[APPELLATE CIVIL JURISDICTION.]

Regular Appeal No. 51 *of* 1873.

1875. December 28.

LAKSHMA'PPA' .....*(original Plaintiff) Appellant.*

RA'MA'VA' and others ..... *(original Defendants) Respondents.*

Hindu Law—Adoption of the eldest or only son—Gift in adoption by widow—Assent of husband when implied—Adoption among Brahmans and Sudras—Disqualification for adoption—Marriage—Chúdákarana and Upanayana ceremonies— A dwyámushyayana son.

In Western India an adoption among Sudras is not invalid, although the person adopted was married before his adoption, nor although he may be a son of the adopter's sister, and, therefore, not a *sagotra* (*i.e.*, of the same family) with the adopter.

Even among Brahmans marriage does not disqualify for adoption.

Quære—Whether the adoption of an *asagotra* married man belonging to any of the three regenerate classes would be invalid.

According to Hindu law, a second adoption is invalid while the first adopted son exists and retains his character of a son.

Among Brahmans the adoption of a son for whom the *chúdákarana* and *upanayana* ceremonies have been performed in his natural family is not on that ground invalid. He notwithstanding acquires the legal *status* of an adopted son, the fact of those ceremonies having been already performed only rendering necessary, in a religious point of view, their re-performance and the performance of certain additional ceremonies in the adoptive family, the latter being considered to have the effect of annulling those performed in the boy's natural family.

A gift, by a Hindu widow, of her deceased husband's only son is invalid in the absence of an express authority conferred upon her by him during his life-time. Such an adoption, being null and void *ab initio*, cannot be supported by the maxim *quod fieri non debuit factum valet.*

Quære—Whether a gift in adoption of an only son *by his father* is void in the Presidency of Bombay.

In the Presidency of Bombay a widow may give in adoption a younger son where her husband has not, by direct prohibition or otherwise, indicated his unwillingness that she should, after his death, give such younger son in adoption, the husband's assent to such a gift being implied. But it cannot be implied to the gift, by his widow after his death, of an eldest and still less of an only son in adoption where he did not expressly indicate such assent in his life-time.

Semble. Where a father gives his only son in adoption as a *dwyámushyayana* he consents to deprive himself of one-half of the spiritual benefit derivable

from the performance of religious obsequies. Hence his consent cannot be implied even to such a gift when made by his widow after his death. To such a case the *factum-valet* principle is wholly inapplicable, because the adoption would be, as regards her, not *quod fieri non debuit*, but *quod fieri non potuit.*

The maxim *quod fieri non debuit factum valet* considered, and its application pointed out.

There can be no gift where there is an absence of authority, the attempt to give being a mere nullity. There is nothing in such an attempted transaction to set aside ; it should simply be declared null and void *ab initio.*

There is no authority for drawing any distinction between Sudras and the other classes on the question of the legality of the adoption of an eldest or an only son,

Mhálsábái v. *Vithobá* (1) dissented from so far as it supported the gift in adoption, by a widow, of an only son without the authority of her husband.

THIS was an appeal from the decision of Dayárám Mayárám, Subordinate Judge (First Class) of Belgaum, in Original Suit No. 336 of 1871.

Lakshmáppá, a Sudra by caste, brought this suit in the Subordinate Judge's Court at Belgaum against Rámává (widow of Sitárámáppá) and others, seeking to recover certain moveable and immoveable property, and to establish his right to certain annual payments from Government attached to a Náiki *vatan.* He alleged that he was the adopted son of Sitárámáppá Náik, deceased, and, as such, entitled to the possession of the said property and enjoyment of the said money allowances. He further alleged that he had been given in adoption by his natural mother Bhágirthibái, after her husband's death, to Rámává, Sitárámáppá's widow.

Rámává answered that neither she nor her late husband Sitárámáppá had legally adopted the plaintiff as a son ; that he was unfit for adoption according to Hindu law, as he was the only son of his parents ; that she had only brought him up as foster son, because both his parents were dead, and because he agreed to act according to her wishes and allow her to enjoy the property during her life-time.

Defendants 2 and 3 (Somáppá and Rámáppá) denied that the plaintiff had been adopted as alleged, and pleaded, among

(1) 7 Bom. H. C. Rep., Appx., p. xxvi.

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other things, that, even supposing he had been adopted, the adoption was invalid according to Hindu law. Rámáppá, (defendant No. 3) further pleaded that he himself had been adopted by Rámává (defendant No. 1) before the plaintiff's alleged adoption by her, and that, therefore, the latter adoption was invalid.

On the 24th March 1873 the Subordinate Judge disposed of the case on only one issue, viz., whether the plaintiff's adoption was invalid by Hindu law by reason of his having been married before his adoption. He found this issue in the affirmative, and dismissed the plaintiff's suit. He was of opinion that his decision was supported by *Náthájí Krishnáji* v. *Hari Jagoji*.[1] He observed in his judgment: "The precedent quoted above clears this question entirely. I referred to the authorities of the Hindu law stated therein, and find that the adoption of a Sudra (not a *sagotra*) is invalid if taken place after his marriage. It is in evidence that the plaintiff is the son of the deceased Sitárámáppá Náik's sister, and, consequently, he is not a *sagotra* (of the same family), and it is also in evidence, as well as admitted by plaintiff's pleader, that plaintiff's adoption took place long after his marriage * * * * and after his marriage he became an object incapable of adoption under the Hindu law. The objection, in my opinion, is fatal to the plaintiff's case, and the precedent cited by the defendant's pleader is the converse of this case; the person adopted in that case was a *sagotra*, and, therefore, the adoption has been upheld. I see no necessity for going into the other issues laid down formerly."

In appeal, which was preferred by the plaintiff, the only question raised and argued was whether the adoption was valid or invalid. The appeal was heard by Westropp, C.J., and Nánábhái Haridás, J.

Shántárám Náráyán for the appellant:—The lower Court has based its decision on *Náthájí Krishnáji* v. *Hari Jagoji*,[2]

(1) 8 Bom. H. C. Rep., A.C.J., 67.
(2) 8 Bom. H. C. Rep., A.C.J., 67.

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but that ruling does not apply. The case which is on all fours with the present case is *Mhálsábái* v. *Vithobá*,(1) in which the High Court held the adoption to be valid, although the person adopted was, as in this case, the only son of his natural parents, and married before his adoption, and had been given in adoption by his mother after her husband's death and without his authority. The Vyávahara Mayukha, one of the highest authorities in this Presidency, allows the adoption of "a married man who has even had a son born": ch. iv, sec. 5, pl. 19; Stoke's H. L. Books, p. 64. In *Shri Brijbhukunji Maháraj* v. *Shri Gokulutsavji Maháraj*(2) the late Sadar Adálat held as valid the adoption of a man who was not only married, but had a family at the time of adoption.

Dhirájlál Mathurádás for the respondent:—In *P. Venkatesaiya* v. *M. Venkata Charlu*(3) the High Court of Madras held that the adoption of one upon whom the *upanayana* ceremony has been already performed is invalid. See, also, Cowell's Lectures on Hindu Law, pp. 327—334; 1 Norton's L. C., pp. 65—76. Marriage is among the Sudras what *upanayana* is among the three superior classes of Hindus. A man of the Sudra Caste, therefore, cannot be adopted after his marriage. The ceremony of *upanayana*, if performed in the natural family of the person to be adopted, may be annulled by the performance of certain other ceremonies. But it is not so with marriage, which is incapable of annulment: 1 Strange's H.L., pp. 90—92; 1 Norton's L. C., p. 76; 2 Strange's H. Law, p. 87. Marriage is the only ceremony allowed for Sudras as calculated to regenerate them, similarly to what tonsure and investiture are for the three superior classes: 1 Strange H. L., p. 335; Datt. Mím., sec. iv, pl. 51, 52, 57; Stoke's H. L. Books, pp. 582—3; Datt. Chan., sec. 2, pl. 29, 32; Stoke's H. L. Books, pp. 643—4; 2 Col. Dig., note to text CXXI (Mad. ed.) The adopted son is supposed to be born again in the adoptive family: 1 Strange's H. Law, p. 90; Macnaghten's Prin. H. Law, pp. 74, 75.

(1) 7 Bom. H. C. Rep., Appx., p. xxvi.

(2) 1 Borr. 181 (1st ed.); 202 (2nd ed.) (3) 3 Mad. H.C. Rep. 28.

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The following are the judgments of the Court :—

NA'NA'BHA'I HARIDA'S, J. :—The appellant Lakshmáppá instituted this suit to recover possession of two villages and some lands and houses, as also their title-deeds and a silver seal; also to recover Rs. 1,000 alleged to have been received as the net produce of the immoveable property, on his account, during three years by the first defendant; and to establish his right to certain *haks* or money allowances attached to a *vatan*. He averred in his plaint that he was the adopted son of the deceased *vatandár* Sitárámáppá; that during his minority the first defendant managed the affairs of the *vatan*; and that, when he (the plaintiff) came of age two years ago, the defendant, on being asked to make over the property to him, refused to do so on the 1st October 1868.

The first defendant Rámává, the widow of Sitárámáppá, alleged in her written statement, in answer to the claim, that, the plaintiff having consented to act under her orders and allow her during her life-time to enjoy the property, she had kept him as her son; that he had executed to her an agreement to that effect; that she had possession of the property; that he had not been formally adopted as a son either by herself or by her deceased husband; that he was incompetent to be adopted, having lost both his parents and being their only son; and that he had filed the suit at the instigation of her enemies.

The second defendant Somáppá contended that the plaintiff was not the adopted son of Sitárámáppá; that the third defendant Rámáppá was such; that the shástras did not permit the adoption of the plaintiff; that he (the second defendant) was an equal co-parcener, no partition having taken place between him and Sitárámáppá; and that he alone had managed the affairs of the *vatan* since the death of Sitárámáppá.

Rámáppá, the third defendant *(inter alia)* denied that the plaintiff was the adopted son of Sitárámáppá, and alleged that he himself was so.

At the suggestion of the third defendant, Devápá, his natural father, was also made a party, but he did not appear to contest the claim.

The Subordinate Judge thought it unnecessary to decide any of the questions thus raised between the parties, because he was of opinion that, even if the *factum* of the plaintiff's alleged adoption were proved, the adoption itself was invalid, it having taken place, as admitted by the plaintiff's pleader, after the plaintiff's marriage, and the plaintiff being Sitárámáppá's sister's son, and, therefore, an *asagotra*, or belonging to a different family; and he, accordingly, dismissed the claim.

One of the questions which we have to decide in this appeal is, whether, assuming that the plaintiff was, in fact, adopted by Sitárámáppá, or by his widow Rámává after his death, the adoption was invalid on account of the plaintiff being married at the time, or on account of his being Sitárámáppá's sister's son, and, therefore, not a *sagotra*. With that question I propose to deal. The other questions will be dealt with by the Chief Justice.

The authority relied upon by the Subordinate Judge, in support of his decision upon the point which I am about to discuss, is the case of *Náthájí Krishnáji* v. *Hari Jagoji*.[1] He seems to think it "clears this question entirely". We are unable to agree with him in this view. We are quite prepared to regard that case as conclusive on the point of law determined in it, namely, "that in Western India the adoption of a *sagotra* or relation (as the respondent Hari was) is not invalid, because the person adopted was married at the time of the adoption."[2] But it cannot be looked upon as going further. The adoptive father and the adopted son happened in that case to be *sagotras*. The question, therefore, which arises in this case, whether the adoption of an *asagotra* is invalid, because the person adopted was a married man at the time of the adoption, did not arise in

(1) 8 Bom. H. C. Rep. A.C.J., 67.

(2) 8 Bom. H. C. Rep. A.C.J., 73.

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that case. It is, therefore, one which the learned Judges who disposed of that case did not intend to decide one way or the other, and they have carefully abstained from expressing any opinion on it. The decision of the Subordinate Judge thus deriving no support from the precedent relied upon, we have to determine, on a consideration of the authorities, whether it was correct.

The parties to this suit are admittedly Sudras, belonging to the so-called servile class, and not to any of the three superior or regenerate classes—a circumstance which requires to be carefully borne in mind in dealing with the authorities cited at the bar in support of the decision appealed against.

It has been contended that, as the *chúdákarana* and the *upanayana* ceremonies of the person to be adopted should be performed in the adoptive family, the adoption must take place at a sufficiently early age; and no doubt there is authority for saying that, if a boy eligible in other respects can be obtained, upon whom these ceremonies have not been performed in his natural family, he is to be preferred for adoption to one upon whom they have been performed. But any such rule is obviously intended for the three superior or regenerate classes, and not for the Sudras, those ceremonies not obtaining among them;[1] and even in the case of a Bráhman boy for whom those ceremonies have been performed in his natural family, his adoption is not on that ground invalid. He notwithstanding acquires the legal *status* of an adopted son, the fact of those ceremonies having been already performed only rendering necessary, in a religious point of view, the re-performance of those ceremonies, and the performance of certain additional ceremonies in the adoptive family, the latter being considered to have the effect of annulling those performed in the boy's natural family.[2] It is argued, however, that the ceremony of marriage is not capable, like them, of being annulled and

(1) Manu II, 26, 68: *Ib.* X, 4, 126: 2 Coleb. Dig., p. 295. (Mad. ed.); Jagannatha's note on Text 121: *Id.* p. 301, Text 134: 1 Stra. 35, 91; Macnaghten, 57, 58: Yajnavalkya I, 39.

(2) 1 Stra. H. L. 91.

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re-performed in the adoptive family; that, therefore, the adoption of a married Bráhman would be invalid, and that as marriage is a *sanskára* ordained for the Sudras as well, and, with regard to them, stands in place of the *upanayana*, the adoption of a married Sudra must be equally invalid. This argument is, no doubt, supported to some extent by authority; (1) but upon the whole it seems to us more plausible than sound. If marriage, because incapable of annulment, disqualifies a Sudra for adoption, it must equally on that ground disqualify a Bráhman for that purpose. But we fail to find it mentioned as a disqualifying cause either by Manu, Kulluka Bhatta, Yajnavalkya, or Vijnaneshvara, or by any of the other authorities of weight in this Presidency. On the contrary, we find the Dharmasindhu, (2) the Sanskára Kaustubha (3) and the Vyavahára Mayukha distinctly recognizing the adoption of a married man, the latter even going a step beyond the other two, and laying it down that "a married man, who has even had a son born, may become an adopted son"; (4) and, accordingly, in the case of *Sri Brijbhookunji Maháraj* v. *Sri Gokoolootsavji Maháraj* (5) the adoption of a married Bráhman of the age of forty-five and having a family was considered a good adoption. The argument, therefore, based upon the assumed invalidity of a married Bráhman's adoption falls to the ground. But it is further contended that, though a married Sudra may be adopted, still, if he happens to be, as in this case, an *asagotra* relation of the adopter, the adoption is bad. We are not referred to any Bombay authority in support of such a proposition, nor are we aware of any. On the contrary, Nilakantha, whose authority, especially when not opposed to Vijnaneshvara's, is supreme in this Presidency, broadly lays it down, as already observed, that "a married man, who has even had a son born, may become an adopted son. This also," he says, "is reasonable, for it is not in opposition (to other maxims)." He does not

(1) 1 Stra. H. L. 91; 2 *Id.* 87. (2) See annexed extract in note, p. 373.
(3) See annexed extract in note, p. 374. (4) Vyav. May., ch. iv, sec. v. 19.
(5) 1 Borr. 181. (6) Vyav. May., ch. iv, sec. v, 19.

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limit the rule to cases where the 'married man' happens to belong to the same *gotra* as the adoptive father, and we see no reason for so limiting it in this case. The adoption of a sister's son, though prohibited to the three superior classes, is declared to be "the most proper for Sudras".(1) In the absence of any sufficient authority, therefore, we should not be justified in holding that the adoption, which is thus declared to be "the most proper" adoption, was invalid, because the boy adopted happened to be married at the time of his adoption. The only original authority to which our attention has been directed as fixing the time or event in a man's life after which his adoption cannot be made, is a passage from the Káliká Purána, which is not an authority of high rank upon such a subject. That passage runs thus: "O Lord of the earth, a son, having been initiated under the family name of his father, *unto the ceremony of tonsure inclusive*, does not become the son of another man [*anyatas*]. The ceremony of tonsure and of investiture being, indeed, performed under his own family name, sons given, and the rest may be considered as issue; else they are termed slaves: After their fifth year, O King, sons given, and the rest are not sons. [But] having taken a boy five years old, the adopter should first perform the sacrifice for male issue."(2) Independently of the fact that the genuineness of this passage has been questioned by Nilakantha,(3) and denied by Devanda Bhatta,(4) and "justly denied" according to Sutherland,(5) it is enough for us on the present occasion to say, first, that the rule therein laid down does not seem to us to have been intended for Sudras at all, the reason of the rule not applying to them,(6) nor the ceremonies men-

(1) Vyav. May., ch. iv, sec. v, 11, 36.

(2) Vyav. May., ch. iv, sec. v, 20. (3) *Ibid.*

(4) Dattaka Chandrika, sec. ii, 25. (5) Stoke's H. L. B. 666.

(6) The bringing up of the adopted son "in the religious tenets of his adoptive father" is given as the reason of the rule: 1 Borr. 195 (ed. 1825). Answer sixth. The shástras contemplate religious instruction for the regenerate classes only: Manu. iv, 80, 81; *ib.* ii, 173, 174.

tioned in it obtaining among them; and, secondly, that it did not prevent the recognition as valid of the adoption of a married Bráhman of forty-five in the case of *Sri Brijbhookunji Maháraj* v. *Sri Gokoolootsavji Maháraj*,(1) nor the enunciation, as already observed, without any qualification, by Nilakantha and his father, of the proposition that a married man with family may be adopted as a son.(2) We express no opinion on this occasion as to whether the adoption of an *asagotra* married man of any of the three twice-born classes would be valid or otherwise. That, it seems to us, is still an open question, the adopted son in the Maháraj case in 1 Borr. appearing to have been a *sagotra*, though not a *sapinda*, of the adoptive mother. We are clearly of opinion, however, that the adoption of a married *asagotra*(3) Sudra is not invalid by Hindu law as administered in Western India. We must, therefore, reverse the Subordinate Judge's decree, and remand the case for a new trial.

(1) 1 Borr. 181. (2) Vyav. May., ch. iv, sec. v, 19.

(3) For ceremonial purposes it would appear that Sudras have no distinguishing *gotras*; 2 Stra. 89; remark by Mr. Ellis., Datt. Mim. sec. ii. 80.

NOTE—

Extract from the Dharmasindhu, Book III, 1st half, leaf 13, *Bombay Edition of Samvat* 1926.

Who may or may not be adopted.

Amongst Bráhmans the son of a uterine brother, because preferable, is to be taken first.

In his absence any *sagotra-sapinda*, or the son of a half-brother.

In the absence of such, an *asagotra-sapinda*, one produced in the family of the maternal uncle or in that of the father's sister, &c.

In the absence of such, an *asapinda* of the *same gotra*.

In the absence of such, even an *asapinda* of a *different gotra*.

Of the *asagotra-sapindas* the sister's son and the daughter's son are prohibited * * * * *. But by a Sudra even a sister's son and a daughter's son are receivable. * * * *. The adopter having adopted should perform the ceremonies commencing with the *játakarma* or those commencing with the *chúdákarana* for the boy adopted. This is the preferable doctrine; but if a boy for whom they can be so per-

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formed is not procurable, then from amongst the *sagotra-sapindas* one whose *upanayana* ceremony has been performed, or even whose marriage has taken place, may become an adopted son; but in the latter case, only if he has not produced a son. So it seems to me. If adoption is to be made from amongst *asapinda-sagotras*, only he whose *upanayana* ceremony has been performed is to be taken. This appears also. As to a *bhinna-gotra* (one of a different *gotra*), he whose *upanayana* has not been performed is alone to be received. Some authors, however, say that a *bhinnagotra* whose *upanayana* has been performed, may also be received.

Extract from the Sanskára Kaustubha, leaf 45, *p.* 2, *line* 5, *Bombay Edition of Shak Year* 1783.

One may be adopted as a son whether the *sanskáras* commencing with tonsure have taken place or not, and whether he has passed his fifth year or not. As to the doctrine 'one whose *sanskáras* have not taken place is alone to be adopted,' and 'who has not completed his fifth year is alone to be adopted,' founded upon the Káliká Purána [passages which are here given in full],* that is wrong; because some say the passages are not genuine, as they are not to be found in many copies of the Káliká Purána; and others say that, even if they be genuine, the first three shlokas have reference to *asagotra* adoption; that, therefore, the last shloka also must be taken to have reference to the same subject; and that hence the rule does not apply to a *sagotra* adoption; and they lay down that even a married [man] may be adopted. But the truth is, that even in the case of *asagotras* a general prohibition [or non-recognition] of adoption after the *sanskáras* ending with the *upanayana* have been performed is not possible upon the strength of the Purána passages, because the authority of the Vedas to overrule contrary passages from the Smritis [and Puránas] is well established by the rule of commentators to determine the relative authority of texts, and the above passages of the Purána are in opposition to the Bahvricha Bráhmana. Thus it is indisputable that the expression 'the son given and the rest' includes 'the son made and the rest'. Hence it follows that one on whom the *sanskáras* have been performed in his natural family cannot become a 'self-given' son either. But in the Bráhmana it is plainly stated that Shunahshepa himself became the son of Vishvámitra, and it is not to be supposed his *upanayana* had not been performed in his natural family. [Here follow passages from the Bráhmana.]

* They are the same as those given in the Datt. Mim., sec. iv, 22.

WESTROPP, C.J.:—The parties here being Bedárs by caste, and accordingly Sudras by class, I concur with my learned brother in holding that, if the only objections to the validity of the plaintiff's (Lakshmáppá's) alleged adoption were that he was married previously to the adoption, and that he was

son of the sister of Sitárámáppá, those objections cannot prevail.

But, in addition to those points which he has disposed of, it is, we think, necessary, with reference to the new trial which has been ordered, specially to notice certain questions which must present themselves on that new trial, and which have not been dealt with by the Subordinate Judge on the trial which has already taken place.

We have here two adoptions alleged to have been made by the first defendant Rámává, the widow of Sitárámáppá, in her capacity as his widow. One of these, which is alleged —whether truly or not, we do not pretend to say—to have been the earliest in date, is that of the third defendant Rámáppá. If that adoption were first made, and there were not any circumstances which rendered it invalid, she could not afterwards, so long as Rámáppá lived, adopt the plaintiff or any other person: *Rangámá* v. *Atchámá*. (1) Again, assuming that Rámává did not adopt Rámáppá, or that such adoption, if made, were not valid, and that she did go through the ceremony of adopting the plaintiff Lakshmáppá, the question will arise whether the adoption of Lakshmáppá was valid. For, even if she did not adopt Rámáppá, or that the adoption of him is invalid, it does not thence necessarily follow that Lakshmáppá, the plaintiff, must succeed in this suit. It must be proved that Lakshmáppá was a person whom she could, according to law, adopt, and that the person, if any, who gave him in adoption, had power so to do. Rámává has in her written statement in defence averred that Lakshmáppá was the only child of his parents. His father, it seems to be admitted on both sides, died many years ago; but the plaintiff alleges that his (the plaintiff's) natural mother, Bhágirthibái, after his father's death, gave him in adoption to Rámává as son to Sitárámáppá, her husband. The case made on behalf of the plaintiff is that this gift by his natural mother Bhágirthibái took place about five years before the institution of this suit, and that Bhágirthibái died about

(1) 4 Moore Ind, Ap, I.

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one year after she gave him in adoption. So far as we can judge from the evidence brought to our notice, the case for the plaintiff is that he was given as a *dattaká* in the ordinary manner. It certainly has not been argued or stated that he was given as a *dwyámushyayana*. In support of the plaintiff's case, as above stated, witnesses have been examined, and have given evidence to the effect alleged. But witnesses on behalf of the defence have testified that the plaintiff's natural mother died ten or eleven years before the filing of the plaint, and, therefore, that it was impossible that she could have been any party to the gift in adoption deposed to as made four or five years ago. If she were dead at the time of the alleged adoption, his natural father being also dead, the alleged adoption of the plaintiff must fail—it not being competent for any other person than the natural father or mother to give in adoption: *The Collector of Surat* v. *Dhirsingji*,(1) *Báshetiáppá* v. *Shivlingappa*.(2) The son cannot give himself in adoption: *Báshetiáppá* v. *Shivlingappa*,(3) *Subbáluvammal* v. *Ammakutty Ammal*.(4) To the same effect is the answer of the shástri of Thána, given on the 6th of March 1858, MS.

Again, assuming the natural mother, Bhágirthibái, to have been living and to have gone through the ceremony of giving the plaintiff in adoption in the ordinary manner, there remain the questions—(1) Was the plaintiff an only son? (2) If he were so, had she any capacity to give him in adoption without an explicit authority to do so conferred on her by her husband in his life-time? It has not been pretended that her husband bestowed any such authority upon her.

The question whether the father himself can give his only son in adoption, is a point upon which there is a conflict of opinion in India. It may be well to enumerate some of the principal authorities.

Three of the Smriti writers expressly prohibit such a gift.

(1) 10 Bom. H. C. Rep. 235.
(2) 10 Bom. H. C. Rep. 268.
(3) 10 Bom. H. C. Rep. 268.
(4) 2 Mad. H. C. Rep. 129.

Vasishta says:(1) "Let no man give or accept an only son, since he must remain to raise up a progeny for *the obsequies* of ancestors," and subsequently in the same text adds: "Through one son the adopter rescues many ancestors"—*i.e.*, from Put, the Hindu Hades. Baudhyana's text is, in the Dattaka Mimansa,(2) mentioned as being to the same effect as that of Vasishta, and so much of that text as relates to the present point has been translated by Dr. Bühler in an article on the Çaunaka Smriti in the Asiatic Society of Bengal's Journal for 1866, p. 15, thus:

"1. We shall declare the rule for the adoption of a son."

"2. (A son) is produced from the seed of the male and the blood of the female. His mother and father are the cause of his existence. His mother and his father have (therefore) the right to give him away, to abandon, or to sell him."

"3. But nobody should give or receive an only son. For he is (wanted) to continue the line of his ancestors."

"4. But a woman should neither give nor receive a son without the permission of her husband." &c. &c.

In Dr. Bühler's translation, (contained in the same article, p. 13,) of Çaunaka's text on adoption there is this passage: "No person, who has only one son, ought ever to give (him to be adopted); but a person, possessing many sons, ought anxiously to do so."

Omitting the interpolations from Balambhatta (Lakshmidevi) and other commentators, pl. 9 of ch. 1, sec. xi, of the Mitákshara 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 *(dattaká)*. So Manu declares: 'He is called a son given *(dattrimá)* whom his father or mother affectionately gives as a son

(1) Cole. Dig., Bk. V, ch. iv, sec. 8, pl. cclxxiii.

(2) Sec. v, pl. 42, and see pl. 31.

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being alike (by class), and in a time of distress: confirming the gift with water.' "

"10. By specifying distress it is intimated that the son should not be given unless there be distress. This prohibition regards the giver."

"11. So an only son *must* not be given. For Vasishta ordains 'Let no man give or accept an only son.' "

"12. Nor though a numerous progeny exist, *should* an eldest son be given: for he chiefly fulfils the office of a son, as is shown by the following text: 'By the eldest son as soon as born, a man becomes the father of a male issue.' "

Notwithstanding the observations in *Chinna Gaundan* v. *Kumára Gaundan* (1) and 1 Stra. H. L. 87 as to the injunctions with respect to only sons as well as to eldest sons being merely directory, it is manifest that there is a stronger reason for prohibiting the gift of an only son than an eldest son, and it may not be unworthy of remark that the learned translator, Mr. Colebrooke, in rendering the above passages in the Mitákshara, employs, with regard to the only son, the expression 'must not', and with regard to the eldest son the expression 'should not'. This distinction is, as will presently appear, even more strongly marked in the Vyavahara Mayukha, which treatise is, as is well known, a high authority here. And Balambhatta's commentary on the prohibition of the gift of an only son, contained in pl. 11 above extracted from the Mitákshara, is: "Nor should such a son be accepted. The blame attaches both to the giver and to the taker, if they do so."

The Dattaka Mimansa says that "the *capacity to give* consists in having a plurality of sons", &c.,(2) and that he who has one son only is '*ekaputrá*', or one having only one son: by such a one the gift of that son must not be made: for a text of Vasishta declares 'an only son let no man give,' " &c.,(3) and in the following passages the author condemns the giver and receiver of an only son

(1) 1 Mad. H. C. Rep. 54. (2) Sec. v, pl. 14; and see sec. iv, pl. 1.
(3) Sec. iv, pl. 2.

in the strongest terms, and says that the prohibition applies to both, that each alike incurs the penalty of "extinction of lineage", and such an adoption cannot be made even in a time of calamity.(1) According to him it is merely as a *dwyámushyayana* that an only son can be given in adoption.(2)

In discussing the case of *Mhálsábái* v. *Vithobá* (3) I shall state the doctrine of the Dattaka Chandrika on this point, and, therefore, pass over that treatise for the present.

The Vyavahara Mayukha in treating of the eldest and only sons, first mentions the eldest,(4) and says that Çaunaka's prohibition of his adoption applies to the giver and not to the taker. He next,(5) again quoting Çaunaka, says: "By no man having an only son *(ekaputrá)* is the gift of a son to be ever made. By a man having several sons *(bahuputrá)* such gift is to be made on account of the difficulty *(prayatnatas)*." "On account of difficulty" means in the event of distress or calamity, and subsequently (6) he quotes the already given text of Vasishta: "But let no man give or accept an only son, for he is destined to continue the line of his ancestors. Let not a woman give or accept a son without the assent of her husband." He carefully abstains from affirming that this express prohibition, by Vasishta, of giving or receiving an only son, or the previously mentioned text of Çaunaka, is to be limited to the giver only. Remembering what he did say with regard to the eldest son, his omission to repeat that remark with respect to the only son is important, challenged, as he was, by the the text of Vasishta to make such a remark, if there were grounds for it. That omission implies that the prohibition to adopt an only son was, by Nilakantha, deemed imperative. To whichever, therefore, of the two principal authorities in this Presidency we look, viz., the Mitákshara and the Mayukha, we find an absolute prohibition of the giving of

(1) Sec. iv, pl. 3, 4, 5, 6 and 8. (2) Sec. ii, pl. 36, 37, 38, 44, 49.
(3) 7 Bom. H. C. Rep., Appx., p. xxvi. (4) Ch. iv, sec. v, pl. 4, 5.
(5) *Ibid.* pl. 9. (6) *Ibid.* pl. 16.

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an only son in adoption, and, at the very least, a strongly implied prohibition in the latter of the taking also, and a similar implied prohibition deduced from the former by Balambhatta. These are followed up by a most distinct and reiterated prohibition in the next highest authority on adoption in this Presidency, the Dattaka Mimansa, of both the giving and taking of an only son; and an examination of the Dattaka Chandrika, which ranks next to the Dattaka Mimansa, discloses, as will presently be seen, no different doctrine.

From the Smriti writers and great commentators upon them, who all seem to be of one accord on the incapacity of a father to give his only son in adoption, we pass to the decisions of the Courts, and to the *vyavasthas* and modern writers, and here the discord of opinion is considerable.

Sir Thomas Strange holds the prohibitions as to an eldest as well as to an only son to be directory, but admits that Mr. Sutherland (the especial expert on the subject of adoption, and translator of the two great works on that topic) questioned his proposition so far as regarded an only son "on the ground, according to him, that the prohibition of Vasishta (Mitak. on Inheritance, ch. i, sec. xi, pl. 11) attaches to the *adoption* as well as to the gift." (1) Sir Thomas Strange seems to have been led to his opinion by Mr. Ellis; but that opinion is opposed to the higher authority, not only of Mr. Sutherland but of Mr. Colebrooke, who, like Mr. Sutherland, says that "a valid adoption of an only son cannot be otherwise" (*i.e.*, than as a *dwyámushyayana*) "made, the absolute gift being forbidden," (2) and, as authority for this, he refers to the passage in the Mitákshara, on which Mr. Sutherland also had relied.

The answers of the shástris and the decision of the Sadar Adálat in *Huebut* v. *Govindráv* (3) are favourable to the validity of the adoption of an eldest or only son. It is not, however, quite clear in that case whether Malharráv had only two

(1) 1 Stra. H. L. 87, note 2, and Suth. Syn. II, cl. 4.
(2) 2 Stra. H. L. 107. (3) 2 Borr. 75 (1st ed.); 83 (2nd ed.).

sons or three. He himself alleged that he had three, one of whom, Chimnáji (not his eldest), he gave in adoption to Venkatráv, his first cousin once removed, and subsequently another, Govindráv, the plaintiff and respondent, who was his eldest son, to Gangábái, the widow of his (Malharráv's) deceased brother Khanderáv *alias* Balvantráv. The Court in its question to the shástri seems to have assumed that Malharráv had only two sons. If that were so, the adoption of Govindráv would seem to have substantially been the adoption of an only son, the younger son having been previously given away (see 2 W. Macnaghten's H. L., p. 178, Case III). But neither in the text nor in the table of answers of shástris does the question of the validity of the adoption of an only son appear to have been put directly in that case to the shástris. Some of the questions in the text bore upon Govindráv being an eldest son, but in the table there are not any questions as to an eldest or only son.

The note to 1 W. Macnaghten's H. L. at p. 67 is at complete variance with the cases in his second volume at pp. 178, 179, 182, 192, 195, and other cases hereinafter mentioned.

I have examined the papers amongst our records in the unreported case of *Nilkanth Náráyan Kulkarni* v. *Gurnáth Shripat, the heir of Shripat Appá, deceased*, [1] decided by the Bombay Sadar Adálat A. D. 1839. The plaintiff Nilkanth (who was also the special appellant) instituted the suit in the Mámlatdár's Court against Lakshmává, widow of Náráyan Sheshâli, and (as I understand the papers) against Shripat Appá, who would seem to have died *pendente lite*, and one of his sons, Gurnáth, was probably substituted for him as a defendant. The suit may, however, have been brought against Gurnáth in the first instance, and not against Shripat Appá. Its object was to recover the moiety of a kulkarni *vatan*. The plaintiff alleged that he had been adopted by Lakshmává as a son to her deceased husband, Náráyan, about forty-two years previously—*i. e.*, about A. D. 1797 (Fasli 1806-7)—and that such adoption had been recognized

(1) Special Appeal No. 1419.

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by the native government, that, he being a minor, the management of the *vatan* remained in the hands of (as I understand the papers) Shripat until Fasli 1227, when the plaintiff took possession of his share in the *vatan* and held it until Fasli 1229, and that in Fasli 1240 the defendant Shripat "by force got possession". There is some inconsistency here in the case made by the plaintiff not explained by the papers available amongst our records, as he had previously represented himself as holding the *vatan* from Fasli 1227 to 1229 only. The defendant Shripat (as I understand the papers, it may, however, have been his son Gurnáth) replied "that the adoption did not take place," he (the defendant) "having declined to sanction it, as Nilkanth was his eldest son, and as such a proceeding would have been contrary to the shástra." He also said that the other defendant, Lakshmáná, had voluntarily, under a *kararnáma*, given up the share of her deceased husband to him. The Mámlatdár made a decree in favour of the plaintiff in A.D. 1834, upholding his adoption, which decree, however, was made *ex parte*, and there is nothing to show that the Mámlatdár took the opinion of any shástri on the matter. The second defendant, Gurnáth, appealed to the Zilla Judge (Mr. J. A. Shaw) of Dhárwár, the main point of appeal apparently being that the plaintiff Nilkanth was the first-born son of his natural father, and, therefore, that by Hindu law the adoption was invalid. Mr. Shaw having taken the opinion of his Court shástri on that question, and finding it to be in accord with the objection made by the defendant (and appellant) Gurnáth, viz., "that the eldest son could not be given," declared the adoption to be invalid, reversed the Mámlatdár's decree, and rejected the plaintiff's claim with costs. As to the alleged confirmation of the plaintiff's title by the native government, Mr. Shaw said that the *sanad*, adduced in proof of that allegation, related to a different *vatan* not within the territories of the East India Company, and could not affect the case. The plaintiff made a special appeal to the Sadar Adálat, on the ground that there was evidence in the case showing that, by the

custom of the caste, to which the parties belonged, in that part of the country, an eldest son might be adopted, and, consequently, that the Zilla Court ought not to have preferred the law as laid down in the shástra. He also denied that he was an eldest son, and said that he had two elder brothers who were then dead. The shástri of the Sadar Adálat, on being consulted, having (as I understand from the papers) said that the plea put forward by the plaintiff as to local and caste usage, if true, was "tenable", the Sadar Adálat (Giberne and Pyne, JJ.,) admitted the special appeal for argument "on the grounds of the difference of opinion apparent in the lower Courts and of there being precedents that, where the law of the Hindus differs with usage of caste or country, the latter is followed in preference to the former, the shástri of the Sadar Adálat Court having declared the same in a late case." This, no doubt, was a correct opinion. Evidence of usage of caste or country to the contrary of the general Hindu law is admissible, and, if satisfactory as to the antiquity and invariability of the usage, the latter will be preferred to the general Hindu law, but the burden of proof lies on him averring the usage. It is observable that the special appellant and the Sadar Adálat shástri do not appear to have denied that the general rule of Hindu law is that an eldest son cannot be adopted. The special appeal was finally heard and argued before Mr. Pyne; but the question as to the existence of the custom was not disposed of or remanded to the Court below, inasmuch as, although the plaintiff relied on two entries made in the name of "Nilkant Náráyan" in a *tákidpatr* and a *táliband*—by whom does not appear—it was admitted that in A.D. 1807 and again in A. D. 1825 he had signed his name as "Nilkanth Shripat", which Mr. Pyne was of opinion he would not have done if there had been any *bonâ-fide* adoption of him by Náráyan or his widow Lakshmává: so the decree of the Zilla Judge was affirmed with costs, and the special appellant carried the case no further.

In another unreported case, *Bomlingappa, alleged heir by adoption of Maláppá, deceased*, v. *Sakrává, widow of*

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Maláppá, decided in the Sadar Adálat of Bombay, A.D. 1843,[1] I have examined the papers. The plaintiff sued to recover a share in a *vatan* of considerable value in right of Maláppá Desái, who was a co-sharer with others in the *vatan.* The plaintiff alleged that he was adopted by Maláppá in the Fasli year 1222 (A.D. 1812-13), who died nine years afterwards. The defendant, who was the widow of Maláppá Desái, denied the plaintiff's adoption, said that he, being the eldest son of his natural father Basápá, could not be adopted, and that, in fact, Maláppá had adopted another person (Nenáppá) in the same year in which the plaintiff alleged that he was adopted. The Principal Sadar Amín found that Maláppá Desái had adopted the plaintiff with all due form, and that the defendant failed to prove that Maláppá Desái had adopted Nenáppá. The Principal Sadar Amín consulted the shástri of his Court, who "was of opinion that the plaintiff, being the nephew of Maláppá, was a fitting person for adoption," and the Principal Sadar Amín accordingly made a decree for the plaintiff, Bomlingáppá. The defendant appealed to the Zilla Judge of Dhárwár, on the ground *(inter alia)* that the plaintiff was the eldest son of his natural father. The Zilla Judge, Mr. J. H. Pelly, consulted the shástri of his Court as to the validity of that ground of appeal. The shástri "plainly stated that the eldest son cannot be adopted." Mr. Pelly, having also considered the question of "the custom of the country" and referred to four documents in evidence before him as to that custom, came to the conclusion that the custom was conformable to the law as laid down by his shástri, and accordingly reversed with costs the decree of the Principal Sadar Amín. The plaintiff made a special appeal to the Sadar Adálat. Two of the Judges (one of them being Mr. Pyne) admitted the appeal for argument on account of the conflict between the decisions of the lower Courts; Mr. Pyne, however, saying in his minute, made on that occasion, that the law, on which the Zilla Judge reversed the decree of the Principal Sadar Amín, was in his (Mr.

(1) Special Appeal No. 1953.

Pyne's) opinion "indisputably sound". The hearing afterwards took place before Mr. Pyne, from whose decree it would appear that for the plaintiff it was contended before him that "the custom of the country" and not "the law of the shástra" should have been considered; but Mr. Pyne held that the plaintiff had by appealing "to the law of the shástra," viz., by submitting a question in the Principal Sadar Amín's Court to his shástri as to the law of the shástra affecting his case, in which question, however, he "concealed" the fact that he was an eldest son, debarred himself from saying that the law of the shástra should not be taken into consideration. Mr. Pyne having orally consulted the shástri of the Sadar Adálat as to the validity of the adoption of an eldest son, and finding his opinion to concur with that of the shástri of the Zilla Court, declined to enter upon the question of custom of the country, and affirmed with costs the decree of the Zilla Judge. It will be remembered that the latter had found as a fact that the custom of the country was against the adoption of an eldest son. The plaintiff appears to have acquiesced in Mr. Pyne's decree by not carrying the case any further.

Aná, the adopted son in *Abáji Dinkar* v. *Gangádhar Vásudev Gosavi*, [1] was an eldest, not an only son. The pedigree shows that he had three younger brothers. He was given by his father. The Munsif, for various reasons not material here, disallowed the adoption. The Zilla Judge, Mr. Remington, reversed his decree, and remanded the cause. Another Munsif, on the re-trial, disallowed the adoption for reasons not here material. The Zilla Judge reversed his decree, and, with reference to the point that the adoptee was an eldest son, said [2] that the prohibition of such an adoption was against the giver only, and did not invalidate the adoption. The Sadar Adálat Judges (Mr. Harrison *dissentiente*) upheld Mr. Remington's decree, but were silent altogether as to the fact of the adoptee being an eldest son. The less said about the judgments the better.

(1) 3 Morris S. D. A. Rep. 420, decided in 1856.

(2) 3 Morris S. D. A. Rep. 424.

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In *Vishrám Baburáv* v. *Náráinráv Kási* (1) the defendant and respondent Náráinráv was an only son, whose uncle Kási went through the form of adopting him. The Munsif, Tirmalráv Venkátesh, a native Judge of considerable experience, found the adoption to be invalid on the ground *(inter alia)* that Náráinráv was an only son. It does not appear in the report or in the papers in the case amongst our records (which I have examined) by whom he was given in adoption ; it is, however, most probable that the gift was by his natural father ; otherwise there would have been a special objection made to a gift by his mother if a widow, and she could not, without her husband's express authority, have given Náráinráv in his father's life-time.(2) On an appeal to the Zilla Judge (Mr. Remington) the two unreported Special Appeals Nos. 1419 and 1958 (of which I have already stated the substance from the records of the Sadar Adálat) were cited to him on behalf of the respondent. The Zilla Judge (Mr. Remington), however, declined to follow those cases. Admitting that they were in point (they were, in fact, more than in point, for if the adoption of an eldest son is invalid, *á fortiori* the adoption of an only son would be so) he said : "The Court, however, observes that, though a period of more than three years elapsed between the dates of these decrees, they were pronounced by one and the same Judge, and not by a full Court, and that they have had no place assigned them among the selected cases printed for professional use, though deciding points of great and universal interest. It cannot be overlooked that the question referred to the shástri was rather a limited one, being confined to the ascertainment of this, whether the adoption of an eldest son was good, and not whether, if a wrong act in itself, it ought on that ground to be set aside after formal completion." Here we must observe that the learned Zilla Judge's reasoning is not of much force, inasmuch as it is scarcely possible to find cases worse selected or worse reported than those in the published reports of the Bombay

(1) 4 Morris S. D. A. Rep. 26.

(2) See *Náráyan Bábáji* v. *Náná Manohar*, 7 Bom. H. C. Rep. 153, A. C. J.

Sadar Adálat, especially since Borrodaile's Reports, which, though very far from being good, are better than their successors. Further, the questions put to the shástris on both occasions seem to have been whether or not the adoption was invalid,—a question which included within it the question whether or not the *factum-valet* principle was applicable; if it were, the adoptions would not have been invalid, although they may have been reprehensible. Mr. Remington continued: "And it is to be noticed, as not without significance, that the native Courts, represented by a Mámlatdár and Principal Sadar Amín, both decided in favour of the adoption which was afterwards set aside." In the case Mr. Remington was then deciding, as well as in *Abáji Dinkar* v. *Gangádhar Vásudev Gosávi*,(1) which he also decided, and in both of which cases he upheld the adoptions, the lower Courts had come to conclusions opposite to those at which he had arrived—whatever may be the value of that circumstance; and we have already noticed the fact that the Mámlatdár in S. A. 1419 pronounced his decree *ex parte*. The Zilla Judge referred to 1 Morley Dig., Adoption, art. 40, which treated adoption of an only son as invalid, except when he is adopted as a *dwyámushyayana*, a ruling against the decision of Mr. Remington, as the case before him does not appear to have been an adoption of that nature. The Madras decision at article 41, indexed in the same volume of Morley to which he referred, seems to have been in point as being an application of the rule *factum valet*. But article 43, also referred to by him and expressed under a *semble*, was the opinion of only one Judge (Mr. Courtney Smith) in which the majority of the Sadar Adálat of Bengal did not concur (*vide* 4 S. D. A. Rep., pp. 70, 78 and 79). The passage in 1 Strange H. L., to which he refers, we have already mentioned. He appears also to have referred to 1 Borr. 662,(2) which appears to be a mistake for 2 Borr. 662 (1st ed.); 719, 720 (2nd ed.). Those pages occur in the report

(1) 3 Morris S. D. A. Rep. 420.

(2) There are only 418 pages in the first volume (1st ed.), and 500 pages in the second edition of the same volume.

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of *Ruvee Bhudr* v. *Rupshankar Shankarji*, (1) but that case had not any bearing upon the point before him. It was an adoption of a wife's brother's son rightly held to be valid, and which, like any other valid adoption, the adoptee could not renounce. Upon the authorities which I have stated Mr. Remington as having referred to, and, to use his own words, "considering the decision of the superior Court" (*i.e.*, the Sadar Adálat in the two unreported cases) "as affirming the doctrine against an eldest and only son being given in adoption, did not decide that such an adoption, being once made, ought to be set aside," he held that the adoption of Náráinráv could not "be called in question", and reversed the decree of the Munsif with costs. I have discussed thus fully the judgment of the Zilla Judge as he attempted to give reasons for his decree. The Sadar Adálat (which was then very far from being strongly constituted), without, so far as the report shows, any examination of the authorities, affirmed his decree—simply saying "that there is no point of Hindu law more firmly decided than that an adoption, once made in proper form, cannot be set aside, though both the giver and receiver in adoption may have committed sin in allowing it"—an assertion almost ludicrous when the remarkable conflict of decisions and the *vyavasthas* on the subject (which *vyavasthas* we shall presently mention) are remembered, and so sweeping that, if true, it would render unimpeachable a gift in adoption with the proper form by C of the child of A and B without their knowledge or consent.

In *Chinna Gaundan* v. *Kumára Gaundan*(2) it was held in 1862 in Madras that such a gift in adoption of an only son is sinful but valid, thus following 1 Strange H. L. 87, on the *factum valet quod fieri non debuit* principle. Subsequently, in 1868, the very opposite was held in the High Court at Calcutta by two very able and experienced Judges, L. S. Jackson and Mitter, JJ., who distinctly refused to follow the Madras case or to apply the *factum-valet* doctrine—*Rájá*

(1) Commencing at 2 Borr. 656 (1st ed.), 713 (2nd ed.).

(2) 1 Mad. H. C. Rep. 54.

Upendra Lal Roy v. *Shrimati Rání*[1]—on which doctrine the observations of Mitter, J., are well worthy of consideration. In *Ráje Vyankatráv* v. *Jayávantráv*,[2] a Sudra case, it is not stated in the report by whom the defendant Jayávantráv was given in adoption. He is spoken of by counsel as an only surviving son of his natural father; but whether he was so at the time of the adoption, does not appear (see *Mt. Dullabh De* v. *Manu Bibi*.[3]). It was also said by counsel that the defendant was a father, possibly a grandfather, but it does not appear whether either of his parents was living at the time of the adoption; if both of them were then dead, the decision there would certainly, according to other cases here and at Madras, be unsustainable.[4] The *dictum*, therefore, in one of the judgments in that case, at page 195 of the report, that "the rulings of this Court as shown from 2 Borrodaile, p. 83 downwards, as also of the Calcutta Courts have been that an adoption once made cannot be set aside," is, as has been shown, even in Bombay, far from accurate, and it is as to the Calcutta Courts almost wholly erroneous. The learned Judge who spoke thus was himself afterwards a member of the Court which decided *Náráyan Bábáji* v. *Náná Manohar*;[5] where an adoption was treated as absolutely invalid, although it was not there asserted that all the forms and ceremonies required by the Vedas were not duly performed. The cases in 2 W. Macnaghten H. L., pp. 178, 179, 182, 192, 195; 2 S. D. A. Rep. 169; 3 S. D. A. Rep. 232; S. C., on review, 4 S. D. A. Rep. 70—all condemn as invalid the adoption of an only son. The Supreme Court Case, *Joymoney Dossee* v. *Sibosandery Dossee*[6] stands, I believe, alone. No Hindu authority appears to have been quoted for the conjecture or assumption that the adoption of Kallycoomár, there sustained, was as a son of two fathers. In the case of *Mt. Tikday* v. *Lálla Hureelal*

(1) 1 Beng. L. R. 221, S. C. 10 Calc. W. R.

(2) 4 Bom. H. C. Rep. 191, A.C.J (3) 5 S. D. A. Rep. (Calc.) 50.

(4) See *Balvantráv Bháskar* v. *Bayábái*, and 5 Bom. H.C. Rep. 83 O.C.J. *Subbáluvammal* v. *Ammákutti*, 2 Mad. H. C. Rep. 129; *Báshetiáppá* v. *Shivlingáppá*, 10 Bom. H. C. Rep. 268.

(5) 7 Bom. H. C. Rep. 153. (6) Fulton Rep. 75.

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(Calc. W. R. 1864, p. 133) it was held that the adoption of an only son as a *kurta-putrá* (by which is probably meant a *krita-putrá*) amongst Sudras is valid. *Kritrimá* adoption stands on a footing peculiar to itself (*vide* 7 Calc. W. R. 700), and does not affect the general question. In this Presidency that species of adoption does not exist. There is not in the books any ground for drawing any distinction between Sudras and other classes on the question of the legality of the adoption of an eldest or only son. The case just cited seems to have received but little consideration. We have already mentioned the more recent case of *Rájá Upendra* v. *Shrimati Rání*[1] where by L. S. Jackson and Mitter, JJ., the adoption of an only son was treated as absolutely invalid, a decision of which Arnould, J., in *Bhaskar Trimbak Áchárya* v. *Mahádev Rámji*[2] expressed his approval. With the exception of the reference to 2 Borr., p. 83, I do not observe that the authorities on the adoption of an only son were examined in the case of *Ráje Vyankatráv* v. *Jayavantráv*.[3]

Amongst my brother West's MS. collection of *vyavasthas* of shástris in this Presidency (as yet unpublished so far as they relate to adoption, with which subject he and Dr. Bühler have yet to deal), one (No. 1632) is: "A man *cannot* give his only son in adoption, and replace him by adopting another." Another (No. 1631) is: "The Smritis *prohibit* the adoption of an only son." Another (No. 1626): "Adoption of an only son is *invalid;*" No. 1623 is to the same effect. Another (No. 1614) is: "An only son desiring to be adopted; it was answered that this was *prohibited.*" No. 1612 is: "An *eldest* son may be given in adoption to a widow." In No. 1750: "An adoption was pronounced *illegal* on the grounds that the adopted son was of a different caste from the adopting widow, and was an only son." No. 1746 is: "The only son of one deceased cannot give himself in adoption." No. 1695 is: "An only son *cannot* be given in adoption; but there is no express provision for setting.

(1) 1 Beng. L. R. 221. (2) 6 Bom. H. C. Rep. 1 O.C.J. See p. 4.
(3) 4 Bom. H. C. Rep. 191, A.C.J.

aside an adoption made with the due ceremonies." No. 1677 is: "An only son cannot be given in adoption to a brother." No. 1684 is: "Both the giving and taking of an only son of a brother are prohibited by the shástras. The giving of an eldest son is prohibited, but not the taking." (See 2 Strange H. L., 105; Miták., ch. i, sec. xi, 21.) These *vyavasthas* show that the current of authorities was strongly against the validity of the adoption of an only son in this Presidency.

At page 17 of a collection of *vyavasthas* given to the S. D. A. of the N.-W. Provinces, published at Agra in 1861, the question put is: "Can a man's only son be adopted by another person"? The answer is: "The adoption of an only son is invalid." In another *vyavastha* in the same book, at page 16, it is stated that the adoption of an eldest son is not valid.

We do not propose now to give any final opinion on the question whether a gift in adoption of an only son *by his father* is, in this Presidency, void, but are content, for the purposes of this case, and for those purposes only, to assume that it is not so, that the texts in relation to it are directory only, and that, if such an adoption were made in opposition to those texts, the principle *factum valet* should be applied to it.

We must, however, remember that in making that postulate we assume that which is much contested. It, therefore, is necessary that we should be most cautious previously to making a step far in advance of even that proposition, which it would be to hold that a gift, by a widow, of her deceased husband's eldest or only son without express authority given by the husband to that effect, is valid. While disposed to admit that in this Presidency a widow, whose husband has not by direct prohibition or otherwise indicated his unwillingness that she should after his death give a younger son in adoption, may so give the latter, and that her husband's assent to such a gift may be implied, we do not see how it is possible, consistently with the Hindu

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law or religion, to imply the assent of a husband, who has made no indication of his pleasure in the matter, to the gift, by his widow, of an eldest and still less of an only son in adoption. As already stated, it never has been pretended that Bhágirthibái gave the plaintiff as a *dwyámushyayana, i.e.*, as a son to Sitárámáppá, but still retaining his position as a son to his natural father, and, notwithstanding the case in Fulton's Reports, p. 75, we do not perceive how we could make any assumption that the adoption of the plaintiff was only of that limited and special character.

In fact, he has brought this suit as Lakshmáppá bin Sitárámáppá Náik Inámdár, and has altogether dropped the name of his natural father, and claims the full rights consequent upon an ordinary adoption, and, under *such* circumstances, a different form of adoption such as that of a *dwyámushyayana* cannot be presumed: *Mt. Eedul Koonwar* v. *Koonwar Debee Singh*.[1] Taking the view most favourable to the plaintiff, if he were the only son of his natural father, and the latter had himself given the plaintiff in adoption, he (the natural father), if his act of gift were not altogether invalid, would, at the least, according to the Hindu religion, which he professed, have committed a grievous sin in giving away his only son, whose religious duty it would be to perform the *shráddh* ceremony, not only of his natural father, but of his ancestors, which the plaintiff could no longer do after his adoption if valid: Miták. ch. i, sec. xi, pl. 32; Vyav. Mayukha, ch. iv, sec. v, pl. 21; Datt. Mim., sec. i, pl. 5, 42, 52, 55, 59; sec. ii, pl. 45; sec. v, pl. 31, 37; sec. vi, pl. 10. But the natural father did not give the plaintiff in adoption. We are of opinion that, in the absence of clear and convincing evidence of express authority conferred by him on his wife, Bhágirthibái, to give his son, the plaintiff, in adoption, any such gift by her would be wholly without authority, as it would be impossible to imply an authority from her husband to her to commit on his behalf, after his death, a sin which, according to the religion of the parties, would, at least, jeopardize, if

(1) 5 Dec. N.-W. P. 341.

not be fatal to, the spiritual interests of himself and his ancestors. Sir James Colvile in giving the judgment of the Privy Council in *Nilmadhub Doss* v. *Bishumber Doss* (1) said: "Again, if there is, on the one hand, a presumption that Guruprashád Doss would perform the religious duty of adopting a son, there is, on the other, at least, as strong a presumption that Parmánand would not break the law by giving in adoption an eldest or only son, or allowing him to be adopted otherwise than as a *dwyámushyayana*, or son to both his uncle and his natural father. This latter kind of adoption would not sever the connection of the child with his natural family." I may here mention that in *Debee Dial* v. *Hur Hor Singh*,(2) which was a case that came from Benares, it was eventually held in the Bengal Sadar Adálat, in 1828, that a woman after her husband's death is incompetent to give their only son in adoption even as a *dwyámushyayana* without the previously given express authority of her husband, and the gift in adoption of an enly son was held to be completely invalid and void. When a father gives his only son in adoption as a *dwyámushyayana*, he consents to deprive himself of one-half of the spiritual benefit derivable from the performance of religious obsequies. Hence his consent cannot be implied to even such a gift when made by his widow after his decease. To such a case the *factum-valet* principle is wholly inapplicable; for the attempted adoption would be, as regards her, not *quod fieri non debuit*, but *quod fieri non potuit*. Where there is an absence of authority to give, there cannot be any gift. The attempt to give is a mere nullity. In such a case the Court should not be asked to set aside the transaction, but to declare it to be null and void *ab initio*. Possibly, in some cases where a father is enjoined not to give in adoption, and such an injunction is merely directory, and not mandatory, the *factum-valet* principle would be applicable. But this could not be so where there was incapability to give. The capacity to give is a *sine qua non* to the validity of an adoption: Datt.Mim., sec. v, pl. 13, 14; Vyav. Mayukha, ch. iv, sec. v, pl. 8, 36, 40. Any power, which the widow may

(1) 13 Moore Ind. Ap. at p. 100. (2) 4 S. D. A. Rep. 230.

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have to give the son of her husband and of herself in adoption, rests solely upon his authority to that effect, express or implied, and no Court would be justified in implying such an authority where the husband is by his own law and religion forbidden to make such a gift.

The only case in which we can find that a gift in adoption of an only son by a widow has been upheld, is *Mhálsábái* v. *Vithobá*.(1) We think, after the best consideration which we have been able to give to that case, that it is unsound in principle as well as unprecedented, in so far as it went to support the gift in adoption, by a widow, of an only son without the authority of her husband, and we must respectfully decline to follow it. The first authority cited for that portion of the decision of the Court in that case is the Dattaka Chandrika, sec. 1, pl. 31, 32.(2) We must premise as to that treatise that, though it may rank higher in the Dravida country than the Dattaka Mimansa of Nanda Pandita, it is inferior in authority to the latter in this Presidency, and in cases of conflict does not here prevail against it, except when supported by other authorities held in high estimation here.(3) Our next observation is that *placita* 31 and 32 treat only generally of a woman's right to give in adoption, and the author cannot reasonably be regarded as, in those *placita*, empowering her to do that which [in *placitum* 29 he had expressly in the following manner forbidden her husband to do.

"29. In answer to the question by whom is a son to be given? Çaunaka declares: 'By no man having an only son is the gift of a son to be ever made. By a man having several sons, the gift is to be anxiously made.'"

"30. The author apprehending the extinction of lineage in case of the gift of a son by one even having two sons, says: 'By one having several sons.'"

(1) 7 Bom. H. C. Rep. Appx., p. xxvi.

(2) Pl. 42 is mentioned evidently by mistake for pl. 32.

(3) See *Náráyan Bábáji* v. *Náná Manohar*, 7 Bom. H. C. Rep. at p. 165, and 1 West and Bühler., Introd., 11.

Devanda Bhatta thus not only cites Çaunaka's remark, prohibiting the gift of an only son, but from the word 'several' used by him, infers that a man who has only two sons ought not to give either of them in adoption. Again in *placitum* 32, in which he says that a gift in adoption may be made by a woman with his sanction if her husband be alive, or even without it, if he be dead, have emigrated, or entered a religious order, he quotes the old Smriti text of Vasishta: "Let not a woman either give or receive a son unless with the assent of her husband;" and in *placitum* 32 says: "Now if there be no prohibition, even there is assent on account of the maxim—'The intention of another not prohibited is sanctioned'"—clearly showing that in saying that a woman might give in adoption without the assent of her husband, if he be dead, &c., he only meant without his express assent, for by admitting that she could not give in adoption if the husband prohibited her from doing so, he admitted that the will of the husband was supreme in the matter, and that her right to adopt depended on his implied assent; and, indeed, Sausse, C.J., in the passage quoted from his judgment in *Mhálsábái* v. *Vithobá* [1] speaks of implied assent, but adds that the husband's assent will be implied if he have not previously manifested dissent—which is, in our opinion, too broad an assertion, and should have been limited to cases in which such an implication can be properly made.

The next authority referred to in that case is Mr. Colebrooke's note to the Mitákshara, ch. 1, sec. xi, pl. 9, who commences by a reference to the texts of Vasishta. Of these the earlier text—"Man, produced from virile seed and uterine blood, proceeds from his father and mother, as an effect from its cause. Therefore both his father and mother have power to give, to sell, or to abandon their son"—is qualified by the subsequent text of the same Smriti writer: "Let not such a woman either give or accept a son, unless with the assent of her husband." In treating in that note

(1) 7 Bom. H. C. Rep., Appx., p. xxvi.

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of the power of a widow or wife to give a son it is evident that Mr. Colebrooke and Balambhatta, whom he there quotes, are speaking of that power only generally, and not with reference to the case of an eldest or only son. We have already seen that Mr. Colebrooke (1) and Balambhatta,(2) when specially treating of the gift in adoption of an only son, both maintain that such a gift, even by his father, is strictly prohibited, and Mr. Colebrooke expressly says invalid unless the gift be as a *dwyámushyayana*. It is impossible, we think, to suppose that either of these authors intended it to be inferred that a widow might, without express authority, do that which they regarded her husband as debarred from doing. Sausse, C.J., referred also to 1 Strange H. L., 82 and 95; but Sir T. Strange nowhere says or invites the inference that a widow could, without the express authority of her husband, give an only son in adoption; and the Mitákshara, so far from leading to such a conclusion, discountenances the gift, by anybody, of an only or eldest son. The Chief Justice also referred to Vyav. Mayukha, ch. iv, sec. v, pl. 1, which embodies the text of Manu, and a comment of Madana to the effect that, if the father be dead, the mother alone may give away the son; but here, again, the subject of gift in adoption is merely dealt with generally, and not with reference to the special case of an only or eldest son; and it is not to be presumed that the sage or his commentator was intimating any opinion that the mother had any authority to do that which would have been either a sinful or invalid act on the part of the father. And Sir William Jones, in his translation of Manu, inserts in italics after the word "mother" in ch. ix, pl. 68, the words "with her husband's assent," a gloss of Kulluka Bhatta, the best commentator on Manu. (3) We do not mean to assert that in this Presidency the express assent of the husband is required in the case of younger sons, but we do hold that his assent, *express or implied*, is indispensable

(1) 2 Stra. H. L. 106, 107. As to an eldest son, *vide ibid.* 105.

(2) Miták. by Colebrooke, ch. 1, sec. xi, pl. 11, and annotations thereon.

(3) See Preface to translation of Manu, p. xviii, and 3 Dig., p. 261, pl. cclxxv, ch. iv, bk, v.

to a valid gift in adoption by the widow, and that it cannot be implied by the Courts when the gift would be an act either sinful or invalid if performed by himself. The Chief Justice seemed to think that a son might give himself in adoption,[1] but this, we have seen, he cannot do, even if he were a younger son. The decision as to the validity of the adoption of an only son in *Mhálsábái* v. *Vithobá* is directly opposed to *Debee Dial* v. *Hur Horsing*[2] already mentioned. The last-mentioned case appears to have been a carefully-considered case, in which the three Judges of the Bengal Sadar Adálat and their shástri concurred, and was not cited in *Mhálsábái* v. *Vithobá*.

Where there is an absence of authority to give in adoption, the maxim *quod fieri non debuit factum valet* cannot aid the adoption. There is in such a case no *factum*. The transaction is a nullity. The reasoning in the note to 1 W. Macnaghten's H. L., that the adoption having once been made, the boy, *ipso facto*, loses all claim to the property of his natural family, is completely unsound when applied to an adoption which is invalid by reason of want of authority in the giver or on any other ground. An invalid adoption works nothing. It leaves the alleged adoptee precisely in the same position which he occupied before the ceremony, no matter how formally it may have been celebrated: *Bawáni Sári Kara Pandit* v. *Ambábay Ammal*.[3] Scotland, C.J., said there: "Acceptance by a woman without authority is no acceptance at all." So we say: "A giving by a woman without authority, express or implied, is no gift at all." Holloway, J., said: "How can there be an adoption in fact when that has not taken place which is necessary to constitute an adoption?" So we say: "How, when there has been nothing which the law can regard as a giving, can we hold that an adoption has taken place, there being two concurrent facts essential to any valid adoption, gift and acceptance, one of which at least is absent?" The cases are numerous, both in this Presidency, where the law of adoption is most lax,

(1) *Mhálsábái* v. *Vithobá*, 7 Bom. H. C. Rep., Appx., p. 27.

(2) 4 S. D. A. Rep. 320.

(3) 1 Mad. H. C. Rep. 363.

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and elsewhere in India, in which adoptions have been held invalid, and the maxim *factum valet* has not been applied,[1] although warm advocates of that maxim seem to have laid it down somewhat wildly, and as if it were applicable in every case in which the regular form of adoption had been gone through. To us it appears that its application must be limited to cases in which there is neither want of authority to give or to accept, nor imperative interdiction of adoption. In cases in which the shástra is merely directory, or only points out particular persons as more eligible for adoption than others, the maxim may be usefully and properly applied, if the precept or recommended preference be disregarded.

We reverse the decree of the Subordinate Judge, and remand the cause for a re-trial. The costs of suit and appeal must abide the result of the new trial.

If the Subordinate Judge find that Rámáppá was adopted in a valid manner by Rámává before the alleged ceremony of the adoptlon by her of Lakshmáppá, the plaintiff, or that she did not adopt the plaintiff, there must, in either of these events, be a decree against the plaintiff. If the Subordinate Judge finds that Rámáppá was not adopted by Rámává previously to the alleged adoption of the plaintiff, and that she did adopt the plaintiff, but that he was the only son of his natural father at the time of the adoption, there must be a decree against the plaintiff, it not having been pretended that Bhágirthibái had been expressly authorized by his natural father to give the plaintiff in adoption. If the Subordinate Judge finds that Rámáppá was not adopted by Rámává previously to the adoption of the plaintiff, and that she did adopt the plaintiff, and that he was not the only son of his natural father at the time of the adoption, there should be a decree for the plaintiff.

(1) Ex. gr. 1 Mad. H. C. Rep. 420; 2 *Id.* 129; 3 *Id.* 283; 2 Knapp P. C. 203; 4 Moo. Ind. App. 1; 6 Bom. H. C. Rep. 83, O. C. J.; 7 *Id.* 153, A. C. J. *Ibid.* Appx. 1; 10 *Id.* 235, 241, 268; 2 S. D. A. Rep. 245, 169; 3 S. D. A. Rep. 232, 387; 4 *Id.* 70, 320; East's Notes, Case 20; 2 Morley Dig. 32; 2 W. Macnaghten H. L. 178, 179, 182, 192, 195; 1 Beng. L. R. 221; Bourke Rep. 189; S. C. 2 Ind. Jur. N. S. 24; 5 Beng. L. R. 362, &c., &c.

Should the Subordinate Judge make a decree, upholding the adoption of the plaintiff, he should consider to how much of what the plaintiff claims he is justly entitled.

The allegation of the defendants being that the plaintiff was an only son, and there not being any allegation on their part that he was the eldest of more sons than one, we have limited the inquiry to the question whether he was an only son, and have said nothing as to his rights, if he were an eldest son, a case which, at this stage of the cause, we do not think the defendants would be entitled to set up.

Decree reversed and case remanded.