

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ma Me Gale v. Ma Sa Yi, from the Chief Court of Lower Burma; delivered the 8th December 1904.

Present at the Hearing :

LORD DAVEY.

LORD ROBERTSON.

SIR ARTHUR WILSON.

[*Delivered by Lord Robertson.*]

The question in this case is whether the Respondent and the Appellant are both keitima adopted daughters of the deceased Ma Ye, a Burmese lady of considerable fortune, who died on the 14th April 1899, or whether the Respondent alone stood in that relation to the deceased. Ma Ye had been married; her husband, Ko On, predeceased her by a few years; and she was childless. The two litigants are sisters by blood, being both daughters of a lady named Ma Ku, who was cousin of Ma Ye. The Respondent, who is the elder of the two sisters by a year and some months, is admitted to be a keitima adopted daughter of Ma Ye; and the suit, which was initiated in the Court of the Judge of Moulmein by plaint on 19th September 1899, was brought to obtain a declaration that the Appellant is keitima daughter of Ma Ye, and entitled to a half of her estate. The written statement of the Respondent was, in substance, a denial that the Appellant had been adopted;

and the first and leading issue settled for the trial of the cause, to which alone the attention of their Lordships was invited, was as follows : " Was the Plaintiff adopted by the late " Ko On and Ma Ye so as to entitle her to inherit?"

Evidence was taken before the learned Judge of Moulmein, and on commission, and on 7th November 1900 he decided in favour of the Appellant. On appeal this Judgment was reversed on 8th August 1901 by the Chief Court of Lower Burma.

Upon the issue in the suit, which has been above set forth, it is to be observed that the thing to be established is a relation between these two persons, Ma Ye and the Appellant. Neither ceremony nor written document is required to constitute or initiate that relation. There must be, on the one hand, the consent of the natural parents, and, on the other, the taking of the child by the adoptive parent with the intention and on the footing that the child shall inherit. What has to be ascertained is whether with the consent of her parents the Appellant was adopted by Ma Ye as her child and one of her heirs.

While the consent of the natural parents is a legal condition of the relation, this cannot seriously be said to present any substantial difficulty in the way of this Appellant. From her early childhood she and her mother were left by her father to shift for themselves, and her mother had before her marriage lived in Ma Ye's house, and was on affectionate terms with that lady. It happens that while the mother is dead the father was examined on commission, and he gave direct and positive evidence of his consent, and of the adoption; and the Judge has believed his testimony.

The question of fact whether the Appellant was adopted by Ma Ye and treated by her as her

keitima adopted daughter is to be determined as a question of evidence. A few of the more salient facts must be noted in the order of time.

The Appellant, to begin with, was born in Ma Ye's house, in or about 1857, so that the early incidents of her childhood are sufficiently remote to account for inaccurate or varying recollection on the part of the witnesses. Between her birth and the death of her natural mother, which occurred in or about 1869, there is a period during which she lived at times with Ma Ye and at times with Ma Ku. From Ma Ku's death to her own first marriage, she lived with Ma Ye, a period of four or five years. In or about 1873 she married Ismail Lotia. While the circumstances of this marriage were not creditable and would have strained any but a strong tie, this was very soon condoned; the husband was employed by Ma Ye; the Appellant's first two confinements took place in the house of Ma Ye; and the third in a house hired by that lady. The first husband died in or about 1884, and from his death the Appellant and her children lived in Ma Ye's house until her second marriage in or about 1888. This second marriage, again, was not at first regarded as satisfactory, and it was delayed until Ma Ye's consent was obtained. From that time, the Appellant, while living with her husband, was frequently at Ma Ye's house, and Ma Ye frequently at her's; and one of her children was constantly with Ma Ye.

Finally, Ma Ye died in the arms of the Appellant, on 14th April 1899.

These bare facts in the Appellant's life show that from her own birth to Ma Ye's death the two are closely associated in Ma Ye's house. Nor can it escape observation that on the death of mother and husband the Appellant reverts to Ma Ye's house, and that even during the lives of

mother and husband that house is more to her than it would be but for some special tie. Further, the care and authority of Ma Ye are exerted when occasion arises.

The outline thus drawn is filled up by numerous witnesses ; and their Lordships, looking to the nature of the matters spoken to by those witnesses, cannot but ascribe a special weight to the impressions formed and the conclusions arrived at by the Judge of First Instance. One consideration, however, must be mentioned as considerably narrowing the controversy.

At an early stage of the trial, the Counsel for the Respondent admitted that whenever the Respondent and the Appellant during their youth were together in Ma Ye's house they were treated in the same manner, except that the Respondent alleges she was and the Appellant was not entrusted with the keys. The significance of this admission lies in the fact that the Respondent was, on her own showing, a keitima adopted daughter. Accordingly it is admitted that in Ma Ye's house the Appellant was treated as a keitima adopted daughter was treated ; and this applies to not weeks, or months, but years. (The matter of the keys does not detract from the admission, as presumably this was an indivisible privilege and the Respondent was the elder sister.)

Again, the true question being, what was the relation ? it is a question of secondary, although doubtless considerable, importance, when it began. The Respondent and the learned Judges in the Court of Appeal have made much of the fact that the witnesses for the Appellant ascribe the adoption, some to one period, and some to another. At the distance of thirty or forty years, it is not surprising that there should be this variance. But it has not been shown to the satisfaction of their Lordships how this objection meets or gets

rid of the large body of evidence which goes to prove that Ma Ye called both girls her daughters and told people they were her daughters, while Ma Ye's conduct towards the Appellant completely accorded with the truth of the statements thus ascribed to her. It seems probable that the true solution of the question as to the time of adoption, is the simple one adopted by the learned Judge of First Instance, that the father of the two speaks truly and that the Appellant was adopted in her early childhood; that Ma Ye let the natural mother have the girl much with her while young; that the Appellant's return to Ma Ye's house on the death of her natural mother looked of itself like an adoption; but that her position as Ma Ye's adopted daughter had existed all along. The vicissitudes of the Appellant's matrimonial affairs throw her life into strong contrast with the more steady and stay-at-home life of the Respondent; but these circumstances cannot abate the result already brought about, while in one view they render the more significant the intimacy which subsisted between the Appellant and Ma Ye, from the earliest days of the Appellant down to the last moments of Ma Ye.

The learned Judges in the Chief Court of Lower Burma have discussed the evidence in much detail, some of their appreciations and discriminations being of a character more generally possible to the Judge who heard and saw the witnesses. But, towards the close of his Judgment, Mr. Justice Birks says: "It is clear that the fact of adoption has been inferred from the conduct of Ma Ye to the Plaintiff, and had Ma Me Gale" (the Appellant) "been the only daughter of Ma Ku, I think the Judge might have been justified in his inferences. The conduct of this kindly

“ old couple may be easily explained by the fact
“ that the two sisters were very fond of each
“ other, and that they did not wish to make any
“ difference of treatment apparent.” This rather
roundabout explanation is not to be found in the
deposition of the Respondent, who ought to
have known, and is unsupported by the rest of
the evidence. Nor does the learned Judge
furnish any satisfactory explanation of the body
of testimony which explains this identity of
treatment by Ma Ye’s own statements that both
girls were hers. To say, as Mr. Justice Fox
has done, that these things took place long ago,
and that the Burmese are proverbially in-
attentive and inexact, is an observation which
hardly meets the circumstantial and unshaken
evidence given by several persons on a point the
importance of which was crucial, and on which
cross-examination has failed of any substantial
effect.

Their Lordships are satisfied that the case
was rightly decided by the Judge of First
Instance, and they will humbly advise His
Majesty that the Appeal ought to be allowed,
the Judgment of the Chief Court of Lower
Burma reversed with costs, and the Judgment
of the Judge of the Court at Moulmein restored.

The Respondent will pay the costs of this
Appeal.
