APPELLATE CIVIL.

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

MA AYE TIN *v.* DAW THANT.*

1940

Aug. 23.

Burmese Buddhist law—Manukye, *Book X*, s. *28—Rule of inheritance not applicable to wife's vested interest in* payin *property— Property acquired by either or both spouses—"Passing into common enjoyment"—Rule applicable to deceased spouse's property generally—Parent can be natural or adoptive.*

A wife is not deprived by the rule in *Manukye* Book X, s 28, of her vested interest in the *payin* property of her husband who has died leaving no issue and who lived with his parent and whose property is in the possession of the parent.

All property acquired by either or both the spouses before or during marriage passes into common enjoyment and both spouses have a vested interest in all such property. "Passing into common enjoyment" is a consequence of marriage and not a test of the vesting of property.

U Pe v. *U Maung Maung Kha*, I.L.R. 10 Ran. 261 (P.C.), followed.

The wording of s. 28, *Manukye*, Book X, does not appear to restrict its operation to the vested interest of the deceased in his undivided family property only but appears to extend its operation to his separate property as well which is in the possession of the parent.

Ma Pwa Thin v. *U Nyo*, I.L.R. 12 Ran 409; *Maung Ohn Khin* v. *U Nyo*, I.L.R. 10 Ran. 124, considered.

The right of the parent under the above rule is applicable to all parents, whether natural or adoptive.

Ma E Dok v. *Maung Ngwe Hlaing*, (1897-1901) 2 U.B.R. 109; *Maung Thein* v. *U Tha Byaw* [1939] Ran. 341 (F.B.), referred to.

Maung Po An v. *Ma Dwe*, I.L.R. 4 Ran. 184, distinguished.

E Maung (1) for the appellant.

Ba Han for the respondent.

MYA BU and DUNKLEY, JJ.—We first heard this appeal on the 20th, 21st and 22nd June, 1939, and at that hearing it was made clear to us that the only obstacle in the way of the appellant's complete success in the appeal was the decision in *Maung Ohn Khin and others* v. *U Nyo* (1), in which it was laid down that

* Civil 1st Appeal No. 8 of 1939 from the judgment of the District Court of Henzada in Civil Reg. No. 11 of 1937.

(1) (1931) I.L.R. 10 Ran. 124.

1940

MA AYE TIN v. DAW THANT.

MYA BU AND DUNKLEY, JJ.

the provisions of the *Manukye*, Book X, section 28, were still the law of Burma in regard to the division between the parents and daughter-in-law of the property of a son who has died childless. So far as the present case is concerned the pertinent part of that section of the *Manukye* reads as follows (the section referring specifically to the case where the daughter has died and the son-in-law survives) :

> " Besides this he shall not recover any of his wife's property actually in the possession or keeping of her parents ; they shall retain it."

As there was reason to doubt the correctness of the decision in *Maung Ohn Khin* v. *U Nyo* (1) we referred to a Full Bench for its opinion the following question :

> " As between the parent and the surviving spouse of a child who dies leaving no issue but who lived with his or her parent and whose property is in the possession or keeping of the parent, who is entitled to inherit such property under the Burmese Buddhist Law ? "

We have received the answer of the Full Bench to this question, and it is that the parent is entitled to inherit such property.*

The conflict in this case is between the widow of one Maung Than Tun namely, Ma E Tin, who is the appellant and was the plaintiff in the District Court, and Maung Than Tun's adoptive mother, Daw Than, who is the respondent and was the defendant in the District Court. Most of the facts of the case have been set out in the order of reference, dated the 24th August, 1939, and it is unnecessary to repeat them. In fact, the only further questions of fact which remain for decision are (1) which of the properties mentioned in

(1) (1931) I.L.R. 10 Ran. 124.

* Reported at [1940] Ran. 572—*Ed.*

the schedules attached to the plaint belonged to Maung Than Tun, it being admitted by the appellant that they were all acquired by him prior to his marriage, with her, and (2) which of the properties mentioned in the schedules belonging to Maung Than Tun were in the possession of the respondent at the time of Maung Than Tun's death.

The properties which the appellant claims to have constituted the estate of Maung Than Tun are set out in seven schedules attached to the plaint.

[On the evidence their Lordships' conclusions were as follows :]

Consequently, on the evidence it would appear that Maung Than Tun's estate consisted of the whole of the properties mentioned in schedules A and B and a half share of the properties mentioned in schedules D and E, but that all these properties were in the possession of the respondent at the time of his death.

Now, as we have said, on the reference to the Full Bench the learned Judges who composed it have held that the case of *Maung Ohn Khin* v. *U Nyo* (1) lays down the law of Burma and that section 28 of Book X of the *Manukye* is applicable in a proper case ; but their decision is subject to a qualification in respect of any vested interest which the appellant may have obtained in her husband's property before his death. In the course of his judgment the learned Chief Justice said :

" But, of course, the question whether the property has been brought to the marriage and has been in the common enjoyment of the married couple, though still in the custody of the parent or parents, is all important."

(1) (1931) I.L.R. 10 Ran. 124.

1940

MA AYE TIN v. DAW THANT.

MYA BU AND DUNKLEY, JJ.

In his judgment Mosely J. said :

"It has been held in *N.A.V.R. Chettyar Firm* v. *Maung Than Daing* (1) and again by their Lordships of the Privy Council in *U Pe* v. *U Maung Maung Kha* (2), that either spouse has a vested interest (to the extent of one-third) in the *payin* property brought by the other spouse to the marriage, that is to say, property which has passed into the common enjoyment though it may be in the custody or keeping of the parent, * * *. I would agree that the law of inheritance contained in *Manukye* X, 28, cannot affect the wife's interest in such property."

And Mackney J. said :

"As my learned brother Mosely observes, the rule will not affect the vested interest of the son-in-law or daughter-in-law in the *payin* property brought to the marriage by the daughter and son : but property which is 'in the possession or keeping of the parents' can scarcely be deemed to be property brought to the marriage, unless it can be shown that the married couple actually enjoyed it as their own, the parents being as it were merely their agents for the management of the property."

Hence the learned Judges composing the Full Bench have held that the daughter-in-law could not be deprived by the rule in *Manukye* Book X, section 28, of her vested interest in the *payin* property of her husband, to which vested interest the law of inheritance could have no application. The learned Judges have laid particular stress on the question of common enjoyment and have said that property cannot be said to be brought to the marriage unless it has passed into common enjoyment. With the greatest respect, these dicta would appear to be not in accordance with the judgment of their Lordships of the Privy Council in *U Pe* v. *U Maung Maung Kha* (2), in which their Lordships observed (at page 268) :

"Married persons hold during the subsistence of the marriage an interest in all property belonging to either or both."

(1) (1931) I.L.R. 9 Ran. 524. (2) (1932) I.L.R. 10 Ran. 261 (P.C.).

Their Lordships further observed (at page 280):

"After all the ancient law has still a wide scope if admittedly all property acquired by either or both of the spouses before or during marriage passes into the common enjoyment and it is only dealt with by either according to his or her vested interest therein."

We consider ourselves bound to follow these statements of the law made by the Judicial Committee, which lay down as a principle that all property acquired by either or both the spouses before or during marriage passes into common enjoyment and both spouses have a vested interest in all such property; that is, "passing into common enjoyment" is a consequence of marriage and not a test of the vesting of property.

Moreover, in the present case the property had passed into common enjoyment because the appellant and Maung Than Tun were during their married life maintained from the income of this property, and the respondent has stated in her evidence that this income was even insufficient to maintain the married couple.

The interest of the wife in the *payin* property of her husband is one-third, and, in our opinion, the appellant had such a vested interest in the property of Maung Than Tun, which she acquired on her marriage with him, and which interest cannot be defeated by the fact that on his death his estate is inherited by some other person. On this ground the appellant is, in our opinion, entitled at least to a one-third share of the properties mentioned in schedules A and B attached to the plaint and to a one-sixth share of the properties mentioned in schedules D and E.

A further question that has been raised on behalf of the appellant is whether section 28 of Book X of the *Manukye* has any application at all in the present case. In support of the negative answer submitted by

1940

MAIAYE TIN v. DAW THANT.

MYA BU AND DUNKLEY, JJ.

learned counsel for the appellant the following passage in the judgment of Page C.J. in *Ma Pwa Thin* v. *U Nyo and others* (1) has been relied on :

"The doctrine laid down in section 28, in my opinion, ought not to be extended. In cases where it directly applies the law will be enforced, and the Court applied section 28 in connection with the claim to Po Aung's share. But unless the facts of any particular case bring it clearly within the terms of section 28, in my opinion, the provisions of that section ought not to be extended by analogy or otherwise to other cases which are not brought within the ambit of the section."

The points of distinction between this case and the case of *Maung Ohn Khin and others* v. *U Nyo* (2) which dealt with the same family were (1) Po Aung had not taken from his mother his share in the estate of his deceased father and he and his wife lived with his mother until his death leaving no issue, whereas Maung Nyun had received a sum of money from his mother in full satisfaction of his claim in the estate of his deceased father and he and his wife lived separately from his mother, and (2) the claim put forward by Maung Ohn Khin was for Po Aung's alleged share in the estate of his deceased father which was until Po Aung's death in the possession of the mother, while Ma Pwa Thin's claim was for Maung Nyun's share in the estate of his sister who lived with the mother and died a spinster. Similar points of distinction do not exist between *Maung Ohn Khin*'s case and the present case. Another ground advanced by learned counsel for the appellant is that the property in dispute in *Maung Ohn Khin*'s case was the vested interest of Po Aung in undivided family property, whereas the property in dispute in the present case consists wholly of separate property belonging to the deceased. But the wording

(1) (1934) I.L.R. 12 Ran. 409. (2) (1931) I.L.R. 10 Ran. 124.

of section 28 of Book X of the *Manukye* does not appear to restrict its operation to the vested interest of the deceased in the undivided family property only but appears to extend its operation to the property of the deceased generally which is in the possession of the parent. It has further been contended on behalf of the appellant that the respondent not being the natural mother of Maung Than Tun but only his adoptive mother, the provisions of section 28 should not be extended so as to give the right under the section to the adoptive parents. Support is lent to this contention by the fact that under sections 25, 26 and 27 of Book X which lay down rules regarding the right of inheritance of a child "publicly and notoriously" adopted, that is, a *keittima* child, the position of an adopted child is inferior to that of a natural child, and in *Maung Po An* v. *Ma Dwe* (1) it was held that under the *Dhammathats* the position of the *keittima* child was distinctly inferior in respect of inheritance to that of own children and accordingly that the right of the *keittima* child to equality with own children should not be extended to the *orasa*'s right. But *Maung Po An* v. *Ma Dwe* (1) was a case in which the right of the *keittima* child, the only child of the family, to claim a quarter share from the widow on the death of the adoptive father constituted the principal point for consideration. Such right is not enjoyed under the *Dhammathats* by an ordinary child, though the child may be a natural child, who does not possess the qualifications of an *orasa* child. The right is a preferential right even under the *Dhammathats* extended to, and only to, a child who possesses certain qualifications and is, therefore, designated as an *orasa* child. As regards the general inferiority of the position of the *keittima* child in respect of inheritance to that of

(1) (1926) I.L.R. 4 Ran. 184.

1940

MA AYE TIN v. DAW THANT.

MYA BU AND DUNKLEY, JJ.

the own children recognized by the *Dhammathats*, the judge-made law for more than forty years has been that the *keittima* child stands exactly in the same position as a natural child and has taken firm root in the modern Burmese Buddhist law of inheritance. The fact that the preferential right of an *orasa* child is denied to the *keittima* child even under the prevailing system of law does not throw any doubt on the correctness of the proposition that for ordinary purposes of inheritance the *keittima* child stands in the same position as a natural child. Nor is this fact sufficient to show that the proposition, which has never been doubted during the last forty years, that adoptive parents stand in the same position as the natural parents and have the same rights so long as the relationship constituted by adoption subsists [*Ma E Dok* v. *Maung Ngwe Hlaing* (1)], cannot be consistently applied in favour of the adoptive parent in the matter of inheritance of the *keittima* child's estate, the right of the parent under section 28, Book X of the *Manukye* being a right applicable to all parents and not only to parents with certain special qualifications. In *Maung Thein* v. *U Tha Byaw* (2) a Full Bench of this Court has pointed out that the *keittima* adoption creates not only heirship of the adoptee to the adoptor but also the relationship of a parent and child and by virtue of such relationship the adoptee acquires the rights of an ordinary natural child of the adoptor in the estate of the adoptor's collaterals or ascendants. This shows that the relationship of the adoptive parent and the *keittima* child is as complete as that between an ordinary natural child and his parent in regard to rights of the *keittima* child or of the adoptive parent in the matter of inheritance.

For these reasons we decline to uphold the contention that the provisions of section 28 of Book X

(1) (1897-1901) 2 U.B.R. 109. (2) [1939] Ran. 341.

of the *Manukye* have no application at all in the present case. In the result the decree of the District Court will be set aside and there will be a decree in favour of the plaintiff-appellant for one-third share of the properties mentioned in schedules A and B attached to the plaint and for a one-sixth share of the properties mentioned in schedules D and E. The appellant's costs of this appeal and of the suit, including the Court fees payable on the plaint and on the memorandum of appeal, shall be paid out of the estate of Maung Than Tun.

G.P.C.P.O.—No. 49, H.C.R., 2-12-40—1,650—III.