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NOTES ON BUDDHIST LAW

BY THE JUDICIAL COMMISSIONER, BRITISH BURMA.

Jardine, Sir John.

II.—MARRIAGE.

How dissolved: The right to divorce and the rights flowing from Divorce.

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IN THE COURT OF THE JUDICIAL COMMISSIONER, BRITISH BURMA.

Circular Memorandum No. 31 of 1882.

[NOT TRANSLATED.]

Dated Rangoon, the 14th September 1882.

I HEREWITH circulate another note on marriage discussing the subject of divorce at Burmese Buddhist law and the rights to property which accrue after the status of matrimony has been terminated. I began it with a view to aid the Subordinate Courts in their application of the law. For the purposes of the Penal Code and section 536 of the Criminal Procedure Code it has become necessary that the Magistrates should have some precise knowledge of these things as well as the Civil Judges. But as I went on I found the utmost difficulty in coming to clear conclusions, because there are no decisions of Superior Courts which explain the Burmese law with anything approaching fullness. In administering a law which so deeply affects the whole basis of society and determines the position of women and children, no decision can be satisfactory unless it deals thoroughly with the subject. Wherever I have made enquiry, among Judges, Advocates, and Authors, I have been met with doubts; and I am convinced that a great part of the Menu Kyay Dhammathat is generally ignored, while the Woonana Dhammathat has hardly been looked at. Obliged to deal with unsettled law and varying practices which are alleged to be established custom, this third note of mine must be controversial and contain argument and speculation, especially as I would judge particular theories by larger canons of criticism. But I have tried to bring forward for the use of the lower Courts every rule of the Menu Kyay Dhammathat bearing on the subject and every recent decision of a Superior Court explaining these rules. On some points the Menu Kyay Dhammathat contains contradictions; I have tried to deal with these by referring to the Woonnana and simil[illegible] works. As most Europeans have very slight knowledge of Burmese customs, I have thought it well to quote from such writers of authority as the Lord Bishop of Rámatha and the late Captain Forbes.

2. The controversy about divorce among Burmans involves the affirmation or denial of the whole or each part of the following proposition :—

(1) among Burmese Buddhists, either the husband or the wife may, without the consent of the other, terminate the marriage at any time under any circumstances and without any cause ; and

(2) this right of *ex-parte* divorce at mere caprice may be exercised without any decree of a competent Court or arbitration by an impartial person or persons.

3. One learned advocate, Mr. Benemy, who has had a good deal of experience, has informed me that the whole proposition is, in his opinion, sound law because it has never been disputed. On enquiry I cannot find that the whole proposition has been affirmed by any Judge of a Superior Court or by any writer of authority, while it cannot be found in plain terms in the Dhammathat.

4. The first clause of the proposition has repeatedly received the sanction of the Recorder of Rangoon, as I infer from his decisions, as a matter of construction of written law only ; but, so far as I can ascertain, the Judicial Commissioners have never affirmed it either as written law or as established custom.

5. The second clause has been affirmed in principle by one Judicial Commissioner, Quinton, J., but only in general terms and hesitatingly and without giving reasons because the point was not argued. The question as to whether a divorce may be had at mere caprice was not raised nor determined. I believed the Recorder has never affirmed this second clause ; and the fact that he tries and decrees suits for divorce seems to show that he considers a decree necessary to validity, extra-validity being a contradiction in terms.

6. Both Captain Forbes, in his book on " British Burma," and Major Spearman, in the Gazetteer (page 384, Vol. I), avoid any definite statement on either clause, and I know or no author of repute who has yet given a plain utterance of carefully distinguished between mere desertions and separations and dissolutions of marriage.

7. I think it might be argued *a priori* from ordinary judicial principles that the two clauses must stand or fall together. If the first is sound law, there can be no defence to a suit ; the Court cannot possibly raise any issue ; and there being no question to decide the need of judicial decision cannot

arise. It is absurd to say that a Burman may act on unlimited caprice, and in the same breath say that the Judge shall control what is, by definition, uncontrollable.

8. If, however, the first clause is not law at all, and if the right of *ex-parte* divorce only arises *under certain circumstances* as Major Sparks puts it, or for certain causes expressly specified as valid in the Dhammathat or otherwise valid in law or equity, then it is reasonable that the question should come before a Court, as the party wishing to divorce the other without the other's consent cannot possibly be a judge of his own cause.

9. The only Courts now in existence are those created by the Burma Courts Act. Some people contend that the lugyis or elders have a jurisdiction to divorce or to refuse a divorce. I cannot find any better reason for calling their interference a jurisdiction than in the numerous other matters in which they interfere, such as the inheritance of land, the partition of property, and the settlement of accounts. I do not deny the right of parties to resort (subject to section 28 of the Indian Contract Act) to any individuals as arbitrators; but as the matrimonial jurisdiction is conferred on the Courts by statute, and, rightly or wrongly, has been held to include the jurisdiction of a Court of Divorce, any doctrine that it still vested in the lugyis, who are an indeterminate body without procedure, might be applied with absurd results to the other jurisdictions mentioned in section 4. If the parties agree to a divorce before or after recourse to arbitrators, it is, if a divorce at all, a divorce by mutual consent. There is no objection to the villagers being called to attest any transaction, whether it be a marriage, divorce, sale of land, or anything else, and section 523 of the Civil Procedure Code is intended to facilitate settlements of disputes by arbitrators appointed by the parties. Whatever judicial powers the thugyis and village elders may have had under the Burman Government seem to me to have been transferred to the Courts created by the different Acts of the Indian Government, and the lugyis, like the village punchayet of India, have ceased to be judges. Moung Kyaw Doon, who was an Extra Assistant Commissioner in the Henzada and Prome districts, informs me that the Deputy Commissioners—Colonel Plant and Colonel David Brown—issued notices years ago informing lugyis that their matrimonial jurisdiction had ceased to exist.

10. I have wondered why so many Europeans insinuate without definitely saying that a Burmese husband or wife may

break the marriage contract at any time without consent of the other party. One reason I suspect is that the cases coming under the notice of Europeans are nearly always those of quarrelsome or profligate people difficult of control. Some of the English having no other experience have based their idea of the practice on the statements and conduct of people who were interested parties. Moung Kyaw Doon informs me that any such freedom of divorce is contrary to the Burmese ideas, and that he never heard of an *ex-parte* divorce being allowed merely because the one partner had ceased to love the other. Such an idea might find favour among men addicted to concubinage, but its discordance with Buddhist law is perceptible at once in its ignoring pregnancy and the rights of born or unborn children of women united in the first and most honourable form of marriage. Another reason is, I incline to think, a misconception of the nature of the lugyis' interference. The English have not noticed that their awards depended on the mutual submission or later consent of both parties, and the same mistake has been made as in the cases of so-called Buddhist wills, which are not wills at all but derive their only efficacy from the will or consent of the heirs, not of the supposed testator. Yet we are all aware that for some years the English Courts confused the law and created a new practice among Buddhists by treating these contracts as wills until the Special Court stated their true nature. A third reason is that the Courts have looked for the law about divorce in the wrong place and raised inferences contrary to positive rules found elsewhere.

11. Since Major Sparks' Code was made the Courts have taken up the subject. Neither the Recorder nor the Judicial Commissioner has, so far as I know, ever affirmed the existence of any such custom, the Recorder's decisions being only interpretations of the ancient written law. But these decisions have gone beyond that Code; they have ignored the rights of children, and, so far as I see, they have leaned decidedly, with whatever reluctance, to the side of laxity. It is doubtless the case that as these decisions have become known manners have been influenced, and it is probable enough that some *ex-parte* divorces have occurred in Rangoon and practices grown up in conformity with the decisions.

12. Up till the present time the doctrine applied in the Recorder's Court has not been affirmed by the Court of the Judicial Commissioner; but as Major Sparks' Code is out of print and some of the Burman Judges even have but slight

knowledge of the Dhammathats, and still less of the Pâli originals, I have thought the present the best time for bringing the whole of the authorities and decisions together before the minds of the lower original and appellate Courts. No Native Judge who reads these notes will ever again have an excuse for evading trouble by merely recording as his reason for decision that such and such an act is in accordance or otherwise with Burmese law or custom. If he does, his shallowness will give the opposite side the means of attacking the decision in appeal; and then these notes will unfold to the Deputy Commissioners the nature of the issues requiring settlement.

13. The decisions in the Recorder's Court are based on the law of the Dhammathat, not on the existing custom of Burmans. The part of the Dhammathat relied on is one isolated passage difficult to interpret; it relates to divorce without mutual cousent when there is no fault on either side but their destinies are not cast together. It occurs among rules for partition of property, which rules have been treated as if they were the substantive law of divorce. In my note I discuss at length the real meaning of these mysterious words. It has been assumed, in my humble opinion without sufficient argument, that they relate to people one of whom has ceased to love the other, and for this mere fickleness marriages have actually been dissolved by decree in the face of the protest of the other party.

14. Before affirming any such far-reaching doctrine, I would ask the subordinate Courts to consider the question from every point of view. Some day the matter may be decided by the Judicial Commissioner or the Special Court; until then it must be decided by reference to the Dhammathats, the established customs, and the religious morality of the Buddhists. I therefore point out, in opposition to the single doubtful passage on which the doctrine is is sustained, that there are manifold, distinct, and repeated provisions in the Dhammathats which express and imply the very opposite doctrine; these codes say that for some weighty reasons there may be a divorce without mutual consent; and for other causes, such as abusive language or a first beating, there may be no such thing. I have also quoted Bishop Bigandet as showing the virtuous tendency of Buddhism, and it needs no remark from me to point out the manifest moral sentiment of the Dhammathat, the regard for chastity and good morals, and the use of religious sanctions. Marriage is not looked on as a

mere commercial partnership or a mere animal connection by these lawgivers. The words of the Judge Ordinary in "Hyde *v.* Hyde" (1, P. and D., 130) seem to me to express their view of marriage. "Marriage has been well said to be some-"thing more than a contract, either religious or civil,—to be an "institution. It creates mutual rights and obligations as all "contracts do, but beyond that it confers a status." I quote these words because of the tendency of some published decisions to deal with marriage as if it were a mere mercenary connection. I add also that the Dhammathats distinctly treat mutual comfort and help as being conditions of the matrimonial bond. The case of Mathura Naikin (4, Bombay, 546, I. L. R.) contains authorities for the Courts recognizing a new and good usage rather than an old and bad one and for their leaning towards the opinions of the more enlightened part of the community. The alleged custom must be proved by instances in which it has been observed and followed ("Rahimatbai *v.* Hirbai," (3, Bombay, 34, I. L. R.); and the Courts ought not in the present state of the law to assume the existence of a custom without proof. The more general and ancient a custom is, the more easy it is to prove undisputed instances of its exercise. The fact that a rebellious wife left her husband and said she had ceased to be his wife, while the husband asserted the contrary, of course proves nothing: nór would mere acquiescence prove much.

15. The greatest mistake of all in our past interpretation of the Buddhist law of divorce has, I think, consisted in our looking for it in those sections which treat elaborately about partition of property after divorce. Before dealing with the right to break a contract, a jurist would get a clear conception of what the contract was: and we ought therefore to form as definite notion of what the Buddhist marriage was and is. As in the law of England, we have to mount up to Leviticus to learn what is meant in the statute of Henry the Eighth about prohibited degrees forbidden by *God's law*, so we must search the Dhammathats in our inquiry about the Buddhist law of marriage. We may remember that these books are Brahmanical and have been greatly modified by the Buddhist religion, and to confine our researches to them would be as futile as if an English lawyer were to study only Leviticus and the Jewish Scriptures and traditions, at the same time ignoring the great interpretation placed by Jesus Christ on the Mosaic law of divorce, and the paramount consequences of that construction to all Christian law and society ever since. Starting from the

ethical doctrine there proclaimed, a Canonist acquaints himself with the later rulings and opinions of the Doctors of the Church till he comes to the period when the law is left in the hands of Judges. Something of this research must now be devoted to the Buddhist law. In the Dhammathats we shall find many texts. We ought then to discover which are Brahmanical and Indian and which date their origin from Buddhism, Talaing, or Burmese. We ought not to pass by the maxims of Gotama Buddha himself, nor those of his disciples or the monarchs who professed to rule by his law. Up till now the Buddhist law has not received such treatment: and not one of the Burman Judges or elders whom I have consulted has even referred to this test. It never occurs to them to remark that the great benefit of Gotama's teaching lay in the victory over the passions, a teaching exemplified by himself in the famous scene preceding his departure from his royal father's house, and again in the temptation by the daughters of Manh. Some are probably ignorant that Gotama preached the duty of cherishing wife and children as in the sermon at page 123 of Volume I of the *Legend of Gaudama*; and on another occasion explained to the mother and wife of Ratha the duties of their sex and position (page 125). The third of the great precepts (page 196 of Volume II) threw a protection over married life against adultery. Although, like St. Paul and the founders of the great religious orders Gotama felt that celibacy was alone consistent with his spiritual vocation and made that state the rule for the religious, there is nothing to show that he ever treated marriages among the laity with disrespect (*see* Bishop Bigandet's note at page 50 of Volume II of the Legend). I myself do not understand why the Burmans should ignore facts like these. Like the Europeans, they have rested their case on the rules about property as if the sentiments on which the law of marriage is based were to be bound there, as if there were no divine laws within the meaning of the religious lawgivers. My impression is that the decisions of the English Courts give some excuse for this meagre treatment of the question; and that manners have begun to change since the conquest of Pegu and the many changes in thought and institutions it has produced. In such changing times the legislative function of the Judges must assume great dimensions; the Courts alone can certify what practices shall be treated as valid customs, and they have a wide discretion in forming a case-made law. This function has already profoundly affected the notions of the marriage

contract entertained by Burmese officials: and from the necessities of the case, in the absence of a code, the moulding of the law about divorce must be left with almost unlimited discretion to the Superior Courts. Hence the need of great circumspection in judgment. The decisions on so delicate a subject as divorce vary as the public sentiment and the popular usages vary; and as contests arise out of new circumstances new rules, or exceptions to old rules, are propounded by Judges. Such rules of the Dhammathat as that a husband may get a divorce for his wife's adultery and keep the property, or that the wife may get the divorce if her husband after public promise of amendment continues to beat her, are easily laid down. Cases of mutual consent present no great difficulty. But as soon as we try to lay down a rule about the amount of cruelty or misconduct which shall be ground for either divorce or judicial separation we find it impossible (*see* Maine's Ancient Law, page 380). The degrees and shades of difference are so various as to defy adequate expression in a code. Thus in the end it must be left to the Judges to say in each particular case whether there is legal cruelty. Such decisions tax the experience of the most learned Judges as in "Milford *v.* Milford" (1, P. & M.L.R., 295). There the Judge Ordinary observed:—"The essential features of cruelty are "familiar. There must be actual violence of such a character "as to endanger personal health or safety; or there must be the "reasonable apprehension of it. The Court, as Lord Stowel "once said, has never been driven off this ground." In "Kelly *v.* Kelly" (2, P. & M. L. R., 31) it was held that "if "force, whether physical or moral, is systematically exerted to "compel the submission of a wife, in such a manner, to such a "degree, and during such a length of time, as to injure her "health and render a serious malady imminent, it is legal "cruelty and she will be entitled to a judicial separation." Here moral force is included and the doctrine extended. The Court will interfere when "a man put his wife's permanent "health in jeopardy and sets at nought not only his own obli-"gations in matrimony but the very ends of matrimony itself, "by rendering impossible the offices of domestic intercourse and "the reciprocal duties of married life." The delicacy of such cases is apparent; we can only form an opinion about legal cruelty by studying the decisions so carefully and cautiously passed. It is the same in the Burmese jurisprudence. The causes for divorce are most strictly defined, and other kinds of misconduct are treated as grounds for judicial separ-

ation. Then different writers deal with exceptional cases which had probably come under their individual notice. One, for instance, would make the openly obscene conjugal behaviour a ground for divorce. Another deals with the case of a proud and insolent wife, who after repeated correction continues her bad behaviour. It seemed to him sufficient ground for a divorce. But as these two cases do not come within the written category of causes for divorce the fiction of law is introduced, so that the divorce, even when there is no mutual consent, is "to be considered as divorce by mutual consent." The principles applied are substantially those applied in the Divorce Court in England and in Courts of Equity. A man against whom grave or repeated misconduct is proved will be judged, not by his professions, but by his conduct. If, in order to save the property, he refuses to join in a divorce by mutual consent, the Judge would say: "Your conduct is inconsist-
" ent with the continuance of the matrimonial bond. It tends
" to injure your wife's health, and it shows you wished to get
" rid of her. We will not let you dissolve the marriage by
" causing her death: but we will dissolve it for you as your be-
" haviour showed your desire to extinguish the contract. The
" divorce we now pronounce will be considered as a divorce
" by mutual consent." This is the way the husband who after admonition continues to beat and abuse his wife is dealt with in the 12th Book of the Menu Kyay. In the account of the same case given by Kvaw Deng, the jurist of last century, in the *Wini Tshaya Paka Thani* in the same rule of division is applied if the consent is mutual. I argue that this affords some indication that the faulty husband, knowing the doctrine of equity which would be applied against him, often gave a reluctant consent to the divorce and so saved the Court the trouble of passing decree.

16. In the passage relied on in the Recorder's Court either party are at fault and the destinies of the two are not cast together. If this means that their tempers are incompatible, it is a condition precedent to relief and requiring proof. The plaintiff would be subjected to such maxims as that a party should not profit by his own wrong. If a man did not use the ordinary means of making marriage happy, he would have no right to complain against destiny. If after thrashing his wife with a poker he complained of incompatibility of temper, I imagine that any Judge of a Divorce Court would refuse him relief. I do not think that the strictest follower of St. Augustine or Calvin or Hobbes would treat as the

result of predestination or neccessity what to our ordinary notions is the act of a man's own will. It seems inconsistent with all existing notions to hold that a woman who knowingly marries a man with an ugly face may apply to a Court for divorce on no other ground but his ugliness. The rule in section 115 of the Evidence Act about estoppel might apply as in the divorce case before the Special Court (page 75 of Christopher's Rulings). If we treat destiny as a juridical conception at all, we should most carefully consider every case in which it is set up as a plea. But in so important a jurisdiction as divorce a Judge should proceed as cautiously as in England. If a mutual consent, express or implied, is essential, as we have seen, to the divorce of the husband who continues to beat his wife, it may be assumed that a woman who has sustained no wrong whatever could not, in the opinion of the religious lawgiver, divorce her innocent husband at her mere caprice. Nor could a husband divorce his innocent wife, pregnant with child, unless he satisfied the Judge that he would discharge all his paternal duties.

17. The destiny which has been treated as incompatibility means the ill-luck attending a balance on the wrong side of good and bad deeds in all previous existences. The word is modified from the Sanskrit word karma and is fully discussed by Bishop Bigandet at page 137 of his 1st volume. Now, supposing this so be a condition precedent to obtaining relief, it would be impossible to prove it or anything about previous existences, and so that suit would fail. A Judge is not an astrologer. It is reasonable to presume that a religious lawgiver would not allow a party to take advantage of a theory which establishes caprice and evades the moral law, which the Buddhist religion and the Dhammathat everywhere treat as supreme. But as mutual consent is allowed, there would be no objection to let the parties divorce if there was a deliberate and mutual consent ; and Mr. Sen has acutely suggested that the words bear this meaning and that the two parties have agreed about their unfortunate destiny perhaps after consulting an astrologer. "Hardly anything can be undertaken without the advice of an astrologer" says Major Spearman (Gazetteer, Volume I, page 395), and if they agreed to divorce no wrong would be done. A woman may so annoy her husband because of his ugly face as to make his life unbearable. He may reason that no decree can secure her affections and may be led to give a reluctant consent to divorce on reasonable terms. The terms are found readymade for

him by the religious lawmaker. Most people are willing to accept well-known reasonable arrangements even when they cannot be enforced by law. The maxim about doing as you would be done by is doubtless acted upon without any reference to legal constraint; and in all sorts of things the parties accept what the society considers "the right thing to be done." I think the general law and the particular case may be reconciled if we suppose the case to be one of mutual consent, although reluctant consent on the part of the previously unwilling partner. But there is nothing which can be legally enforced where there is no fault, unless and until this reluctant consent has been given. The unwilling person holds out till he gets a money consideration for terminating the mutual contract. The rule is so far commendable as it prevents separations or contracts in derogation of marriage, just as the lugyis do a good deed when they patch up a matrimonial quarrel. Any other rule would enable a wife whose property was invested in joint trade to ruin the business suddenly, and if the passage refers as may also fairly be argued, to award of damages after the wrongful divorce, the decision would not be unreasonable. I notice that none of the decisions referred to the 54th and 55th sections of the 10th volume of the Menu Kyay, which discuss the case of the pregnant woman and appear to require that the unborn child shall be compensated and forbid the father to desinherit the child. The more I consider the manner in which pregnancy and paternity are left out of sight by those who uphold the construction of the Dhammathat, allowing divorce at mere caprice, the more inclined I am to suspect that this doctrine received easier assent among the English, because it seemed to give a kind of sanction to the concubinage which many indulged in after the last conquest. I cannot understand a jurist dealing with the one matter and leaving the other on one side.

18. I may add that so far as I can understand the Dhammathats, they resemble the principle of *Kelly* v. *Kelly* in contested cases, although the applications of the principle may vary and the principle be carried further. We must never forget the character of the ancient tribunals and the peculiar remedies afforded by ancient law, to which I will refer later on.

19. In Mathura Naikin's case it is said to be the duty of the Courts to ascertain the custom: and in the absence of any judicial enquiry on evidence of its existence, or any judgment of a superior Court affirming it, or any affirmation of it

in any author of repute, no Court can possibly hold as proved the custom of *ex-parte* divorce without any cause whatever. Such a custom must be proved like any other fact; and inasmuch as it is inconsistent with the religion and law, strikes at contract and is derogatory of the matrimonial bond, the proof must be strict. It would then remain for the Courts to say whether, if proved, it can be held valid.

20. I would therefore ask the Deputy Commissioners to impress on the Native Judges the necessity of taking evidence before assuming the existence of the custom and of thoroughly considering the Dhammathats when considering if it is sustained by the written religious law. In this notice I do not put forth my views as judicial; they are only arguments; but any Judge dealing with the contract of marriage should carefully consider the authorities and the results of a finding one way or the other.

21. In examining the authorities and testing principles by results, I have been greatly aided by Mr. Sen and Moung Kyaw Doon; and they have assisted me in revising Mr. Macdonald's translations. I am also under considerable obligations to Dr. Forchhammer, Professor of Pâli, for his examination of Pâli editions and manuscripts and his notes on that literature.

22. I avoid extracting many special rules from the authorities as that might interfere with my freedom on the Bench; but as the main question affects all the arrangements of society, I have thought it desirable to deal with it at great length. I hope in this way that it will be better decided when it comes before a Superior Court, as my note states the arguments, authorities, and decisions.

23. I have added some information to explain the technical terms by which different kinds of property are known among the Burmans, and some rules of division which are said to be customary and common but which have hardly ever been mentioned in English before. I allude to the different treatment of couples who have never been married before and couples who unite after both have been already married. The rules about the relation of capitalist and dependent (naithaya and naitheeta) extracted from the Woonnana are also new. But I am unable to say whether they are in force in the present times.

24. There has long been an absolute need of a handbook for the Courts on the subject of divorce, and the Magistrates

must have had great difficulty in deciding questions of status up to the present time. It is vain to wait till the Superior Courts give a series of full and lengthy judgments; they have never done so in all the past, and nobody has yet made corrected translations of Richardson's Dhammathat or translated those parts of the other Dhammathats which relate to the part of the written law construed by the Recorder with such important results. In my note I have supplied these translations.

25. If the written law, written ages ago, gives such freedom of divorce as to undermine marriage altogether, one might fairly expect to find plain effects in the shape of existing custom conforming to the written law. I have already stated that different Native Judges have informed me that no such custom exists to their knowledge. Bishop Bigandet, after an experience of 40 years, does not know of such a custom, although he informs me that the practices of the people are tending towards laxity, which tendency, I think, is not unlikely to be the result of the decisions of our Courts. The Rev. Dr. Bennett, of the American Baptist Mission, after equally long experience, allows me to say that he too is ignorant of the existence of the supposed custom, although he believes that for many years ignorant lugyis have applied their hazy notions of the Dhammathats in a variety of ways to matrimonial disputes. Two Commissioners and Judges of long years of experience—Colonel Street and Colonel Plant—have in consultation stated that they are not aware of the existence of any such custom. Major Poole, a Deputy Commissioner, has not had a case of abandonment of a wife without fault which the wife has not objected to. Everybody knows that a good many husbands and wives desert each other in Burma as in England; but because they often take no legal action against each other it would be foolish to infer that the abandonment is lawful. In every country people submit to wrongs because they think the law gives no adequate remedy. What can't be cured must be endured. But because many wives suffer their husband's ill-usage in silence, we would never infer that a husband has by custom a right to be cruel to his wife. In Burma, where there is no property at stake, a forsaken husband or wife has hardly any inducement to come to Court; and in the town of Rangoon, where the Recorder's decisions make the law, they can have none at all, especially if the Court refuses to entertain suits for conjugal rights, which is the remedy in England. It would probably be found in a good many cases

of abandonment that the party abandoned gave a consent with more or less reluctance. The divorces that do not go before either the lugyis or the Courts are few. But until the facts of particular cases are proved in Court under Chief Justice Westropp's rule about proof of custom, it would be extremely rash to affirm the existence of so extraordinary a custom. I cannot find that any such enquiry has ever been made. Even then the validity of such a practice or custom would require consideration, as the High Courts have held similar customs void, because of their immoral tendency or their opposition to the general religious law. In the same way one of the Dhammathats treats as penal the case of an older person who entraps a young one into marriage and then threatens to divorce.

26. I am very doubtful of the reasoning which assumes that the ancient lawmaker sanctioned an iniquity whenever he imposed a penalty for it. We could hardly apply such a rule to other ancient codes, *e*.g., the case of violation in Deuteronomy, xxii. 28, or the fines for murder in the Anglo-Saxon laws. The subject is explained by Sir Sumner Maine in the tenth chapter of his Ancient Law. "Now the penal law of "ancient communities is not the law of crimes; it is the law "of wrongs, or to use the English technical word, of torts; "the person proceeds against the wrongdoer by an ordinary "civil action, and recovers compensation in the shape of money "damages if he succeeds. In the original administration of "justice, the proceedings were a close imitation of the series "of acts which were likely to be gone through in private life "by persons who were disputing, but who afterwards suffered "their quarrel to be appeased. The Magistrate carefully "simulated the demeanour of a private arbitrator casually called "in." In my note it will be seen that in the Dhammathat the Magistrate is hardly mentioned, and that many disputes are settled as if my *mutual* consent; while the indigenous system of submitting to arbitrators paid for their trouble is in force even now. Again, "in settling the damages to be awarded, "they took as their guide the measure of vengeance likely to "be exacted by an aggrieved person under the circumstances "of the case. This is the true explanation of the very different "penalties imposed by ancient law in offenders caught in the "act or soon after it, and on offenders detected after considerable delays." In our present jurisprudence we compensate the injured person under section 308 of the Procedure Code and punish the offender under the Penal Code, but in

"The commencement of a suit in Court is by the presentation of a written plaint, on which the Judge commonly orders an assistant called nakhan '(listener)' to enquire into the case and report. The nakhan examines the parties and perhaps their witnesses and presents his report. With this the parties submit their pleading, full statements of cause of action, and reply or defence. A day is then appointed for hearing, advocates are chosen, and the the case is heard. After the necessary examination of the parties and their witness, issues are fixed by the Judge, who at the same time declares on who the burden of proof lies. Thus the order runs "let the plaintiff prove so-and-so," and "let the defendant, if he can, prove so-and-so." Witnesses are examined after this, and judgment is given. If the parties agree to abide by the judgment, they both eat tea, and the judgment thus becomes final. If they do not so agree, they may appeal to a higher grade of Court. Sometimes, if the worsted party is considered unreasonable and contumacious, he is imprisoned for a time to compel him to 'eat tea' and accept the Court's decision."

28. Whatever may be the fruit of this discussion, I think I have given sufficient reasons for holding that the Courts ought to be altogether sure of their ground when they pass decisions prejudicial to the contract of marriage and to the interests of born or unborn children, especially when the effect of such decisions is to establish caprice and allow people to escape from the yoke of the moral law. I hope the note I now distribute will assist the Courts under the superintendence of the Judicial Commissioner to deal adequately with this great and important subject. As the Recorder's judgments state a contrary theory of the law, and have been assented to by the Burmans in the capital city, every right-judging mind will agree that my mere argument is open to grave doubts and cannot possibly conclude the question. These judgments have doubtless had a profound influence on Buddhist morality and practice and complicated the inquiry about custom. I should have been wanting in respect to those decisions if I had not attempted to set forth those parts of lately printed Dhammathats on which I rely as fully as possible, and to support the theory I put forward with arguments of a more general kind, and it would be wrong to suppose that equitable defences would not have received attention if the parties had chosen to make them in the cases cited. So that the practical differences of opinion may be less than at first appears.

JOHN JARDINE,

Judicial Commissioner.

II.—MARRIAGE—HOW DISSOLVED: THE RIGHT TO DIVORCE AND THE RIGHTS FLOWING FROM DIVORCE.

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

In his Code of Burmese law and *Lex loci*, Major Sparks in 1860 states that the Courts of Pegu have always professed to administer the Burmese law of marriage and divorce to Burmans, but that the only Code they had for their guidance was the Dhammathat, or Burmese version of the laws of Manu. Even in his day this book was considered an imperfect guide. He writes as follows:—"This book "is in a great measure obsolete, and is no more applicable to the "decision of suits of the present day in the Courts of Pegu than are "the laws of Alfred in the modern Courts of England. It contains, "moreover, a vast number of contradictory enactments on matters of "grave importance, mingled in almost inextricable confusion with the "most puerile absurdities. Still some points of this Code have retained "their vitality and are as familiar in the mouths of the people as "household words. There has always, consequently, existed a great "uncertainty as to how far these laws are affected by or have merged "into local custom, and in what places they have altogether, yielded "to that unwritten code which is engraved in the minds of the people." Colonel Horace Browne, in his preface to the Manu Woonnana Dhammathat, notices that these Dhammathats are in their origin Indian and Brahmanical and not Burman and Buddhist. He says:—"Of "the Dhammathats there are various versions with various titles. They "profess generally to be based on the Pâli text, but contain also pas-"sages which have evidently been interpolated in later days to suit the "changing forms of society. One of their most prominent charac-"teristics is a total want of systematic arrangement, various and often "inconsistent provisions on cognate subjects are scattered here and "there throughout their pages, and topics the most incongruous are "jumbled up together forming a strange *indigesta moles* of law and "custom, ancient and modern, Hindu and Buddhist, Indian and Bur-"man. Up to 1847 such books existed only on palm-leaf manuscripts. "In that year Dr. Richardson published at Moulmein an edition in "Burmese with translation into English of the Manu Kyay Dhamma-"that, and from that time until now this edition has been the sole book "of reference consulted by Judges, both European and Native, in mat-"ters relating to Burman law." These words were written in 1878 Colonel Browne remarks, on the revival of religion and literature in the reign of King Anawratha at Pugan in the eleventh century, when communication with India and Ceylon appears to have been frequent. "The fact that the Dhammathats are more Brahmanical than Bud-

" dhist favours the supposition that the originals were introduced at " this later period, when Brahmanism had regained its ascendancy " over Buddhism in India. Thus the division of the people into castes " is everywhere recognized by the Dhammathats, whilst the equality of " all men is one of the leading tenets of pure Buddhism." As to the last observation I may quote what the Right Rev. P. Bigandet, Bishop of Ramatha and Vicar Apostolic, says at page 249 of the 2nd volume of his *Legened of Buddha*:—" Buddha opened the door of " his society to all men without any distinction or exemption, im- " plicitly pulling down the barriers raised by the prejudices of caste. " Did he in the beginning of his public career lay down the plan of " destroying all vestiges of caste, and proclaiming the principal of " equality amongst men? It is, to say the least, very doubtful. The " equalizing principle itself was never mentioned in his discourses. " But he had sown all the elements constitutive of that principle in " his discourses."

2. These different predominating influences must be remembered when we are called on to say whether any particular precept of the Dhammathat has ever been or is the established law of Burma. The opposing sentiments are sometimes brought into close connection as in the 12th Book, where, after 24 possible matrimonial combinations of husbands and wives of different classes and castes have been enumerated, it is stated, in the 28th section (page 346), that this has been done for information only, not for guidance, as the law about divorce between the children of noblemen is the law for all other people. In the definition of the fourth kind of wife at page 355 non-conformity to the habits of the class is treated as a fault, just as we sometimes call an act ungentlemanly: in the later Codes the more ethical notion of *bad conduct* is found.

3. The learned prelate, from whom I have already quoted, also at page 48, notices the influence of religion on Burmese morals through the civil law, the religion being " a moral and practical system, making " man acquainted with the duties he has to perform in order to shun " vice and practice virtue." Again, " it will not be deemed rash to " assert that most of the moral truths prescribed by the Gospel are " to be met with in the Buddhist scriptures." All jurists recognize that the marriage laws of a nation depend on their social, moral, and religious ideas and are modified thereby. One of the five great precepts of Gotama is directed against adultery, and the effect of the Buddhist religion on the position of women is thus stated by Bishop Bigandet at page 33 of his second volume:—

" The comprehensiveness of Buddhism, its tendency to bring all men to the same level and allow of no difference between man and man but that which is established by superiority in virtue, its expansive properties, all those striking characteristics have mightily worked in elevating the character of the woman and raising it to a level with that of man. Who could think of looking on a woman as a somewhat inferior being when we see her ranking, according to the degrees of her spiritual attainments, amongst the perfect and foremost followers of Buddha? Hence in those countries where Buddhism has struck a deep root and exercised a great influence over the manners of nations, the condition of the woman has been much improved and placed on a footing far superior to what she occupies in those countries where that religious system is not the prevalent one, or where it has not formed or considerably influenced the customs and habits of the people."

4. Considerations of this kind must be borne in mind when an isolated text of a strongly Brahmanical character is quoted as part of the customary law in opposition to the spirit of such passages as sections 20 and 21 of Book 5, where the equality of husband and wife in matters of religious duty is declared. In this way perhaps we shall be able some day or other to discriminate mere Brahmanical precepts from those rules which have been adopted by the people as customs, though the time may be far distant when some competent scholar will explain the inconsistencies of the Dhammathat with something approaching to the learning and critical experience of my revered friend, the translator of the Burmese *Legend of Gaudama*.

5. In the meantime we are encumbered with all the difficulties encountered by Major Sparks and Colonel Browne and hardly any progress is being made. Since I have been in Burma I have vainly tried to get some explicit or authoritative opinion as to what the Burmese consider to be the existing law on some elementary questions relating to dissolution of marriage. Some of them are raised in the following propositions of Major Sparks' Code under the title "What constitutes a legal divorce?" Major Sparks was really legislating although he wished his legislation to be generally in accord with the popular customs: perhaps his propositions may be treated as embodying his opinion of the existing customs having the force of law. They are as follows:—

"Marriage by the Burmese law is purely a civil contract, terminable at any time by mutual consent, or under certain circumstances, against the will of one of the parties.

"A divorce may either be pronounced by a Court when one party does not consent, or it may be completed by a written agreement executed by both parties in the presence of respectable witnesses specially called together for the purpose."

For these propositions no authority in the Dhammathat is mentioned. The statement that the Burmese marriage is purely a civil contract has led to misconception. It seems to me to be something more, *i.e.*, an institution with a moral and religious sanction (*see* paragraph 14 of the introductory circular). The opinion held on this question must affect all other reasoning about the contract. Captain Forbes writes as follows of the women's position:—"In cases of illtreatment "or other just cause, she can divorce herself from her husband in pre- "sence of the elders, taking all her separate and a portion of the jointly "acquired property (page 55)." As regards status, too, we must remember the distinct position of the wife as compared with the concubine and her right to inherit matters discussed in my earlier notes.

6 In my earlier note I have given reasons for the opinion that not ceremony is necessary to constitute a marriage, but that the consent of both parties is essential. According to all notions of contract, such a bond can only be broken by consent of both parties; and I have never heard it doubted that the status of husband and wife among Burman Buddhists may be terminated by mutual consent. I will not stop to discuss questions about consent given by a minor, or through coercion, or any of the other causes mentioned in section 14 of the Indian Contract Act, IX of 1872. Captain Forbes, at page 64 of his book called *British Burma*, says that "divorce" may be obtained by going before the village elders and signing an "agreement to separate."

In section 3 of Book 12 of the Dhammathat, and elsewhere, divorce by mutual consent is most distinctly recognized ; and the division of property on such a divorce is treated as a standard for divisions in other circumstances. In section 170 of the Manu Wonnana Dhammathat the same recognition occurs. I hold, then, that it is clearly allowed by the Dhammathat, and, so far as I know, it is universally recognized by the people in the present day.

7. I am not aware of any passage in the Dhammathat requiring, or even implying, that the pair who mutually consent to terminate the marriage should execute a written agreement or get a decree of a Court. Maung Kyaw Doon, formerly an Extra Assistant Commissioner, informs me, however, that he never knew of a divorce by mutual consent which was not transacted before a thoogyee or kyaydangyee or the village elders. He considers this appearance essential to validity, and so did Major Sparks. In Maung Kyaw Doon's opinion the separation, which often occurs after a quarrel, does not terminate the status or make a divorce, and this opinion on the custom is supported by legal texts to be mentioned further on (*see* para. 42). In a case which was not argued (page 96 of Christopher's Order-book), the Judicial Commissioner answered a reference on this point by holding that neither a decree of Court nor a written agreement executed before witnesses was essential to a divorce between Burman Buddhists, and from the case at page 97 of Christopher it may perhaps be inferred that Sandford, J., was of the same opinion. So far as divorce by mutual consent is concerned that opinion seems supported by the silence of the Dhammathat and the argument that, if marriage may be contracted without ceremony or registration, no such formality would be requisite where both agree to dissolve the bond. I note further that no decree or document is suggested in the case of a three-years' abandonment (section 17 of Book 5) quoted in the 54th paragraph of my former note. There the doctrine of consent by abandonment and acquiescence seems to be implied. It may be reasonable enough that the parties should wish for written evidence of the divorce and of the mutual consent, and especially where they have agreed on a certain division of assests or liabilities. But I am not aware of any rule of law or any decision declaring the existence of an invariable custom which renders any appearance before witnesses or any written agreement essential to the termination of the status of husband and wife when both parties agree to terminate it. It doubt also whether a Civil Court would admit the plaint or put the other party to the expense of an appearance if on examining the plaintiff asking for a decree of divorce it appeared that the other party had consented and that there was no wrong nor cause of action. The Civil Courts or not mere offices for registering private contracts ; and it may well be urged that, if there is no dispute, there can be no occasion to come to Court ; and that the question whether registration or other formality is essential to the validity of a divorce must be settled, not by the law of Civil Procedure but by those relating to marriage, registration, or evidence, which latter are altogether silent as regards these divorces.

8. The case of a married couple who do not mutually consent to divorce is more likely to require the intervention of a Court ; and it

now becomes necessary to consider two very important questions,—first, whether either the husband or the wife can at any time and without any particular reason but for mere caprice terminate the marriage; and, secondly, whether either party can do this against the wish of the other without any decree of a Court or submission to any short of arbitration.

9. To the second point the Judicial Commissioner's answer already quoted applies. It relates to all manner of divorces, but was, as the reports shows, given with hesitation because the point was not argued though very plainly raised by Major Spearman, the referring Judge. I know of no other ruling of a superior Court on this most important subject. It is the practice of the Recorder's Court to decree divorce; and I think it may fairly be argued that such a practice is favourable to the theory that one of the married pair cannot divorce the unwilling party without obtaining a decree of dissolution of marriage. For if the party wishing divorce has power to divorce the other, there is no reason for applying for a decree dissolving the marriage: although, if the party so divorced denies that he has been divorced, the Court may, under certain circumstances, be asked for a declaration that a divorce has already taken place. There seems no reason why a party should come to a Court for a specific relief which he can obtain by his own act. If, however, the Courts shall ultimately hold that the party can himself make the divorce, but that nevertheless he may after so doing apply for a decree for dissolution of marriage, we shall find ourselves in the midst of perplexities as it will be necessary for the decree to specify the date when the status of husband and wife had been put an end to. Thus during the interval between the divorce and the decree the parties must be held on this assumption to have ceased to be joined in marriage, and the former husband would be precluded from prosecuting a third person for adultery with the former wife. As regards this second question, I may mention that most of the Native Judges whom I have consulted as to what they consider to be the customary law in force today have doubted the right of one party to divorce the other in an informal manner. Some say that the parties must go before loogyees, by which they mean elderly or respectable persons, but they are not clear as to whether a mere appearance is sufficient, or whether the loogyees have jurisdiction both to dissolve the marriage or to refuse to do so, or whether the loogyees are mere advisers without any jurisdiction to overrule the will of either party. Others, foreseeing the difficulty of holding that the loogyees have the powers of a Divorce Court or a one-sided power, and the absence of any definition of the qualification of loogyees or the number required for a quorum, have let me understand that the marriage cannot be dissolved by one party against the wish of the other, but that such an extraordinary power is vested in the Civil Court alone. If, however, the parties agree to the advice of the loogyees and divorce they may do so. This arrangement is, however, a divorce by mutual consent, and the loogyees have been mere advisers. In the case at page 10 of Sandford's Rulings, the loogyees are described as effecting a divorce, but the words are loosely used and the present point was not before the Court. When the omission to mention the loogyees in the Dhammathat and the absence of any judi-

cial ruling affirming their jurisdiction are considered, with the fact that the remedy by suit in the Civil Courts is extensively used and that the Civil Courts have an express jurisdiction over questions regarding these marriages under the Burma Courts Act, it will, in my opinion, require no great argument to hold that the only validity or effect of the loogyees' recommendations is conferred by the parties both consenting to adopt them. The practice of using loogyees as attesting witnesses of arrangements about divorce probably owes its present vitality to the enactment of Major Sparks quoted above. As we shall presently see, Moung Kyaw Doon, in his "Essay on the sources of Buddhist Law," doubts the validity of the loogyees' proceedings.

10. The other question, namely, whether either the husband or the wife can at any time and without any particular reason, but for mere caprice, terminate the marriage, without the consent of the other party, has, so far as I am aware, never been distinctly answered by any one but the learned Recorder of Rangoon. In the printed judgment in civil suit 10 of 1881, the Recorder states his opinion of the existing law and custom as follows: "Though either party may divorce the "other from mere caprice, even though there is no fault on such other's "part, divorces are seldom made except at the instance of the loogyees "before whom *the parties consent* to go, who then pronounce the divorce "or the parties sue in the Civil Court for a divorce, and until it is for-"mally pronounced the marriage subsists." I may here premise that I am in perplexity as to the jurisdiction of the Court if either party may divorce the other at mere caprice. If he can do this for himself, he would, in the absence of distinct enactment, have no right to claim the jurisdicion and especially where the Equity Judge is asked by one party alone to dissolve a contract which two parties have made and acted on. Major Sparks, in the passage quoted, would allow divorce against the will of one of the parties only *under certain circumstances* as if there were limits to this power. But he does not specify the conditions or circumstances, and the only instance in which he denies the power is that of a husband or wife who knowingly marries a person already afflicted with leprosy, insanity, or other incurable disease or infirmity. (Compare with the judgment at page 97 of Christopher.) He places the restrictions of the Dhammathat about marrying some one else on the woman whose husband is absent, and also in cases of illtreatment, which must be repeated and continuous to justified divorce. In the following passage he seems to allow, subject to all the above limitations, that either party may break the matrimonial bond against the wish of the other, the difference of wills not interfering with the right to dissolve the status, but being only relevant to questions about property :—"When the husband wishes to separate and the wife "does not, or *vice versâ*, supposing that no sufficient cause for separ-"ation can be established, the one who wishes for the divorce is entitled "to take an his or her separate property only: all the rest of the pro-"perty ond all the children shall remain with the party unwilling to be "divorced, save and except that if the wife is the party wishing for "the divorce, she has a right to take with her her loom with all the "implements belonging to it and the unfinished web in it." This is something like the law applied for several years in the Court of the

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rely on the rule of estoppel in section 115 of the Evidence Act, and be driven to find out some means of securing their position by contract before marriage. Such provision is allowed by the Mahomedan law, and a woman can enforce a contract under which her husband gave her a power to divorce him under certain contingencies (*Hamidoola* v. *Faizunnissa*, 8, I. L. R., Calcutta, 327). In such a case the Judges remarked—"We are aware of no reason why an agreement entered "into before marriage between parties able to contract, under which "the wife consented to marry on condition that under certain specified "contingencies, all of a reasonable nature, her future husband should "permit her to divorce herself under the form prescribed by Mahome-"dan law, should not be carried out. We may observe too that the "conditions under which it is stipulated that this power should be "exercised by the wife are certainly not opposed to the Mahomedan "law on the subject." The Courts have not yet decided what liberty is allowed for similar purposes by Buddhist law, and the judgment of the Bengal High Court in "*Sitaram* v. *Mussummat Aheeree*" (11, B.L.R., 129) must be looked at. Written contracts or recognizances conferring a right to divorce may be executed by the gambling or violent husband under the Dhammathat as we shall presently see, but these are post-nuptial. But the matter is one likely to tax the igenuity of lawyers when there is no other way of avoiding the consequences of the law as declared by decisions. The Buddhist law is in so obscure and unsettled a state that the judges are really legislators, and their interpretations make the law. For the town of Rangoon the law on the point now under discussion has been declared by the Recorder, whose trumpet gives no uncertain sound; his decisions are the only distinct and deliberate answers I have yet received to the question under discussion. For the territory outside the town of Rangoon the point can hardly be considered settled, as it has not been formally determined by the Judicial Commissioner's Court. Of all Courts in this province, that of the Recorder has the greatest experience of divorce cases, being the only Court of Divorce for Christian people and being an original Court for the town of Rangoon. The importance of the decision cannot be exaggerated, for if a decree is essential, then the validity of separations without a decree among people in Rangoon may be questioned when the supposed divorce is made against the will of one party, and intolerable questions about legitimacy may arise. The fact that in the principal city the Burmese resort to Court for decrees of dissolution of marriage certainly seems to me to throw doubt on what my learned friend, Mr. Benemy, described as a proposition never doubted that either party may, without any cause, at any time, and without any judicial or other intervention, divorce the other. I am writing these notes with a very practical aim, not merely to raise point for discussion, but principally with a view of placing before the Courts of Burma the whole law, whether contained in the Dhammathat, or in the decisions of judges, and for all purposes with seems best to refer at length to the clear judgments of the learned Recorder before I pass on to the obscurities of the Dhammathat, which these decisions interpret. I take the more recent, but I understand that the same interpretation has been enforced in his Court for a number of years

These decisions relate not only to dissolution of marriage, but also to division of property and other rights accruing on the dissolution; the right to a divorce and the rights flowing from a divorce, and most of them deal with both matters. They constitute the only distinct statement of the law actually held to be in force in the present day, and so far are more valuable than mere quotations from the Dhammathat, which Burmese Judges and others often make without stopping to consider whether such quotations are in accordance with the present custom or whether there may not be other and contradictory passages.

12. The reader must remember that, in cases of divorce at the will of one party alone, it may be of importance to ascertain whether the other party has committed a fault; in other words, whether the plaintiff has reasonable grounds for asking for divorce, as on this question the division of the property has to be settled. This remark is necessary to explain why the Recorder inquired into such matters where the suit was brought for property as well as for a dissolution of marriage. Indeed it is not easy to understand the real Burmese conception of divorce. The passage on which the efficacy of caprice is sustained occurs in a long section of the Dhammathat (*see* paragraph 36 below), which is entitled "The law for the partition of property on separation:" the passage does not enact any rule about divorce, but, like many others, deals only with the effect of divorce on property. The cases in which divorce is permitted are elsewhere mentioned, as also those of conjugal separation. Section 29 of the 12th Book of the Manoo Kyay makes the point clearer. We may make some inferences from the law of partition as to what the law of divorce was, but the reasoning is inferential, and we must look elsewhere for enactment about divorce. In this way I explain the apparent want of precision in Sparks' Code as to what circumstances entitle a party to dissolve the matrimonial bond. He avoided the subject of status when he laid down the rule about property quoted in paragraph 10 above. In our present jurisprudence we must, to avoid confusion, discriminate the two things with the utmost care.

13. Suit 173 of 1877, *Ma Ma* v. *Ma Nyoon*, was brought by a wife for both kinds of relief. The husband did not consent to be divorced. The Recorder held that, according to the Dhammathat, the wife and husband have a joint interest in the property acquired by the investment of the separate property of the husband, and that "the wife is entitled to her share on divorce provided she has a just "cause for seeking a divorce." The following quotations illustrate the way of dealing with conduct, the application of the doctrine of condonation to Buddhists, and the present equality of castes:—

"As to the first issue, I think there can be no doubt that the defendant has been guilty at times at least twice of what would be strictly characterized as misconduct towards his wife. Although he claims according to Burmese law to take up with any woman he pleases, still I am of opinion that if a man persistently consorted with prostitutes, it is a good ground for a wife to seek a divorce. The defendant admits that he took up with the two women the plaintiff complains of, but he says that when his wife objected to this he gave them up: therefore, as she has since lived with him, she cannot now refer back to that circumstance, because the evidence shows that offence has been condoned.

"No doubt if, in married life, one of the parties so conducts himself or herself in such a manner as that, by persistent acts of harshness or violence, the life of the other becomes unbearable, this would in Burmese law, as under English law, be a good ground of divorce, but when there are only isolated instances of such conduct and there is no real or *bonâ fide* apprehension of further acts of violence being committed or persisted in, I do not consider that a Burmese would have a sufficient ground for seeking for a divorce, for the Dhammathat recognizes the right of the husband even to inflict chastisement on the wife, and I cannot apply English rules of law to a case like this.

"Are these, then, sufficient reasons to come into Court for a divorce? I say "No." In the first place there was a quarrel in which both appear to have been in fault; and because Burmese law permits a husband to chastise his wife as a father may chastise his child, for, as it is laid down, the husband is the lord of the wife, mere ebullitions of temper are not to be regarded as causes for divorce. But even if these acts are evidence of committing more, and that they were justified by the occasion, has the plaintiff condoned them? The evidence shows that she has, because there does not appear to have been any renewed misconduct on the defendant's part between the second and third time of her leaving his house. From this it may be said that it was she, and not her husband, who has subsequently misconducted herself. I am of opinion that the plaintiff has no real or substantial cause against her husband for what he did; her own waywardness and jealousy fomented the occasional quarrels and impelled her on the three several occasions to leave the house; and as one of the witnesses said, and I think it was a very pertinent remark, the whole cause of their disagreement was Ma Thin. If defendant had not taken her as his second wife, he and the plaintiff would no doubt have lived happily together. Ma Thin being a thorn in her side, she every now and again broke out in her temper and became the immediate cause of her husband's conduct towards her. Admitting that there are faults on both sides and instances of misconduct on his, I am of opinion that neither would justify the plaintiff to claim a divorce. She is, however, according to Burmese law, entitled to a divorce if she wants it, but she must take it as if it was a case where there is no fault on the side of the party objecting. I asked her during the trial if she would go back and live with her husband, but she declined, whilst the defendant said he was willing to take her back but that he was not in a position to sever his relationship with Ma Thin, whom he considered his second wife, although he had not married her with all the usual ceremonies. This, however, was not necessary to constitute the relationship of husband and wife between them, for, she being a widow, mere consent to live together as man and wife would be enough. No doubt the plaintiff is his first and principal wife, but it is equally certain that Ma Thin is his second wife, and would probably resist a divorce, and the defendant cannot be required to make his divorcing her a condition precedent to the plaintiff going back to him, or be taken as showing that he is a consenting party to a divorce from the plaintiff. Therefore, as the plaintiff insists on a divorce, she is, according to Burmese law, entitled to it; but as I find that there are no sufficient grounds for seeking it, she is only entitled to take her separate property and not to share in that which the defendant has acquired during the marriage from the property he brought at his marriage with her solely by his own exertions,—*see* the Dhammathat, Book III, Chapter XXI, page 343 (Richardson's translation), where it is laid down that this is all the party seeking a divorce where there is no fault on the other side is entitled to have. On reference to the Burmese law as it appears in Major Sparks' Code, I think it is a fair conclusion to draw that, no matter who the parties are, the law in this respect is to all claims alike. Society amongst Burmese in the present day is not divided into the several classes mentioned in the Dhammathat, and hence I apply the rule laid down in the text of the Dhammathat I have quoted as if the parties now before the Court were of the same class as those referred to, there being no other rule of division that I am aware of which is recognized by the Burmese of the present time for dealing with the property of married people on divorce being had. In this case I find that no property was acquired by the plaintiff by her own labour since the marriage, much less by her "skill and science." Although she had property when she married the defendant it did not go into the common purse; she is only entitled to have now what she had then. She has already taken away property to a considerable value, to much more than she brought with her, and there is a garden in her name, but her husband has not asked for a return of the jewellery which she has taken above the value she brought at marriage. These she will retain, and as

she has taken more than she is entitled to, for the reasons I have given, there will be a decree for divorce, but without partition of property. I will make no order as to costs."

14. The facts of the next case, No. 127 of 1880, "*Ma Ing Than* v. *Maung Tsan Hla*," appear in the judgment :—

Judgment.—"The reference to the Special Court on certain points of law, namely, as to whether a wife was entitled to a divorce under the Buddhist law upon the ground that her husband had taken another wife, there being otherwise no fault against him and he being unwilling to grant a divorce, having been returned to this Court, the case now comes on for final disposal. The Special Court having ruled that it does not amount to any fault on the part of the husband under Buddhist law, nor can it in any way be considered to amount to legal cruelty by his taking a second wife during the lifetime of the first without her consent, there must be a decree for a divorce; but as it is a divorce without any fault on the part of the husband and against his wish, the plaintiff is therefore not entitled to share in any property which may have been acquired during the married life. I therefore decree a divorce and that plaintiff do leave her husband's house with the clothes on her person and nothing else."

The plaint contained a prayer that defendant might be directed to pay all debts contracted by both or either during their marriage.

15. The suit of "*Ma Thai Ngway* v. *Maung Thin Gyee*" (179 of 1880), was for divorce only on an allegation of ill-treatment and beating in the two months before suit. I give the whole judgment :—

"This is a suit for divorce brought by the wife against her husband, both of whom are Burmese, and were married about 29 years ago, and had a quarrel, when the plaintiff left the defendant's house and refused to live with him, and insists on a divorce on the ground that her husband ill-treated her for two months previous. When the plaint was filed, I purposely fixed the hearing of the case for a remote date, so that an opportunity might be given to this couple, who had been married for so long a time, to become reconciled to each other. The plaintiff, however, persisted in demanding a divorce and asserted that nothing would induce her to live again with her husband On hearing her case to-day and the witnesses she produced, I find there was no such ill-treatment as would justify her in seeking the dissolution of the marriage. The husband admits that he once struck her in a fit of ill-temper, brought on by her disobeying his reasonable request that she should not go to the *kyaung*, where she was in the habit of meeting a certain man, and in respect of whom the neighbours had been talking in connection with her. So far as the striking went it was an improper act on the husband's part, but inasmuch as it arose from her disobedience on a matter which rightly irritated and annoyed the husband, I cannot say it was an act to justify the plaintiff in seeking a divorce. Some of the children were called as witnesses, and they say, with the exception of this particular quarrel, that their father and mother lived on the ordinary and affectionate terms of married life. Although the Burmese law allows a divorce at the request or desire of either party still, whilst giving this great latitude, it imposed a salutary restriction and safeguard, that it shall not be capriciously indulged in, by laying down, that if either party wished 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. In this I do not consider that the plaintiff has any just cause, and the defendant objects to a divorce. I cannot, however, prevent the plaintiff obtaining a divorce, but she can only have it under the penalties provided for under the Burmese law. It has been proved that the plaintiff took away a gold necklace, valued Rs. 100. I therefore decree the dissolution of the marriage and direct that the plaintiff do give up to defendant the gold necklace or pay him Rs. 100, its value, and do also pay any costs the defendant may have incurred."

16. In suit No. 222 of 1897, Maung Po Lin filed a plaint alleging that his wife Ma Thoo had committed adultery and praying for three things, namely, dissolution of marriage, that the woman should leave the house with a single garment, and that she be declared not entitled

to any property. The Recorder finding the adultery proved treated it as improper conduct and decreed the three things prayed for.

In these cases the Recorder does not seem to have considered whether the rules of the Dhammathat about satisfaction in damages or by re-settlement of joint property in favour of the innocent partner do not point to divorces or abandonments which have already occurred and for which compensation is due and demanded. Both kinds of compensation are known to our own law: but it would be ridiculous to contend that this relief against adultery confers the slightest approval of adultery. The fear of damages is doubtless, to use the Recorder's words, "a saultary restriction and safeguard" against adultery as well as a caprice: but I cannot see how the right to demand damages for either caprice or adultery gives a moral or legal sanction to either caprice or adultery. I think it connotes much more than saultary restriction or safeguard: it means strong disapproval and, to speak generally, the right to damages implies that a wrong has been done.

17. In suit No. 26 of 1880, Ma Thine sued her husband Maung Myat Tsan, praying for "a decree for divorce and for possession of "all her joint and separate property and for such further and other "relief as to the Honourable Court may seem just." She claimed money brought by her at the time of marriage, which she said she had lent to her husband. The Recorder found that this money had been expended for household expenses and held that, according to the Dhammathat, it comes under the heading of separate property brought by one and expended during marriage, and this cannot be recovered at divorce. Plaintiff alleged her husband misconduct, and urged that she could not live in the same house with the children of a previous marriage. The Recorder said —

"I think the plaintiff has not shown any good grounds for seeking the divorce by reason of defendant's misconduct. I don't know that there is anything in Burmese law to compel a husband to provide a separate establishment for his wife, and it seems to me it is only a piece of ill-temper on the part of the plaintiff in seeking this divorce. This question, as I said, is not, however, of much consequence because there are no profits to divide and the plaintiff not having made out that the defendant has either property or money. As plaintiff insists on a divorce I must decree it."

18. Suit No. 76 of 1880 is highly instructive as showing how easily a decree of divorce may be obtained, and that the Recorder will grant it on terms. Mai Khin alleged in her plaint that her husband, Maung Tsan Min, had ceased to cohabit with her, refused to support her, and had been neglectful at the time she gave birth to a son. The only prayer was "that a summons might issue against "the said respondent to show cause why a decree should not be "granted." The husband appeared and denied the charges and prayed that a divorce be not granted, and that the said Mai Khin might be directed to return to your petitioner's protection. There was no mention of property in the pleadings or evidence, and the court-fee was only Rs. 10, which is the proper fee chargeable where the only relief asked for is a decree for divorce. The following judgment was passed by the Recorder:—

Judgment.—"There does not appear to be any real ground for divorce, but as the plaintiff insists the Court cannot refuse it, The party wishing it under such cases

must pay the penalty of relinquishing all right to the joint acquired property, and in the case of a wife she must leave her husband's house with merely a garment and her spinning things. In this case there will therefore be a decree for divorce on these terms. The woman merely wants her divorce for caprice, for she says she does not like the man's face. He is certainly not prepossessing, but the Dhammathat does not lay down this as a good ground of divorce."

19. The decree "ordered and declared that the marriage between "Mai Khin, petitioner, and Maung Tsan Min, respondent, be and is "hereby dissolved, and it is further ordered that the petitioner do give "up all right to the joint property, and that she do also leave her "husband's house with a single garment and her spinning things."

20. In suit No. 156 of 1882 Ma Mee sued her husband, Po Thee, for dissolution of marriage alone, and the formal decree deals with this only. The Recorder's judgment is as follows:—

"This a suit brought by the plaintiff against the defendant, her husband, for dissolution of marriage on the ground of his having deserted her after cohabiting as man and wife for four months by going to Upper Burma and leaving her without subsistence. The questions in this case are, was there an abandonment, or has the plaintiff shown sufficient grounds to justify her to seek a divorce? The defendant admits having gone away by reason of some trouble he had got into in respect of some timber not having proper marks. The plaintiff and her parents do not exactly admit that this was the whole and sole reason for his going away, but to my mind there is no doubt it was. I find as a fact that the defendant did not abandon his wife nor had he any intention to abandon her.

"Then as regards being left without subsistence, I think this is an after thought suggested either from cupidity or caprice, for she did possess herself of some timber, part of which she sold and applied the proceeds to her own use and does not desire to account for them. This shows that she was not left without subsistence.

"The plaintiff admits having written a letter to the defendant, and the defendant says he did not return immediately and not till some time after, when he at once went to his wife's house, when he was repulsed by her and her mother. Then he asked for his accounts, which were refused, and he put the matter in the hands of the *loogyees*, who also demanded the accounts from her; she still refused, saying that she would give them up after she got a divorce. I believe this, and that having sold the timber and made use of the money she wanted to get rid of her husband. I therefore find that there is no fault on the part of the husband to justify the plaintiff seeking a divorce, but according to the Burmese law as I read it I cannot prevent her from seeking the divorce if she insists, the only penalty being that she loses all her rights in the property acquired during marriage, and she must leave the house with only the clothes on her person.

"I accordingly declare the marriage dissolved."

These are most important precedents as applications of equity by the Judge. There are many passages of the Dhammathats which seem to show that the early lawmakers would have refused relief, unless the women had shown their willingness to surrender the property. This opens a question of procedure as to the prayer of the plaint, the form of decree, and the amount of court-fee in such suits. Some passages in the Dhammathats impose severer penalties of a nature to check such suits, *e g.*, section 142 of the Manu Thara Shway Myin, which perhaps relates to couples who have been married before. It is as follows: "Besides this, if neither party "has any fault and the husband wishes to divorce, let the whole of "the property be taken over and let him be sent away with the dress on his person. If the wife wishes to divorce let the whole of the

"property be taken over; her head shall be shaved and she shall be sold."

21. These judgments, and more especially those decreeing dissolution of marriage only where no property was claimed, or where no property was awarded, show in a most concrete form the close connection of the two questions about the individual right of each partner under Burmese law and about the forum where it may be enforced. If a decree of the Recorder's Court is essential to the validity of a divorce without mutual consent in the town of Rangoon, then it may conceivably be argued that the so-called divorces effected there without decree have no validity, unless by a roundabout reasoning we hold that some of them effected without mutual consent have become substantially divorces by mutual consent because the objecting party has not sued to get the invalidity declared. The soundness of such reasoning may, however, be doubted as the Buddhist law condemns hasty one-sided desertions. But if a decree of the Court is not essential, we have to look for some basis for the jurisdiction to dissolve Buddhist marriages, and then the above rulings present some difficulty. If either party has a right to terminate the marriage without any cause, the other party can have no possible answer to such a claim: the Judge in decreeing a dissolution of marriage has no judicial function, having only to pass a decree at the will of the plaintiff. The thesis that either party may claim a divorce against the will of the other and without any cause, but on his mere volition, at once excludes the Court from all jurisdiction to determine equitable considerations, pre-nuptial or post-nuptial contracts, questions about coming into Court with clean hands, and such things, for, if we allow the Court to deal with these, we must frame a new formula of an entirely different kind, and thus abridge the individual right of divorce by allowing the other party to show cause against it. It may be questioned whether our Courts, which are Courts of equity as well as law, are not bound to admit equitable defences. But assuming it to be correct law that either party may divorce the other without any cause whatever, there would hardly appear any reason for coming to Court where the suit concerns status only. All that would then be wanted would be evidence of the dissolution of the marriage: and for that purpose a Registrar's or a Notary's office would seem to be the more appropriate place. I have been assured by several learned advocates that the jurisdiction of the Courts is prayed for in suits to have dissolution of marriage decreed not because the party has any doubt of his right to transact his own divorce outside, but because he wishes good evidence of the dissolution. This reason is not stated in the plaints, and the lawyers know very well that a wish does not give jurisdiction. No such plea would be listened to for one moment if a Buddhist applied to a Court to have the fact of marriage entered in a decree, or if a Hindu wished to get an adoption registered, or an Englishman to get a will attested. They would be told that the marriage or the adoption or the attestation might be performed outside the Court: and the mere fact that certain ceremonies and transactions are not obliged to be registered before a marriage registrar or a registrar of deeds or a notary public

features suits for dissolution of partnership under the Civil Procedure Code (*see* the forms of plaint order and decree, Nos. 113, 132, and 133, of the fourth schedule). The plaintiff seeks a dissolution of the partnership and a distribution of the property. In suit 127 of 1880 in the Recorder's Court ("Ma Ing Than *v.* Maung Tsan Hla," *see* above) the plaintiff "prayed the Court to decree a dissolution of the "marriage of the plaintiff and defendant; that the defendant be "ordered to pay to the plaintiff any property or sum of money to which "she may be entitled; and that the defendant may be directed to pay "all debts contracted by both or either of the parties during their "marriage." A prayer like this is entirely in accordance with Burmese ideas. In discoursing with Native Judges I have found that they rarely make a mental separation of the two things dissolution of marriage and division of property. Major Sparks too treats the two things in a very close connection, and there is no enactment or clear judicial decision setting forth distinctly the grounds for divorce as in section 10 of Act IV of 1869. But in the interior, as well as at Rangoon, suits for dissolution of marriage and nothing else are often met with: and for the purposes of the penal laws about adultery and those of section 536 of the Criminal Procedure Code they must be kept apart. A European jurist would say that the rights to property accruing on divorce do not accrue until a divorce has taken place; and that there can be no cause of action about the property until the claimant has been divorced and then demanded the property and had his claim refused. A reversioner entitled to property after the death of the present possessor can have no cause of action for the property under ordinary circumstances until the death has taken place and a demand been made, and a refusal or other wrong suffered. Some parts of the Dhammathat, however, and one section of the Manu Woonnana Dhammathat, speak with some vagueness on this point, and I will refer to these passages afterwards. I have discussed this subject in the introductory circular.

23. The following remarks relate to the question of jurisdiction above discussed. Under section 53 of the Procedure Code a plaint must be rejected or returned if no cause of action is disclosed. The only jurisdiction conferred over Buddhist marriages by section 4 of the Burma Courts Act, XVII of 1875, is *where it is necessary to decide any question:* if the Court is satisfied from its own knowledge and notice of the laws applicable that there is no question for decision, *i.e.*, no *questio vexata*, *e.g.*, if it is satisfied that the proposition which allows either party to divorce the other under any circumstances is an impregnable position of Buddhist law, it would, I apprehend, hold that there is no possible matter of dispute for litigation. If the above proposition is sound law, then the maxim *ubi jus ibi remedium* would not avail the divorcée, so there would be no reason for putting him to the trouble and expense of an appearance. In the same way as the divorcer has ample remedy without coming to the Court at all, he would not be entitled to claim the general remedial jurisdiction. of the Court irrespective of statute as the remarks of the Judicial Committee in the cases of *Ardaseer Cursetjee* v. *Perozeboye* (6 Moore's I. A., 348) and *Moonshee Buzloor Ruheem* v. *Shum-*

shoonissa Begum (11 *ibid.* 551) would not apply in his favour In fact the Court would be wary of the consequence before assuming a jurisdiction; as the Privy Council says of Jewish law applied to Jewish marriage by Ecclesiastical Courts in England, " the very " great difficulties attending such investigation and the almost absurd " consequences to which they lead would not induce us to follow those " precedents further than strict necessity requires." Let us examine one result of assuming as impregnable the proposition now under discussion. Suppose that A is about to prosecute B for adultery with his wife C, and that B and C are advised that under section 478 of the Criminal Procedure Code, such a prosecution can only be instituted by the husband. In order to deprive A of that status C divorces A or applies to the Court for a decree of divorce. Unless we abandon the proposition, the divorce must be decreed to the great scandal of morality. In similar cases the High Courts have tested extraordinary customs by the spirts of the general law. The 30th section of the 6th Book of the Manoo Kyay punishes a husband or wife who deserts the other with 600 stripes. The 18th section of the 5th Book contains similar provisions as to abandoning a leprous or diseased partner, and has been quoted with approval by Sandford, *J.* There are many passages giving a moral sanction to conjugal duties. In the analogous cases of Hindu customs such things are considered by the High Courts in *Reg.* v. *Karsan* (2) Bombay H. C., 124) an alleged custom that a woman might leave her husband without his consent and contract a valid marriage with another man was held invalid as being entirely opposed to the spirit of the Hindu law, and that the man who contracted the second marriage was punishable for adultery. In *Uji* v. *Halhi* (7) Bombay H. C. A. C., 133) a custom was set up, by virtue of which a man might marry a woman already married to another man by paying Rs. 105 to the caste: this also was pronouncecd by the Bombay High Court to be void for immorality. *See* also *Reg.* v. *Sambhu* (1) I. L. R., Bombay, 347), and *Barayan Bharti* v. *Laving Bharti* (2) I. L. R., Bombay, 140). It was held in the case of Mathura Naikin (4) I. L. R., Bombay, 545) that a Court may discard an old and bad usage in favuor of one more reasonable and moral.

24. The present Sitkeh of Toungoo and other Native Judges have informed me that an *ex-parte* divorce, I mean against the will of one partner, cannot take place except by a decree of Court, and that the village elders have no jurisdiction. The passage quoted in paragraph 5 shows that this was the opinion of Major Sparks in 1860. I transcribe a passage from the work of Moung Kyaw Doon, an Extra Assistant Commissioner of considerable experience, who wrote his essay some years ago. His opinion is not categorically expressed, but I find that he is of much the same mind as the Sitkeh. He explains how the custom of going to village elders arose as an evasion of a regular jurisdiction. It was recognized by Sparks' Code as regards divorces by agreement in writing, and although Quinton, *J.*, denied that in such case a resort to lugyis was essential, the fact of Sparks' legislation probably accounts for the continuance of the practice in cases of consent by written agreement simultaneously

with the other and, in Moung Kyaw Doon's opinion, more ancient practice of going before Judges in defined jurisdictions in cases where, instead of agreement, there was a dispute. I think it possible that the practice of resorting to loogyees and their laxity in regard to rules may have led many Europeans to treat this practice as the valid one, as established custom, and by parity of reasoning to adopt the looser rules of the Dhammathat about divorce rather than the more stringent rules of the same Code. I do not think we can fairly look to the loogyees' decisions for precedents. They appear to me to be something like the early English jury; they are acquainted with the facts, and thus are witnesses as well as Judges; they are not learned in the law and are probably less bound by it than an English jury is; and as they assume to be Judges also, they doubtless feel themselves less bound by written law than Judges who have to give reasons. They are as it were conciliators, and may adjust compromises and thus get a mutual consent as easily as when they arrange the disposition of property erroneously assumed to be a will by those who were ignorant of the fact that its efficacy depends entirely on the consent of the heirs. It is well known that loogyees are called in as conciliators or arbitrators in all sorts of disputes about land, money, cattle, and settlement of trading accounts; but I have never heard it alleged that they have jurisdiction over contested questions in such matters so as to oust the Courts, and I do not clearly see, if we treat Sparks' Code as an enactment, how they can have any higher control over divorce cases than over others, especially as the ruling of the Judicial Commissioner, that their attestation is not essential, applies only to divorce cases.

25. Moung Kyaw Doon's account of the law of divorce and adultery is as follows, and it is important as coming from a learned Burman of judicial experience:—

"*Adultery*.—The source of this law is clearly that of marriage, because if marriage were not instituted there could be no adultery; and in the case of the disputed wife, there appears to be a reference to adultery, since the man that the woman declared not to be her husband gets her, but they, in consequence of having no regard to the credit of their relations, were ordered to go and live beyond the bounds of the village in which they were, and were cut off from inheriting the property of their relatives.

"Adultery is said to be committed in seven different ways—

(1) when a man takes liberties with a married woman;

(2) when he visits a married woman secretly, knowing that visits are prohibited by and against the wishes of her husband;

(3) when he lives with a married woman in a secret place;

(4) when a man is found speaking to a married woman in a place that is improper for them to meet in;

(5) when a man enters the screen or curtain behind which a married woman lives;

(6) when a man enters the private apartments of a married woman and holds converse with her;

(7) when a man lies in the same bed as a married woman.

"It is," not apparent how all seven of the above can be called adulteries.

"The third and seventh are the only cases in which a divorce should be granted although the laws of Menu allow a divorce for the following reasons, that is to say,—

"A woman may obtain a divorce—

(1) when the husband is poor and unable to support her;
(2) when he is always ailing;
(3) when he is impotent;
(4) when he is an idiot;
(5) when he does not work and leads an idle life;
(6) when he is incapacitated by reason of old age;
(7) when, by reason of his lust, he is likely to injure his wife;
(8) when the husband becomes a cripple after marriage.

"And a man may obtain a divorce if—

(1) his wife is barren;
(2) she do not bear male children;
(3) she be a leper;
(4) she be a loose character;
(5) she has no love for her husband.

"The second reason for obtaining a divorce would only refer to Kings, because women cannot reign, and, in the absence of male issue to succeed to the throne, the dynasty would pass away.

"The source of the law of divorce is the same as that of adultery, but there does not exist a divorce amongst Buddhists with which the law is unable to grapple. Instances have been recorded where parties even whilst travelling together have divorced themselves, the divorce consisting in cutting a notch in a tree as evidence of the fact, and coming together again the following day. In the time referred to there were no judicial functionaries, and it frequently happened that parties making a divorce had to travel hundreds of miles to go before certain loogyees, or elders, who, however, could not grant a divorce without a reference to the thoogyee, or Governor, who had power to vest the loogyees with jurisdiction in the matter.

"At the present time there are persons in almost every village who, with the ostensible view of saving parties seeking a divorce expenses which would accrue by their going to a Court of Justice, draw up a document purporting to be a final divorce. This document is in most instances not signed or in any way acknowledged by the parties, nor often even signed by the writer. This system of divorce should be put down as much as possible."

26. I have now stated the views of the law about divorce expressed by the learned Recorder and a former Judicial Commissioner and a Burman Judge. They, of course, speak of existing law, not of antiquarian matter; and I think Moung Kyaw Doon does not distinguish the English words *divorce* and *separation*. It is now time to turn to the Dhammathat and see what it says, for, as Moung Kya Doon remarks, divorce can only be treated as a consequence of marriage; and unless we fully understand the contract itself, we can infer nothing about the right to break it.

27. In the 5th Book the conjugal subordination of the wife is affirmed and her moral duties defined. The following passage, section 13, page 139, shows that the law-maker looked on marriage as based on affection and governed by the moral law, not merely as a commercial partnership. The same sentiment pervades sections 20 to 22 and section 24 and the 12th Book, particularly section 48, as also Menu's famous decision about the disputed wife at page 15.

Section 13 of Book 5—

"Women are like the earth and men are like rain, and by the earth and rain trees and fruit and such are produced. Trees and fruit are like children; and when man and woman, like the earth and rain, are suited to each other only are children produced. A good woman is one who corrects and assists her children and slaves, and provides for her husband the best food and clothes; who puts in order his bed and the place he stays in; who provides for him the best perfumes flowers, betel, tea, and things of that kind; who has no thought of other men and who takes the greatest care of what is acquired by her husband; who rises before him, and who, after he has gone to rest, puts (the house) to rights before she sleeps; who considers each day what will be her proper work, takes his orders; who disputes not his authority; who complies with his wishes; who speaks in the mildest and most endearing language; who provides for warmth and coolness. In this way all women should in the most proper way minister to their husbands, and women who habitually practice this fulfil their duty to their husbands. Thus the Lord Recluse called Menu said."

28. A similar description is given in sections 177 and 178 of the Woonnana on the authority of the supernatural Sakya, and husbands are forbidden to desert or divorce affectionate and dutiful wives.

29. In sections 14 to 17 of the Menu Kyay, as remarked in the 53rd paragraph of my former note, we have the case of a husband who travels afar in pursuit of wealth or learning. The right of the wife to re-marry before eight years are passed is distinctly denied her, unless he ceases to support her and takes another wife in his distant abode, and even then she must wait three years. In section 165 of the Manoo Woonnana the period of eight years is extended to ten where the absence is for the purpose of getting learning. Section 17 I have quoted in the 54th paragraph; it postpones the right of re-marrying for three years in the cases where a husband leaves the wife or the wife the husband from want of affection, and during the three years the husband does not contribute anything to the wife's support. Section 18 deals with the case where one of the pair is leprous, mad, diseased, or maimed, and distinctly refuses to allow the other to cast him or her off. The same rule is repeated in section 43 of the 12th Book. The husband may take a second wife and may refuse conjugal rights to the diseased wife, but he is bound to support her, and expressly and repeatedly forbidden to put her away. Vices inconsistent with the mutual comfort, which everywhere is a mutual consideration for the marriage contract, are thus dealt with in section 18:—"If the husband is a drunkard, a gambler, a better on cock-"fights or goat-fights, and a seducer, and will not be advised, and has "three times in presence of scientific and moral good men made a "written engagement openly and before witnesses to forego these prac-"tices, and if he still continue the same, let the wife have a right to "put him away and separate from him." Compare this with section 54 of the Wini Tshaya Paka Thani in paragraph 39 below. The engagement probably gave her this right, and so the divorce was really by mutual consent as under the Mahomedan law. All these restrictions on the right of re-marriage and the right of divorce are recognized in Sparks' Code.

30. The Manoo Woonnana Dhammathat, which Moung Kyaw Doon describes as the accepted statement of the Buddhist law, was, he says, written by a Minister of the Court of Ava in 1137 of the Burmese

era. It discusses divorce in the 4th chapter. In section 154 it is said that the wife, like a murderess, thief, or master as therein defined, may be divorced, but the other four kinds ought not. Section 155 says that women of good behaviour and conjugal affection may not be divorced on account of frequent illness. Section 156 specifies the five kinds of wives whom a husband may divorce (*kwa shin*): they are those mentioned by Moung Kyaw Doon, and in section 43, page 355, of Richardson's Dhammathat, where, however, the following important proviso seems to indicate the cessation of conjugal rights and the diminution of status involved in the taking of another wife:—"By "putting away is not meant that he may take all the property and put "her away, but if he wishes he may take another wife, and (a wife as "above) shall have no right to oppose his wishes; thus she may be "said to be put away. This is one point in this matter." See also pages 142, 170 and 357.

31. In section 157 the six faults or bad habits are described as those for which a wife may be beaten, but shall not be put away. In section 12 of the 5th Book of the Menu Kyay Dhammathat these six faults are described, and it is expressly stated that the proper way to deal with them is by correcting the wife. The 12th Books is more favourable generally to divorce; but in section 42 it expressly declares that the wife shall not be put away for these six faults until repeated correction has been tried and failed. The same section contains a full description of five sorts of improprieties and expressly lays down a similar rule. The 158th section of the Woonnana shortly specifies the same five improprieties, and adds that the wife may be chastised and beaten for them, but may not be divorced or deserted.

32. At page 358, section 46, of the Menu Kyay Dhammathat it is said that a wife has a right to abuse a husband for certain eight reasons including his ignorance, laziness, and adultery:—"If a woman "happen to abuse her husband for any of these eight causes, no fault "shall be imputed to her, and if the husband say he wishes for a "divorce, and if both consent to it, let them divide the property equally "and separate. There is no law in the world that, because a woman is "an abusive wife, her husband shall separate and take all the property: "this all teachers said." Then the wife is advised not to abuse the husband, even when she sees his faults; such forbearing and dutiful conduct gives her the advantage of good deeds through all transmigrations and is the true road to the Nat country. The 176th section of the Woonnana mentions the right to abuse and gives the wife a right to divorce if the husband commits adultery. She has then a right to say 'I do not wish to live with you.' "But the said wife is not "entitled to all the property. Wise men may decide this." Section 43 of Book 12 of the Menu Kyay gives the faultless husband a right to divorce his wife for adultery and to keep all the property. But the language is very curt and the rule about property vague where the separation is caused by incompatibility of temper or habits. "Of a "woman who will not comply with her husband's desires it is said her "desires are not toward him, her wishes are not the same. As in the "last instance, let him have a right to put such a woman away." But the proviso quoted above shows that she is not to be divorced though

she may be superseded. Throughout the Dhammathat polygamy is treated as lawful, but with a feeling that it is a grievance to the first wife. The sentiment at present is much the same. Captain Forbes says :—"Even where polygamy is indulged in, the general "feeling may be said to be against it, for any native official or wealthy "man, in which classes it is more common, who contents himself with "one wife is looked on with much greater respect for so doing. Though "all the wives are equally legitimate, there is always one chief wife, "generally the first married, whose home is the family home, the lesser "wives being provided each with her own house, perhaps living in "another town or village, but never under the same roof as the head "wife" (see also Bishop Bigandet's note to page 173 of his first volume). The supersession of the first by a second wife is a serious matter. The writer of the 5th Book of the Menu Kyay takes a rather different view of incompatibility to the two others. The 24th section deals with men and women of shameful and perverse, perhaps obscene, habits, who may be called brutes, and adds :—"If the one who "has good habits does not wish to remain with the other, but says "I will separate,' and though the other who acts degradingly should "refuse to consent, let them (or let the other) have the right to separate. "It is not only when the one has taken a paramour or the other a "lessor wife, or uses violence to the other, that there is a right to "separate; and though the person whose habits are bad should say he "does not wish to separate, let all the property common to both be "divided equally between them and let them have the right to separate." Now we find the writer of the 12th Book and the writer of the Woonnana allow *ex-parte* divorce only in case of *adultery* when they discuss bad habits, and the former makes his meaning clear by the proviso. Why then does the writer of the 5th Book extend the rule about divorce to shameless conduct while altering the condition about property? The language appears to me controversial, and the assumption in the 5th Book that a divorce not by mutual consent is by mutual consent looks like a fiction of law. A solemn ethical tone pervades the 5th Book, and the passage is highly important as showing that the writer considered distinct words were necessary to confer the right of divorce. When the Burmese are roused from their lethargy, some learned man among them will perhaps inform us whether the passage in the 5th Book was written before or after that in the 12th Book which denies the right of divorce. In the 47th section the conduct of the proud and impertinent wife who makes her husband angry is considered, and various rules about division of property are applied to various circumstances. But it is evident that divorce is not to be resorted to until other means of repression have been tried and failed, as in the analagous case of children there specified, and then it is to be "considered as a divorce by mutual consent" if the husband insists and the wife refuses to consent to divorce. The general moral tendency of the religious law must never be forgotten. Nor the great difficulty English Judges find when determining the decree and kind of incompatibility requisite for a decree of divorce. Compare, *e.g.*, *Mitford* v. *Mitford* with *Kelly* v. *Kelly* (see paragraph 15 of the introductory circular). In order to ascertain the

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It is clear therefore that the great jurist who digested the law about 1770 A.D. did not sanction the notion that a man or woman may divorce the other from mere caprice or fickleness when the other party has not been guilty of misconduct. This would be inconsistent also with section 176 of the Woonnana and section 142 of the Manoo Thara Shway Myin (quoted in paragraph 20 above) and would open the door to all manner of profligacy and fraud, a fact known to the Wini Tshaya Paka Thani writer, and we will see how, in sections 57 and 58, he deals with different cases of trickery. The Vagaru is in prose and more explicit. The following translation is furnished me by Dr. Forchammer :—

"A man *may* abandon five kinds of wives,—one who does not give birth to children; one who has borne daughters only; one who does not consent to the desires of her lord (*pati*); one who is afflicted with leprosy; a woman who has another man (lit. another man's wife); these five kinds of women a man *may* abandon."

Divorce is most fully treated in the 12th Book of the Menu Kyay, and in the long section 3, about partition of property, occurs the passage about divorce on account of the influence of destiny, which is the chief ground of the Recorder's decisions. The 12th Book seems to bear signs of its Brahmancial origin. In section 43 a rule, based on the inferiority of women, is explained by the Buddhist compiler as being merely civil law; he proceeds to explain the moral equality of women with the sentiment noticed by Bishop Bigandet. I avoid discussing sections 30 to 41, which relate to marriages with inferiors, slaves, wives taken at the sack of a town or from an enemy, or in a war, or from a thief, or who have been purchased, or redeemed from slavery, or saved from the penalties of debt, or obtained for benefits conferred, or given by the King. These unions are of a peculiar kind, and the consideration for the contract is generally not mutual consent, and it would be unsafe to use them for analogies, and they are not relied on in the Recorder's judgments. Section 3 is very long, and I accordingly divide it into paragraphs. It begins as follows :—

A. "The law for the partition (of property) on divorce (ကွာ) (*kwa*) of a husband and wife, who are members of noble families.

"If a husband and wife, both being members of noble families, mutually wish to divorce, let the man take the clothes and ornaments of his rank, and the wife the clothes and ornaments of her rank, and let the remainder of the property, animate and inanimate, be thus divided. If there is any property acquired by (အမှိုပြုပြီးဖြစ်သော) (*ahmeepyuywai phyitthaw*) either the husband or the wife, let the party who acquired it (အမှိုပြုရှင်) (*ahmeepyushin*) have two shares and the other who did not acquire it have one share. If both have equal original property, let it be divided in equal share and proportion. If the clothes and ornaments of the man are many, and those of the woman few, let those of both be valued, and if those of the man are more valuable, let him pay the difference to the woman; if those of the woman are more valuable, let valuation be placed in the same manner and let her pay the difference. Let the father have the sons and the mother the daughters. If the sons live with the mother because they are too young to be separated from her and she having nothing, sells them, let her pay one-half (of the proceeds) to the father. If the father also sells the daughters, let him pay one-half (of the proceeds) to the mother. If the mother be dead and the father having nothing sells the daughters, he cannot be said to have no right to do so, and if the father be dead and the mother sells them, the sons have no right

to say that she has no right to do so. Why is this? Because the parents are owners (of their children). Thus it is said: if the father takes a lesser wife and the mother sells the daughters, the father shall have no right to say (anything). If after the father has taken a lesser wife or the mother a lesser husband, the mother sells the sons, or the father the daughters, let the whole of the price of the sons be given to the father and the price of the body of the daughters to the mother. This is said when the father or the mother having taken a lesser wife or husband sell or sells the children from some other cause. When the sons are living and eating with their father or mother, and a step-mother or step-father, they have no right to sell them (sons) for any portion of a debt contracted by the step-mother or step-father, and let the step-mother or step-father pay such portion of it to the father or mother, who has a right (to the sons). If such step-father, or step-mother has no children, the own father or mother has no right to take the sons, because the law provides that the sons brought by the husband $\frac{\text{and}}{\text{or}}$ the wife are entitled to inherit the estate of the step-father or step-mother. If the step-father or step-mother has children, let the abovementioned contracted debt be divided into eight parts, and let the children formerly brought pay one part, and if the husband and wife divorce, let them equally pay the (နှစ်ပါးဝိုင်) hnapazone debts (the debts contracted by them jointly) if any. If after the husband and wife had been divorced there be no final settlement as regards the property, animate and inanimate, let it be divided according to the decision that has been already laid down, and the husband cannot be said to have no right to take unto himself (another) wife on account of no settlement having been effected as regards the property and the debts, but let him have the right to take (such wife) and let the wife also have right to take unto herself (another) husband.

33. The last portion is interesting as showing that a divorce can by mutual consent take place without actual division of the property, just as an undivided Hindu family may, without physical division of the property, terminate the undivided status and become separate in interest by agreeing to such effect. Section 171 of the Woonnana does not contradict this passage, as we shall presently see it prevents mere angry words creating a divorce, and gives the angry person time to repent in cool blood.

34. The next part seems to have got into a wrong place, but it is highly important:—

B. "There are three kinds of property acquired by the husband and three by the wife, which are as follows:—

(1) property (ပါရင်း) (payin) animate and inanimate originally brought;
(2) property acquired by ingenuity, skill, and science, and
(3) property given by the King.

These are the three kinds of property. The three kinds of property which should be treated as acquired by the husband are,—(1) when the wife at the time of marriage had no property from her parents and the husband had; (2) property acquired by the husband's skill and science during the time they live together, and (3) property given to the husband alone by the King in praise of him. The three kinds of property which should be treated as acquired by the wife are (1) when the husband had no property from his parents, and the wife had; (2) property acquired by the wife's skill and science, and (3) property, aninmate and inanimate, given to the wife alone by the King in praise of her. If they had debts originally contracted, let them pay in same manner."

35. C. "This is said of a couple who became husband and wife from their younger days or who have not been married before), who are of the same race and who divorce by mutual consent."

The above words ought probably to have followed A, but it seems that the part from A to H relates to virgin couples.

36. The next three cases, D, E and F may be looked at together, as D ought not to be so construed as to defeat E, F, and G, nor sections 12 to 18 of the 5th Book, nor sections 42 and 43 of the 12th Book, nor the other passages restricting the right of *ex-parte* divorce. We ought to be careful not to raise a tremendous categorical proposition by mere inference, and we must never forget the extreme caution with which Judges of Divorce Courts infer any general rule. The case of opposite destinies is not stated in the other Dhammathats.

D. "Thus has been said for the divorce by mutual consent of a couple who became husband and wife from their younger days (or who have not been married, before). When the husband wishes to divorce and the wife does not, or the wife wishes to divorce and the husband does not, and when there is no fault on either side but on account of their destinies not being cast together, the following shall be the form of division: let the party in whom there is no fault and who wishes to divorce retain what the King has given him or her, and also the wearing apparel he or she has. But the party wishing to divorce shall have no right to all other remaining property, animate and inanimate; let the party who does not wish to divorce have the whole of it, and let the other party bear the penalty of the law. If there be no property, animate or inanimate, but if there be an increase in the wearing apparel on account of the treasure and ornaments given by the Governor, let the party wishing to divorce have just enough for him or her to wear, and let the party not wishing to divorce have the whole of the remaining. If there be any old or new debts which had been contracted, let the party wishing to divorce pay it. Of the wearing apparel, besides those given by the King, let the man (if he be the party wishing to divorce) have one suit of clothes, putsoe, jacket, *gaungbaung*, and swords, and the woman, (if she be the party wishing to divorce) let her have a *htamaing*, shawl, jacket, and girdle, being a woman's wearing apparel, and also her cloth rolled up, the loom, the shuttle, and other implements. If they have no good debts due to them and no property except that given by the King, let each take (what they are entitled to) and let the party wishing to divorce pay the price (of his or her) body according to their race. This is the law which shall form the rule of decision when a divorce takes place without any fault on either side."

E. "If under the same circumstances (meaning perhaps that the couple is a virgin pair, J.J.) the husband takes a lesser wife and ill-treats, beats, uses abusive words, and pounds with his elbow the head wife, and if in such a case any ill-treatment is proved on enquiry, let them live together on the same terms as before. If such behaviour is thereafter repeated (by the husband), let him leave (the house) with a single garment only, and let him pay the debts contracted.

Wise Judges should decide thus. But if, notwithstanding, the wife say she does not wish to live (with the husband) and that she wishes to divorce, let them be divorced, let the (နှစ်ဘဏ္ဍ) 'hnapazone' (or joint property) be divided equally between them, and though the husband declares his unwillingness to divorce, let the divorce be made as if both were consenting, this being said by Menu."

F. "In another case where there is a written document, the husband ill-treats the wife, and if an enquiry is held by the Judges, let her have the whole of the 'hnapazone' (or joint property) animate and inanimate, let the husband leave (the house) with a simple garment only, and let him pay the whole of the debts contracted. If there be neither debts nor property, let the husband pay the price of his body to the wife. Thus it is said.

37. It may first be contended that the passages A to D enact no rule about the matrimonial contract or the right to dissolve it: they do enact rules in great detail about partition of property

Secondly, that neither here not anywhere else is there any distinct proposition to the effect that the mutual contract of marriage may be broken against the will of one party at the mere caprice of the other, and irrespective, *e.g.*, of so common an incident as pregnancy.

Thirdly, the words about bad destinies in D do not apply to every capricious person but only to those in whom there is no fault, which allegation ought to be made in the plaint and form the subject of proof before Judges, strict to mark iniquity, and governed in their notions about fault by considerations of the intention of the marriage contract, the status it confers, the needs of children, the requirements of public policy and morality.

Therefore, so far as the question is one of construction of written law, it is violation of the words to say that they extend the right of capricious divorce to any party who is not faultless: the words of D apply only to the case of a virgin couple, both of whom are without fault.

Furthermore, as D is not part of a Divorce Code, and as all meagre enactments are imperfect and *summum jus summa est injuria* (*see* Story on the very Nature of Equity), I think that, in the absence of legislative enactment, no Court would extend the meaning of D more than can be helped. The rule only specifies cases where the destinies are not cast together, where there is ill-luck occasioned by the *karma* or balance of good and evil deeds in all previous existences. About this the parties may settle themselves; they are in the habit of going to astrologers; and as the words will bear the meaning, I think it probable that the case is really one of mutual consent after ascertaining the destiny in the only possible way. I see no reason for not taking the words literally: I would not take them otherwise if the consequence led to frivolous dissolutions of marriage even in the case of pregnant women; I would adhere to what is just and reasonable. On this view there can be no other theory but that of mutual consent; for as there is no judicial astrology, the condition precedent to relief cannot possibly be proved; the Judge is not "a member of God's Privy Council," and would pass no decision on the result of previous existence.

38. Suppose, however, that we give at our mere unaided judicial discretion or guess some other possible meaning to the words so as to give a jurisdiction. Suppose we assume that they do not relate to physical defects of the sort mentoined at pages 173 and 355 of the Menu Kyay. Suppose we hold that the words mean incompatibility of temper, forgetting that incompatibilities are dealt with elsewhere. Then, for the reasons given in the introductory circular, this incompatibility must be proved. But that implies that the defendant may show that there was no incompatibility, but only the plaintiff's misconduct, caprice, or crime. There would then be *a question necessary to be decided* and a jurisdiction under section 4 of the Burma Courts Act, but we only establish the jurisdiction by demolishing the theory on which the decrees are passed, namely, that an *ex-parte* divorce may be granted without cause and on mere caprice. But, again, this theory is inconsistent with E and F, for if a woman grievously ill-treated is not to get a divorce at once for ill-treatment unless with express or implied mutual consent, it is absurd to suppose that a woman who has not been wronged in any way can terminate the mutual contract without a mutual consent If in law or in me a-physics we assume that effects may take place without cause, there

would be no need to inquire into causes at all; and therefore the definition of express causes for divorce in the Dhammathat becomes unmeaning and wholly frivolous, which is absurd.

39. I think the 54th section of the Wini Tshaya Paka Mani, edited by the jurist Kyaw Deng at the end of last century on the cases raised in D, E and F, worth quoting. In the case of continued ill-treatment after giving a written contract to amend, the wicked husband's consent to the divorce is required. It may then be fairly assumed that the case of no fault which follows is to be governed by the same principle. Otherwise we must apply the tremendous doctrine establishment caprice. We have no available store of the maxims of jurisprudence applied in the old Burmese times. But there were evidently *leges fori* and an equity and apparently power to insist on a compromise and a decision by consent of both parties. The Recorder will continually apply such maxims as that nobody shall profit by his own wrong, nobody shall get relief unless his hands are clean, nobody shall use his right so as to injure some one else. But we do not expect to find such ordinary maxims in every printed Act or in every decision. Rather than extend the meaning of D so as to dissolve marriages by giving it a fanciful interpretation, a Court would assume that it was to be construed by British Courts as subject to all such equitable and moral rules as may fairly be endorsed by both British and Burmese Judges.

Section 54 of the Wini Tshaya Paka Thani Dhammathat :—

54. "The following is a case of divorce between a husband and wife. If the wife alleges that she is oppressed and ill-treated by her husband by means of harsh language and beating, and if the husband denies the truth of the statement, the wife must prove it. If the evidence shows that the husband was heard abusing and scolding his wife, but was not seen beating and striking her with the elbow, although the evidence does not show that the husband was seen striking his wife, if marks are found on the wife's body, the statement being corroborated by the fact of the marks found on the wife's body, it is to be presumed that the alleged statement of the wife is true in spite of the incompleteness of the evidence given. If the alleged statement is proved, the husband shall bear the costs of the suit, and such husband shall be admonished to live on good terms with his wife, and a written order shall be entered into to the effect that the husband will not do the like again on peril of leaving (the house) with only the dress on his person. Nevertheless, in spite of this decision, if the wife claims a divorce because she does not wish to live with him, a divorce may be given as if the consent were mutual. If the husband says "I too wish to divorce you," let him be made to leave all the property in the possession of his wife and let them be free. If the husband has no fault and the wife wishes to divorce, let the husband get all the property, and such wife shall pay all the debts. If the wife has no fault, the husband shall get the property, and such wife shall pay the incurred debts. If the wife has no fault and the husband wishes to divorce, in this case, where the husband divorces, it may be decided on the same principle. This is said of a husband and wife married from their younger days."

40. The 57th and 58th sections of the Wini Tshaya Paka Thani seem to me to show how a Burman Judge dealt with particular cases :—

57. "A divorced man takes a virgin and lives with her, and if after a short time and before much property is acquired he says to her 'leave the house' and divorces her, it amounts to fraud, and for this fault let him compensate her with the value of a pair of '*nadoungs*' (earrings). Of this it is said that the man is inferior and the woman superior (in rank). If they are of the

same class and respectability, let him give her the slaves or followers brought at time of marriage, palanquins, sword, the clothes and ornaments worn, and all such things as are brought at such time. Thus it shall be decided. If there are no such slaves or followers, ornaments, elephants, ponies, palanquins, and sword, let him give her a slave in his place. If she be 'thanday swaikathee' (*enciente*), let him give her a slave. If she has already brought forth children, let him give her a male and a female slave. The term 'kowoon-shethe' (meaning carrying) shall not be used.

58. "A divorced woman takes a young man and lives with him, and if she wishes to divorce him without any fault of hers, let her give him the man's clothes and ornaments and turban (or head-dress), and also a slave or follower. If such husband and wife have not acquired much property, let them be divorced if they give their mutual consent."

41. The first case in section 57 is stigmatized as a fraud and a case for damages. Far from conferring validity on the act, it is treated as our Courts would treat a fraudulent decree if objected to, as fraud vitiates the most solemn acts of Courts of Justice. If the first case was fraudulent, so are the others, the facts being the same, and the only enactment is to decree damages, the assumption being that they are asked for by the injured party who, in order to claim damages, must first assent to the divorce. In the last case, where no relief in damages would be effectual, the rule is made plain that the marriage cannot be terminated except by the act of both parties. In all these cases there seems nothing inequitable. The injured person may either accept the *ex-parte* divorce and claim damages, or apparently refusing to be divorced apply to have her status declared, as she would be entitled to specific relief because she has a right to share in the *hnapazone* and the *letthelpwa*. I believe the Burmans look on the marriage of an old woman with a young man as unwholesome, and this might affect the amount of damages. I have already stated that it seems to me unsound reasoning to the hold that the ancient religious jurists wished to indicate their approval of breach of contract by imposing damages or punishments for it: or that Equity Judges applying Buddhist law now should assume that the religious law permitted what it expressly punished. In the introductory circular I have given reasons for a deeper consideration of this matter. The prodigious effects on the English law of divorce which would follow from the theory that amercement in damages or deprivation of property indicated approval of the co-respondent's and guilty partner's behaviour are plain to the meanest apprehension. Nor do I understand how penalty or damages can he conceived except as consequences of wrong.

42. In Kyaw Deng's General Digest, I mean the Manoo Woonnana, the omission of any mention of the *ex-parte* divorce for mere whim except to deny its effect, in the case usually coming before English officers, often followed by murder or other crime, is significant in connection with the denial of any such custom by Judges of such long experience as Colonel Street, Colonel Plant, and Maung Kyaw Doon. Custom is the proper interpreter of an ancient law. I give the translation of sections 170 and 171 of the Woonnana :—

"170. If either a husband or a wife desires to divorce, let the person who is (နွှဆာ) 'naithaya' (supporter) obtain two-thirds, and the person who is

(နိသာတ) 'naitheeta' (dependant) one-third of the property, and let them in the same manner get the debts due and owing to them. So be it. (Here follows a reference to the Inandana Zat.)

"A wife is said to be the (နိတာ) 'naithaya' (supporter) and her husband (နိသာတ) 'naitheeta' (dependant) when the wife at the time of the marriage posseses large property, which may increase by being used as principal in trade (yinhnee yingwai) or when the husband is wholly dependant upon his wife's exertion for his living, and a husband is said to be supporter and his wife dependant when the case is the contrary.

"If such husband and wife wish to divorce by mutual consent, let the supporter obtain two-thirds and the dependant one-third of the property consisting of animate and inanimate in possession. As for the debts they owe the supporter shall pay one-third and the dependant two-thirds, because it is to be understood that the supporter laboured and had anxiety and trouble from the time such debts were contracted, and the supporter worked for gain, while the dependant did not labour and lived eating and sleeping. As for the property in possession they shall get one-third or two-thirds in proportion to their status.

"When the husband and wife are sharers of each other's poverty and prosperity and are helpmates to each other, let the property be divided equally; and in the case of either party possessing some property originally (ပါးရင်း) (payin) let the owner get it. If the said property is spent or lavished, there can be no compensation. The husband gets the sons and the wife the daughters, who are children begotten by both. There is no offence committed if the husband sells the sons he gets, but if he sells the daughters he shall make good half (of the proceeds of sale and a similar compensation shall be given by the wife if she sells the sons.

171. "If a husband or wife in a state of anger says to the other 'I do not love you,' such words shall not be sufficient to constitute a divorce. It is constituted only when they divorce and leave each other after a division of the good and bad property in possession and not in possession to which they are entitled.

"After such a separation if the man or the woman, regarding the other as his former wife or her former husband, has sexual intercourse without the other's consent, he or she shall forfeit all his or her property and he or she, himself or herself, shall be possessed by the other. If the woman uses obscene language against him, regarding him as her former husband, an indemnity shall be given to the man according to the offence committed.

"If there is mutual consent, there is no offence."

43. Returning to section 3 of the 12th Book of the Menu Kyay, the following is interesting as showing that not only adultery but proof thereof was required to justify a dissolution of marriage, and before a wife, like an enemy or a thief, can be punished there must, under section 2, be an inquiry before a Judge. These ideas are inconsistent with the efficacy of whim.

G. "If the husband suspects the wife of having a paramour in a certain man, but is not certain and accordingly accuses her of having gone wrong with a certain man, and she says that it is not so; if he also gives notice, in presence of other persons, of his suspicion to the man suspected, and he also denies it; and if the husband afterwards divorces the wife and she goes and lives with the said man before a final settlement of the property has taken place; let the husband have compensation for the seduction of his wife and the price of her body; and let him also have the whole of the property. If a wife really has a paramour and she says so, let (the husband) have the price of the body of his guilty wife, and let him take possession of the whole property. Thus the Sage Menu hath said. This is also said of a couple who become husband and wife from their younger days (or who have not been married before)."

44. The passages I divide into H, I, and J relate to the couples who have already been married before; and, if I am right in presum-

Bai's case (L. R., 1, Bombay, 164) as to legal cruelty, and see "Lidlingapa *v.* Sidava" as to marriage creating status (L. R., 2, Bombay, 624). We must not hastily assume that the order making a fickle spouse compensate the deserted partner in damages was an affirmation of the fickle person's right to break the contract. We do not find any author of repute or any judicial decision of a superior Court passed on evidence affirm any general custom to exist such as might be traced to the old written law.

Secondly, on the custom. The last remark applies, and we find Judges of experience denying that any such practice exists. There is every reason to suppose either that one party cannot divorce the other against the consent of the latter without a decree of Court dissolving the marriage, or without liability to suit to declare the alleged divorce to be invalid or for compensation in damages. The affirmation of the principle which requires submission to a Court carries important consequences and is almost inconsistent with the doctrine about caprice.

Lastly it is for those who affirm that the Dhammathat gives a right to divorce at mere caprice to establish this out of the Dhammathat. The onus is on them and not on those who deny such a rule.

With all due deference therefore to the decisions of the Recorder's Court, it cannot be said that the question is settled so far as regards the territory outside the Town of Rangoon : and its enormous importance to practical morality and social arrangements makes a thorough discussion expedient. In the very nature of things the rulings must differ widely according to our treatment of marriage as a mere civil contract to be studied in books about property, or as a contract creating a status, fraught with importance to the young generation, closely connected with civil duties and pervaded with the religious and moral ideas of centuries. In applying general maxims of jurisprudence as a test of argument we must not turn those maxims topsy-turvy. There may be results that escape one single mind, and the vast subject can only be dealt with properly and throughly by a Bench after argument. The necessity of thoroughness is greater in Burma than elsewhere, because the very youngest Myo-ôkes sitting in the lowest Courts of all have a matrimonial jurisdiction, and yet they have no published decisions to guide them among these perplexities. At starting I have shown in Bishop Bigandet's words how the equalizing doctrines and the ennobling influences of Buddhism have elevated the Burmese women. It will occasion astonishment and regret if the rulings of Courts cause marriage to be so undermined by the notion of one-sided divorce as to lose even its character as a mutual contract as well as status. Such a result appears to me contrary to both British and Burman jurisprudence.

46. The technical terms used in disposing of property on divorce are partly explained in the quotations from the *Dhammathats*, and I have mentioned some of them in my earlier note on marriage, as also the difference in treatment of virgin couples and twice-married couples. These differences and technical terms must never be forgotten in dealing with questions of Buddhist law. Such explanations as I now give I do not put forward with authority, because they

have been hastily gathered. The word payin (ပါရင်း) is more especially used in relation to couples both of whom have been married before and means the original capital which each brings in to the joint concern. Khanwin (ခဏဝင်) is a popular word signifying the property devoted by the partners in either kind of marriage at the time of marriage to joint purposes: by being so devoted it becomes hnapazone. The saved earnings of an Advocate so devoted at the time of marriage would be khanwin. The profits or interest of payin and khanwin accruing after the marriage are called letthetpwa hnapazone, the first term meaning accrued after marriage and the second joint benefit. The relations of naitheeya (နိဿယ) and naitheeta (နိဿိတ) are based partly on the notion of the first being the rich partner and the other the dependant: and naithaya (နိဿယ) as a noun means the capital of the rich husband or wife acquired before marriage, the ancestral property devolving during coverture, such property not being devoted to joint purposes as khanwin is. The interest of this capital accruing after marriage becomes letthetpwa. In the present vagueness of decisions I do not venture to formulate precise rules about division on divorce or to show the treatment these different sorts of property receive under the laws of inheritance. Some of the terms are unknown to the younger Burman Judges, perhaps because they have only read Richardson's Menu Kyay; and I am quite without information as to whether they have any significance among the people at the present time.

G. B. C. P. O.—No. 269, Supdt., G. P., 25-2-1903—510.