APPELLATE CIVIL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Spargo.

1939

July 6.

MA THAN YIN

v.

MA THAN MAY AND OTHERS.*

Appeal from Original Side of High Court—Nature of appeal, not a re-hearing without witnesses—Appellate Court's function—Principles of law correctly applied—Finding of facts on evidence—Mistake of fact or inference or material oversight—Weight of evidence—Trial Judge's advantage of hearing witnesses.

An appeal from the Original Side of the High Court is not in the nature of a re-hearing without witnesses, *i.e.*, the appellate Court is not to try to reach from the written material available to it a conclusion which is entirely independent of the Judge of first instance who saw and heard the witnesses. What the appellate Court has to do is to see (1) whether the principles of law applicable to the case were appreciated and correctly applied, (2) whether there was evidence upon which the Court of first instance could find the facts as it did, (3) whether any mistake of fact or of inference or any material oversight has occurred any one of which might reasonably affect the result, (4) whether the weight of the evidence shows that the trial Court came to a right conclusion, bearing in mind that the Judge who saw and heard the witnesses is in a much better position to form an estimate of the worth of the testimony than the appellate Court which has not that advantage.

Chinnaya v. *U Kha*, I.L.R. 14 Ran. 11 ; *Powell* v. *Streatham Manor Nursing Home*, (1935) A.C. 243, referred to.

A. N. Basu for the appellant.

Sein Tun Aung for the 1st respondent.

Daniel for the 2nd, 3rd and 4th respondents.

ROBERTS, C.J.—In *Chinnaya* v. *U Kha* (1), Page C.J. pointed out that the principles laid down by Viscount Sankey in *Powell* v. *Streatham Manor Nursing Home* (2) ought to be applied at the hearing of appeals in this Court from decrees or orders passed by learned Judges

* Civil First Appeal No. 35 of 1939 from the judgment of this Court on the Original Side in Civil Regular Suit No. 307 of 1937.

(1) (1935) I.L.R. 14 Ran. 11. (2) (1935) A.C. 243.

on the Original Side. I desire to emphasize the importance of that case. There seems to be a mistaken impression in some quarters that such an appeal ought to be in the nature of a re-hearing without witnesses, or in other words, that the appellate Court will try to reach from the written material available to it a conclusion which is entirely independent of the Judge of first instance who saw and heard the witnesses.

But what the appellate Court has to do is to see, first, whether the principles of law applicable to the case were appreciated and correctly applied; secondly, whether there was evidence upon which the Court of first instance could find the facts as it did; thirdly, whether any mistake of fact or of inference, or any material oversight has occurred, any one of which might reasonably affect the result; and, fourthly, whether the weight of the evidence shows that the trial Court came to a right conclusion, bearing in mind that the Judge who saw and heard the witnesses is in a much better position to form an estimate of the worth of the testimony than the appellate Court which has not that advantage.

Now, the present appeal raises the very simple question, was Ma Than May, or was she not, the *keittima* adopted daughter of her aunt Daw Tin? The learned Judge has shown by his references to decided cases in the judgment that he knew exactly what facts had to be proved and that the burden lay on the present first respondent to prove them. And he passed on to consider whether those facts had been proved.

She called witnesses to show that there had been a public ceremony of *keittima* adoption, and they said there had and the learned Judge believed them, and there is an end of the matter. He reviewed the evidence of these witnesses with the greatest care in a voluminous judgment in which he gave his reasons for

1939

MA THAN YIN v. MA THAN MAY.

ROBERTS, C.J.

believing them: it is not shown that they are bad reasons. He also pointed out that there was much other evidence which fell short of proving *keittima* adoption but which showed a relationship between the parties consistent with *keittima* adoption and making it probable that those who swore they attended the ceremony were speaking the truth. He did not omit to consider the matters urged by the present appellant but, having considered them he explained exactly why they failed to shake the first respondent's case. He was perfectly entitled to take the view he did and it is not shown that the reasons given by him were bad reasons.

It is said he made no reference to the fact that Ma Than May became possessed through her adoptive father of property formerly possessed by her natural father, and this is doubtless so, because in the light of other evidence before him it could not be a material factor in arriving at his decision. The learned Judge disbelieved much of the evidence given in support of the appellant's case : he gave his reasons for so doing, and it is not shown that they were bad reasons.

It is not, and could not be, suggested that there is any material mis-statement in the judgment as to the evidence given at the trial, or that through some error or omission the learned Judge failed to take into consideration the evidence as a whole and to come to a conclusion of fact thereon.

The trial in this case lasted three weeks and there is a right of appeal on questions of fact. Where the record is bulky it is undesirable that the appellate Court should have to consider it in detail twice.

Accordingly, owing to the necessarily lengthy judgment and the great mass of evidence, the appeal was admitted. But as soon as the judgment is read and the evidence sifted it becomes apparent that though

1939

MA THAN YIN v. MA THAN MAY.

ROBERTS, C.J.

there is a right of appeal under section 96 of the Civil Procedure Code, there are no grounds of appeal at all, and accordingly this appeal is dismissed : costs advocate's fees fifteen gold mohurs.

SPARGO, J.—I agree and have nothing to add.