inconvenience "is likely to follow from our adopting the stricter rule. Amongst the "large majority of the people of this country marriage is accom-"panied with so much of ceremonial and publicity that there can "rarely be any difficulty in proving it. If there be any class of the "community with whom it is otherwise, whose marriages, notions, "and practices are so lax as to render many marriages of doubtful "validity, this seems to us additional reason for requiring the actual "facts to be brought properly before the Court, so that it may deter-"mine the validity or invalidity of the marriage in each case that "comes before it."

The judgment of the Full Bench was delivered by Chief Justice Garth:—

"We think that in this case the evidence was not sufficient to jus-"tify a conviction for adultery. The marriage of the woman in as "essential an element of the crime charged as the fact of the illicit "intercourse and the provisions of the Evidence Act (s. 50) seem to

" point out very plainly that where the marriage is an ingredient in the " offence as in bigamy, adultery, and the enticement of married women " the fact of the marriage must be strictly proved in the regular way."

Otherwise there is a danger of confounding marriage with concubinage and giving the paramour the same privileges as the husband.

34. It has been customary in British Burma for unchaste women to sue the paramour for damages, even when there is no allegation of breach of promise of marriage. Such an action does not relate to marriage, and the law of the Dhammathat which allowed it has not been preserved to the Buddhists as law ; and therefore the general principle which bars such actions on the ground of public morality would apply.

35. In a recent appeal, however, it was held by the Judicial Commissioner that a woman who has been injured by breach of promise of marriage may sue for reasonable damages. In considering whether the man has rendered himself unable to perform his promise the Courts must not forget that polygamy is lawful.

RANGOON :
The 17th July 1882.

IN THE COURT OF THE JUDICIAL COMMISSIONER, BRITISH BURMA

Circular Memorandum No. 30 of 1882.

[NOT TRANSLATED.]

Dated Rangoon, the 21st July 1882.

THE Judicial Commissioner herewith distributes a second note on Buddhist law dealing with the incidents of marriage. With a view of aiding the Subordinate Courts, an endeavour has been made to introduce, by quotation or reference, every section of the Dhammathat relating to the subject, as well as to incorporate such judicial interpretations as have been found. The latter are few and meagre, and some of the rulings quote no authorities; thus the commentator has to state and discuss the ambiguous rules of the Dhammathat without that assistance from exhaustive and fully considered judgments which is received by commentators on Hindu or Mahomedan law. The present notes are believed to be the first of their kind; and in the present state of the law, and especially where decisions of the Superior Courts are criticized, the opinions expressed have no higher value than those of other commentators. But it is hoped that other opinions may be elicited and that the social problems which conceal themselves under the rulings of the Judges may in this manner be brought into the light of day.

JOHN JARDINE,
Judicial Commissioner, British Burma.

NOTES ON BUDDHIST LAW.

MARRIAGE—ITS INCIDENTS.

By John Jardine, Esq., Bo.C.S., Judicial Commissoner of British Burma.

36. In the case of "Maung Ko *vs.* Ma Shway Get and others" (page 15 of Mr. Justice Sandford's rulings) the learned Judges of the Special Court lay down the following proposition :—"It is quite certain that the Burmese law recognizes the husband as the lord of his household." The conjugal subordination of the wife may be inferred from the account of marriage duties in the 5th Book of the Dhammathat, pages 135 and 144, and in Book 12, page 334. For certain improprieties he may correct her (Book 12, section 42, page 354), but in a mild manner only is laid down in section 47, page 360. This law was recognized in the case of "Ma Ma *vs.* Maung Nyoon" by the present learned Recorder of Rangoon, who remarks that the Burmese law permits a husband to chastise his wife as a father may chastise his child, as it is laid down that the husband is the lord of the wife, and therefore mere ebullitions of temper are not to be regarded as causes for divorce.

37. With respect to the management and acquisition of property the Buddhist law, while distinctly recognizing the status, treats the husband and wife as if they were partners in the profits, unless perhaps the woman lives and has an establishment separate from her husband and takes no share either in the management of his business or in his household affairs. "Where she in fact performs the duties of a wife no further than by receiving his visits, although she may be a wife under present Burman customs, she is not a wife, who under the law of the Menu Dhammathat would be entitled to hold the property acquired during the so-called marriage as joint property" *per* Sandford, J., at page 25 of his rulings). The passages at pages 344 and 347 in the 3rd and 31st sections of the 12th Book are quoted as the authority for this ruling, which, as I shall presently try to show, is open to question.

38. For the purposes of marriage, divorce, and inheritance, the property of the married persons is considered as separate (*thinthee*) or joint (*hnapazone*). The words *payin*, meaning *originally belonging*, and *letetpwa*, meaning *obtained since marriage*, are, according to Sparks, indiscriminately used instead of *thinthee* and *hnapazone*.

39. Major Sparks defines the following property as *thinthee* or separate property of the husband and wife :—

(i) what belonged to either before marriage ;
(ii) what has been given specially to either since marriage ;
(iii) what has come into the possession of either by inheritance from his or her own family since marriage.
(iv) clothes, jewels, and ornaments.

Major Sparks also quotes Book 6, section 43, page 181, as showing that niether party has any power whatever over the separate property of the other. The separate character of the first class is distinctly inferrible from Book 12, section 3 and so is tha of the second class if given by the king. The judgments at page 14 of Sandford's Rulings and in circular memorandum No. 25 of the 11th July 1882 affirm that, for purposes of inheritance at least, property which either husband or wife has inherited from his or her own family during the marriage is *thinthee* or separate. In my judgment in the latter case occurs the following :—

" The counsel for appellant argues that the property in suit does not come within the definition of property jointly acquired during marriage, as such a ruling would be inconsistent with the rule of partition at page 273, section 8, of Richardson's Dhammathat. That rule draws a distinction between property inherited by a wife from her parents during coverture and property otherwise acquired. Of the inherited acquisition the wife's son by a former marriage is to get half, and the husband's right of succession is limited to the other half; whereas out of the other acquisition the step-son is to have only one-sixth. Mr. Sen wishes me to follow Mr. Justice Sandford's example and apply analogy so as to make the rule at page 273 applicable to the present case.

My opinion as to the application of the definition in page 344 to the persent case is as follows :—The definition of jointly acquired property in that section is not made for the purpose of the law of inheritance, it appears to me to relate only to the law of divorce and partition following divorce. The rules about partition and inheritance on the death of relation make frequent and plain distinctions between ordinary joint acquisitions made by skill, science. thrift or trade, and the succession of the husband or wife to his or her relation's property. I instance, section 6, at page 272, section 8, at page 273, mentioned by Mr. Sen, sections 15 and 16, at page 276, as to children surviving parents which parents have not received a share, section 38, at page 286, where the ancestral property inherited by a husband is expressly said to be his and thus liable to equal disposal among wives, and section 66, where the distinction is most plainly drawn. I hold therefore that the property in the present suit is not *acquired* property within the meaning of section 10, on which Mr. Sandford's judgment is based, and that the two cases are quite distinct."

The property was inherited during coverture from the husband's relation, and was held to be the husband's separate acquisition.

40. The chance child is excluded by section 81 of Book 10, page 319, from property so devolving. The subject of separate property of married people is discussed in Book 10, to which, with the above judgments, I refer the reader.

41. *Tinthee* in relation to married persons among themselves must not be confounded with *thinthee* as regards parents ; the word is used also to imply separation of interests between parents and children and between other relations. In section 81 of Book 10,

page 315, the twelve kinds of *thinthee* or separate property of children are described; and in sections 22, 23, and 24 of Book 10 page 278, the cases of grown up children who leave the father's house and set up a separate abode, taking with them some of the property without it being specially given to them, are determined I mention these important cases because in the prevailing ignorance of Buddhist law suits are often brought to oust people in long possession on the mere allegation that there was no partition, and in apparent ignorance of this part of the law and its interpretation in the case reported at page 33 of Sandford's Rulings.

42. The principle of Buddhist law, that husband and wife inherit from each other (Book 10, section 38, page 287), though easily applied when a wife dies without issue, is modified as we have seen when there are several wives and families, as in the case at section 66, page 301. As remarked in the judgment from which I have quoted in paragraph 39:—"Two principles must be borne in mind in adjudicating the case according to the spirit of the Buddhist law. The wife is entitled to some share because, while she lives with her husband she has a joint interest in all the household concerns, and although the property may have descended from the husband's ancestor it might be wasted or become profitless if the wife did not do her share in taking care of it. But at the same time the surviving husband or wife is jealously excluded from complete appropriation of what property came direct to one or other from his or her own family; such property is not to be diverted in its entirety from the whole blood to the half blood, or to the step-parent's own family who are not even blood relations."

43. The profits or interest arising since marriage from the employment or investment of the *thinthee*, or separate property of either husband or wife, as also the property acquired during the coverture by their mutual skill and industry are their *hnapazone*, or joint property. These propositions of Major Sparks' Code are supported in his opinion by the real meaning in the third section of the 12th Book, which section, he says, is incorrectly translated by Richardson. Sandford, J., in the judgment at page 24 of his rulings, to which I have already referred, appears to accept these propositions, but excludes from the category of joint property what was acquired by the husband by his own exertions when the wife lived separate and took no share in the management of the business or the household. "The idea of the joint property of the husband and wife must have arisen from the fact of the husband and wife living together and managing their concerns together. The wife takes, among Burmans, often a more active part in business than the husband; and even where the profits arise from his separate property, or from the separate business or trade of the husband, the wife would be in charge of the property, or she would be managing the domestic affairs of the husband and administering to his domestic comfort, and so giving him leisure to attend to his out-of-door business and enabling him to perform it more efficiently. But where the parties live apart, where the wife merely receives the visits of her

"husband, she contributes nothing to the acquisition of the property "or to the domestic economy. She has received a money payment "and a maintenance in return for her favours, and the principle "whereon the idea of joint property, as I imagine, rests fails to apply." Again, "although she may be a wife under present Burmese customs, "she is not a wife who under the law of the Menu Dhammathat, would "be entitled to hold the property acquired during the so-called mar-"riage as joint property."

44. It will be observed that in the judgment the learned Judge made an exception to the general rule of the Dhammathat which had been accepted in an earlier case at page 10 of the rulings, and that no authority for the exception is quoted from the Dhammathat, but the reasons for making it are derived from the present circumstances of Burmese society. Doubt is thrown on the status of the woman, but at the same time the contract is treated as a marriage, the suit being one for property after a divorce.

45. In the later case of "Ma Ma *vs.* Moung Ngyoon" (Civil Suit No. 173 of 1877) the Recorder remarks:—"As regards the Burmese "law of divorce, so far as it is to be ascertained from the scattered and "oftentimes obscure and contradictory texts in the Dhammathat "translated by Richardson, I think it may be taken as settled law "among Burmans that property acquired either by means of separate "property brought by each at the time of marriage or acquired by "the joint exertions of husband and wife during marriage belongs "equally to the husband and wife. * * I come to the conclusion "that property now in the defendant's possession was acquired by "his own separate capital and without any assistance from the plain-"tiff. But this in itself will not deprive the plaintiff from sharing "in the property acquired by investment of the separate property of "the husband, for according to the Dhammathat the wife and hus-"band have a joint interest therein, and the wife is entitled to her "share on divorce, provided she has a just cause for seeking a "divorce." This ruling appears to me only to establish the general rule in terms identical with Major Sparks' statement thereof, but not to touch the exception made by Mr. Sandford, and of which no mention is made by Major Sparks. In another case however, suit No. 26 of 1880, where the husband lived separately at Mandalay, and by his own exertions made profit as a goldsmith, the Recorder remarks that the defendant "being a goldsmith, his skill and labour would fall "under self-acquired property in which the wife does not participate." The suit was for divorce and division of property, but the Recorder did not intend to decide the point as he had other reasons for the decision. We may infer that question is somewhat difficult from the difficulty which attended a like question under the Hindu law in the cases at page 56 of 2 Madras High Court Reports and page 1 of 6 Bombay High Court Reports, A. C. J. I will return to it afterwards.

46. As regards joint property, the following propositions were expressly decided by the Special Court in the case reported at page 15 of Sandford's Rulings:—"The 43rd paragraph of the 6th Book "treats of the power of the husband and wife over the joint property

"and the conclusion to be derived therefrom is that they each have a "certain power over this property, *i.e.*, each may lend it, but neither "may permanently alienate it. It is difficult to reconcile this rule "with the doctrine laid down in the 8th volume as to the power of the "husband to make gifts, but either passage is equally conclusive "against the claim of a wife to possession of the joint property in "opposition to the husband. * * Of joint property we cannot say "that the parties or either of them are entitled to its exclusive posses-"sion * * So long as the marriage subsists the Court cannot "decree an absolute dominion over it to either husband or wife. But "we think that on the doctrine laid down above, as quoted from the "8th volume, *viz.*, that the husband is lord of his wife he is entitled "to the possession of it in trust for both rather than the wife."

47. It would seem, then, that in executing the warrant of a criminal court for levy of a fine, the distinctions of the Buddhist law, especially as declared by the superior Courts, must be carefully borne in mind, as section 307 of the Criminal Procedure Code only authorizes the distress and sale of "any moveable property belonging to the offender" and it would be adding injury to insult if, on sentence of fine for adultery or rape, the property of the innocent and wronged wife were seized and sold as well as that of the guilty husband. We must revert to this subject in dealing with the liability of husband or wife for each other's debt, and the decisions about a Buddhist's ownership ceasing on his death, important matters under section 70 of the Penal Code and under those parts of the Civil Procedure Code which relate to attachments and sales.

48. But to return to the exception made by Mr. Justice Sandford. It is evident that in discussing the elaborate separation of rights made between husband and wife in the Dhammathat, and in dealing with a state of things under which the husband has become a trustee, and where a married woman has wonderful facilities for terminating the marriage whenever she so desires, we have got among ideas and practices very dissimilar to those of the *Patria Potestas*, under which it was for the parents to settle the marriages of their children. Learned inquiry may some day discover how it came about that the liberty denied to the virgin was conceded in so full a measure to the married woman along with an equality unkown to the Hindu law.

49. Whether the woman to whom the exceptional rule was applied was a wife or not is, as we have seen, doubted by Mr. Justice Sandford. So far as I know no formal decision on this matter of customary law has been given, though I am informed that the custom of wives living quite separate from the husband is not uncommon. I confine my remarks to the Dhammathat. In the two descriptions of the seven kinds of wives it is assumed that the wife lives with her husband and cherishes and comforts him. Elsewhere, in discussing polygamous marriages, stress also is laid on the eating out of the same dish, but more as proof of the status of wife (compare sections 33 and 35 of Book 12, pages 348 and 349, and see pages 93, 141, and 289). Polygamy, as we have seen in a former note, is recognized as common: the case is stated at pages 94 and 286 of wives living in separate

houses, even in separate villages. "They are called greater or lesser "wives according to the priority of the marriage, but it is only a "name." It is vain to pretend to any knowledge of the ancient customs as the indications of the Dhammathat are uncertain and few. But seemingly one way of distinguishing the wives from the five slave concubines and the free concubine, described at page 288, was by the social equality implied in eating out of the same dish as the husband, and the person of higher rank, whether man or woman, could raise his or her slave paramour to a status approaching that of marriage by admitting to such like familiarity.

50. So I would be inclined to hold that there is nothing in the mere fact of separate establishment to prevent a woman from being a wife. If the status is disputed, it must be proved in one of the usual ways. The Courts would have to infer from the acts proved and the acknowledgments and repute whether the parties had consented to a marriage or to concubinage or only a trading partnership. For a precedent I refer to the Recorder's judgment in Civil Suit 10 of 1881. Where there has been no ceremony nor document, it may easily happen that the parties had different intentions: and in charges of adultery it may also happen that the accused had no reason to suppose the woman living separately to be a wife, especially if, as is not uncommon, she had several times broken the marriage and become a single woman and then remarried the same husband.

51. From this examination of the Dhammathat I would be of opinion that Mee Soung, the plaintiff in the exceptional case, was rightly treated as a wife, there being no allegation against her except that she lived in a separate house. She was divorced from her husband against her will and without any fault in her part, and under the ordinary rule she is entitled to the joint property acquired during marriage. I must confess I have doubts whether the Dhammathat gives any sanction to the doctrine that the husband divorcing a faultless wife against her will may retain any part of the acquisitions made during the coverture on the plea that they lived separately and that the wife took no part in the business or the household, or may exclude her from any share in what he acquired by his professional skill.

52. It is certain that in many respects the Dhammathat deals with the property of the married people and of several wives among themselves and with debts incurred without the husband's knowledge on principles like those of commercial partnership. "Property acquired "equally by both, or where both had an equal share in the capital "shall be divided equally" (Book 12, section 3). There is, however, no allusion to capital in the original, and the meaning is only that property acquired by joint exertions shall be divided between them. But at the same time the Dhammathat never ceases to recognize the status of marriage and the mutual duties of husband and wife.

53. In Book 5, sections 14 to 17, we have the case of a husband who goes away to a far country in pursuit of wealth of learning. He must send her a letter every three years; when he comes back he must pay her debts; she cannot take another husband until eight years

are passed, not even if in his new settlement he marry another woman, unless at the same time he shows his intention to abandon her by ceasing to send her the means of living; any one seducing her in the interval may be punished. A similar rule is applied to soldiers going on a campaign. On this subject see the cases at pages 15 and 25 of Sandford's Rulings and the Recorder's judgment in Civil Suit 10 of 1881.

54. But in section 17 the question of separate living is considered uncomplicated by distance; and there what is discussed is a complete abandonment, the intention being shown either in words or by conduct. I qucte the whole section :—

"The law when a husband and wife having no affection for each other separate. 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) where they were living together, and if during one year he does not give her one leaf of vegetables or one stick of firewood let each have the right of taking another husband and wife.; they shall not claim each other as husband and wife, let them have the right to separate, and marry again. If when the husband leaves the house the wife shall take another within the three years, or when the wife has left the house and within one year the husband shall take another wife, of the property of both what was brought at marriage, and that which belongs to both, having counted one, two, and weighed by ticals, let all the property be demanded and taken from the person who failed in his or her duty as husband or wife by the other who has become the lord of it; 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. Thus the son of the King of Bymalo called Menu, said: 'If a husband who has a wife becomes a rahan, she must wait seven days: if after seven days the rahan shall return to the world, he shall not claim her as his wife; let the wife have a right to take a husband."

55. In the cases dealt with in this section the ordinary rules about division of property on divorce can be applied to a mutual separation whether with or without fault. But it is not hinted here or anywhere else that a woman is at fault merely because she lived separately from her husband.

The separate living may be a matter of mutual convenience, as, *e.g.*, where there is limited accommodation in the house, or where the husband wishes to set up a shop in a distant town, but not to take his wife there. A policeman on the frontier or a station-master or telegarph signaller on a railway may find it impossible to take his wife about with him, but it seems inconsistent with the contract of marriage to hold that the wife is not entitled to share in the proceeds of his labour and skill. It often happens that a man takes a second wife and prefers that his first wife should live by herself, perhaps in her own house, so as to avoid domestic broils.

56. If then her separate living is by his license or desire or for joint convenience, there would seem to be no reason in equity why it should deprive her of any advantage belonging to the status of wife. If she has by living separately committed any fault, this should be alleged and proved by the husband as in any other suit for divorce

or consequent division of property. The wife may then be able to show justification, *viz.*, repeated misbehaviour, immorality, or other of the reasons seggested in section 18, page 142, or at page 343, where the vexation naturally aroused by the taking of a second wife is alluded to as being heightened by the changed behaviour of the husband, who abuses and beats the wife of whom he is tired. Although as the Recorder has observed, there is no obligation on the husband to provide a separate house for the first wife, he is bound to take care not to abuse or beat her in circumstances when his affections have been transferred to another woman.

57. In section 18 too, the duty of the husband to minister to a leprous or otherwise diseased, blind, or enfeebled wife is plainly laid down : "He shall have no right to put her away with her pro-"perty. If he takes a lesser wife, he has a right to do so. If he "neglects his first wife and does not take care of her, minister to and "support her, let one-half of all he possesses be taken and given to "her relations ; if he will not give up the property, nor support her, "let him be severely punished criminally. On the precedent of the "case of Ampoola, the rahan, this may be decided so, and the pro-"perty may also be taken from him. Thus the Lord Recluse, called "Menu, said."

58. I note then that in the case of the trading husband the exceptional rule applied to Mee Soung is not applied, and that the spearation may be either by license of the husband when there is no fault or on account of legal cruelty when a justification may be pleaded. If the husband alleges faulty conduct, he ought, on the ordinary rule of pleading, to prove it. The principle is stated in section 18 : "The "husband is the lord of the wife ; let her be judged according to her "fault."

59. At section 38 of Book 10, page 286, the inheritance devolving on the husband during coverture with several wives living in the same house is to be shared among them, on the general principle that wives inherit from the husband. I can find no authority in the Dhammathat for holding that anything disqualifies a wife from any benefit pertaining to the status, unless fault is proved and as already noticed, circumstances may often make separate living quite consistent with a wife's performance of her duties. The opposite ruling also seems to conflict with the desire of the Dhammathat to provide a *modus vivendi* for the superseded wife in a polygamous society and to prevent a harsh husband profiting by his own wrong.

60. The wife has an interest in the husband's gains for out of them he is bound to maintain her, and his moveable property, without exception, is liable for this purpose under section 536 of the Criminal Procedure Code. The wife, however, may be answerable for the debt of a deceased or runaway husband, even when she was ignorant of it being incurred. The test given in section 30 of Book 3 at page 83 is whether the debt was incurred for the benefit of both parties with a view to making profit, but not where the debt was incurred for immoral purposes, or to pay a criminal fine, or in cock-fighting, or gambling, or where the debt was contracted when the man was drunk (sections 30, 31, and 32), unless the wife has by her conduct signified

to the creditor that she assumes part of the responsibility for such debt. Similar rules apply to debts incurred by the wife without the husband's knowledge. If when the creditor comes to demand the "debt, the husband or wife has seen and been aware of his having "done so, and shall have placed before him spirits, betel, tea, or "tobacco, or have begged him to wait a few days, they shall not "plead ignorance; let them pay. But if, when the creditor thus "comes and makes his demand, they have said before witnesses that "they have nothing to do with the debt, let them be free. Children "and grandchildren are heirs to good and bad, let them pay." By being heirs to good and bad is meant that the liablities go with the assets on succession, a general principle of the law of inheritance.

61. In section 46, at page 93, the subject is resumed, the above principles about liablity being, I suppose, assumed, as the object in section 6 is merely to determine the proportion to be paid by the husband according to the rank of the wife or concubine. If the head wife has incurred the debt for necessary expenses and is dead, the husband must pay with cent.-per.-cent. interest. In sections 47 and 48 the principle is laid down and followed out, by which all the wives are liable for debt incurred by the husband without their knowledge in proportions according to the wife's rank. For their separate debts not incurred for their joint benefit the liability of each wife is single among themselves. At the end of section 48 occurs the following passage. I am doubtful of its meaning, but it appears to decide a case where the husband dealt with one wife separately from all the other wives, and where that wife and her family succeeded somehow to the property in her house, the others having no share: here the debts and the assets, the burdens and the benefits, are transferred together to the widow:—"If the husband shall "have the wives above noted in separate villages or separate houses "in the same village and shall contract debts in the house of one "only, the wife and children in that house shall pay it on his death. "Why is this? Because the property came into their possession: "it is their own separate share."

62. This, it must be observed, is a very peculiar case, unknown, I believe, in the present state of society. The husband has different wives of the royal, the Brahman, the wealthy, the mercantile, and the poor class. We can only speculate about the circumstances under which this one wife got a special treatment and inheritance. I do not find in the law of inheritance on the husband's death, or in the law of partition on divorce, that such great distinction were made between wives of these classes, although the head wife was carefully discriminated from the free concubine and the slave-wife as at Book 10, section 40, page 288, and Book 12, section 30, page 348, and the following sections. We can, however, easily imagine a custom of contract by which a royal wife or an heiress refused to associate with the meaner spouse and had separate dealings with tradesman; and we have already noticed the case of a trader who goes to a far country to trade and there marries another wife. At page 311, section 81, we find a peculiar rule of inheritance, which would be difficult to explain if the precedent of the wild pigeons had not been given.

There a husband and wife live separate from each other and from their children.

63. The importance to the Burmese society, especially to the Burmese women, of careful and correct settlement of the definition of separate property has become manifest as we examine the peculiar conjunctures of married life. We have seen that the wife is not liable to pay the debts incurred by the husband in adulterous, gambling, and other vicious pursuits. We have seen that the separate property of a married woman exists, and that the highest Court has held her to be joint owner of the joint property. We have discussed the careful and elaborate rules of the Dhammathat made to secure the woman in her rights when death takes place in the family and when the household is broken up on divorce. So that when a Magistrate levies a fine under section 307 of the Criminal Procedure Code, he should remember that his power extends only to the *moveable property belonging to the offender*. These are the express words of the law, and they do not include the property, separate or joint, of the Offender's wife. This interpretation is supported by the case at page 300 of Christopher's circular order-book, and in circular memorandum 27 of the 29th October 1881, the procedure for hearing claims to property attached in criminal cases laid down. In the present note I have discussed this matter from the points of view of the Dhammathat and the Criminal Procedure Code. But at page 26 of Sandford's Rulings, the learned Judge considers the wife's liability from the higher stand-point of justice. He says :—" I am inclined to think that the " question to be decided here, *viz.*, the liability of a wife to third " persons on account of an obligation contracted by her husband, can " hardly be considered a question regarding marriage, and that in " deciding this question the Court should act according to justice, " equity, and good conscience, and should only be guided by Bud- " dhist law so far as that is just and equitable. But to hold a wife " personally responsible for an obligation contracted by her husband " to which it is not shown that she was in any way privy, and from " which it is not proved that she received any profit, is certainly " not in my opinion, in accordance with justice, equity, and good " conscience." To this I would add that in order to prove that the wife was privy to the offence for which the fine was levied, the proper way is by charging her with it or with the abetment, and it would be scandalously unfair to seize her property without even making a charge against her. The Magistrates ought most carefully to see that this well-known principle of justice is observed, especially in those cases where the police or the informers are awarded part of the fines. Otherwise there is a danger of our British justice becoming unjust and of women being oppressed in defiance of the law of the country and of the interpretations of the higher Courts.

64. I only glance here at the difficult question of the rights of the parties who after divorce marry each other again. Mr. Justice Sandford at page 10 of his Rulings, treats the second marriage as a new start : and in the Recorder's judgment in civil suit 222 of 1879. the following passage states the facts and the ruling :—" The parties were " lawfully married according to Burmese custom some 12 or 13 years

"ago, and lived together until six years ago, when she was divorced "by the loogyees on the ground of having committed adultery; and "she left the plaintiff's house with one garment, but they afterwards "came together again and lived as man and wife until the present "year. From the manners and customs amongst the Burmese, I "hold that the re-union constituted a legal marriage." In the one case no reasons are given; in the other the re-marriage is treated as valid by custom without reference to the Dhammathat The disuussion appertains more fitly to the subject of dissolution of marriage contracts.

65. So also the rights of the parties on divorce taking place. In the case at page 24 of Sandford's Rulings the Judicial Commissioner rules that "a husband is entitled to take back his *separate* property "on divorce, even when the divorce is against the wish and not "owing to any fault on the part of the wife." In suits 127 and 179 of 1880, and suis 156 of 1881, the Recorder ruled that if either party wishes to separate and the other does not and is not in fault, the party so wishing to separate should forfeit all right to a share in the *joint* family property. It does not seem to be disputed that if both parties assent to divorce and neither is at fault, each takes out his or her separate acquisitions and they divide the joint property between them, as stated at section 53, page 128, of Book XII of the Dhammathat.

66. I am obliged, however, to make some remarks on section 3 of Book XII as translated by Richardson, page 341, as in the description of three kinds of property acquired separately by husband or wife, the second kind is what was acquired by skill or science, and so far as the husband is concerned the words *during their cohabitation* are rightly inserted in the translation at page 342. But I find no authority there or anywhere else in the Dhammathat for holding that the faultless wife is on divorce to be deprived of any share whatever in what may be the only property in the establishment (*see* the *obiter dictum* in the goldsmith's case cited in paragraph 45 of this note). Such a ruling would enable an Advocate, whose whole property was derived from pleading, to divorce his wife and retain all the property. The section under notice makes very plain differences between a virgin couple and married pair who have both been married before. The word *thinlhee* is not used, and the divisions do not coincide with *thinthee* and *hnapazone*. If the virgin couple agree to separate, each takes two-thirds of his separate acquisition and the other takes the remainder. So that if the separate property of the husband was Rs. 18,000 and that of the wife Rs. 9,000 and they separated by consent, the husband would get Rs. 15,000 and the wife Rs. 12,000. Here is an endeavour to equalize their fate, and the wife is benefited. If, however, one party objects to the divorce and is without fault, the party wishing for divorce takes out his or her clothes and ornaments and only one of the three sorts of separate acquisitions mentioned in the section, *viz.*, what was given by the King, whatever that may mean; what was acquired by skill and science during the coverture he has to leave behind; this and all else is forfeited to the party not wishing for divorce.

Where the parties have both tasted matrimony before the rule is different. If the divorce is by mutual consent, each takes the property he or she brought in, and the rest, with the debts, is to be halved. An exceptional rule is, however, given as to the ancestral inheritance devolving during coverture (*see* paragraph 39 above), which is divided in proportions of two-thirds and one-third. Where the couple who have been married before separate at the instance of one party, the other objecting, the party wishing for divorce takes out only what he originally brought in; all the rest remains with the other party, and no exception is made of what was gained during coverture either by science or by gift from the King. The word used is *payin*, which Major Sparks translates as *originally belonging*. The distinction between gains resulting from labour and capital which Richardson inserts in the sentence quoted in paragraph 52 is not apparent in the Burmese and seems misleading. I have had a translation made of section 170 of the Menu Woonana Dhammathat, which says that in a divorce by mutual consent the division shall be into two-thirds and one-third between the husband and wife according to their relation as *nisaya* and *nissita*, which is something like that of capitalist and dependent. But where they contracted matrimony on terms of more equality they each take out their original property and divide the remainder. I think therefore that we ought not hastily to supersede the ordinary juridical view of matrimony as a joint status in favour of the theory that, even as status by mere operation of law and without special contract it is subject to the rules about separate capital and joint labour, which are reasonable enough in commercial partnerships and other connections founded on contract. At any rate we ought to be very certain of our authorities first or of the established custom, and the chief reason why I suggest doubts as to soundness of the exceptional rule is that no authorities are quoted and I can find none.

67. This brings me to the threshold of another matter likely before long to be of general importance. At present there are no sufficient materials for determining questions about the substitution of contractual relations for those of status. Would a woman be entitled to heavier damages in a suit for breach of promise or to a greater share in a suit for divorce if she proved that the husband had contracted not to enter into a polygamous marriage and had broken the contract? Can either party by express words or conduct contract themselves out of their status so as to be treated in matters of separate trade of investment or property as if the marriage-bond did not exist between them? How far may the one be treated as independent of the other in civil suits and proceedings? I imagine these matters must be left for decision as they arise.

RANGOON:
The 21st July 1882.

G.U.B.C.P.O.—No. 145, Min. of J.A., 29-7-53—500.—II.