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that of the respondents. The sale purporting to be made to Dhunput in his suit of the 1 anna 2 gundahs and 2½ krant share in the jagirs Ramgunge Pipra, &c. was subsequent in date to the order of the 12th January 1891 authorising the Receiver to sell this property, and the sale purporting to be made of the Simraha property was subsequent to the sale of this property to Chutterput on the 29th July 1891. These dates are sufficient to give priority to Chutterput. But their Lordships agree with the broader proposition [218] stated by Mr. Phillips. When the estate of a deceased person is under administration by the Court or out of Court, a purchaser from a residuary legatee or heir buys subject to any disposition which has been or may be made of the deceased's estate in due course of administration. In fact the right of the residuary legatee or heir is only to share in the ultimate residue which may remain for final distribution after all the liabilities of the estate, including the expenses of administration, have been satisfied. The judgment-debtors in Dhunput's suit were certain of the heirs of Taki, and nothing more could be sold in execution of the judgment against them than their shares or what might prove to be their shares in the ultimate residue of Taki's estate. On every ground, therefore, their Lordships think that the purchaser at the sales made in the administration suit is entitled to priority over the purchaser at the execution sales purporting to have been made in Dhunput's suit.

The High Court have, however, held that the 1 anna 2 gundahs and 2½ krant share in Ramgunge Pipra was not the property of Taki but of Kazim, overruling to this extent the finding of the Court below on the seventh issue that all the properties in suit belonged to Taki, and Kazim had no interest in them. It appears, however, that this share, as well as the larger shares in the same estate, was in the possession of the Receiver, and he gave possession of it to Chutterput. On the whole their Lordships think there is not sufficient reason shown for disturbing the finding on this point of the Subordinate Judge.

Their Lordships will humbly advise His Majesty that the decree of the High Court dated the 23rd February 1899 should be reversed, and the decree of the Subordinate Judge of Purnea dated the 16th December 1895 restored, and that the respondents should pay the costs of their appeal to the High Court. The respondents will also pay the costs of this appeal.

Appeal allowed.

Solicitor for the appellants : *G. C. Farr.*

Solicitors for the respondents : *T. L. Wilson & Co.*

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MA ME GALE *v.* MA SA YI.*

[23rd November and 8th December, 1904.]

[*On appeal from the Chief Court of Lower Burma.*]

Burmese Law—Adoption—Evidence of adoption—Keitima adoption—Date and manner of adoption alleged but not proved.

* *Present* : Lord Davey, Lord Robertson and Sir Arthur Wilson.

Held, (reversing the decision of the Chief Court of Lower Burma) that the evidence of a *keitima* adoption alleged to have taken place 40 years ago fully proved that the relationship of *keitima* daughter existed between the plaintiff and her alleged adoptive mother ; and that being so, it was a matter of only secondary importance to show when such relationship began.

[Ref. 36 Cal. 978. Fol. 45 Cal. 1.]

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APPEAL from a judgment and decree (August 8th, 1901) of the Chief Court of Lower Burma by which a judgment and decree (November 7th, 1900) of the District Court of Amherst was reversed.

The plaintiff appealed to His Majesty in Council.

The plaintiff and defendant were sisters and the defendant was in possession (as administratrix) of the estate of one Ma Ye whose keitima daughter by adoption she admittedly was. The suit was brought on the 19th September, 1899, for a declaration that the plaintiff was equally with the defendant the keitima daughter of Ma Ye, and as such entitled to share in her estate equally with the defendant.

The plaint stated that Ma Ye was formerly the wife of one Ko On, a resident of Moulmein ; that Ma Ku, a cousin of Ma Ye, married one Ebrahim Cassim about 45 years ago in Moulmein; that after their marriage Ebrahim Cassim and Ma Ku lived for a time in a house of their own at Kaladan, and afterwards in the same house with Ko On and Ma Ye, and two children, the plaintiff and the defendant, were born to them in that house, the plaintiff the younger of the two being born about 1857 ; that (paragraph 6) when the plaintiff was a few months old, Ko On and Ma Ye requested Ebrahim Cassim and his wife Ma Ku to allow them to adopt their two daughters, the [220] plaintiff and defendant, " and Ebrahim Cassim and Ma Ku having agreed to give their daughters to them, Ko On and Ma Ye publicly adopted at the same time the said Ma Sa Yi (defendant) and Ma Me Gale (plaintiff) as their keitima adopted children promising at the same time that they should inherit all their property, and the said parents of the said two girls gave them up for that purpose." The plaint further stated that thereafter the plaintiff and defendant with their natural parents continued to live with their adoptive parents, and Ebrahim Cassim shortly after went away and never returned to Moulmein, and Ma Ku died some years after, about 1869 ; that when the plaintiff was about 16 years old she was married to Ismail Lotia, and after the marriage she and her husband lived with her adoptive parents for about 10 years when Ismail Lotia went to Calcutta on business and on his return died in Rangoon, about 1884 ; that the plaintiff continued to live with her adoptive parents after the death of her husband until 1888 when she married Mung Tha Ya and afterwards lived with him at his house in Hpettan ; that her three children by Ismail Lotia were all born and brought up in the house of Ko On and Ma Ye by whom they were treated as their own children, and they lived with Ma Ye until her death except the youngest, Amma, who left after she married a year previous to Ma Ye's death which took place on 14th April 1899 ; letters of administration to her estate being granted to the defendant on 4th September 1899.

The defendant in her written statement denied that the plaintiff was ever adopted by Ko On and Ma Ye and that she lived with Ma Ye as stated in the plaint ; she alleged that Ebrahim Cassim and Ma Ku after their marriage lived at Kalladan, and it was only when Ma Ku was about to be confined of the plaintiff that she came to Ma Ye's house, returning after her confinement, and taking the plaintiff with her, to Kalladan ; that about 5 months after the birth of the plaintiff Ebrahim Cassim

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went away to Rangoon, and Ma Ku and the plaintiff removed to the house of Ma Ye where the defendant who had already been adopted was then living; that about 5 years after her removal to Ma Ye's house Ma Ku married again and went with her husband to live at Aukkyin taking the plaintiff [221] with her but leaving the defendant with Ma Ye; that when the plaintiff was about 14, Ma Ku died at Aukkyin during her husband's absence in the forests, and the plaintiff then came and lived with the defendant in Ma Ye's house; that when the plaintiff was about 18 she eloped with Ismail (whom she afterwards married) and lived with him at Kalladan, returning to Ma Ye's house only on the occasion of the confinement of her first two children, her third child being born elsewhere; that about 4 years after her husband's death the plaintiff again came and lived in Ma Ye's house bringing her three children; and that about 4 years afterwards the plaintiff eloped with Maung Tha Ya taking her daughter Amma with her and went to live at Hpettan, but about 3 years later Amma alone returned to Ma Ye's house. The defendant submitted that under these circumstances the plaintiff was never adopted, and that even if she had been she lost her right to inherit by reason of her abandonment of her adoptive parents, and her change of religion (as a Burma-Buddhist) when she married Ismail (a Mahomedan).

"Keitima" children are thus described in the law of the Dhammathat Book 10, page 305:—"The sons and daughters of another person who shall be publicly taken and brought up (in order or with the understanding) that they should be made children to inherit, they are called keitima,' that is, notoriously adopted children."

The main issue in the case was whether the plaintiff had been duly adopted so as to entitle her to inherit.

As to this issue the District Judge held that it was not necessary for the plaintiff to prove the particular formal adoption by request from her natural parents referred to in paragraph 6 of the plaint, but it was enough for her to prove adoption after her natural mother's death, while her father was at a distance and she was orphaned and alone, and that it was open to her to prove her adoption in either way and at any time, and for this purpose in Burma-Buddhist Law the essential point to be ascertained was the intention of the adoptive parents and whether they intended her to inherit.

The District Judge then discussed the evidence at length and decided that the plaintiff had made out her claim to be a keitima [222] daughter of Ma Ye and was entitled to inherit a share of her property. As to the actual date of the adoption, he came to the conclusion that both the plaintiff and defendant were adopted by Ma Ye when they were very young with the intention that they should be her heirs, but with no intention to deprive the natural mother of their services, and that after the natural mother's death they were wholly claimed by the adoptive mother and from that date were taken and brought up as her own daughters, and generally he based his decision as to the plaintiff's adoption on the fact that there was no difference between the treatment she received and that accorded to the defendant who was admittedly adopted.

The District Court, therefore, gave the plaintiff a decree. The defendant preferred an appeal to the Chief Court of Lower Burma which was heard by BIRKS and FOX, JJ.

Mr. Justice Birks held that the burden of proof was on the plaintiff to establish the adoption as stated in paragraph 6 of the plaint and the

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defendant could not be expected to meet the case of an adoption made at a different time and in a different manner; that the plaintiff had not established her case because the evidence produced by her as to the time and manner of her alleged adoption varied widely, whereas the evidence of the defendant's witnesses was consistent; that on the evidence it was probable that the defendant had been adopted as a keitima daughter before the plaintiff's birth, that she never left her adoptive mother's house and that there was a radical difference in the position of the two sisters. The learned Judge came to the conclusion that the District Judge had not taken an impartial view of the evidence, having wrongly credited the plaintiff's witnesses and discredited the defendant's witnesses, and come to an erroneous decision on questions of fact. He further held that though the evidence failed to show a keitima adoption it was not inconsistent with a casual or *apatitha* adoption after the natural mother's death, but that inasmuch as under the latter form of adoption, even if established, the plaintiff would not be, by the Burmese Law, entitled to any share of the adoptive mother's estate, it was unnecessary to decide whether having alleged a keitima adoption in her plaint she should be allowed to set up an adoption of a different character.

[223] Mr. Justice Fox held that an essential part of keitima adoption was publicity of the relationship, and of the intentions of the adoptive parents in regard to the inheritance of their estate by the adopted child, and that such publicity was of great importance for the protection of the interests of the next of kin, and therefore adoption must be strictly proved. On the evidence he found that there was a marked difference throughout in the relations of the plaintiff and defendant with the adoptive parents especially with regard to their respective marriages, and held that the plaintiff had failed to establish a keitima adoption.

The appeal was, therefore, allowed and the decree of the District Judge reversed, the suit being dismissed with costs.

On this appeal:

Lawson Walton K. C. and *J. W. Macarthy*, for the appellant, contended that the evidence substantially established the keitima adoption of the appellant as alleged in paragraph 6 of the plaint. But even if it was not proved to have taken place at the time and in the manner there set out, she was entitled to rely on paragraph 2 of the plaint in which she alleges she was the adopted daughter of Ma Ye, and on the form of the first issue raised in the suit, and to prove her status as an adopted daughter without any reservation as to the time and manner of her adoption. There was no onus on the appellant to prove the particular date or circumstances of the adoption, and the Chief Court of Lower Burma had erred in treating that as being the question at issue. The substantial question was whether there was proof, from statements made at various times by the adoptive parents, and from a course of treatment by them extending over a great number of years, that the appellant was in fact adopted by them. This, it was submitted, the appellant had shown. She was, whenever the two sisters were together at Ma Ye's house, treated in exactly the same manner in all respects as the respondent who was admittedly a keitima daughter. If the respondent's contention were allowed the appellant would be left penniless which would be quite contrary to the intention indicated by the treatment she had received from the adoptive parents.

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[224] *Cowell*, for the respondent, contended that the appellant had not proved her adoption as alleged in the plaint, that is, a double adoption of the two sisters at the same time, 41 years before suit: this it was incumbent on her to do. But both Courts below had found on the facts that no such adoption was proved. Nor had the appellant showed that any keitima adoption took place after the death of her natural mother; such an adoption was not alleged in the pleadings, nor intended to be raised by the issues, and though the District Court had found as to that in favour of the appellant such finding was based on mere presumption. As to what was necessary by Burmese Law to prove an adoption, *Ma Mein Gale* v. *Ma Kin* (1) was cited showing that mere presumption was not sufficient. The essential part of a keitima adoption was publicity of the relationship and of the intention of the adoptive parents in regard to the inheritance of their estate by the adopted child, and the Courts were bound to insist on strict proof of the adoption. No keitima adoption of the appellant had been established on the evidence. One of the Judges of the Chief Court had held that the evidence was not inconsistent with an *apatitha* (or casual) adoption of the appellant after the natural mother's death; but that kind of adoption did not carry with it any right to a share of the estate of the adoptive parent. It was submitted, therefore, that no adoption of the appellant had been proved giving her any right to inherit, nor had she controverted the case of the respondent that she herself had alone been adopted as a keitima daughter.

Lawson Walton K. C. replied.

The judgment of their Lordships was 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; [225] 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

(1) (1893) Chan-Toon's L. Cas. 168.

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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.

[226] 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 **[227]** 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 alloges she was and the appellant was not entrusted with the keys. The significance of this admission lies in the fact that the

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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 [228] 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 inattentive 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.

Appeal allowed.

Solicitors for the appellant: *Bramall & White.*
Solicitors for the respondent: *Richardson & Co.*

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32 C. 229 (=9 C. W. N. 300.)

[229] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice and Mr. Justice Mitra.

HAMID HOSSEIN *v.* MUKHDUM REZA.*

[25th August, 1904.]

Revenue Sale—Revenue sent by money-oder—Estate, wrong description of—Mistake—Arrear of Revenue—Revenue Sale Law (Act XI of 1859) ss. 8, 20, 33—Land Revenue Rules in the Land Revenue and Cesses in Bengal Rule 29—Jurisdiction—Board's Towji Manual.

Where the actual amount of revenue remitted by money-order reached the Collectorate in time, but the remitter made a mistake in the towji number and the name of the registered proprietor, but was right as to the name of the estate and the amount of Revenue payable in respect thereof:—

Held that it was the duty of the Officers of the Collectorate to do what Rule 29 of the Land Revenue Rules prescribes, and not to put up the property to sale which, if held would be without jurisdiction and ought to be set aside.

Bal Kishen Das v. *Simpson* (1) referred to.

SECOND APPEAL by the plaintiff, Syed Shah Hamid Hossein Sajjada-nashin.

This appeal arose out of an action brought by the plaintiff to set aside a revenue sale held under Act XI of 1859. It appeared that there were two estates in the District of Shahabad, one named Narsingha, the towji number of which was 2894, the registered owner's name was Golam Najaf and the revenue payable was Rs. 24-4; and the other Naughar, towji number of which was 2897, the registered owners' names were Ramsaran and Latchmi, and the revenue payable was Rs. 16.

On the 26th March 1898, the plaintiff sent a revenue money-order for Rs. 24-4, payable ostensibly to the credit of Narsingha No. 2897. The proprietor's name was given as Haidar Ali [230] Sajjada-nashin. This remittance reached the Collectorate on the *kist* day and was credited to the account of Naughar 2897. The estate Narsingha being thus still in arrears was sold.

The plaintiff's allegation was that there was no arrear at all; and that the property was wrongly sold at an inadequate price on account of various irregularities. The plaintiff further alleged that he had preferred an appeal to the Commissioner, but his appeal had been dismissed.

The defence chiefly was that there was no irregularity in the procedure, and that the revenue being in arrear the sale of the estate could not be set aside.

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* Appeal from Appellate Decree, No. 1507 of 1902, against the decree of H. R. H. Coxe, District Judge of Shahabad, dated April 11, 1902, affirming the decree of Lal Behari Dey, Offg. Subordinate Judge of Arrah, dated June 17, 1901.

(1) (1898) I. L. R. 25 Cal. 883; L. R. 25 I. A. 151.