APPENDIX.

Regular Appeal No. 17 *of* 1863.

1866.
March 7.

BAYA'BA'Ī, widow of Rámákánt Vithal Náik. (*Defendant*) *Appellant.*
BA'LA' urf VENKATESH RA'MA'KA'NT, by his Guardian, Govind Shálu.....(*Plaintiff*) *Respondent.*

Hindú Law—Adoption by Widow—Prohibition by Husband to adopt—Implied Prohibition—Opinion of Devanda Bhatta—Fraud—Concealment from Widow of her Rights.

A Hindú widow has no power to adopt a son to her deceased husband, if she have been expressly prohibited from doing so by her husband in his lifetime.

Whether, according to the Maráthá school, she can adopt without the authority of her husband, given prior to his decease—*Quære.*

Where a Hindú childless husband, when at the point of death, positively refused to adopt a son, and died without retracting that refusal, it was held that a subsequent adoption by his widow was null and void, as authority from her husband to adopt could not in such a case be implied (*per* WESTROPP, J.)

Dictum of the High Court of Madras, "that the opinion of Devanda Bhatta must have been that the assent of the husband stood upon the same footing, and was of the same scope, in the cases of giving and receiving" (a son in adoption by the wife), questioned.

Where an adoption by a young Hindú widow is set up against her, and to defeat her rights, the Court will expect clear evidence that at the time she adopted, she was fully informed of those rights, and of the effect of the act of adoption upon them; and if it find that fraud or cajolery was practised upon the widow to induce her to adopt, or that there has been suppression or concealment of facts from her, it will refuse to uphold the adoption.

THE facts of this case are sufficiently stated in the judgment.

Anstey, for the appellant, referred to Mitákshará, Ch. I., Sec. XI., pl. 9, and the note by Colebrooke upon it; Steele's Law and Custom of Caste, pp. 52, 188, 189; Sutherland's Synopsis of the Hindú Law of Adoption, Head I. and *note* vi.; Macnaghten, II. L., Vol. I., pp. 66, 68; Vol. II., pp. 175, 180, 182, 183, 189, 190; I. Strange's Notes of Cases at Madras, 91 (*Veerapermall Pillay* v. *Narain Pillay*); II. *Ibid.* 1, 159 (*Chellummal* v. *Garrow*), per Sir Thomas Strange; S. D. A. Rep. (Morris), Part II., 1, 7.

Vishvanáth Náráyan Mandlik (with whom was *Vishnu Moreshvar*), for the respondent, cited Select Cases S. D. A. (1820 to 1840), pp. 25, 29; 3 Morris S. D. A. Rep., p. 420; 1 Borradaile Rep. 202; 2 Borradaile, pp. 83, 90, 488; Vyavahára Mayúkha, Ch. IV., Sec. V., pl. 17 (Stokes' H. L. Bks., pp. 63, 64); Viramitrodaya, leaf 189, Calcutta edn. of 1815; Dattaka Chandriká, Sec. I.,

1866.

BAYA'BA'I v. BA'LA' VENKATESH RA'MA'KA'NT.

pl. 7, 31, 32; *The Collector of Madura* v. *Ramalinga Sethupati* (2 Mad. H. C. Rep. 206).

March 7. WESTROPP, J.:—This is a regular appeal from the decree of Mr. Walter, late Acting District Judge of Khándesh, pronounced on the 31st of July 1863, whereby he declared the infant plaintiff to be the adopted son of the defendant, Bayábái, allotted to her a maintenance, and required her to account annually for the estate during the minority of the infant, and took certain other steps for the preservation of the estate. The decree also allotted out of the estate a certain annual sum for the support of the infant during his minority.

Rámákánt Vithal, a Bráhman, died on the 26th of September 1861, at the early age of twenty-seven years, leaving surviving him the defendant, his widow, aged only seventeen years, and no issue male or female.

Shortly after the death of Rámákánt, his widow, the defendant, applied for and obtained a certificate of heirship to him, notwithstanding the opposition of her mother-in-law, Chimábái. The latter appealed to the Sadr Adálat, but the grant of the certificate was, on the 19th of February 1862, affirmed. It is remarkable that by neither party was the alleged adoption, which is said to have taken place on the 21st of January 1862, mentioned to the Sadr Adálat.

Rámákánt carried on business as a shroff under the name of Yádu Manohar. His property, which was chiefly moveable, has, for the purpose of stamping the plaint, been valued by the plaintiff's advisers at Rs. 4,29,125-4-0.

There seems to be reason for believing that, subsequently to the death of Rámákánt, the infant plaintiff, who is alleged to have been adopted, was brought from his father's house and detained and supported for some months in the appellant Bayábái's house, either by her, or some of the male dependants of her late husband. There has been a considerable conflict of oral testimony as to the mode of performance of the alleged ceremony, and as to the assent of the appellant to it.

A deed or other writing of adoption is not indispensable to the validity of an adoption by Hindú law. In *Sootrugun Sutputty* v. *Sabitra Dye* (*a*) Lord Wynford said: "But according to the Hindú law neither registration of the act of adoption, nor any written evidence of that act having been completed, is essential to its validity. It is to be lamented that an irrevocable act, which defeats the just expectations of the relations of deceased persons, may, at any distance of time after it is supposed to have been done,

(*a*) 2 Knapp P. C. C. 290.

be proved by verbal testimony. It would certainly contribute much to the security of property, and the happiness of Hindú families, if in a country where the religious obligation of an oath is unfortunately so little felt, and documents are so readily fabricated, adoptions and all other important acts were required to be perfected in the presence of some magistrate, and recorded in some court." Although a writing be not essential, yet if the existence of such documentary evidence be alleged, but the document itself be not produced, and its absence not satisfactorily accounted for, such circumstances cast some suspicion on the alleged adoption, where the fact of adoption is in controversy, and the oral evidence conflicting.

Evidence was given for the plaintiff to the effect that two deeds relating to the adoption were executed, one by the appellant, Bayábái (for the non-production of which by the respondent no satisfactory excuse was given), and the other by the plaintiff's (respondent's) father, Govind Sháhu, which latter deed is in evidence as exhibit No. 31.

We, perhaps, might have thought it necessary to remand the cause to the court below for the purpose of having further evidence taken, and the appellant herself examined, if we were obliged to dispose of the question as to the fact of a ceremony of adoption having taken place with the apparent assent of the defendant.

But we do not think it necessary to determine whether a ceremony did so take place, or whether the form of such ceremony was proper; because we have arrived at the conclusion that, even if a suitable ceremony of adoption were performed, and with the apparent assent of the defendant, yet such adoption was wholly invalid, and cannot stand.

In one reason for holding the adoption to be invalid my brothers Tucker and Warden concur with me. That alone, therefore, will be sufficient to rule this case.

But for another reason also I hold the adoption to be invalid. I shall begin by mentioning that reason.

It is, that Rámákánt, the husband of the appellant, when at the point of death, positively refused to adopt a son.

This refusal to adopt was deposed to by witnesses on both sides, who concurred in saying that he more than once refused to adopt. Some of them spoke of what Rámákánt said on the day preceding his death, and others of what he said on the day of his death, and on both occasions, in reply to suggestions made to him by his friends that he should adopt a son, he refused to do so. Amongst those witnesses were the three following:—Pándu Báláji was examined on behalf of the infant plaintiff, to whom on most other points

1866.
BAYA'BA'I v. BA'LA' VENKATESH RA'MA'KA'NT.

his testimony was favourable, and there is not any reason for suspecting him of bias in favour of the defendant, Bayábái. On cross-examination he said: "I went to see Rámákánt on the day before his death. People said to him 'Adopt some one;' he replied 'No, I have a wife.'" Váman Bálkrishna, a witness examined on behalf of Bayábái, said: "Rámákánt said that he did not wish to adopt." Lakshuman Sadáshiv, a witness examined on behalf of Bayábái, said: "I saw Rámákánt; he said 'I don't wish to adopt, I have a wife.'"

The Judge of the District Court does not appear to have raised or considered the question as to the legal effect of Rámákánt's refusal to adopt, but does observe that "there is no reason, from the evidence, to suppose that she" (Bayábái) "acted by order of her deceased husband" in making the adoption; and at the opening of his judgment he said that, on the exposition of the Hindú law officer, it "is clear that a Hindú widow can adopt, either in pursuance of the orders of her deceased husband, or of her own accord." However, the District Judge omitted to notice that there was here not only an absence of a direction or recommendation by the husband to the widow to adopt, but also a positive refusal by him, when *in articulo mortis*, to do so.

The doctrine of the Hindú law officer of the District Court, contained in the dictum of the learned Judge, that "a Hindú widow can adopt, either in pursuance of the orders of her deceased husband, or of her own accord," although it may perhaps be sustainable in this Presidency, or in those parts of it in which the Maráthá school of law is in the ascendant, and in Southern India, does not prevail throughout Hindustán, and in this Presidency it has been frequently disputed—so frequently that during my experience of the Sadr Adálat and Supreme Court the power of the widow to adopt without the express authority of her husband has been invariably a matter of controversy between the parties in cases of adoption by the widow which have come before those courts. The present case is no exception. Mr. Anstey, in his argument for the appellant, strenuously contended that, without express authority from her husband, a Hindú widow could not in this Presidency make a valid adoption. It is, however, unnecessary now to give any decided opinion on that point, because, assuming that a widow have power to adopt, without any express authority from her husband to that effect, yet if he when dying, but in the full possession of his intellect, then distinctly refuse to adopt, and die without in any wise retracting that refusal, as was the case here with Rámákánt, I cannot doubt that a subsequent adoption by the widow would be void and of no effect. In stating the grounds of that view, I must examine the authorities on which the right of a

widow to adopt without express authority has been debated, although not at present proposing to give any positive opinion upon that controversy.

That the ground for adoption amongst Hindús rests upon the religious necessity for having a son, in order to deliver the adoptive father from *Put*, is a point beyond dispute (Manu, Ch. IX., pl. 137, 138) (*b*), although some question has been made whether the mere birth or acquisition of a son is of itself, independently of the performance of funeral ceremonies, sufficient to effect that deliverance (*c*), a point into which there is no present necessity to inquire.

But adoption is a right, not a duty to be enforced by the civil power. "No good Hindú lawyer," adds Sir T. Strange, "sitting in any of the King's or Company's courts in India, would listen for a moment to an application to compel a childless Hindú to adopt—succession to his property being at all events provided for, whether he have a son to inherit it or not:" 1 Strange H. L. 76. Adoption is by Hindú jurists recommended, not enjoined (2 Stra. H. L. 83, remark by Colebrooke).

Manu, in the case of persons of low caste, recognises the ancient law which gave a right to the husband, who is childless, to authorise the wife to effect the procreation of a son by a brother of the husband duly appointed for the purpose (*d*), and denounces as illegal such a proceeding amongst the twice-born classes (*e*). He does not appear to contemplate adoption by a widow under any circumstances (*f*).

Vasishṭha, one of the Smṛiti writers mentioned by Mr. Steele in his list of authorities accepted in Khándesh (*g*), whence this case comes, says: "Let not a woman either give or receive a son in adoption unless with the assent of her husband" (*h*). We shall subsequently see what efforts have been made by certain schools to explain away this text.

The Mithila school adopted, to the fullest extent, the doctrine of Vasishṭha. Vachespati Misra, one of the principal expositors of

(*b*) And see 3 Jagannátha's Digest by Colebrooke, pl. cccii to cccxiii.

(*c*) 1 Mad. H. C. Rep. 57, *per* Scotland, C.J.; Strange's Manual 51; Manu, Ch. IX., pl. 106, 107; Dattaka Mímamsá, Sec. I., pl. 4, 13, 14, 36, *et seq.*, 52, 55, 56, 61; and Sutherland's Preface, first three lines; Dattaka Chandriká, Sec. I., pl. 4, 5, 6; Sutherland's Synopsis, Head I.

(*d*) Ch. IX., pl. 59, 63, 145, 146, 159, 190; and see pl. 58, 143, 144, 147, 148, 162, 164, 165, 167; and see 2 Stra. H. L. 137, 164, 201, 203.

(*e*) *Ibid.*, pl. 64, 68; Miták., Ch. II., Sec. I., pl. 18.

(*f*) Acc. 1 Stra. Notes of Cases at Madras, p. 119.

(*g*) As "Wusisht," Steele's Summary, p. 25.

(*h*) Vásishṭha 15, 4; 3 Jagannáth's Digest by Colebrooke, Bk. V., Ch. IV., para. cclxxiii.; Dattaka Mímamsá, Sec. I., Cl. 15.

1866.

BAYA'BA'I v. BA'LA' VENKATESH RA'MA'KA'NT.

that school, denies that a woman can adopt otherwise than in association with her husband (*i*).

The Mitákshará, which stands, under the name Whyuwar Widyaneswuree, at the head of Mr. Steele's list (*j*) of compilations of authority in Khándesh, preserves a complete silence as to the power of a widow to adopt, but recognises her right to give in adoption. The passage, when purged of the interpolations obtained from the commentatrix Bálambhaṭṭa, runs thus: "He who is given by his mother, with her husband's consent, while her husband is absent or after her husband's decease, or who is given by his father, or by both, being of the same class with the person to whom he is given, becomes his given son (dattaka). So Manu declares: 'He is called a son given (dattrima) whom his father or mother affectionately gives as a son, being alike (by class) and in a time of distress, confirming the gift with water'" (*k*). Vijñánes'vara, the author of the Mitákshará, in the other parts of the same section containing his views on adoption, relies for the most part on Vasishṭha and Manu. Mr. Colebrooke's note on the passage which has now been quoted from the Mitákshará, after referring to the mother's authority to give away her son when she is a widow, is as follows: "In regard to a widow's power of adopting a son there is much diversity of opinions. Vachespati Misra, who is followed by the Maithila school, maintains that neither a woman nor a S'údra can adopt a dattaka or given son: because the prescribed ceremony includes a sacrifice, which they are incapable of performing. This difficulty may be obviated by admitting a substitute for the performance of that ceremony: and, accordingly, adoption by a woman, under an authority from her husband, is allowed by writers of the other schools of law. Nandá Pandita, however, in his treatise on adoption, restricts this to the case of a woman whose husband is living, since a widow cannot, he observes, have her husband's sanction to the acceptance of a son. On the other hand, Bálambhaṭṭa contends that a woman's right of adopting, as well as of giving, a son, is common to the widow and to the wife. This also is the opinion of the author of the Vyavahára Mayákha, but while he admits that a widow may adopt a son without her husband's previous authority, he requires that she should have the express sanction of his kindred. Writers of the Gaura (Bengal) school, on the contrary, insist on a formal permission from the husband, declared in his lifetime." As to Bálambhaṭṭa, I should here observe that her name is not to be found in the list of authorities

(*i*) Vivada Chintámani, translated by Prossono Coomar Tagore, pp. 74, 75.
(*j*) Steele's Summary, p. 26. (*k*) Miták., Ch. I., Sec. XI., pl. 9.

in Khándesh published by Mr. Steele (*l*), and is expressly stated by him (*m*) to be omitted in the Puṇá catalogue. Her authority does not stand high in this Presidency, and her doctrines have the reputation of generally inclining in favour of her own sex.

It is remarkable that the Dattaka Chandriká is not mentioned in the Puṇá or Khándesh catalogues of authorities given by Mr. Steele in his Summary. In Mr. Borradaile's preface to the Vyavahára Mayúkha he states that neither it nor the Dattaka Mímamsá exists in this Presidency; but as regards the Dattaka Mímamsá at least he appears to have been misinformed, as will presently appear.

Mr. Sutherland, in his preface to the Dattaka Mímamsá and Dattaka Chandriká, says of the Dattaka Chandriká that it is a more concise work than the Dattaka Mímamsá, and was written by Devanda Bhaṭṭa, the author of an eminent compilation of law, the Smṛiti Chandriká. The Dattaka Chandriká, he says, is a work of authority, and supposed to have been the groundwork of Nandá Pandita's Dattaka Mímamsá, the doctrines of the two books varying on some points. Mr. Sutherland continues: "Of the Smṛiti Chandriká of Devanda Bhaṭṭa, Mr. Colebrooke observes: 'This excellent treatise of judicature is of great and almost paramount authority, as I am informed, in the countries occupied by the Hindú nations of Draviṛa, Tailinga, and Carnáṭa, inhabiting the greatest part of the peninsula or Dakhaṇ. It is not unlikely that the Dattaka Chandriká may have attained equal distinction."

Commenting on the passage of Atri: "By a man destitute of male issue only must the substitute for a son, of some one description, always be anxiously adopted, for the sake of the funeral cake, water, and solemn rites," and on the similar text in Manu, the author of the Dattaka Chandriká, in Sec. I., pl. 7, says: "Women, with the sanction of their husbands, are competent to adopt, as Vasishṭha shows: 'Let not a woman either give or receive a son in adoption, unless with the assent of her husband.'" And at pl. 24 he says: "So also in the case in question, the affiliation of a son by a woman *proceeding legally with the sanction of her husband*, to constitute for him male issue, only takes place where no son of that person may exist: but if he have any, although she may be destitute of the same, such adoption does not obtain, for to proceed therein would be unproductive of the object." Speaking of the giving of sons in adoption, he says at pl. 31: 'But by a woman the gift may be made with her husband's sanction if he be alive; or even without it if he be dead, have emigrated, or entered a religious order;" and then he requotes the same text

(*l*) 1st ed., pp. 25, 26; 2nd ed., pp. 19, 20.
(*m*) 1st ed., p. 25; 2nd ed., p. 19.

1866.

BAYA'BA'I v. BA'LA VENKATESH RA'MA'KA'NT.

from Vasishṭha. At pl. 32 he continues: "Now if there be no prohibition even, there is assent; on account of the maxim: 'The intention of another not prohibited is sanctioned.' Yájñavalkya suggests the independency of the woman: 'He whom his father or mother gives is a son given.' Also in another place, 'deserted by his father or mother, or either of them.'"

In the very able judgment in *The Collector of Madura* v. *M. Ramalinga Sethupati* (*n*) the High Court of Madras supposes that Devanda Bhaṭṭa would have put the same construction upon the passage of Vasishṭha as to receiving a son in adoption as he did with regard to giving a son in adoption. It is said: "The proper conclusion seems to be that the opinion of Devanda Bhaṭṭa must have been that the assent of the husband stood upon precisely the same footing, and was of the same scope, in the cases of giving and receiving, for if the words of Vasishṭha require this explanation in the one case, they require it in the other."

After a careful consideration of the remarks of the High Court of Madras, and with all due respect to the note at page 68, 1 Macn. H. L., I think that Devanda Bhaṭṭa ought not to be held responsible for anything more than he actually did say. The two placita immediately preceding pl. 31 and 32, above quoted from the Dattaka Chandriká, show that he was there dealing with the case of giving only. They are these: "29. In answer to the question by whom is a son to be *given?* Caunaka declares: 'By no man having an only son is the gift of a son to be ever made. By a man having several sons, such *gift* is to be anxiously made.'" "30. The author, apprehending an extinction of lineage in case of the *gift* of a son by one even having two sons, says, 'by one having several sons.'" The 4th and 7th placita of the same section (1), referred to in the judgment of the Madras High Court, do not seem to support the conclusion to which it came as to the views of Devanda Bhaṭṭa. On the contrary, the concluding portion of the 7th plac.:—'Women, with the sanction of their husbands, are competent to adopt, as Vasishṭha shows: 'Let not a woman either give or receive a son in adoption, unless with the assent of her husband,' where Devanda Bhaṭṭa treats of the competency of a woman to take in adoption,—furnished him with a suitable opportunity to express, if he entertained it, the opinion attributed to him by the High Court of Madras. The fact that he not only carefully refrained from giving utterance to such a doctrine, but, when again, in plac. 24 of the same section, he touches upon receiving in adoption by a woman, he says, as already above mentioned: "So also, in the case in question, the affiliation of a son, by a woman *proceeding legally with the sanction of her*

husband, to constitute for him male issue, only takes place where no son of that person may exist," and thus treats the husband's sanction as necessary to the taking in adoption; and the further fact that, in the passage quoted by that court from the Smṛiti Chandriká (viz., "The objector says that the gift of a son by his mother is not proper, notwithstanding her power. The reason of this is her want of independence. Refutation:—True, but it is right if it be authorised by an independent male. Hence only Vasishṭha says: 'No woman shall give or receive a son unless with the permission of her husband.") the same learned commentator (Devanda Bhaṭṭa) exhibited the like abstinence, lead strongly to the conclusion that his intention was to expand the text of Vasishṭha only so far as it related to the giving of a son (*o*). I should say that Devanda Bhaṭṭa is doubly entitled to the benefit of the rule *expressio unius est exclusio alterius*, he having twice expressed himself in favour of the expansion of the text of Vasishṭha in the case of a woman giving a son, and preserved a rigid silence on each occasion as to any such expansion being proper in the case of a woman taking a son in adoption. His glosses upon that text are open to this further—and, I humbly conceive, conclusive—remark, that throughout them he avoids making any distinction between a wife and a widow, and if those glosses be intended to comprise as well the taking as the giving in adoption, he must be considered as sanctioning a taking in adoption, without the authority of her husband, by a wife as well as by a widow: for his remarks as to giving in adoption include both wife and widow; whereas no Hindú jurist of high reputation has, so far as I can discover, ever affirmed that a wife may, without the authority of her husband, take a son in adoption. It is vehemently improbable that Devanda Bhaṭṭa would have gone to such a length. Had he done so, the result of his comments would, instead of an explanation, have been a complete contradiction of Vasishṭha's text—an intention which, without very clear proof, ought not to be attributed to the commentator, and which he was not likely to leave to mere implication. Assuming, however, that my view of the meaning of Devanda Bhaṭṭa is not well founded, it must be remembered that his work, the Dattaka Chandriká, though it may rank higher in the Draviḍa country than the Dattaka Mímamsá of Nandá Paṇḍita, is inferior in authority to the latter in Maháráshṭra, and in cases of conflict does

(*n*). 2 Mad. H. C. Rep. 206, 219, 220.

(*o*) See the Commentary on Chandes'wara, 3 Jagannátha's Dig. 257, Colebr. Trans., to the effect that "if the father be living, a mother can only make a gift with his assent, but if he be not living, she may do so even without his previous consent;" but the same commentator lays down clearly that the widow cannot *take* in adoption without her husband's assent: *Ibid.* 253, and *infrá*, p. xii., xiii.

1866.
BAYA'BA'I v. BA'LA' VENKATESH RA'MAKA'NT.

not there prevail against it, except when supported by other authorities of high standing, *which is in such instances of difference sometimes the case.* Of the Dattaka Mímaṁsá, Mr. Sutherland, in the preface (p. ii., 1st ed.; p. 527 Stokes' ed.) to his translations of it and of the Dattaka Chaṇḍriká, says that "The Dattaka Mimansa is the most celebrated work extant on the Hindú law of adoption." Mr. Colebrooke, in his letter to Sir John Royds, printed at pp. 132, 133, of Vol. II. Strange H. L., says: "The Datta Mimansa is, no doubt, the best treatise on Hindú adoption" (*p*). It appears to be included in the Puṇá catalogue of authorities printed by Mr. Steele (*q*), though somewhat disguised in spelling as "Dut Meemans," and is stated by him to be a work well known in the Carnatic country, but neither the Dattaka Chandriká nor the Smṛiti Chandriká is included in the Puṇá or the Kháṇdesh catalogue, and the omission of the lastmentioned work is noticed by Mr. Steele (*r*). In Maháráshṭra, however, both the Dattaka Mímaṁsá and the Dattaka Chandriká must yield in authority to the Mitákshará, and generally also to the Vyavahára Mayúkha.

In the Dattaka Mímaṁsá, in the course of a long exposition of the abovementioned text of the Smṛiti writer Atri: "By a man destitute of a son only must a substitute for the same always be adopted; with some one resource (yasmát tasmát prayatnatas) for the sake of the funeral cake, water, and solemn rites," Nandá Paṇḍita observes (*s*): "15. 'By a man destitute of a son.' From the masculine gender being here used, it follows that a woman is incompetent (to adopt). Accordingly Vasishṭha ordains: 'Let not a woman either give or receive a son in adoption unless with the assent of her husband.' "16. From this the incompetency of the widow is deduced, since the assent of her husband is impossible." 17. "Nor should it be argued that the assent of a husband is requisite for a woman whose husband is living because she is subject to control, but not so the widow: for, mention being made of woman in general, dependency on control is not the cause; and (were it) her subjection to the control of kinsmen exists, as shown in the following text, 'on default of these the kinsmen,' &c." Mr. Sutherland, in his annotation on that section, points out that the text alluded to by Nandá Paṇḍita is that of Yájñavalkya: "The father protects her when a damsel. The husband when married: sons in old age: on default of these, kinsmen. A female

(*p*) See also Colebrooke's Preface to the Dáyá Bhága and Miták., and Stokes' H. L. B., p. 177.

(*q*) p. 22, 1st ed.; p. 18, 2nd ed.

(*r*) pp. 24, 25, 1st ed.; p. 19, 2nd ed.

(*s*) Dattaka Mímaṁsá, Sec. I., plac. 15, 16, 17, 18.

'attains not independence" (*t*). Nandá Pandita carries yet further than shown by the passages already quoted the disability of the widow; he says: "18. If it is contended, then, that she may adopt a son, with the assent of the kinsmen even, it is wrong; for the term husband would become indefinite; and the purpose would not be attained. Now the purpose of the husband's sanction is that the filiation, as son of the husband, may be complete even by means of an adoption made by the wife." He also, in speaking, as I understand him, of an adoption by the wife with the permission of the husband (the only adoption by her which Nandá Pandita recognises), says: "Now the connexion of lineage to the father is the filiation as his son; and such filiation proceeds from the sanction only of the father, not from the act of adoption: for the agent of that, in this instance, is the wife" (*u*). At plac. 28 he reiterates his opinion as to the disability of the widow: "28. Besides, this part of the text, 'unless with the assent of her husband,' is an exceptive exemption from the general prohibition contained in the part preceding: 'Let not a woman either give or accept a son,' and in it the assent of the husband is the cause. Therefore the widow is incompetent (to adopt): for her husband being dead, since his assent is impossible, the exemption destitute of the cause (to give it effect) is without validity; *and other* means of deducing (her authority,) are wanting. Thus the doctrine of every writer is rendered even consistent."

In his account of the different schools of law, furnished by Mr. Colebrooke to Sir T. Strange, Mr. Colebrooke says: "In the west of India, and particularly among the Mahrattas, the greatest authority after the Mitákshará is Nílakámṭha, author of the Vyavahára Mayúkha and of other treatises bearing the same title" (*v*). It stands second to the Mitákshará in the list of authorities accepted in Khándesh given by Mr. Steele in his Summary. He, writing in 1827, says it was "composed about 300 years ago; it is of chief notoriety in the Carnatic, though attended to both at Poona and Benares" (*w*).

At plac. 16, Ch. IV., Sec. V., of the Vyavahára Mayúkha the author quotes the passage of Vasishṭha which has been so frequently mentioned, and at plac. 17 proceeds thus: "Therefore, if there must be an order from the husband, it is for a married woman only, as above shown; but for a widow, even without it, (adoption) may be made,

(*t*) Acc. Manu, Ch. IX., pl. 3.

(*u*) Dattaka Mímamsá, Sec. I., pl. 19; and see pl. 22.

(*v*) 1 Stra. H. L. 318; and see Colebrooke's Preface to the Miták. (Stokes, H. L. B. 173); and see *Vináyak Anándráv* v. *Lakshmibái*, 1 Bom. H. C. Rep., 122, 124, 127.

(*w*) Steele's Summary, p. 7, and see his Preface, p. vi.

1866.
BAYA'BA'I v. BA'LA' VENKATESH RA'MA'KA'NT.

with the permission of her father, or, on failure of him, of the relations (*nyati*) under this precept: 'Let a female be taken care of by her father while a child, by her husband when married, and by her sons in her old age. If none of these exist, let her other relations take care of her. A woman is never fit for independence.' This has been declared by Yájñavalkya only with reference to difference of age, and the circumstances of a woman being under the power of her husband. In case of his being dead, or unable, from old age or other disqualification, or from helplessness, then she is indeed under the power of her sons or other relatives." Pl. 18. "By Katyáyana also it has been said: 'If a woman, without the orders of her father, husband, or son, should perform obsequies, such obsequies are of doubtful validity.' What is here said of the orders of her father, husband, &c., relates only to the difference of age. Obsequies here means rites performed for the other world; wherefore, at whatever age a married woman may (require to) receive the command of her husband, that very command is, in the case of a widow, not required, since the command of any other person not here mentioned is nowhere declared requisite. Therefore, the right of adoption, even without the order of her (late) husband, does pertain to a widow."

"Even without the order of her late husband" does not include a case in which the husband has indicated his pleasure to be that there shall not be an adoption. If he die silent, then indeed, in the opinion of Nilákantha, as shown by this passage, the widow may adopt, albeit without any express order of her husband, verbal or in writing, enjoining her so to do.

Mr. Raymond West, our learned and able Registrar, who, in conjunction with Professor Bühler, is engaged in making, on behalf of Government, a compilation or digest of the Hindú Law, as exemplified in the responsa of Shástris, has kindly furnished me with the following valuable note, made by him in the pursuit of his task:—

"On the subject of adoption by a widow three doctrines have been maintained by Hindú lawyers.

"(1.) Nandá Pandita in the Datta Mîmaṁsâ contends that a woman cannot adopt without the express command of her husband, because the passages on adoption speak of the adopter only in the masculine, because a woman is not allowed to recite the passages of the Veda required at the ceremony, and because a passage of Vasishtha expressly declares that a woman cannot adopt without directions from her husband (which after his death he cannot give). He argues against an interpretation of this passage founded on the word bharta (husband) which translates it as 'keeper', and would thus extend the right of granting permission to the guardians of the widow.

"(2). Against this, Nîlakaṇṭha, in the Vyavahâra Mayûkha, contends that the passage refers to married women under coverture only, not to widows; and he maintains that a widow may adopt without her husband's express permission, if authorised by the male relations under whose protection she lives, but not otherwise: because if a woman performs even funeral ceremonies without the consent of her father, husband, or son, a passage of Katyáyaṇa declares that they are wholly inefficacious.

"Kamalakara, the author of the Nirṇayasindhu (*x*), explains the passage of Vasishṭha in the same way as Nîlakaṇṭha, and from a verse which occurs in Vatsa as well as in Manu, asserting that a mother, as well as a father, may give away a son, infers that she may also receive a son in adoption.

"(3). In the Sanwaskara, Kaustubha, and Dharmasindhu (*y*) it is maintained that the language of the ancient Smṛitis is such as will include women also amongst those entitled to adopt, and that the permission of relatives is no more necessary for this than for other religious acts, which a woman, though dependent, and subject to control when she is inclined to do wrong, may perform without permission, and even against the consent of her guardians.

"This last doctrine has been very generally adopted on this side of India, especially since the establishment of the British rule made extension of the power of adoption dear to the natives, both as a national distinction, and as a means of enrichment at the expense of the State, but it proceeds on a confusion of the civil and religious effects of the widow's acts, which is unauthorised by analogy, and is quite opposed to the general tenor of the Hindú law-books as to the status and capacity of women. As to the language of the Smṛitis, though the masculine, which is uniformly employed, may, according to the construction of the Sanskṛit language, include females also, yet the general correspondence of the passages relied on, with others in which no doubt has ever been entertained that men only are intended, leaves no reasonable doubt that it was not intended to extend the right to females. Had this indeed been intended, it is impossible to conceive that a matter of such importance should not have been expressly provided for, instead of being left to a mere (and somewhat obscure) grammatical inference. The interpretation of Nîlakaṇṭha is met by the remark that a broader view of Vasishṭha shows that he did not intend to treat of adoption

(*x*) Stated in 1827 by Steele (p. 10) to have been then written 214 years.

(*y*) Stated in Steele (p. 10) to have been then (1827) written about half a century.

1866.
BAYA'BA'I v. BA'LA' VENKATESH RA'MA'KA'NT.

after the father's death at all; it was a case which (apparently) he did not contemplate."

There is much force in these remarks of Mr. West, and there unquestionably is good reason to believe that the doctrine of Nílakaṇṭha, repeated and expanded in other works referred to by Mr. West, is a deviation from the ancient and strict rule of Hindú law, enunciated in its simplicity by Vasishṭha, and still maintained in Mithilá, Bengal, and Benáres, and some other parts of India. Neither Manu, nor the Mitákshará, nor the Dattaka Mímaṁsá, nor, if I be right in my interpretation of him, Devanda Bhaṭṭa in the Dattaka Chandriká, countenances the laxity of Nílakaṇṭha, and his Maráṭhá school, in maintaining that a widow needs no express authority from her husband to adopt.

That in order to give validity to her adoption she needs such an authority where the Benáres, Bengal, and Mithilá schools prevail, is beyond doubt: *Raja Shum Shere Mull* v. *Ranee Dilraj Konwar* (*z*) from Goruckpore; *Mt. Tara Munee Dibia* v. *Dev Narayen Rai* (*a*), from Dacca; Anonymous (*b*); *Jai Ram Dhami* v. *Musan Dhami* (*c*), from Behár; *Raja Haiman Chull Singh* v. *Koomer Gunsheam Singh* (*d*), from Etawah; *Huradun Mookurjia* v. *Muthoranath Mookurjia* (*e*); *Chundermonee Debia Chowdhoorayn* v. *Munnobhunee Debia* (*f*).

In the following passage in 1 Stra. H. L. 79, 80: "The assent of the husband may be given to take effect (like a will) after his death; and, according to the doctrine of the Benáres and Maháráshṭra schools prevailing in the peninsula, it may be supplied by that of his kindred, her natural guardians, but it is otherwise by the law that governs the Bengal Provinces," the Benáres school seems to have been introduced by mistake. In *Raja Haiman Chull Singh* v. *Koomer Gunsheam Singh* (above mentioned),—Mr. Justice James Parke, in giving the judgment of the Privy Council, says (*g*): "According to the Native text-writers, it seems to be clear that the ancient law of Hindostan required the authority of the husband; but it is also clear that the strictness of that law has been, in many districts, relaxed, or modified by local usage; and the opinion of the Shástris, as published in Mr. Borradaile's Bombay Reports, is very strong to show that in the Mahratta States, to the west of the Peninsula, the law does not require any such authority to render the act valid. But that such relaxation has extended to this particular district (Etawah) is not in their Lordships' judgments established;

(*z*) 2 Macn. S. D. A. Rep. 169. (*a*) 3 Macn. S. D. A. Rep. 387.
(*b*) East's Notes X.; 2 Morley Dig. 16. (*c*) 5 S. D. A. Rep. 3.
(*d*) 2 Knapp P. C. C. 203. (*e*) 4 Moo. Ind. App. 414, 426.
(*f*) 8 Moo. Ind. App. 477.

on the contrary, the weight of authority is in favour of the opposite conclusion." In a Calcutta case, *Srimati Rajcoomaree Dossee* v. *Nobocoomar Mullick* (*h*), in which it was held that where a widow, who is heiress in possession of her deceased husband's estate, claims to have a power of adoption, the court will not establish that power against the reversionary heirs of the deceased husband's estate before an adoption, Colville, C.J., said: "Even if it be granted that a person, merely because he is a dattaka or son given, apart from the performance of any further ceremony, becomes incapable of returning to his natural family, that rule would not govern the case of an adoption that was invalid because the widow had not power to adopt. For to constitute a dattaka there must be both gift and acceptance. *A widow cannot accept a son for her husband unless she is duly empowered to do so*; and, therefore, her want of authority, if it invalidates the adoption, also invalidates the gift" (*i*). Commenting on the already-cited text of Vasishtha, Jagannáth Tercapanchánana, in his Digest (*j*), says: "If a son be accepted by a wife without the assent of her husband, her property in that child is valid, but not his performance of filial duties; he can neither possess the heritage, nor offer the Shráddha or the like, for it is shown that the adoption of a son is the act of the man; in no code of the law is it found that adoption can be the act of the woman." And again (*k*): "Accordingly, a widow, though she may perform acts of religion without consent previously declared by her deceased lord, cannot, *without such consent*, adopt a son given, for the text of Vasishtha expresses: 'Let not a woman give or accept a son,' &c. (cclxxiii.) But if her husband assented, she may adopt a son given, as a son of the wife *is raised up to a husband by his consent*, else it should have been expressed in the law: 'he shall not be the son of her husband unless adopted with the assent of her lord, but shall be her own son to perform her obsequies and take her inheritance.' *A son given is, therefore, the child, not of his adoptive mother, but of his adoptive father only.*" And see W. H. Macnaghten, H. L., Vol. I., pp. 66, 68; Vol. II., pp. 175, 180, 182, 183, 189, 190; 1 Stra. Notes of Cases at Madras, 121.

As to the extent of the deviation in Maháráshtra there is a contest. Some authorities maintain that if the husband have died without having authorised his wife to adopt, she may adopt on obtaining the assent of his kindred or of the caste. Others contend that she may adopt without the consent either of the relatives of her husband or of the caste.

(*g*) 2 Knapp, P. C. C., p. 221. (*h*) Boulnois R. 137. (*i*) *Ibid.* 143, 144.

(*j*) Vol. 3, Colebr. Trans., p. 244; As to his authority see 1 Stra. H. L., preface xviii.; 2 *Ibid.* 175, 176 (Colebrooke's Letter).

(*k*) *Ibid.*, p. 253.

1866.

BA'YA'BA'I v. BA'LA' VENKATESH RA'MA'KA'NT.

Steele (*l*) speaks of the necessity of the consent of the husband's Sapiṇḍa relations, or caste, and in this, so far as regards the caste, he would appear to follow the doctrine laid down by the Shástris in *Sri Brijbhookanji Maharar* v. *Sri Gokooloosaoji Maharar* (*m*); but, for the right of the caste to intervene, there does not seem to be any respectable authority. In order to attempt to support their doctrine on that point, the Shástris seem to have mistranslated the word "Nyati" in the Mayúkha as "caste," its proper meaning appearing to be Sapiṇḍas, or gentile kindred (*n*).

Of the nine Shástris who gave opinions in *Hurbut Rao Mankur* v. *Govindrao Bulwunt Rao Mankur* (*o*), only one, Harbhaṭ Kásikar, mentioned the consent of the relatives or of the caste, and he did not treat such consent as indispensable. All nine were of opinion that the widow might, according to the Maráṭhá school, adopt without the order of her husband. Báji Ráv, the last of the Peshwás, as a general rule, treated adoptions by widows without the order of their husbands as illegal. But it is certain that he was swayed by interested motives (*p*). By an intrigue of Bállobá Tátyá and Parashrám Bháu Paṭvardhan, Yeswadábái, the widow of Mahádev Ráv Sivái, the preceding Peshwá, had been induced to adopt Báji Ráv's brother, Chimṇaji A'ppá, very much against the will of the latter. Eventually, after Báji Ráv had, on the 4th of December 1796, taken his seat on the *masnad* as Peshwá, it was declared by a council of Shástris that the relationship between the late Peshwá, Mahádev Ráv Sivái, and the sons of Raghunáth Ráv (Báji Ráv and Chimṇáji A'ppá) prevented the widow of Mahádev Ráv from adopting the second cousin of his father; the adoption was declared illegal, and annulled. The Shástris who had performed the ceremony were expelled. Chimṇáji A'ppá, though he had acted on compulsion, was compelled to undergo penance in atonement for the deed, but was soon afterwards restored to the favour of his brother (*q*). Báji Ráv himself rested the invalidity of the adoption on the ground that the widow had not express authority from her husband to adopt. The disapprobation which the deviation of the Maráṭhá school met with in such high quarters may to some extent account for the fact that, for a long time afterwards, and down even to the hearing of this case, we find that adoptions by widows without express authority from their husbands have been constantly and

(*l*) 1st ed., p. 54, para. 45; but see Appx., pp. 32 *et seq.*, 37, 177, 188, and 189; 2nd ed., pp. 47, 48, 175, 176, 187, 390, 391 *et seq.*

(*m*) 1 Borr. Rep. (2nd ed.), pp. 202, 214, and 216. And *see* 2 *Ibid.* 492, 493.

(*n*) See note 6, 2 Borr. Rep. (2nd ed.), pp. 492, 493.

(*o*) 2 Borr. Rep., p. 83, 104 (2nd ed.).

(*p*) 2 Borr. Rep. (2nd ed.), p. 101.

(*q*) 3 Grant Duff's Hist. Mahr. 93, 95, 102, Bombay reprint.

vigorously contested, but, it must be admitted, generally speaking, without success, unless there were some other defect in the adoption than the absence of express authority from the husband. In support of the widow's right to adopt in Maháráshṭra and the Peninsula are 2 Stra. H. L. 92, 96, 115 (but with the consent of the husband's relations), also the cases already cited from Borradaile's Reports, and the following authorities: the Shástri's opinion in *Bhasker Bachaji* v. *Naru Ragunath* (*r*); *Virbudr Haribudr* v. *Baee Ranee* (*s*), which was a strongly contested case in the Nágar Bráhman caste, in which the Súrat Shástri seemed to regard the consent of relations as necessary, but the Bombay Ṣadr Diváṇi Adálat Shástri was silent as to any such necessity; *Abajee Denkur* v. *Gungadhur Vasudeo Gosaee* (*t*), also a strongly-contested case. It seems to have been an adoption by a widow, in the last moments of her life, without the consent of her husband's relatives. Mr. Frere, one of the Judges, notices, and apparently adopts the view, that there is not any necessity for the consent of kindred (*u*), and such would appear to have been the decision of the court. Mr. Harrison's doubts seem to have rested on the delay in the adoption. In the unreported case *Gopal Shridhar Dikshit Patvardhan* v. *Náro Vináyak Dikshit Patvardhan* (Sp. App. 369 of 1865),* the consent of one of two kinsmen was held by Newton and Janárdhan Vásudev, JJ., to be sufficient to an adoption by a widow, although the dissenting kinsman was in possession of the major portion of the property of the deceased.

Assuming, but not deciding, that the deviation of the Maráṭhá school is established to the furthest extent to which any of the foregoing authorities reach (namely, that the widow may, without express authority or order from her husband, and without the consent either of his or her relations, adopt a son), and without in the least degree wishing or intending to infringe on the law of adoption by a widow so far as it can be considered as established in Maháráshṭra, cherished as I believe that law to be by the Hindú community, or a very considerable proportion of it, yet I am not disposed to extend it, or to depart from the general Hindú law one single step further than provincial or local usage has firmly settled as admissible. And I have not any doubt that we should extend it much beyond its present boundaries, were we to hold that the widow may adopt where the husband has, when perfectly in the possession of his senses, as well on the day preceding his death, as on the day of his death, in reply to suggestions that he should adopt a son, positively refused so to do.

(*r*) Bombay Select S. D. A. Cases, 25, 31.
(*s*) S. D. A. Rep., Morris, Part II., 1, 3, 7. (*t*) 3 Morris' Rep. 420.
(*u*) *Ibid.*, 427, 428. * See *post*, p. xxiv.

1866.
BAYA'BA'I v. BA'LA' VENKATESH RA'MA'K'ANT.

Some of the strongest advocates of the widow's right to adopt admit that if the husband have signified his desire to be that there should not be an adoption, the widow cannot adopt. In 2 Borr. Rep. 104, Chintáman Shástri Dikshít A'pte says: "The widow should adopt with her husband's order, but she may adopt without it, *provided her husband did not say he wished to have no son adopted.*" It will be observed he does not require an express prohibition, but regards an intimation of the husband's wish, that there should not be an adoption, as sufficient.[e] In the Nágar Bráhman case already mentioned, the question put to the Shástri of the Bombay Sadr Diváni Adálat was: "Can a widow of the Nágar Bráhman caste adopt a son without having obtained the permission of her husband?" To which the Shástri replied: "*If the husband forbade the adoption of a son, the widow could not adopt;* but if he did not prohibit it, it must be understood that he assented to it. For it is commanded in the Shástr that a person who has no male issue must adopt a son, and if the widow adopted under such circumstances, in the way required by the Shástr, her act would be valid. Some law-books deny this right to a widow, but the greater number allow it. To give publicity to the adoption, it should be made known to the ruler, though if this was not done the adoption would not be invalid, if otherwise in accordance with the Shástr" (*v*). And in *Abajee Denkur* v. *Gungadhur Vasudeo Gosaee*, above cited, the Zillá Judge, Mr. Remington (some time also a Judge of the Sadr Adálat), who seems to have given the best judgment in the case, said: "The court considers authority to be in favour of this position, that though the widow should adopt with her husband's consent, she may act without it, *provided he has not expressed a desire not to have an adopted son*" (*w*). Although some of the Maráthá school may use the expression that the widow may adopt without the consent of the husband, this means simply without his express assent. The foundation underlying every adoption amongst Hindús is the consent of the husband. The only difference between the schools is that some require that it should be express, and that others are satisfied with an implied assent, and are ready to imply it if he have neither said nor done anything inconsistent with such an implication. The concession that there cannot be a valid adoption by the widow if the husband prohibit adoption, admits the necessity for his consent, express or implied, and so the Shástri in the Nágar Bráhman case perceived, as appears by his remark that "if he (the husband) did not prohibit it, it must be understood that he assented to it." And this assent is presumed, because the adoption is supposed by the Hindú religion

(*v*) 2 S. D. A. Rep., Morris, Part II., p. 7, note.

(*w*) 2 Morris' Rep., 423, 424.

to redound to the spiritual benefit of the husband. However, *expressum facit cessare tacitum*. Where, therefore, there is an express and reiterated refusal to adopt by the husband, both before and when he is *in articulo mortis*, there cannot be any implication to the contrary. And the reason which evidently influenced Rámákánt was an abiding reason, namely, his desire that his wife should continue in the enjoyment of his property, which would be defeated if he or she adopted a son to him. The indication of that desire implied a prohibition to her to adopt. I can easily conceive a case in which, although a man might say nothing on the subject of adoption, yet he might so act as completely to signify his intention that there should be none. Take for instance the case of a childless Hindú dying divided as to ancestral property from his family, and also leaving self-acquired estate, who makes a deed or will, leaving or assuring to his wife the enjoyment of all his property during her life, with remainder over to his brother as regards the ancestral property, and to his sister as regards the self-acquired property. An adoption by the widow under such circumstances, if allowed by law, would wholly frustrate the intentions of her husband. We have it on all sides laid down that the right to adopt is absolute in the husband, and the wife's assent is not necessary: 1 Stra. H. L. 78, and the answers of the Shástris at 2 Borr. Rep. 102. And see 4 Moo. Ind. App. 1 (*Rungama* v. *Atchama*); 3 Jagannátha's Dig., Colebr. Trans., pp. 244, 253, 254. Whenever a woman duly authorised adopts, it is on her husband's account and for his own sake, not her own: 1 Stra. H. L. 79 (*x*); "Filiation proceeds from the sanction only of the father:" Dattaka Mímamsá, Sec. I., pl. 19. The impossibility of such sanction after his death, alleged by Nandá Pandita (pl. 28), is surmounted by implying his assent, if he have not previously spoken or acted in a manner incompatible with such implication. The passage already above quoted (*y*) from Sec. I., pl. 24, of the Dattaka Chandriká, shows that the efficient legal and religious motive for the adoption is the affiliation of the son to the man, and that it matters not whether the woman be destitute of male issue, adoptive or natural-born.*

Mr. Sutherland in his Synopsis (*z*) observes: "The same reason which imposes the necessity of adoption on a man, not equally applying to a woman, the latter (at least such seems the more accurate and prevailing doctrine) is incapable, in her own right of adoption,

(*x*) And see 2 Stra. H. L. 88, 91 (Colebr. and Ellis); 94 (Sutherland); 98 (Colebrooke); 111 (Ellis); 116 (Ellis); 128 (Ellis).

(*y*) *Suprà*, page .

* Acc. *Chowdry Pudun Singh* v. *Kaar Oodey Singh*, 12 Moo. Ind. App. 350, 356.—ED.

(*z*) Head I., and notes v. and vi. (Stokes' H. L. B. 664, 671, 672.)

1866.

BA'YA'BA'I v. BA'LA' VENKATESH RA'MA'KA'NT.

though it is admitted that by his sanction she may affiliate on the part of her husband a son, who would necessarily be filially related to herself (*a*). Nandá Pandita denies *generally* the authority of a widow to adopt, assigning a reason by no means satisfactory, that the assent of her husband is impossible: but it is reasonable to admit, consistent with practice and the opinion of other authors, the validity of an adoption made by a widow under the sanction of her husband, written or formally expressed during his lifetime, and perhaps, in some places, under that of kinsmen." The reason for requiring, as we have seen some authorities do, the assent of kinsmen, is, no doubt, that they are, after the husband's decease, considered sufficiently to represent him to give on his behalf that assent which death prevents him from giving. But, as we have seen, his previous language or conduct may be wholly inconsistent with any possibility of vicariously substituting their assent on his behalf, or implying it to be his assent.

I am clearly of opinion that in this case the language of the husband has been such as to render it impossible to imply any authority in his wife, or any other person, to adopt, or assent to the adoption of, a son on his behalf, and that for that reason the alleged adoption here, if made, is null and void.

But, as already stated, beside the refusal (or implied prohibition) of Rámákánt to adopt, we have, upon a careful review of the facts of this case since the argument, unanimously come to the conclusion that for another reason it is impossible for the court to sustain the alleged adoption, and that it is unnecessary to send back the cause to the District Court for the examination of the widow or for further evidence.

Not only was the appellant a Hindú female, whom the law only barely recognises as *sui juris*—so careful does it require that the court should be in ascertaining that she has full knowledge of the nature and consequences of any acts affecting her legal rights, which she has been induced to perform (*b*)—but she was only seventeen years of age at the time of the alleged adoption (as was admitted in the course of the argument), and she could have had little more experience or knowledge of the world than a mere child. If she adopted, or assented to the adoption of, the infant plaintiff at all, she manifestly did so at the suggestion of the Bráhmans, Gumástás, and clerks who surrounded her, and who were the real actors on the occasion, and

(*a*) Acc. Datt. Chandriká, Sec. I., pl. 24.

(*b*) 1 Stra. H. L. 244; Manu, Ch. IX., pl. 2 and 3; 2 Stra. Notes of Cases at Madras, 159; Steele, 1st ed., p. 241, pl. 79; 2nd ed., p. 242. (And see 5 Calc. W. Rep., 246, decided since this case.—Ed.)

who were desirous to transfer to their own hands the control and management of Rámákánt's property and firm during the minority of the infant plaintiff.

Looking at the effect of adoption upon the rights of a Hindú woman who succeeds to the property of her husband, we should expect clear evidence that she was fully informed of those rights, and of the effect of the act of adoption upon them;—an act which reduces her from the position of complete and absolute mistress of her husband's moveable property, and tenant, for life at least, of his immoveable property, to a mere right of maintenance (*c*).

Hindú women should be shielded from cajolery and undue influence with nearly all the jealous strictness with which the rights of a minor or other person not *sui juris* are watched—not an iota of which strictness should be abated in the instance of a widow just emerging from infancy, as was the case with the appellant at the time of the alleged adoption. Some relaxation of this strictness would, of course, be allowable in the case of a Hindú woman whose husband has directed that she should adopt. She is then under at least a moral duty to adopt, and the act of adoption by her is one which may justly be expected. It is different in the case of a woman whose husband leaves no such direction, because the act is one in derogation of her own right, and not in obedience to any order of her husband, and especially so in this case, in which the husband, from an anxiety to preserve his estate intact for his wife, has positively refused to adopt. If the conscience of the court were satisfied that the widow voluntarily performed the ceremonies absolutely essential for adoption, and had been previously fully informed, first, of her rights, and secondly, that the effect of an adoption upon them would be wholly to divest her of those rights and to reduce her to a maintenance, it would be the duty of the court to uphold that act of adoption, supposing the law to be that a widow may, at this side of India, adopt a son without the express authority of her husband—a question on which we do not consider it necessary, nor do we purpose now, to express any final opinion.

We not only have been unable to find any evidence, however slight, that Bayábái was informed, by any one or more of the persons who surrounded her, of the effect which adoption would have upon her own rights, but on the other hand we are satisfied that that was sedulously withheld from her knowledge, and that she never was informed of her rights or position. It is unnecessary to go beyond the evidence given on behalf of the plaintiff to show that previously

(*c*) 3 Moo. Ind. App. 229; 1 Stra. H. L. 101; 2 *Ibid.* 88, 116, 117, 127, 213, 214; 2 Morris' Rep. 19, 424; 1 Bom. H. C. Rep. 130; 2 Knapp, P. C. C. 35.

1866.
BAYA'BA'I v. BA'LA' YENKATESH RA'MA'KA'NT.

to the alleged adoption she was never informed as to the effect such an act must have upon her rights. Tátiá Hari (No. 54), one of the witnesses for the infant plaintiff, says that Bayábái supposed she would be still owner of the property, and, on discovering that this was not to be the case, became insolent (*qu.* unkind) for two months to the boy (plaintiff), and then expelled him. From this and other evidence, we are quite certain that no pains whatever were taken to explain to the defendant Bayábái the legal consequences of the act which she is alleged to have performed, and that, on the contrary, she must have been studiously kept in the dark as to those consequences, and was unduly and, we think, fraudulently influenced by the Bráhmans and other persons around her. It is not to be endured that a young Hindú girl of tender years is, by an act done when she was thus hoodwinked, to be stripped of her property by the greed or fanaticism of those who may be around her. We think it unnecessary to go into the details of the evidence, and that it is enough to say that, looking at the whole mass of evidence in the case, we do not think that Bayábái has been fairly dealt with, or at all informed as to her rights or position, or as to the effect upon them of an adoption by her, before she was inveigled into the alleged act of adoption on which the plaintiff relies. The Hindú law abhors fraud or unfair dealing as fully as the English law, and treats all transactions effected either by the *suppressio veri* or the *suggestio falsi* as void (*d*).

For these reasons, we think that the decree of the District Judge is unsustainable, and ought, upon the third of the additional points of appeal, namely, that the appellant was cajoled into making the alleged adoption, by being kept in ignorance of her rights and of the effect of an adoption, to be reversed with costs.

Had I come to the opposite conclusion, and regarded the adoption as valid, I should have thought that the Judge was right in appointing the widow to be manager and receiver over the estate, and in requiring her to account annually; but I am strongly inclined to think that the annual sum allotted to her for maintenance would, having regard to the extent of the pnoperty, have been insufficient. But as we are of opinion that the alleged adoption was obtained by fraudulent means, and is, therefore, void, and that the decree, accordingly, should be wholly reversed, and the adoption declared null and void, those questions need not be considered, and the widow should be left in undisturbed possession of the property, without any condition as to accounting to the court, annually or otherwise.

(*d*) 1 Stra. H. L. 112, 202; 1 Macn. H. L. 124, 2 Jag. Dig. 181, 183, *et seq.*; (Colebrooke's transl.)

1866.

BAYA'BA'I v. BA'LA' VENKATESH RA'MA'KA'NT.

TUCKER, J., concurred in thinking that the defendant Bayábá had been circumvented by unfair means, and that an adoption procured, as the alleged adoption in this case, by suppression and misrepresentation of facts, could not be permitted to stand. It was clear to him that this youthful widow had been led by those around her to believe that the act of adoption would not divest her of her interest in the property of her late husband, and that she had not been fully informed as to her position and rights. He referred to Manu, Ch. VIII., pl. 165: "When the Judge discovers a fraudulent pledge or sale, a fraudulent gift or acceptance, *or in whatever other case he detects fraud, let him annul the whole transaction,*" as the well-known rule of Hindú law, and to the repetition of the same passage in the Vyavahára Mayúkha (*e*), with this remark upon it: "Fraud, circumvention, *or in whatever other case*, that is, in whatsoever business. The meaning is, the whole of that business in which fraud is detected shall be reversed." He also adverted to the non-production of the deed alleged, on behalf of the plaintiff, to have been executed by Bayábái, and which appeared to have come into the custody of the parties opposed to her, as a very suspicious circumstance. No proper explanation had been given for the absence of that alleged deed. He was dissatisfied with the evidence in support of the plaintiff's case, and thought it quite clear that the widow had not been dealt with fairly. He, therefore, concurred in thinking that the decree must be reversed with costs.

As to the right of a widow in this Presidency to adopt without any authority from her husband, he did not consider it necessary now to give any final decision, but his opinion inclined in favour of that right, and of its having been sufficiently recognised by the courts of justice at this side of India. Further, he was inclined to think that she had that right, unless her husband expressly prohibited her from adopting, and that a mere refusal by him to adopt would not be sufficient. But on this point he would refrain from giving any positive opinion.

WARDEN, J.:—I concur in the observations of my brother Tucker.

Decree reversed, with costs.

(*e*) Ch. IX., pl. 10; and see Ch. II., pl. 5.