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contain the admission of the defendant's father that this particular *todá garás* is a charge on land, filed, cannot be complied with. A certified copy of the paper being on the records of the court, we have, as empowered by the Code of Civil Procedure, called for and examined it; and we find that it does not contain an admission of the nature contended for by the special appellant's counsel. There is, therefore, no ground for a remand, and we must confirm the decree of the lower court.

Decree affirmed.

Regular Appeal No. 15 *of* 1866.

Sep. 4.

RA'JE VYANKATRA'V ANANDRA'V NIMBA'LKAR. *Appellant.*
JAYAVANTRA'V bin MALHA'RRA'V RANADIVE. *Respondent.*

Hindú Law—Adoption—Only Son—Age of Adopted.

Held:—The adoption by a Hindú widow of an only son, if valid in every other respect, cannot be set aside by reason of the adopted being an only son of an advanced age.

An adoption by a widow has a retrospective effect, and relating back to the death of the deceased husband, entitles the adopted to succeed to his estate.

THIS was an appeal from the decision of Arthur St. John Richardson, Judge of the District of Ahmednagar in Original Suit No. 4 of 1866.

The plaintiff, who is a Shudra by caste, brought this suit to recover the moveable and immoveable property of Gajrábái, wife of Bhaváníráv Ráje Nimbálkar, the original owner of the same, representing that she died on the 6th of February 1865, leaving no other heir her surviving but himself, and that the defendant, who was her servant, wrongfully possessed himself of the whole estate, and refused to deliver it up on demand.

The defendant, *inter alia*, answered that Gajrábái was his mother's mother; that she had in her lifetime conveyed all her estate to him by a deed of gift, dated the 12th of February 1857; that the Inam Commissioner decided in 1854 that the jáhágír was to terminate with the life of

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Gajrábái; that on the application of Gajrábái herself one-third of the jáhágír was ordered by Government to be continued to him, the defendant; and that he was adopted by Gajrábái on the 4th of February 1865.

The District Judge, on the evidence, recorded the following findings:—

"My finding on the first issue is that Ráje Vyankaṭráv bin Anandráv Nimbálkar is, by the religious law of the parties, who are Hindús, and by the custom of the country, *one* of the family entitled to succeed to the estate, if there had been any, of the late Bhavánráv Rámráv Nimbálkar, to the exclusion of the party in possession of the houses and other property of the late Gajrábái.

"My finding on the second issue is that the evidence recorded does not show that the plaintiff, Ráje Vyankaṭráv, is the *sole* surviving heir of the late Bhavánráv bin Rámráv Nimbálkar.

"My finding on the third issue is that the defendant, Jayavantráv, has acquired, by the express wish of the late Gajrábái, and by the grant conferred by the British Government, presumably, though not on evidence, through the Collector of this district, by order of the 15th of September 1865, a title to a portion, namely, one-third of the jáhágír estate at the village of Mirajgám, and also, by order of the 9th of March 1866, acquired also the office of Páṭíl of Mirajgám. The estates conferred by these grants are such as the British Government alone is competent to grant, and cannot be described as immoveable family property, to which the heirs of the late Bhavánráv Rámráv have established any hereditary title founded on Hindú law."

The District Judge passed a decree in favour of the defendant.

The appeal was argued before WARDEN and GIBBS, JJ.

Vishvanáth Náráyan Mandlik, for the respondent, was called upon to prove the fact of the adoption, as he admitted that in the event of the adoption not being established, the appellant would be the heir.

Pigot, for the appellant:—There are several objections which, I submit, are fatal to the adoption. The person here adopted, Jayavantráv, the respondent, was at the time of his adoption a father, and possibly a grandfather. There is not even indirect evidence in the case to show that the husband of Gajrábái had given her authority to adopt. Jayavantráv, the respondent, is, besides, the only surviving son of his father, and could not, according to the Hindú law, be adopted. Nearly seventy years having elapsed since the death of Gajrábái's husband, it was an adoption to the widow alone.

Vishvánáth Náráyan Mandlik, contra:—The Hindú law, although it does not recommend, permits the adoption of an only son; at least it does not set aside such an adoption otherwise validly performed. As to the question of the effect of adoption, S.A. No. 507 of 1863, decided by Arnould, C.J., and Forbes and Warden, JJ. (13th October 1864), ruled that adoption by a widow has the effect of divesting the widow's rights, and carrying back the effect of the adoption to her husband's death.

WARDEN, J.:—This action is brought by the plaintiff to be declared heir to the estate of Gajrábái. On the side of the defendant an adoption is set up, and the counsel for the appellant urges that this adoption should be held invalid, on the ground that by the Hindú law an only son cannot be adopted. The authorities state that an only son should not be given in adoption, but if such an adoption has taken place, and the requisite ceremonies have been duly performed, then it cannot be set aside. I agree with the District Judge in holding that the adoption was performed with the proper ceremonies.

The terms of the deed of adoption generally, and particularly the use of the word "ours" therein, show that the property referred to was common to Gajrábái and her deceased husband. The adopted son, therefore, became the heir not only to the property of the widow alone, but to that of both.

I, therefore, confirm the decree of the lower court with costs.

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GIBBS, J. :—I agree in the conclusion arrived at by my brother Warden. The suit was brought by the plaintiff as the heir of Bhavánráv, the husband of the deceased Gajrábái. When the case came on for trial, the learned counsel for the appellant, Mr. Pigot, and Ráv Sáheb Vishvanáth Náráyan Mandlik, for the respondent, admitted that in the event of no extraordinary circumstance, such as adoption, being established, the appellant would be the heir ; and further it was admitted that no question would arise as to the moveables, as the deed of gift by Gajrábái was on a sufficiently stamped paper. The Court was, therefore, limited by consent (1) to the question of adoption; and should that not be held proved, (2) whether the immoveable property, the inám and pátílkí watan, was confiscated by Government, and re-granted for political purposes to Gajrábái, *i.e.*, whether it was a personal grant or not.

The case really turns on the question of adoption; and, after carefully considering the evidence adduced, I can arrive at no other conclusion than that it did take place. The District Judge's finding is so obscure that we found it a matter of some doubt whether he held the adoption proved or not; and had we been hearing a special appeal, this uncertainty would have given us some trouble; but this being a regular appeal, we are Judges of fact as well as law, and can decide the issue for ourselves.

It appears that this old lady was left a childless widow in A.D. 1794, or about seventy-one years before she died, if we may believe that she was ninety years old at her death; and undoubtedly she was found a claimant to a very considerable landed estate when the British Government succeeded to that portion of the Dakhan in which this inám is situated. It is not denied by the plaintiff that Bhavánráv was a divided member of his father's family, and that his widow had, at all events, a life-estate in the immoveable property. It appears, then, that she took as an adopted daughter (I here use the word "adopted" in the ordinary English meaning, and not as it would be applied to a son under Hindú law) the mother of the respondent; and the

respondent was born in Gajrábái's house, and always lived there. Now it is proved by the deed of gift, No. 12, that Gajrábái, on the 11th of February 1857, made a settlement of all she possessed on the respondent, reserving a life-interest in it for herself; and as this document is on an eight-rupee stamp, and does not set out the value of the property, it is valid, if otherwise proved (which I find it to be), under Reg. XVIII. of 1827, Sec. XII., Cl. 2, which governs the case.

Some negotiations appear to have been going on between the old lady and the Government regarding her inám, and these were not concluded at her death, three days before which, to make the case of her *protégé*, the respondent, stronger, she appears to have adopted him with the usual ceremonies, and further to have executed the deed of adoption, No. 14, which is dated 4th February 1865. It has been urged that this document requires a stamp; but the counsel for the appellant admits that he can find no law requiring such, and I consider that it is not inadmissible on this ground if otherwise proved, which I hold it to be.

The only serious argument on this subject that has been addressed to the court is, 1*st*, that the ages of the adoptor and the adopted are both too great, as also the interval between the death of Gajrábái's husband and the date of the adoption, to admit of an adoption being permitted; and also that the adoptee was an only son. But the rulings of this court, as shown from 2 Borr., p. 83 downwards, as also of the Calcutta courts, have been that an adoption once made cannot be set aside. If the adopted be not a proper person, the sin lies on the giver and receiver alone; but the adoption must stand. Under these circumstances I need not say more on this portion of the argument. 2*ndly*, it is urged that the adoption is made by the old lady for her own estate, and is not good as affecting the estate of her late husband, and, therefore, that it will not affect the succession to the inám and watan. Mr. Pigot admits that he is unable to quote any precedent, but argues that,

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as the object of adoption by a widow is to benefit the soul of her deceased husband, Gajrábái, having waited seventy years before she made this adoption, must be held to have done it for her own sake, and not for that of her husband's soul. He further urges that the wording of the deed of adoption shows this. Ráv Sáheb Vishvanáth Náráyaṇ, on the contrary, quotes S. A. No. 507 of 1863 (decided, on the 13th of October 1864, by Arnould, Acting C.J., Forbes and Warden, JJ.) in which it was held that the adoption by the wife is an adoption to the husband's estate, and he urges that in this case as the pronouns are in the plural throughout the deed of adoption, it must clearly apply to the joint estate. I have no doubt that the old lady believed that the immoveable property had vested solely in herself; and the conduct of Government throughout led her to this opinion, and she never conceived that anything more was required than the deed of gift *plus* the deed of adoption to establish her *protégé* in the estate; but the latter in itself does not so clearly show this as the counsel for the appellant would have us hold. It is very general in its terms, and certainly does not exclude the husband's estate. But the real question is what is the Hindú law as held on this side of India on this point. Sir Thomas Strange states that an adopted son is in the same position as a posthumous son, and his inheritance dates from the death of the adopted father (*a*), and that a widow may adopt to her deceased husband is a fact invariably held. (*b*) It is asserted that a widow cannot adopt an heir to herself; but the case of the Sátárá Ráṇi has been alluded to as opposed to this. I believe the Ráṇi would have been only too willing to adopt to her late husband, had the paramount authority, the British Government, whose consent was necessary, permitted any other adoption save that to her own estate; but whether such an adoption is good or not is not a question which need be settled in the present case. I am of opinion that a son adopted is in the position of a natural son, and surely if a widow adopts, she must be held to adopt a

(*a*) 1 Strange 101; 2 Strange 127. (*b*) 2 Borr., p. 83, Reprint, Case 14.

son, not illegitimate as her son by other than her husband would be, but a son in the place of a legitimate natural-born son of her deceased husband. I think the silence of all texts or cases on the point raised so ingeniously by Mr. Pigot shows that such an idea would be contrary to the principles of Hindú law on the subject of adoption. I, therefore, consider the adoption of Jayavantráv good and binding on the estate of Bhavánráv, and the second question, therefore, does not arise; and I would confirm the District Judge's decree, throwing out the claim of the plaintiff with all costs.

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Decree confirmed.

Special Appeal No. 543 of 1867.

Nov. 18.

DAVLATA' bin BHU'JANGA' *et al.* .....*Appellants.*
BERU bin YA'DOJI *et al.* .....*Respondents.*

Survey Number—Alienation—Consent of Heirs—Limitation.

There is no precedent for ruling that the holder of a Survey field is incompetent to resign it without the consent of his heirs. A point of limitation must be decided, though raised at any stage of the cause.

THIS was a Special Appeal from the decision of R. W. Hunter, Senior Assistant Judge of the Puná District at Solápúr, in Appeal Suit No. 488 of 1865, reversing the decree of the Munsif of Pandharpúr.

The plaintiffs brought a suit to recover a share in certain fields from the defendants, who, they alleged, were members of the same family as themselves.

The defendants answered that one of the fields sued for, No. 30, was taken up by them after its abandonment by one Narsú, and the other fields after their abandonment by Yádoji, the plaintiff's father.

The Munsif, holding the plaintiffs' right not proved, threw out their claim.

They thereupon preferred an appeal. The defendants, under Sec. 348 of the Code of Civil Procedure, objected that