paying the revenue as persons who owned the land. All these facts put together show, in the absence of anything to the contrary, that, under section 28, read with Article 144, of the Limitation Act, the original grantee's right of recovery of the land had been extinguished by lapse of time at the time the alleged mortgage was made. In these circumstances, in my opinion, the documents enumerated in my learned brother's judgment are sufficient to show that there was *prima facie* title in the mortgagors to the property mentioned in the documents. For these reasons, I agree with the orders proposed by my learned brother.

ORIGINAL CIVIL.

Before Mr. Justice Braund.

U BA THAUNG *v.* DAW U AND OTHERS.*

1936

Dec. 1.

Burmese customary law—Keittima *adoption—Residence of adopted child with adoptive parents—Residence not essential for adoption—Adoption of minor child of tender years—Lack of evidence of fact of adoption—Evidence of residence to prove adoption.*

Among Burman Buddhists an adopted child usually resides with the adoptive parents, but that is not essential for a valid adoption.

Ma Mu v. *U Nyun*, I.L.R. 12 Ran. 634, referred to.

On the other hand in case of minor children of tender years, where other evidence of adoption is lacking, the actual taking of the child by the adoptive parent into his or her home is almost essential for proving adoption.

Conditions of a *keittima* adoption stated.

Ma Than Nyun v. *Daw Shwe Thit*, I.L.R. 14 Ran. 557; *Ma Than Than* v. *Ma Pwa Thit*, 1 L.R. 1 Ran. 451; *Ma Ywet* v. *Ma Me*, 36 I.A. 192, referred to.

Maung Ni (with him *Leong*) for the plaintiff.

E Maung (with him *Kyaw Din* and *Kyaw Myint*) for the 1st and 2nd defendants.

J. B. Sanyal for the minor defendants.

* Civil Regular Suit No. 130 of 1936 and Civil Misc. No. 37 of 1936.

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BRAUND, J.—I have before me two proceedings arising out of the same set of facts. The first is a civil regular suit in which a man named U Ba Thaung is the plaintiff and in which the defendants are two sisters named Daw U and Daw Nu respectively, together with two children whose names are Ma Khin Htwe and Maung Mya Han. That suit has as its object the grant of letters of administration to the plaintiff to the estate of Daw Su, deceased.

The second of the two proceedings with which I am concerned is Civil Miscellaneous No. 37 of 1936 and it is a petition under Part 10 of the Indian Succession Act, 1925, by the two sisters, Daw U and Daw Nu, for the grant to them of a succession certificate in respect of the estate of Daw Su deceased. The facts giving rise to these proceedings are these.

Daw Su was the relict of a gentleman named U Maung Maung Gyi, who was himself the proprietor of the well-known Burmese newspaper "The New Light of Burma." U Maung Maung Gyi died in September 1933 leaving his wife, Daw Su, him surviving. Daw Su thereupon became the proprietress of "The New Light of Burma." She died on the 13th January 1936 and left a considerable estate, valued at over two lakhs. There were no natural children of Daw Su and her late husband U Maung Maung Gyi.

The present proceedings relate to Daw Su's estate. The first and second defendants in the civil regular suit for letters of administration, who are also the applicants in the civil miscellaneous proceeding for a succession certificate, are the two full sisters of Daw Su and, failing the establishment by or on behalf of the third and fourth defendants in the civil regular suit of the status of *keittima* children of Daw Su, it is conceded that Daw U and Daw Nu are the co-heiresses of Daw Su's estate.

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The plaintiff in the civil regular suit is U Ba Thaung, whose wife, Ma Ma Gyi, was a sister of U Maung Maung Gyi, deceased. Ma Ma Gyi died on the 28th July 1932 leaving two children by U Ba Thaung, namely, the defendants Ma Khin Htwe, a girl now of the age of 14, and Maung Mya Han, a boy now of the age of 12. Put shortly, the claim put forward by U Ba Thaung in the civil regular suit on behalf of these two children is that they were adopted by U Maung Maung Gyi and Daw Su, or, if not by both of them, then by Daw Su alone, in *keittima* adoption and that, accordingly, they are between them the only persons beneficially interested in Daw Su's estate and, accordingly, are the persons entitled to letters of administration.

The suit as originally framed was one between U Ba Thaung alone as the plaintiff against Daw U and Daw Nu as defendants. Inasmuch as the whole issue involves one single question whether the two children are *keittima* adopted children or not, it appeared to me to be impossible to decide that issue in this suit unless the two children themselves were made parties to it. It appeared to me to be impossible, or at any rate, most inequitable, to decide the status of the two children in a suit to which they were not parties and, accordingly, at an early stage I required the proceedings to be amended and the two children to be added as defendants.

Those then are briefly the facts which have given rise to this case and the issue which arises for determination is I think this :

> Whether, for the purpose of section 246 of the Indian Succession Act, the minor defendants, Ma Khin Htwe and Maung Mya Han, or either of them, are or is, the *keittima* adopted children or child of Daw Su

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deceased; or whether the defendants, Daw U and Daw Nu, the sisters of the said Daw Su deceased, or either of them, are or is, according to the rule for the distribution of the estate of the said Daw Su deceased, solely entitled to her estate."

Before dealing with the evidence it is possibly desirable, though it is by this time well settled, that I should state briefly what is the Burmese Buddhist Law relating to *keittima* adoption. The law of this province is to be found in a series of reported cases over a number of years and does not, I think, at this stage permit of any great doubt.

It is quite clear that for a valid *keittima* adoption no particular ceremony is necessary. A *keittima* child is described by section 81 of the Tenth Book of *Manukye* (in the words of Richardson's translation) :

"As the children of another person adopted permanently with a promise that they shall inherit which is a matter of public notoriety, these are called *keik-tee-ma*."

The translation of the same passage given by the learned author of May Oung's Buddhist Law is in these terms :

"One kind is the boy or girl called *keittima*, which is the son or daughter of others taken and brought up, to the knowledge of the public, with the intention 'we will make the son or daughter to receive inheritance and who are well known as such.'"

It is, I think the fact—and it is fully borne out by the authorities—that the conditions of a true *keittima* adoption are first that there shall be an actual taking by the adoptive parents of the adopted child with the consent of the natural parent or parents (if any); secondly, that such taking and adoption shall be accompanied by a promise (I myself prefer the word "intention") that the adopted son or daughter shall

receive a share of inheritance from her adoptive parents; and, thirdly, that such adoption shall be a matter of public notoriety.

I have already said that no ceremony of adoption is necessary nor is any deed of adoption necessary, though resort to both is sometimes had. When there is a ceremony or a deed or both, the question becomes a comparatively simple one, for there is, in the ceremony or in the deed itself, evidence both of the adoption and of the requisite public notoriety. In the great majority of cases, however, which come to these Courts, there is neither ceremony nor deed and what is to be relied upon to prove, not merely the adoption, but adoption in the particular form of *keittima* adoption, are the various domestic incidents in the lives of the child and its adoptive parents, which go to show the fact and intention of the adoption. I cannot do better than to refer to the words of Lord Dunedin in *Ma Ywet* v. *Ma Me* (1):

"It has already been laid down by this Board that, according to the law of Burma, no formal ceremony is necessary to constitute adoption. One may go further and say that, though adoption is a fact, that fact 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."

And, again, in the later case of *Ma Than Than* v. *Ma Paw Thit* (2) Lord Parmoor says:

"There is no special ceremony in Burmese adoption, but the adoption must be a matter of publicity and notoriety."

What, therefore, the plaintiff has to prove is not only the fact of adoption but also the facts of the

(1) (1909) 36 I.A. 192, 195. (2) (1923) I.L.R. 1 Ran. 451.

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intention to adopt in the *keittima* form and of the public notoriety which is necessary to constitute a valid adoption in this manner. These principles have I think very recently been considered by my learned brother Mr. Justice Ba U, who is more familiar with Burmese Buddhist Law than I am, and they have not, I think, been dissented from—*Ma Than Nyun* v. *Daw Shwe Thit* (1). There is one other question to which I desire to refer to at this stage. Though an adopted child usually resides with the adoptive parents, that is not essential for a valid adoption. This has some bearing on the facts as they have emerged in this case. The authority for that proposition is to be found in the decision of the late Chief Justice of the Court in *Ma Mu and others* v *U Nyun* (2). That case on its facts was a peculiar one. The adoptee was an adult. A formal deed of adoption was drawn up and registered but the lady who was adopted did not actually come to live in her adoptive parents' house. In that case, therefore, there was in the formal deed of adoption ample evidence of the adoption itself and the fact of residence with the adoptive parents was not in the least necessary to prove adoption. There was ample proof without it. While, therefore, this case is authority for the proposition that residence with the adoptive parents is not one of the legal ingredients of a valid adoption, it is not in the least authority *against* the proposition that, where other evidence is lacking, residence with the adoptive parents is, if not essential, at any rate most valuable as evidence. I desire to make clear the difference between "residence" as a component part of the legal conception of adoption (which it is not) and "residence" as mere evidence of adoption. In a case in which one is dealing

(1) (1936) I.L.R. 14 Ran. 557. (2) (1934) I.L.R. 12 Ran. 634.

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with minor children of tender years there can be no doubt whatever that the actual taking of the child by the adoptive parent into his or her house is almost essential to proving adoption where other evidence is lacking. Indeed, I remember no case of a child's adoption which has not been accompanied by residence in the adoptive parents' house.

[His Lordship discussed the evidence and came to the conclusion that the plaintiff had altogether failed to establish for the two minors the status of *keittima* adopted children. The conditions of a valid adoption were all lacking, and, moreover, the minors never lived with the alleged adoptive parents. His Lordship dismissed the suit with costs and allowed a joint succession certificate to issue to the 1st and 2nd defendants as the sole heiresses of Daw Su deceased.]

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Mar. 16.

The plaintiff appealed. (Civil 1st Appeal No. 196 of 1936 and Civil Misc. Appeal No. 120 of 1936). Roberts C.J. and Dunkley J., before whom the appeals came on for hearing, discussed the evidence and, agreeing with the decision of the learned trial Judge, dismissed the appeals with costs. In the course of his judgment Roberts C.J. said :

" It has been argued before us that it is by no means essential that, in these days at least, children should live with their adoptive parents. Nor is it essential that if they do not do so the proof of adoption should be deemed incomplete. Speaking for myself, I am in agreement with that view ; but I think that in the case of young children it is a normal characteristic of adoption that the upbringing of the children adopted should be undertaken by the adoptive parents and that where this is not done one must look carefully at the surrounding circumstances to see whether, when the normal characteristics have been departed from, there

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is still sufficient proof of the factum of adoption remaining."

And Dunkley J. added :

"It has been strenuously argued before us that there is no reason why adopted children should live in the house of their adoptive parents, but, of course, in the case of adoption of young children that would be the natural consequence of adoption. But in any case the acid test of an adoption is that the children should leave the family of their natural parents and join the family of their adoptive parents, and, consequently, it seems to me that in a case of a *keittima* adoption it is essential that the adoptive parents should, from the date of the adoption, make themselves responsible for the up-bringing of the children."

APPELLATE CIVIL.

Before Mr. Justice Mya Bu, and Mr. Justice Sharpe.

1936

Dec. 23.

MAUNG SIN *v.* MAUNG BYAUNG AND OTHERS.*

Final order—Order remanding case for trial—Respondent's claim to property against applicant re-opened—Appeal to His Majesty in Council—Civil Procedure Code, s. 109 (a).

The 4th respondent sued the petitioner (brother of her deceased husband) for possession of the share of her husband or of him and her in certain properties and for mesne profits. The 1st, 2nd and 3rd respondents who were her children by the deceased husband were also defendants in the suit. The petitioner pleaded, *inter alia*, a certain arbitration award as a bar to her claim except to the extent of the benefits allowed to her by the award. The children were minors at the time of making the award, and in another suit filed by the 1st respondent it was set aside as against the 1st and 3rd respondents.

The trial Court in the first suit would not allow the children to prosecute their claims in respect of the properties except to the extent the mother was allowed, on the ground that they were not joined as plaintiffs in the suit, and the suit was not an administration suit. On appeal the Court said that the award was void *ab initio* against the first three respondents and that they had

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* Civil Misc. Application No. 61 of 1937 arising out of Civil First Appeal No. 25 of 1931 of this Court.