Privy Council Appeal No. 45 of 1915.

Maung Thwe - - - - - - *Appellant,*

v.

Maung Tun Pe (deceased, by his Legal Representatives) - - - - - - *Respondents.*

FROM

THE CHIEF COURT OF LOWER BURMA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH JULY, 1917.

Present at the Hearing:

LORD DUNEDIN.
SIR JOHN EDGE.
MR AMEER ALI.
SIR WALTER PHILLIMORE, BART.

[*Delivered by* SIR WALTER PHILLIMORE.]

The litigation in this case concerns the succession to the estate of U Shwe Mya and Ma Shwe I, Burmans, professing the Buddhist Faith, a wealthy married couple who died childless; the husband early in 1906, and the wife on the 9th of February, 1908. Upon the death of the latter a contest arose between the claims of Maung Thwe, a nephew of the husband, and Maung Tun Pe, a nephew of the wife, each claiming to be the sole adopted child and to succeed to the exclusion of the other.

After certain abortive police proceedings the contest took a regular shape, Maung Thwe being the applicant for administration and Maung Tun Pe resisting him and setting up his rival claim.

Much evidence was given before the District Judge, and he in the result decreed letters of administration to Maung Tun Pe, upon what ground does not appear.

Maung Thwe, being aggrieved by this decision, appealed to the Chief Court, which refused to hear the case upon the merits or to interfere with the order, the Judges stating that the decision as to administration would not operate as *res judicata*, and that it would be open to Maung Thwe to establish his right in other proceedings.

Thereupon the present proceedings were instituted by Maung Thwe against Maung Tun Pe as administrator, Maung Thwe setting forth his title as an adopted son and sole heir to the estate, complaining that Maung Tun Pe wrongfully refused

to deliver the estate to him, and praying for a declaration that he was the sole heir and for consequential relief.

Maung Tun Pe put in a defence, in which he denied the plaintiff's adoption and all the other allegations in the plaintiff's claim, stated that he was the only adopted son and heir, having been adopted in his infancy, and prayed that the suit might be dismissed.

The District Judge, who was not the same Judge before whom the administration proceedings had been taken, framed three issues, which were as follows :—

1. Who of the claimants to the estate should be recognised by Buddhist law of inheritance as heir to the estate of deceased U Shwe Mya and Ma Shwe I ?

2. Have either or both of them been adopted ?

3. What is the extent and value of the estate of the deceased U Shwe Mya and Ma Shwe I ?

By agreement between the parties the evidence in the previous case was read as evidence in this case, some of the witnesses being further examined and cross-examined, and one or two fresh witnesses being added.

By his judgment dated the 12th January, 1911, the District Judge declared that Maung Thwe was the sole adopted *kittima* son of the deceased couple and their sole heir, and directed consequential accounts and enquiries. And by a subsequent order, dated the 3rd May, he directed Maung Tun Pe to transfer to Maung Thwe the property of which he had become possessed as administrator.

From these decrees an appeal was taken to the Chief Court of Lower Burma, which, by its judgment dated the 23rd September, 1913, allowed the appeal, reversed the decrees, and dismissed Maung Thwe's suit with costs in both Courts.

The Chief Court found that Maung Thwe had not proved his adoption, and that it became therefore unnecessary to decide whether Maung Tun Pe had or had not proved his adoption, as he was in possession and the plaintiff had failed to prove a title against him.

From this judgment of the Chief Court Maung Thwe has appealed to His Majesty in Council.

Maung Tun Pe has died during the course of these proceedings, and his legal representatives are now parties to this appeal as respondents.

It appears to their Lordships unfortunate that the Chief Court should have failed to enquire into the rival claim of Maung Tun Pe. The previous decision of the same Court had in substance decided that when the merits of the respective claimants to the beneficial interest in the estate came to be considered, neither was to have an advantage by reason of his having previously obtained administration. And yet, in the present case, the Chief Court treated Maung Tung Pe as if he were in possession and in a position to win his case without

any proof of title, upon the mere weakness of the title of the other claimant. The only way to handle the case after the previous decision was to treat the two parties as competitors, starting upon an equal footing.

Their Lordships proceed to examine the case of the two parties upon this principle.

The Burmese Buddhist Law in the matter of adoption and inheritance has been the subject of discussion in several cases in the local Courts and before this Board.

A child adopted according to the fullest form of adoption and retaining his status as an adopted child till the death of his adoptive parents is entitled to inherit their estate as if he were a natural and lawful child, either in the absence of other children or in competition with them. Such a child is called a *kittima tha* or *kittima* child.

The word is sometimes written *keitima* and seems to be a corruption of the Sanscrit *kritrima*.

There is no ceremony of adoption, and it is not necessary for one who claims adoption to point to any particular statement or act made by his adoptive parents upon a particular date. But on the other hand, the adoption must be a matter of publicity and notoriety.

It is unncessary to state all the authorities upon this subject, as the matter has twice in recent years come before this Board, in the cases of *Ma Me Gale* v. *Ma Sa Yi* (L. R., 32 Indian Appeals, p. 72 (1904)), and *Ma Ywet* v. *Ma Me* (L. R., 36 Indian Appeals, p. 192 (1909)).

To quote a passage from the last judgment, the fact of adoption

> "can either be proved as having taken place on a distinct and specified occasion, or may be inferred from a course of conduct which is inconsistent with any other supposition. But in either case publicity must be given to the relationship, and it is evident that the amount of proof of publicity required will be greater in cases of the latter category, when no distinct occasion can be appealed to."

It is most important that adoption with a view to inheritance, which, in this community, takes the place of testamentary disposition, should be made known to all those likely to be concerned; and their Lordships are anxious in no way to weaken what has been stated to this effect in former decisions.

There is a further principle of law with regard to kittima children, to which attention has been drawn in the course of the argument.

A kittima child may, according to the authorities, forfeit his right of inheritance by separating from his adoptive parents, this being considered an act of ingratitude. The texts are set forth in section 195 of Mr. Gaung's "Digest of Burmese Buddhist Law."

These authorities, however, draw a distinction between the cases where there are other children with whom the kittima child seeks to compete and share, and cases where he has no

such competitor, and in the latter instance allow him to inherit in whole or in part notwithstanding his separation.

This points to the true principle upon which the rule of forfeiture rests. It is a matter of intention. If the kittima child goes to live separately from his adoptive parents, it may be that he has shaken off the tie, that he has provided for himself, has discontinued the further performance of duty towards his adoptive parents, and has given up with his duty his claims upon their estate; and it is more easy to presume this when the parents have other children who can perform the duties and receive the estate.

The fact that the child goes to live apart is some evidence of an intention to break the bond. The distance may be so great as to render it impracticable for the child to continue to discharge duties to his adoptive parents, and in that case it probably works a forfeiture.

But if the distance be not great, if the separation of residence be with the consent of the adoptive parents, and if the child is ready and willing to discharge filial duties after this separation, the bond is not broken.

This is the result of the modern decisions which are quoted in Chantoon's "Principles of Buddhist Law," pp. 88 to 95. To these may be added a decision in the Appeal Court of Upper Burma in the case of *Maung She Thwe* v. *Ma Saing and Another*. (2, Upper Burma Rulings, p. 135; 2, Printed Judgments, Lower Burma, p. 520.)

The general outline of the case on behalf of Maung Thwe was that he was residing with his parents at a distance of about a day's journey from the residence of his adoptive parents, that they came to his house when he was about 17 years old, stayed there for a day or two, and then asked for him in adoption; that certain elders were called in as witnesses of the act of adoption, and that then he went away to his adoptive parents and never returned to his native village.

As he appears to have been born about 1880 that would make the date of his adoption about 1897 or 1898.

In support of this case, besides his own evidence there was that of his father and the three fellow villagers who had been the witnesses to the adoption, two of whom were people of some position in the village.

He stated that he lived continuously with his adoptive parents till his marriage, which took place when he was about 25, some nine months before the adoptive father died. He relied upon the card of invitation to his marriage which was issued by his adoptive parents, upon statements made at the marriage by the adoptive father to the effect that he was his heir, and upon the testimony of several witnesses, tenants and others, who deposed to statements by the parents that Maung Thwe was their adopted son, and that tenants were to treat him as such, and pay rent to him; and he gave other evidence of repute.

The line taken upon behalf of Maung Tun Pe was that he, as a much younger boy, could know very little about the facts alleged by his rival and required strict proof. There was much criticism of the character and statements of the witnesses for Maung Thwe. It was contended that the statements on the invitation card did not support the view that Maung Thwe was a kittima child, and it was pointed out that this card was the only piece of documentary evidence that Maung Thwe could put forward.

It was beyond question that after Maung Thwe's marriage he went to live with his wife's mother. He stated that he continued to discharge such duties as his adoptive parents required of him, and that it was part of the arrangement upon his marriage which was made with the consent of his adoptive parents, that he should go and live with his mother-in-law.

On the other side it was contended that this separate living was fatal to Maung Thwe's case, either as working a forfeiture, or as showing that there never had been a kittima adoption.

The affirmative case of Maung Tung Pe was that his mother lived in the same village as the adoptive parents, and had been visited by them shortly after his birth, when they had agreed to adopt him after he had been reared through his tender years, that the actual adoption began when he was twelve or thirteen years old, from which time he lived sometimes with his own parents and sometimes with his adoptive parents. He said that his adoptive parents paid his school fees, provided for a hospital doctor when he received an injury, and accepted publicly the position of parents when the ceremony of *Shinbyu* was performed. This ceremony, which ends in the boy entering for a time a Buddhist monastery, is one which a Buddhist boy goes through upon attaining puberty.

His case further was that after the adoptive father's death he resided regularly with the widow, and that she put his name into the leases with the tenants, thereby showing either that he was heir to the property, or that he was already entitled to a share as representing his deceased adoptive father.

Maung Tun Pe was said to be about eighteen when the father died in 1906, which makes his birth about 1888.

Maung Thwe said that Maung Tun Pe never lived in the house of the adoptive parents during the father's lifetime.

On the other hand, Maung Tun Pe said that Maung Thwe did not live in the adoptive parents' house, but in his natural parents' village, and only sometimes visited them when on a journey.

The District Judge accepted the affirmative evidence for Maung Thwe. The Judges in the Chief Court looked at it with more suspicion, and thought that the evidence of the supposed act of adoption was improbable, that the witnesses put forward as elders were not of the authoritative class that one would expect,

and that there were discrepancies in the statements of the witnesses as to what took place at the marriage.

They accepted the evidence that for some years before the father's death Maung Thwe had resided a great deal, if not permanently, with the old couple, and helped them in their business, but they said that it would be natural that he, as a nephew, should do this.

The officiating Chief Judge thought that it was not usual to adopt at so late an age as 17, and then o served, somewhat inconsistently, that the old couple might have taken him with them with an intention to adopt him later if he proved suitable, but that when they married him off that idea was abandoned.

The second Judge laid a good deal of stress on Maung Thwe's having gone to live apart from his adoptive parents, and of the acts of the widow indicating that she wished Maung Tun Pe to succeed to her property, as showing that the other had not been adopted.

Both Judges relied upon the language of the card of invitation as being hurtful to the case of Maung Thwe, and the District Judge thought that it was not helpful to his case, though, on the other hand, it was not fatal to it.

The language of this card, omitting unimportant words is in the translation as follows :—

> "As according to the duty of parents it is desired to marry Maung Thwe, the nephew son of U Shwe Mya and Ma Shwe I, and Ma Nyin Ma, daughter of Ma Shwe Hluing, you are invited to come to the marriage ceremony."

Then the date is given, and the residence of the mother-in-law as the place.

Nephew son is a translation of Tu Tha. *Tha* is "son" simply, and *Kittima tha* is "fully adopted son."

There is no doubt that Maung Thwe was a nephew, and nephew son was not inapplicable though it might be inadequate.

It is clear that too much stress must not be laid on the word *son*, because the Burmese are proverbially inexact in their terms of relationship ; but its use is of some assistance to Maung Thwe's case.

On the other hand, the statement that the marriage was being made according to the duty of parents, seems to show that the old couple who issued the invitation were accepting the duty of parents ; and so the District Judge views the phrase.

Their Lordships are unable to hold that much inference can be drawn one way or the other from the language of the invitation card, which seems consistent with either hypothesis ; that is, either that Maung Thwe was an adopted son, or that he was a nephew who had been taken by the old couple to live with them, and to whom they had put themselves under obligation, which they were discharging by providing for his marriage. But they would observe that either of these positions

—and one of them is certainly right—is inconsistent with the story deposed to by the witnesses for Maung Tun Pe.

Their Lordships see no reason for differing from the District Judge in his acceptance of the story of the witnesses as to the statements made at the marriage by the adoptive father; and if they are accepted, they go a long way to prove the adoption.

The view taken by the Chief Court is in substance that the proof was insufficient. The officiating Chief Judge has a very long experience of Burmese habits and customs; and it has been urged on behalf of the respondents that his decision upon such a subject is of special authority.

Their Lordships feel the force of this argument; but they would have attached more weight to it if the Chief Judge had examined the case of Maung Tun Pe in the same manner as he has examined the case of Maung Thwe. They are inclined to think that if he had applied the same critical solvent to the one story as to the other, he would have come to the conclusion that neither had proved an adoption; and this is a consequence in itself improbable, and one for which neither side has contended.

As to Maung Thwe living separately after his marriage, it has not been contended before their Lordships that it was a separation which worked a forfeiture, if there had been a prior adoption. It appears that it was always intended that the marriage should be followed by Maung Thwe going to live with his widowed mother-in-law, and the marriage took place not only with the consent but upon the request of the old people, who apparently first came themselves and then sent an intermediary to beg for the hand of the girl. Maung Thwe deposed that he used to help the couple after his marriage, and it was admitted that he was called in by the widow on an occasion when she was in trouble. There was evidence that he and his wife, when the adoptive father was taken ill, went and nursed him till his death; and through his cross-examination no specific failure of duty was put to him.

Upon the whole their Lordships attach no weight to the separate residence, either as working a forfeiture or (as it was rather put before them) as indicating that there never had been an adoption; and they are of opinion that Maung Thwe did make out that he was an adopted child and an heir to the old couple.

But whether he was the sole adopted child and heir is another question. The District Judge thought that he was, and that Maung Tun Pe had not made out his case; and Maung Tun Pe has not the assistance of any finding in his favour in the Chief Court. But he has strong documentary evidence in the fact of the leases, in which his name appears with that of the widow after the adoptive father's death.

Some, at any rate, of the leases have been proved to be genuine and to have been effected under the authority of the

widow. There is a good deal of evidence that the adoptive father took a principal part in the ceremony of *Shinbyu*, though the natural father was also present. The providing of the hospital doctor was proved, and there seems no doubt that, after the adoptive father's death, Maung Tun Pe, having by that time arrived at an age when he could be useful, did most of her ordinary business for the widow.

Maung Tun Pe's case has this weakness, that the supposed original adoption was made without witnesses. The District Judge commented with force upon the fact that the act of adoption—if there was any one single act—was not witnessed by any elder or any other person in authority, and was a wholly private transaction, and he came to the conclusion that there was no adoption by U. Shwe Mya. He thought it not improbable that Ma Shwe I may have intended to have adopted Maung Tun Pe after she became a widow, but, having regard to the fact that there was already one adopted son, he thought that more proof than that supplied would be necessary to establish a subsequent adoption by the widow.

Their Lordships have been informed by Counsel for Maung Thwe that he does not contend that there would be any legal objection to the widow adopting a second heir, or that the position of a son so adopted would be in any way inferior to that of the first adopted son.

After consideration of the evidence, they have no doubt that, at the death of the widow, Maung Tun Pe was also an adopted son. It would be difficult to fix a date when this adoption began, or to say with certainty, whether it was the act of the couple or of the widow only. The stronger evidence for it is to be found in what happened after the adoptive father's death. This might point to a subsequent adoption, but it would also be consistent with a previous adoption, the evidence for which it has not been so easy to procure.

Upon the whole their Lordships come to the conclusion that both of the claimants were adopted heirs. This being so, either in turn has asked for too much, and each should bear his own costs of the litigation.

Their Lordships will therefore humbly advise His Majesty that the decree of the Chief Court should be reversed, that it should be declared that Maung Thwe and Maung Tun Pe were heirs to the estate of U Shwe Mya and Ma Shwe I as their kittima sons, and that the case should be remitted to the District Court with this declaration, and that there be no costs in either of the Courts below or of this appeal.

In the Privy Council.

MAUNG THWE

v.

MAUNG TUN PE (deceased, by his Legal Representatives)

from

THE CHIEF COURT OF LOWER BURMA.

DELIVERED BY

SIR WALTER PHILLIMORE, BART.

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