

## APPELLATE CIVIL.

*Before Mr. Justice Mya Bu, and Mr. Justice Mackney.*

1938

Dec. 6.

DAW E THIN AND OTHERS

v.

MAUNG SAN THEIN.\*

*Chinese customary law—Illegitimate son—Inheritance in father's estate—  
Inheritance when no other heirs—Inheritance when other heirs—Share—  
Conditions—Recognition of paternity—Responsibility for upbringing.*

According to Chinese customary law an illegitimate son of a man is entitled to inherit from his father if the latter dies without leaving any other heir. But if there are other heirs, the illegitimate son is entitled to a half share of a legitimate son in his father's estate, provided that the father has recognized his paternity and has also made himself responsible for the upbringing of his illegitimate son.

*Ba Han* for the appellants.

*Khin Maung Gyi* for the respondents.

MYA BU, J.—This appeal arises out of a suit filed by the respondent, claiming to be the son of U Shwe Hpay, deceased, for administration of his estate. The appellants, who are the widow and children of U Shwe Hpay, were defendants to the suit. The plaintiff, who was born about twenty-three years ago, is the son of a Burmese lady named Ma Kyin May. About the time of the plaintiff's birth or shortly after, U Shwe Hpay married the first defendant Daw E Thin with whom he lived until his death about six or seven years ago. U Shwe Hpay's father was a Chinaman who came to Burma and settled down at Tagundaing in the Amherst District, where he married a Burmese lady known as Daw Hla Yin by whom U Shwe Hpay was born to him.

For the purpose of disposing of this appeal it is unnecessary to recapitulate the points in dispute between the parties during the trial. The findings of the trial Court, which are unfavourable to the respondent, on

\* Civil 1st Appeal No. 90 of 1938 from the judgment of the District Court of Amherst in Civil Regular No. 12 of 1937.

bare questions of fact, have not been contested on his behalf in this Court. The trial Court has found that the plaintiff is an illegitimate child of U Shwe Hpay and observed that—

“ the plaintiff will therefore rank as a child born of illicit intercourse as mentioned in the latter half of the passage from Jamieson's book and would therefore be entitled to a half share of a legitimate son,”

and consequently has awarded the plaintiff a one-eleventh share in the estate of the late U Shwe Hpay.

The passage in Jamieson's book which is referred to in the judgment of the trial Court appears at page 16 and runs as follows :

“As regards children in general, hereditary official rank descends only to the eldest son and his descendants born in lawful wedlock, but all family property movable or immovable must be divided equally between all male children whether born of the principal wife or of a concubine or domestic slave. Also male children born of illicit intercourse shall be entitled to a half share, or to an equal share in event of a successor having been adopted through default of other children. If no legal successor is in existence, then such illegitimate son shall be entitled to succeed and receive the whole patrimony.”

This passage must be read subject to the explanation which appears in the foot-note in these words :

“By illegitimate children is meant children by a woman not forming part of his father's household and living outside (*wai chia*). But to give them any rights the paternity must have been recognized by the father and he must have made himself responsible for their up-bringing.”

There is another relevant passage in the same book at page 152 which says :

“The illegitimate son of a husband, that is a son by a woman not forming part of his household, would succeed failing other heirs, but no similar provision is made in the case of the woman.”

The effect of these rules is that an illegitimate son of a husband would be entitled to inherit only if the latter

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dies without leaving any other heir, but an illegitimate son is entitled to a half share, or to an equal share with a successor adopted in default of other children only if the deceased father had recognized his paternity and had also made himself responsible for his up-bringing.

The passage appearing at page 170 of the Notes and Commentaries on the Chinese Customary Law, by Alabaster, which says :

“ An illegitimate child follows the father, is to take his name, and be supported by him, or if he be dead by his family—but *semble* has no right to share the paternal property ”,

is even less favourable to the present respondent's claim.

The question as to whether the plaintiff is entitled to a half share of a legitimate son in the estate of U Shwe Hpay who died leaving a widow and seven children, of whom five are sons, turns upon whether U Shwe Hpay had recognized the paternity and had also made himself responsible for the plaintiff's up-bringing. On this crucial point the learned trial Judge has given no definite finding but in one part of his judgment he stated that U Shwe Hpay had acknowledged his paternity of the plaintiff. According to the passages quoted from Jamieson's book, recognition of paternity alone is insufficient to invest an illegitimate son with the right to obtain any share in his father's estate if there are other heirs ; there must be recognition by the father of the paternity and the father must also have made himself responsible for the up-bringing of the illegitimate son in order that he may be entitled to a half share of a legitimate son if there are other heirs.

We have gone through the evidence in the case to see whether U Shwe Hpay had made himself responsible for the up-bringing of the plaintiff but the general trend of it is to the effect that, after the birth of the plaintiff,

U Shwe Hpay married Daw E Thin and Ma Kyin May married one Maung Po Tok. The plaintiff lived with Ma Kyin May and Maung Po Tok and when he was a few years old Maung Po Tok took him to a lay school. It is not known whose name was entered in the register of that school as that of the plaintiff's father, but after the plaintiff left school to join the police force he had to give his father's name which is entered in the register maintained by the police department as Maung Po Tok. The explanation offered by the plaintiff to the effect that he gave U Shwe Hpay's name as that of his father when he joined the police force cannot be accepted without very strong corroboration which is entirely absent in this case. It was not the case of the plaintiff that his expenses of schooling were borne by U Shwe Hpay or that U Shwe Hpay did anything of a very substantial character for him, but it is alleged that for a few years U Shwe Hpay used to send Rs. 36 a year through some friend to Ma Kyin May for the up-keep of the plaintiff and that, on one occasion—when he was to be *shinbyued*—Rs. 150 was received by Ma Kyin May for the expenses of the *shinbyu* ceremony. According to the evidence on this point, this sum of money was handed over by Daw Hla Yin who contributed Rs. 50 herself of this amount while U Shwe Hpay gave Rs. 100. These are the only incidents which have transpired in the course of the evidence which are relevant to the question as to whether U Shwe Hpay had made himself responsible for the up-bringing of the plaintiff. As regards the alleged payment of Rs. 36 a year, it does not appear to be anything more than a paltry contribution towards the maintenance of the plaintiff, and it is not quite clear that the sum was paid by U Shwe Hpay and not by Daw Hla Yin. The only other payment, *viz.*, the alleged contribution towards the expenses of the *shinbyu* ceremony, was made by the hand of

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Daw Hla Yin and not by that of U Shwe Hpay. Be that as it may, a casual contribution towards the expenses of a religious ceremony cannot be deemed to have been made in the discharge of responsibilities for the up-bringing of the plaintiff. Responsibilities for the up-bringing must, in our opinion, be something analogous to the responsibilities that a man would assume for his own legitimate children, and mere compliance with statutory obligation for the maintenance of a child—under section 488 of the Criminal Procedure Code an illegitimate son also has to be maintained by his father—cannot, in our opinion, be regarded as denoting the assumption of responsibilities by the father for his illegitimate son's up-bringing.

For these reasons we are of opinion that the plaintiff has failed to prove his right to a share of inheritance in the estate of U Shwe Hpay under the Chinese Customary Law. The appeal must be allowed, the decree granted by the trial Court in favour of the respondent is set aside and it is ordered that the suit stand dismissed. We make no order as to the costs either of the suit or of this appeal but under Order 33, rule 7, we direct the Court fees prescribed for the plaint to be paid to the Collector by the plaintiff.

MACKNEY, J.—I agree.