APPELLATE CIVIL.

Before U Thaung Sein, J.

H.C. 1948

June 1.

MAUNG BA THI NYO AND OTHERS (APPELLANTS)

v.

MAUNG SAN NYUN AND OTHERS (RESPONDENTS).*

Buddhist Law—Keittima *adoption*—Apatitha—*Difference.*

Held : That distinction between *keittima* and *apatitha* adoption is a fine one and lies solely in the intention of the adoptive parent. If the child was taken with intent that it shall inherit from the adoptive parent then the adoption is *keittima* and it is this intention that must be given publicity. *Apatitha* child is one adopted casually without the intention expressed that the child shall inherit.

Ma Than Nyun v. *Daw Shwe Thit*, I.L.R. 14 Ran. 557, followed.

Maung Gyi and one v. *Maung Aung Pyu*, I.L.R. 2 Ran. 661, referred to.

Yan Aung for the appellants in 14/1948 and respondent in 166/1947.

Ba Nyunt for the respondents in 14/1948 and appellant in 166/1947.

U THAUNG SEIN, J.—Civil Second Appeals No. 166 of 1947 and No. 14 of 1948, which have arisen out of the same suit, namely, Civil Regular No. 32 of 1946 of the Subordinate Judge Tavoy, have been dealt with together, and the present judgment will cover both those cases

In the above suit the plaintiffs Maung San Nyun and Ma Thaung Sein, who are husband and wife, sued Maung Ba Thi Nyo and Ma Aye Kyi (husband and wife) for a declaration of their title to a certain piece of land in Tavoy town and for possession of the same. Their case was that they (the plaintiffs) had bought the suit land from six persons who were the legal representatives and heirs of one Daw Sein Nu, the

*Civil Second Appeal No. 166 of 1947
Civil Second Appeal No. 14 of 1948. Cross appeals against the decree of the District Court of Tavoy in Appeal No. 15 of 1947, dated the 6th November 1947.

original owner. The defendants had, however, built a house on the land and were in occupation and refused to quit in spite of notices served on them.

The suit was hotly contested by the defendants, who claimed that Ma Aye Kyi (2nd defendant) was a *keittima* daughter of Daw Sein Nu and hence sole heir to her estate to the exclusion of all other heirs.

The learned Subordinate Judge framed three issues which I do not propose to reiterate, and the suit went to trial. The most important issue in the case was whether the defendant Ma Aye Kyi was, in fact, the *keittima* daughter of Daw Sein Nu. Evidence was led by both sides, and when the hearing of the witnesses had been concluded, the defendants applied for permission to amend their written statement so as to put in an alternative claim as an *apatitha* child. The learned Subordinate Judge granted the necessary permission, and it is interesting to note that there was no objection to the proposed amendment by the plaintiffs. Finally, the learned Subordinate Judge found that the defendant Ma Aye Kyi was, in fact the *keittima* adopted daughter of Daw Sein Nu and, as such, her sole heir. The suit was then dismissed as the six persons who transferred the suit land had no right, title or interest in it.

An appeal was filed in the District Court of Tavoy against the decree of the learned Subordinate Judge, and the learned District Judge held that Ma Aye Kyi had failed to prove *keittima* adoption and that she was merely an *apatitha* child. It is settled law that an *apatitha* child is only entitled to a half share in the estate of her adopted parents and that the remaining half share must fall to the other heirs. The learned District Judge accordingly set aside the decree of the trial Court and granted a decree to the plaintiffs as prayed for in respect of a half share in the suit land

H.C 1948

MAUNG BA THI NYO AND OTHERS v. MAUNG SAN NYUN AND OTHERS.

U THAUNG SEIN, J.

and for possession of the same. Both the plaintiffs and defendants have now come up in second apeal—the plaintiffs asserting that the learned District Judge was wrong in holding that there was any adoption of Ma Aye Kyi by Daw Sein Nu and that Ma Aye Kyi is not an *apatitha* child. The defendant Ma Aye Kyi, on the other hand, claims that she is a *keittima* child and not an *apatitha* child as found by the learned District Judge.

The main grounds put forward by the learned counsel appearing for the original plaintiffs is that, on the evidence led at the trial, the lower Courts ought to have held that Ma Aye Kyi failed to prove any adoption of herself by Daw Sein Nu. The defendants, however, assert that there was clear evidence of *keittima* adoption. Both the lower Courts have held that there was at least an adoption of Ma Aye Kyi by Daw Sein Nu, though, of course, they do not agree on the exact nature of the adoption. This concurrent finding of fact, that is to say, of the adoption of Ma Aye Kyi, must be accepted. The only question that remains is whether Ma Aye Kyi was a *keittima* or an *apatitha* child.

Now, the distinction between a *keittima* and an *apatitha* child is a fine one and lies solely in the intention of the adoptive parents. In *Ma Than Nyun* v. *Daw Shwe Thit* (1) the distinction between a *keittima* and *apatitha* child has been explained as follows :

"The intention of the person who takes the child of another in adoption that the child shall inherit from the adoptive parent is the principal requisite of *keittima* adoption, and it is this intention that must be given publicity.

* * * *

An *apatitha* child is one who has been adopted casually and without any intention expressed on the part of the adoptive

(1) I.L.R. 14 Ran. 557.

parent that the child shall inherit. The intention forms the dividing line between a *keittima* child and an *apatitha* child; in other respects their position is the same."

Applying these principles to the present case, the questions that arise are whether there was any intention on the part of Daw Sein Nu that Ma Aye Kyi should inherit her estate to the exclusion of other relatives, and whether there was public notoriety of this intention. The learned Subordinate Judge has discussed the evidence led in great detail and held that Daw Sein Nu had adopted Ma Aye Kyi with the consent of her parents and lived for 20 years with her as her adoptive mother. During that period Daw Sein Nu had usually addressed her as "thami" (daughter), allowed her to manage the house and sent her on a religious pilgrimage with other friends. The learned Subordinate Judge was impressed by the veracity of the witnesses cited by Ma Aye Kyi and remarked: "Theirs is a simple story to tell and they told it plainly." He went on to say "Studied as a whole the story has a ring of truth." Some of the witnesses cited by Ma Aye Kyi are admittedly her close relatives.

The learned District Judge, however, refused to accept the testimony of these witnesses on the ground that they "are either under obligations to or relations of Ma Aye Kyi". Perhaps, the learned District Judge has overlooked the fact that, in weighing the evidence of witnesses, the trial Court is always in a far better position than the appellate Court. The trial Court has the advantage of seeing and noting on the demeanour of the witnesses, whereas the appellate Court merely reads the evidence as recorded. As a general rule therefore, findings of fact by trial Courts dependent on the oral evidence of witnesses should normally be accepted. The learned Subordinate Judge, who saw and heard the witnesses in the present case,

H.C. 1948

MAUNG BA THI NYO AND OTHERS v. MAUNG SAN NYUN AND OTHERS.

U THAUNG SEIN, J.

has given good reasons for believing them, and I see no reason why his findings should have been upset by the learned District Judge.

There are, however, two factors pointed by the learned District Judge which were not discussed in the judgment of the trial Court. In the first place, it appears that, at the time of Daw Sein Nu's death, she left a boat and this was sold by one Maung Kywe Phyu, her nephew. According to the learned District Judge, this would clearly go to show that Ma Aye Kyi was not the adopted daughter, as, if she were, no such sale could have taken place except by herself. The answer to this is that, as pointed out by the learned counsel for the defendants, the boat was apparently sold during an unsettled period and perhaps Ma Aye Kyi did not feel inclined to interfere with Maung Kywe Phyu.

Next, the learned District Judge has referred to an *ahlu* given by Daw Sein Nu to which hundred guests were invited. It appears that invitation cards were issued for the occasion, and Ma Aye Kyi has referred to that *ahlu* in the following words :

> "Daw Sein Nu personally performed the dedication ceremony. She did not declare then that I was her adopted daughter."

The ceremony in question was one relating to the offering of honey to some *pongyis*, and I am at a loss to know why it should have been necessary for Daw Sein Nu to have announced then that Ma Aye Kyi was her adopted child. As regards the invitation cards, the learned District Judge has held that they were not issued in the joint names of Daw Sein Nu and Ma Aye Kyi. No copies of the cards in question were filed as an Exhibit, and none of the witnesses were specifically questioned on this matter.

On the whole, I am of the opinion that the learned Subordinate Judge was correct in holding that Ma Aye Kyi was the *keittima* adopted daughter of Daw Sein Nu and, as such, her sole heir. The suit lands were the property of Daw Sein Nu, and Ma Aye Kyi alone was legally entitled to dispose of them. The six persons who transferred the suit lands to the plaintiffs were not legally entitled to do so, and, as such, could confer no title in the property. The learned District Judge therefore erred in holding that Ma Aye Kyi was only an *apatitha* child of Daw Sein Nu.

Before finally disposing of this appeal I should like to point out that the learned counsel for the plaintiffs has also argued that the trial Court should not have allowed an amendment of the written statement by the defendants by means of which they were able to put in an alternative claim as an *apatitha* child. According to the learned counsel, the plaintiffs were deprived of their right to meet the defendants' additional claim. As a matter of fact, no objections were raised by the plaintiffs at the time when the amendment was allowed by the trial Court. It has been laid down in *Maung Gyi and one* v. *Maung Aung Pyu* (1) that a Court may, under suitable circumstances, permit a written statement to be amended so as to make the defence also into an alternative one of *apatitha* adoption. There can be no doubt that the present suit was a fit case in which such an amendment should have been allowed and was, in fact, allowed by the learned Subordinate Judge, Tavoy.

Accordingly, Civil Second Appeal No. 166 of 1947 is allowed and the decree of the lower appellate Court is set aside and the plaintiffs' suit is dismissed with costs in all Courts.

(1) I.L.R. 2 Ran. 661.

H.C. 1948

MAUNG BA THI NYO AND OTHERS v. MAUNG SAN NYUN AND OTHERS.

U THAUNG SEIN, J.

Civil Second Appeal No. 14 of 1948 is dismissed. There will be no costs in this case as I have already allowed costs in Civil Second Appeal No. 166 of 1947.