

the petition was sent by the accused was not himself threatened, and was not "interested" in the person threatened. It appears, therefore, that the act intended and done by the accused lacked an essential element of the offence of committing criminal intimidation as defined in section 503 of the Indian Penal Code (Act XLV of 1860). But it does not follow that the accused could still be legally convicted of an attempt to commit that offence. It is possible to attempt to commit an impossible theft, and so offend against the Code, because theft is itself an offence against the Code, and may, therefore, be attempted within the meaning of the Code. But no criminal liability can be incurred under the Code by an attempt to do an act, which, if done, would not be an offence against the Code. In the present case, therefore, if the accused was not guilty of committing criminal intimidation, because the act intended and done by him lacked an ingredient of that offence, he could not be guilty of the attempt of which he has been convicted. The conviction and sentence must, therefore, be reversed.

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*Conviction and sentence reversed.*

## ORIGINAL CIVIL.

*Before Mr. Justice Farran.*

RA'VJI VINA'YAKRA'V JAGGANNA'TH SHANKARSETT,  
(PLAINTIFF), v. LAKSHMIBAI, WIDOW OF VINA'YAKRA'V  
JAGGANNA'TH SHANKARSETT, (DEFENDANT).\*

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*Adoption—Adoption among Bráhmans—Daivadnya caste—Adoption by untanned widow—Ceremonies essential to adoption—Effect of conflicting opinions among Shástris as to validity of adoption—Estoppel—Adopting widow estopped from denying validity of adoption—Evidence—Custom of caste—Opinion of caste expressed at meeting—Inheritance—Effect of adoption—Inheritance of adopted son—Widow divested of estate—Conditional adoption—Agreement at time of adoption affecting rights of adopted son.*

The defendant's husband, V., died intestate in 1873, leaving his widow, (the defendant), and a son, B., him surviving. A posthumous son, R., was subsequently born to him, who died an infant aged four months. B. died in July, 1877, aged seven years. The plaintiff alleged that on the 18th April, 1878, the defendant adopted him as the heir of her husband, V., and on the same date made an agree-

\* Suit No. 405 of 1886.

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ment with his (the plaintiff's) natural father, whereby he was deprived of the immediate rights in the estate of the said V., to which he became entitled by reason of his adoption. The agreement was in the following terms :—

“Memorandum of agreement made this 18th day of April in the Christian year 1878 between Bálkrishna Ganobá, of Bombay, Hindu inhabitant, of the one part, and Lakshmbái, widow of Vináyakráv Jaggannáth Shankarsett, also of Bombay, Hindu inhabitant, of the other part. Whereas the said Vináyakráv Jaggannáthji Shankarsett died intestate at Bombay on or about the 5th day of October, 1873, leaving him surviving the said Lakshmbái as his only widow, a son named Bhowánishankar *alias* Bállá Sáheb, who was born during his life-time, and another son, named Ráv Sáheb, who was born after his death, as his only heirs and legal representatives him surviving. And whereas the said Ráv Sáheb died while he was an infant, and the said Bhowánishankar died at the age of seven, leaving the said Lakshmbái, his mother, as his only heir and legal representative him surviving; and whereas the said Lakshmbái, widow, is desirous of adopting a son as heir to her said husband, and has requested the said Bálkrishna Ganobá to allow her to adopt one of his sons, named Sitáram Bálkrishna, who has now attained the age of eleven years, on the terms and conditions hereinafter mentioned, which the said Bálkrishna Ganobá has agreed to do. Now these presents witness that, in pursuance of the said agreement and in consideration of the premises, the said Bálkrishna Ganobá has agreed to give, and the said Lakshmbái has agreed to accept, in adoption the said Sitáram Bálkrishna, on the express terms and conditions following, that is to say :—

“I. That the said Lakshmbái, widow, shall have during her life-time, both before and after the said Sitáram Bálkrishna has attained his majority, absolute power and control over the whole of the immoveable and moveable property, estate, and effects so inherited by her as the heir and surviving legal personal representative of Bhowánishankar Vináyakráv, as aforesaid; and shall be at liberty to deal with and manage the same according to her own absolute discretion, as she may, in the exercise of such discretion, deem most advantageous to the estate.

“II. The said Lakshmbái, widow, shall and will during her life provide the said Sitáram Bálkrishna with lodging, food, clothes, medical attendance, and all other necessaries; and will generally maintain and educate him at her own expense in a manner suitable to the position of his family; and will get him married and perform the usual ceremonies on his marriage at her own expense as aforesaid in a manner suitable to the position and respectability of the said family.

“III. That after the death of the said Lakshmbái, widow, the said Sitáram Bálkrishna, his heirs, and legal representatives will be entitled to inherit for his and their own absolute use and benefit all the moveable and immoveable property, estate, and effects of which the said Lakshmbái, widow, shall be possessed at the time of her death.

“IV. That the terms and conditions specified and contained in clauses I and II and III of this agreement shall have full effect and be considered as valid and operative in every respect, any provision of law or the Hindu Shástra to the contrary notwithstanding.”

The plaintiff alleged that since he had attained majority he had always repudiated the validity of the agreement as affecting his rights in any way.

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The plaintiff also alleged that on the *Dassará* day of 1883 the defendant assembled her friends and relatives, and, in view of the approaching majority of the plaintiff, which he attained on the 14th December, 1883, announced her intention of making over to him all the estate of her deceased husband, V.; and that she thereupon renounced and waived all the benefits which she had tried to retain for herself by the agreement of the 18th April, 1878, and expressed her intention to devote herself to a religious life. The plaintiff complained that, recently, the defendant had begun to interfere in the management of the estate, and that she had alleged that the plaintiff's adoption was invalid on the ground that her (the defendant's) head had not been shaved at the time of the adoption, and had threatened that she would proceed to adopt a son and ruin the plaintiff. He prayed for a declaration that he was the validly adopted son of, and entitled to the property which formerly belonged to, V., and that the defendant was only entitled to maintenance; that the agreement of the 18th April, 1878, was invalid; or, in any event, that the defendant had given to the plaintiff all rights to which she might have been entitled under the said agreement, &c.

The defendant admitted that she had performed certain ceremonies which she intended to be an adoption of the plaintiff as son of V.; but she alleged that at the time of the said adoption she had not, nor had she since, undergone tonsure; and that according to the custom of the Daivadnya community, to which she and the plaintiff belonged, a widow could not adopt until her head had undergone tonsure. She also stated that the majority of her caste had declared the said adoption to be invalid, and she submitted the question, as to its validity, to the Court. With regard to the agreement of the 18th April, 1878, she contended that if the adoption was valid, the plaintiff was bound by the terms and conditions contained therein, as she would not, except upon those terms and conditions, have adopted him. She further contended that on the death of her husband, V., his sons, B. and R., become entitled to his estate, and that upon the death of B., who was the survivor of the said two sons, she succeeded to the estate as heiress to B.

*Held*, that the adoption of the plaintiff was a valid adoption. From the evidence it appeared that the requisite religious ceremonies had been performed. Before the defendant took part in them, *Shástris* were consulted as to whether the defendant while untoussured could properly do so, and on making certain expiatory gifts she was pronounced competent. Under such circumstances the Court could not hold her to be incompetent. Even if other *Shástris* were of a different opinion, a Civil Court could not decide between conflicting opinions upon such a question of ecclesiastical etiquette.

If an adoption be performed with all requisite rites, with the assistance of priests, and in accordance with the opinions of *Shástris*, the Court will uphold it, even against the opinions of other *Shástris* expressing or entertaining contrary views.

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*Quære*—whether an adoption is valid among Bráhmans without the performance of the essential religious ceremonies.

*Held*, also, that the defendant was estopped from denying the validity of the plaintiff's adoption. She had taken the plaintiff in adoption, brought him up, and married him as the adopted son of her husband, and had put herself forward as his mother. She could not now, when the plaintiff might have lost all right in his natural family, assert that she had not validly adopted him.

For the purpose of proving that by the custom and in the opinion of the Daivadnya caste an adoption by an untoussured widow was invalid, evidence was tendered to the following effect:—(1) that there had been many instances of adoption in the caste, and in every such case the adopting mother had undergone tonsure, and that there had been no instance the other way; (2) that the caste was divided in opinion as to the validity of the adoption, but that at a meeting of the caste it was declared by a large majority that the adoption was invalid. The Court refused to allow such evidence to be called, holding that it would merely prove what the Court, in the absence of evidence to the contrary, would assume to be the case, *viz.*, that the widows of the caste usually or invariably followed the dictates of the Hindu ceremonial or religious law, which ordains that widows shall shave their heads, and that it would prove nothing more; and with regard to the opinion of the caste, that such opinion, even if expressed by a majority at a caste meeting, as it would not of course be binding upon the Court, ought not to affect its judgment.

*Held*, also, (following *Jamnábái v. Rdíchund*(1)) that the defendant by adopting the plaintiff divested herself of the estate of V., to which she had succeeded on the death of B., and that the plaintiff upon his adoption became entitled to the property.

*Held*, that the effect of the agreement of the 18th April, 1878, was to give the defendant the beneficial ownership of the estate for her life, with the largest possible discretionary powers of management, subject to the duty of maintaining and educating the plaintiff.

*Held*, also, (following *Chitko v. Jánkú*(2)), that the agreement was valid and binding on the plaintiff, and that the defendant had not waived the benefits to which she was entitled under its provisions.

SUIT by an adopted son against his adoptive mother.

The plaint stated that the defendant's husband, Vináyakráv Jaggannáth Shankarsett, was the only son of one Jaggannáth Shankarsett, who died in July, 1865, having by his will appointed his said son his sole executor and residuary devisee and legatee. Probate of his will was granted on the 4th October, 1865.

The said Vináyakráv Jaggannáth died in October, 1873, intestate without having fully administered the estate of his father,

(1) I. L. R., 7 Bom., 225.

(2) 11 Bom. H.C. Rep., 199.

and leaving his widow, (the defendant), a son, Bhowánishankar, and a posthumous son, Rávji, him surviving. Rávji died an infant aged five months, not having been tonsured or married, on the 1st November, 1874.

Bhowánishankar died on the 28th July, 1877, aged seven years.

The plaintiff further alleged that on the 18th April, 1878, the defendant adopted the plaintiff as heir to the said Vináyakráv Jaggannáth Shankarsett, and made an agreement with the natural father of the plaintiff, of the same date, whereby the defendant and the plaintiff's said father affected to deprive the plaintiff of the rights in the estate of the said Vináyakráv Jaggannáth Shankarsett, to which, he, (the plaintiff), became entitled by reason of his adoption. The agreement was as follows :—

“Memorandum of agreement made this 18th day of April in the Christian year 1878, between Bálkrishna Ganobá, of Bombay, Hindu inhabitant, of the one part, and Lakshmbái, widow of Vináyakráv Jaggannáth Shankarsett, also of Bombay, Hindu inhabitant, of the other part. Whereas the said Vináyakráv Jaggannáthji Shankarsett died intestate at Bombay on or about the 5th day of October, 1873, leaving him surviving the said Lakshmbái, as his only widow, a son named Bhowánishankar *alias* Bállá Sáheb, who was born during his life-time, and another son, named Ráv Sáheb, who was born after his death, as his only heirs and legal representatives him surviving; and whereas the said Ráv Sáheb died while he was an infant, and the said Bhowánishankar died at the age of seven, leaving the said Lakshmbái, his mother, as his only heir and legal personal representative him surviving; and whereas the said Lakshmbái, widow, is desirous of adopting a son as heir to her said husband, and has requested the said Bálkrishna Ganobá to allow her to adopt one of his sons, named Sitárám Bálkrishna, who has now attained the age of eleven years, on the the terms and conditions hereinafter mentioned, which the said Bálkrishna Ganobá has agreed to do. Now these presents witness, that, in pursuance of the said agreement, and in consideration of the premises, the said Bálkrishna Ganobá has agreed to give, and the said Lakshmbái

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has agreed to accept, in adoption the said Sitáram Bákrishna, on the express terms and conditions following, that is to say:—

“I. That the said Lakshmibái, widow, shall have during her life-time, both before and after the said Sitáram Bákrishna has attained his majority, absolute power and control over the whole of the immoveable and moveable property, estate, and effects so inherited by her as the heir and surviving legal personal representative of Bhowánishankar Vináyakráv, as aforesaid, and shall be at liberty to deal with, and manage the same according to her own absolute discretion as she may, in the exercise of such discretion, deem most advantageous to the estate.

“II. The said Lakshmibái, widow, shall and will during her life provide the said Sitáram Bákrishna with lodging, food, clothes, medical attendance, and all other necessaries; and will generally maintain and educate him at her own expense in a manner suitable to the position of his family, and will get him married and perform the usual ceremonies on his marriage at her own expense, as aforesaid, in a manner suitable to the position and respectability of the said family.

“III. That after the death of the said Lakshmibái, widow, the said Sitáram Bákrishna, his heirs, and legal representatives will be entitled to inherit for his and their own absolute use and benefit all the moveable and immoveable property, estate and effects of which the said Lakshmibái, widow, shall be possessed at the time of her death.

“IV. That the terms and conditions specified and contained in clauses I and II and III of this agreement shall have full effect, and be considered as valid and operative in every respect, any provision of law or the Hindu Shástra to the contrary notwithstanding.”

The plaintiff alleged that since he had attained majority he had always repudiated the validity of this agreement as affecting his rights in any way.

On the 21st April, 1879, the plaintiff obtained letters of administration *de bonis non*, with the will annexed, to the estate of the said Vináyakráv Jaggannáth Shankarsett.

The plaintiff also alleged that on the *Dassará* day of 1883 the defendant assembled her friends and relatives, and, in view of the approaching majority of the plaintiff, which he attained on the 14th December, 1883, announced her intention of making over to him all the estate of her deceased husband, Vináyakráv Jaggannáth Shankarsett; and she thereupon renounced and waived all the benefits which she had tried to retain for herself by the above-mentioned agreement of the 18th April, 1878; and she handed over to the plaintiff and his wife the keys of various chests and cupboards, and expressed her determination to devote herself to a religious life. She also requested the father-in-law of the plaintiff, one Ganpatráv Moroba, and one Bábáji Káshínáth to act as managers of the estate on behalf of the plaintiff until he became competent to do so for himself.

The plaintiff complained that recently the defendant had begun to interfere in the management of the estate, and to waste the same at the instigation of her spiritual adviser, and that she had alleged that the plaintiff's adoption was invalid, on the ground that her (the defendant's) head was not shaved on the occasion of the adoption; and had threatened that she would proceed to adopt a son, and ruin the plaintiff.

The plaintiff prayed that it might be declared that he was the validly adopted son of, and entitled to the property which formerly belonged to, the said Vináyakráv Jaggannáth Shankarsett, and that the defendant was only entitled to a suitable maintenance; that the agreement of the 18th April, 1878, might be declared to be invalid, and not binding on the plaintiff; or, in any event, that the defendant had given to plaintiff all rights to which she might have been entitled under the said agreement, &c.

In her written statement, the defendant contended that, on the death of her husband, Vináyakráv Jaggannáth Shankarsett, his sons, Bhowánishankar and Rávji, became entitled to his estate, and that upon the death of Bhowánishankar, who was the survivor of the said two sons, the defendant succeeded to the estate as his heiress.

As to the alleged adoption, the defendant admitted that on the 18th April, 1878, she performed certain ceremonies which she

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intended to be an adoption of the plaintiff as son of the said Vináyakráv Jaggannáth Shankarsett; but she alleged that at the time of the said adoption she had not, nor had she since undergone tonsure; and that, according to the usages and customs of the Daivadnya community, to which she and the plaintiff belonged, a widow could not adopt until her head had undergone tonsure. She further stated that the said adoption had been declared to be invalid by the majority of her caste, and she submitted to the Court whether the adoption was not invalid.

As to the agreement of the 18th April, 1878, the defendant contended that, if the adoption was valid, the agreement was binding on the plaintiff, who had been adopted upon the terms and conditions contained in the said agreement. She alleged that she would not have adopted the plaintiff unless upon the said terms and conditions.

The defendant denied the various allegations of fact contained in the plaint.

The following issues were raised at the hearing:—

1. Whether the adoption of the plaintiff was a valid adoption by the custom of the Daivadnya caste or by Hindu law.
2. Whether the agreement, dated the 14th April, 1878, is valid and binding on the plaintiff.
3. Whether the plaintiff has ratified the said agreement, if the same were not originally binding upon him.
4. Whether the defendant waived all benefits, to which she was entitled under the said agreement.
5. Whether, if so, there was any consideration for such waiver.
6. Whether the plaintiff is entitled to the relief prayed in paragraph 7 of the prayer of the plaint (*i. e.* to have a receiver of the property appointed, and to restrain the defendant from dealing with it) upon any ground properly arising upon the pleadings in this suit.
7. Whether the plaintiff upon the said adoption (if valid) became entitled to the property to which the defendant succeeded upon the death of Bhowánishankar.

8. Whether the defendant is not estopped from disputing the validity of the said adoption.

9. Whether the plaintiff is entitled to any, and what, relief in this suit.

*Macpherson*, (Acting Advocate General), *Inverarity*, and *Telang* for the plaintiff.

*Lang* and *Russell* for the defendant.

*Telang*:—The first question which arises is whether the adoption was valid. The *factum* of the adoption is admitted, and the non-tonsure is admitted. We say the adoption was good. No ceremonies are essential among this caste in Bombay. Mere gift and acceptance are sufficient—West and Bühler, p. 922. As to tonsure, see West and Bühler, pp. 998, 1084. At most, the omission of tonsure is a religious objection. No defect in mere ceremonial will deprive adoption of its legal effect. The effect of formal giving and acceptance cannot be done away with, because the spiritual benefit conferred is small—West and Bühler, p. 1141; Mayne's Hindu Law, paras. 136, 138.

Further, we say the defendant is estopped from disputing the validity of the plaintiff's adoption—*Sadashiv Moreshwar Ghate v. Hari Moreshwar Ghate*<sup>(1)</sup>; West and Bühler, pp. 1097, 1098; Mayne's Hindu Law, para. 143. If an adoption is not set aside within six years, it cannot be disputed—*Jagadamba Chowdhrani v. Dakhina Mohun*<sup>(2)</sup>.

The next point arises on the seventh issue, *viz.*, as to whether, by virtue of the adoption (if valid), the plaintiff became entitled to the property to which the defendant had succeeded as heir of Bhowánishankar. The question is practically decided by authority. The effect of the adoption is the same whether the defendant has succeeded to the estate as heir to her son or to her husband—*Mussumat Bhoobum Moyee Debia v. Rámkishore Acharj Chowdhry*<sup>(3)</sup>. A mother's own act divests her estate—*Rájáh Velanki Venkata Krishnarow v. Venkata Ráma Lakshmi Narsayya*<sup>(4)</sup>. The widow's estate is divested on adoption—*Jamnábái v. Ráychand*

(1) 11 Bom. H. C. Rep., 190.

(2) 10 Moore's Ind. App., 279, at p. 311.

(3) L. R., 13 Ind. App., 84.

(4) L. R., 4 Ind. App., 1.

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*Nahálchand*<sup>(1)</sup>; West and Bühler, pp. 985, 1178; *Rámasawmi Aiyán v. Vencataramaiyan*<sup>(2)</sup>; *Pudma Coomari Debi v. The Court of Wards*<sup>(3)</sup>; Mayne's Hindu Law, paras. 170, 178; *Puddo Kumáree Debi v. Kishore Achárjee*<sup>(4)</sup>.

As to the effect of the agreement of the 18th April, 1878: *Chitko Raghunáth Rájádiksh v. Jánki*<sup>(5)</sup>; *Rámasawmi Aiyán v. Vencataramaiyan*<sup>(6)</sup>; *Lakshmana Ráu v. Lakshmi Ammal*<sup>(7)</sup> West and Bühler, pp. 187, 1102, 1117; *Vináyak Náráyan Jog v. Govindráv Chintáman Jog*<sup>(8)</sup>; West and Bühler, p. 1107. As to acquiescence and assent: *Bálkrishna Trimbak Tendulkar v. Sávitribái*<sup>(9)</sup>; *Rádhábái v. Dámodar Krishnaráv Hingne*<sup>(10)</sup>. Where a son is adopted, the *status* of a son is created. As a legal result, he takes the father's property. Here the rights of a son are curtailed by an agreement. No agreement can do this, but the agreement of the son himself—*Bálkrishna Trimbak Tendulkar v. Sávitribái*<sup>(11)</sup>. A general rule of law cannot be abrogated by a private arrangement—*In re Wilcock's Settlement*<sup>(12)</sup>.

The fifth issue raises the question, whether the defendant received any consideration for waiving her rights. No consideration was necessary. It was the case of a gift, not a contract. It was a completed relinquishment. The estate has since been managed in behalf of the plaintiff.

*Lang* for the defendant:—As to the agreement, the Court is bound by *Chitko Raghunáth Rájádiksh v. Jánki*<sup>(13)</sup>. The plaintiff was adopted on the conditions of the agreement, and he cannot now repudiate them.

As to the adoption, we contend it was not valid. The mere fact that the plaintiff has been treated as an adopted son cannot validate it.

(1) I. L. R., 7 Bom., 225.

(2) L. R., 6 Ind. App., 196.

(3) L. R., 8 Ind. App., 229.

(4) I. L. R., 5 Calc., 615.

(5) 11 Bom. H. C. Rep., 199.

(6) L. R., 6 Ind. Ap., 196.

(7) I. L. R., 4 Mad., 160.

(8) 6 Bom. H. C. Rep., A. C. J., 224.

(9) I. L. R., 3 Bom., 54.

(10) Printed Judgments for 1878, p. 9.

(11) I. L. R., 3 Bom., 54, at p. 57.

(12) L. R., 1 Ch. Div., 229.

(13) Bom. H. C. Rep., 199.

The defendant could not ratify an invalid adoption, nor is she estopped from disputing it. He was either validly adopted, or he was not. We say the defendant being untensored, could not adopt, just as an unchaste widow cannot adopt: West and Bühler, p. 998; *Sayamalál Dutt v. Saudámini Dási* <sup>(1)</sup>; *Gopee Loll v. Mussamut Sree Chundraolee Buhoojee* <sup>(2)</sup>. The usage of the caste is that only tensured widows can adopt.

February 28. FARRAN, J. :—This is a dispute between the plaintiff and the defendant relative to the property of the Shankarsett family, and the suit is brought to obtain the decision of the Court as to whether the plaintiff, as the adopted son of Vináyakráv, or the defendant, who is Vináyakráv's widow, is entitled to the present possession and enjoyment of that property. The questions argued before me were questions of nicety—both those of law and those of fact.

The issues raised were the following. I have slightly modified their order :—

(1) Whether the adoption of the plaintiff was a valid adoption by the custom of the Daivadnya caste or by Hindu law.

(2) Whether the defendant is not estopped from disputing the validity of the said adoption.

(3) Whether the plaintiff upon the adoption, (if valid), became entitled to the property to which the defendant succeeded upon the death of Bhowánishankar, the infant son of Vináyakráv and of the defendant.

(4) Whether the agreement of the 18th April, 1878, which defined the plaintiff's enjoyment of the property during the lifetime of the defendant, is valid and binding on the plaintiff.

(5) Whether the plaintiff has ratified the said agreement, if the same were not originally binding upon him.

(6) Whether the defendant waived all benefits, to which she was entitled under the said agreement, as alleged in paragraph 8 of the plaint, namely, on the *Dassará* day which fell in 1883.

(1) 5 Beng. L. R., 362.

(2) 11 Beng. L. R., 391.

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(7) Whether, if so, there was any consideration for such waiver.

(8) Whether the plaintiff is entitled to the relief prayed in paragraph 7 of the prayer of the plaint, (*i.e.*, to have a receiver of the property appointed, and to restrain the defendant by injunction from dealing with it,) upon any ground properly arising upon the pleadings in this suit.

(9) Whether the plaintiff is entitled to any, and what, relief in this suit.

By consent the evidence upon the eighth issue has been reserved until after the decision of the Court has been given upon the remaining issues. It involves painful recriminations between the plaintiff and the defendant, and possibly it may not be necessary, as it certainly is undesirable, to enter upon an examination of them even at a later stage of the case. I should be glad to be spared the task.

The fact that Lakshmibái, on the 18th of April, 1878, being then the widow of Vináyakráv and having previously lost her last natural-born son, Bhowánishankar, went through the ceremony of adopting the plaintiff, is admitted. Lakshmibái was then, as she still is, untonsured; and it is contended on her behalf that the adoption is consequently invalid. Upon this point Mr. Lang sought to adduce evidence of caste custom and opinion to the following effect. Witnesses (he said) will prove (1) that there have been many instances of adoption in the Daivadnya Bráhma caste, and in every such case the adopting mother had undergone the process of having her head shaved, and that there has been no instance the other way; (2) that the caste is divided in opinion as to the validity of the adoption, but that at a meeting of the caste it was declared by a large majority that the adoption was invalid. The plaintiff by his counsel denied both of these allegations. Mr. Lang could not, he of course admitted, produce instances in which an adoption by an untonsured widow was treated as null by the caste. I refused to allow this evidence to be called, as it seemed to me that it would only prove (if given), that the widows of this caste usually or invariably

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followed the dictates of the Hindu ceremonial or religious law, which ordains that widows shall shave their heads, and that it would prove nothing more. In the absence of evidence to the contrary, I shall assume that to be so. The opinion of the caste, even if it were expressed by a majority at a caste meeting, would not, of course, be binding upon the Court, and ought not, I think, to sway its judgment.

The question, therefore, is whether, on this side of India, adoption by the widow of an orthodox Bráhman is invalid if she has not undergone tonsure before adoption. The defendant relies, in support of her contention, on the following passages in West and Bühler, p. 998:—

“Widows of Bráhmans and of others, amongst whom the custom obtains, are deemed impure after the attainment of puberty until they undergo tonsure. They cannot till then adopt.”

“A widow who has attained puberty cannot perform any religious act, and, therefore, cannot adopt until she has undergone tonsure;” and in note (g) “a widow must have attained maturity and have undergone tonsure to give her the qualification.” Pollution arising from want of tonsure, it is argued, resembles that arising from want of chastity, and in like manner renders a widow incapable of performing religious acts, and consequently of adopting a son—*Sayamalal Dutt v. Saudámini Dási*<sup>(1)</sup>. A state of pollution in a male was, in *Ramalinga Pillai v. Sadásiva Pillai*<sup>(2)</sup>, assumed to render an adoption made by him in that state invalid.

Mr. Telang, on the other hand, contended that, in Western India, no ceremonies were requisite to give validity to an adoption; the act of giving and receiving the boy being sufficient to constitute a valid adoption; and cited West and Bühler, p. 922. It is strange that there is so little direct authority upon the question of the necessity, or otherwise, of religious ceremonies. Amongst Sudras it is clear that no ceremonies beyond the giving and receiving are necessary: *Beharee Lall v. Indur Monee*<sup>(3)</sup>; *Kenchawa*

(1) 5 Beng. L. R., 362.

(2) 9 Moore's Ind. Ap., p. 506.

(3) 21 Calc. W. R. Civ. Rul., 285.

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v. *Ningūpa* <sup>(1)</sup>; *Bhagvāndās Tejmal v. Rājmal* <sup>(2)</sup>; *Mahashoya v. Srimati* <sup>(3)</sup>; but I do not find that there is direct authority for so holding in the case of Brāhmans. Mr. Steel says: (Steel on the Law and Custom of Hindu Castes, p. 184) "In the Brāhman and other castes, in which the Sāstra ceremonies are performed, the placing the boy in the adopter's lap is considered an essential ceremony, P.", but in the same page he writes: "It (an adoption) is not retractable among Brāhmans after the Hom ceremony has been performed, nor among lower castes, K." The letters P and K refer to answers received from Poona and Khāndesh respectively. In note (g), at page 926 of West and Bühler, the authors, after referring to the reported and unreported cases in Bombay, conclude thus (p. 923): "It will be seen that there is hardly authority for laying down a proposition as to this (the Brāhman) caste with perfect confidence. The ceremonies are by all Brāhmans thought important, and in practice the omission of them would throw such suspicion on an alleged adoption as to impair very seriously the proof of an alleged giving and taking with the requisite expression of intent." In *Mahashoya v. Srimati Krishna Soondari* <sup>(4)</sup> their Lordships of the Privy Council lay down the law generally thus: "The mode of giving and taking a child in adoption continues to stand on Hindu law and on Hindu usage, and it is perfectly clear that amongst the twice-born classes there could be no such adoption by deed, because certain religious ceremonies, *the datta homam* in particular, are in their case requisite. The system of adoption seems to have been borrowed by the Sudras from these twice-born classes, whom, in practice, as appears by several of the cases, they imitate as much as they can: adopting those purely ceremonial and religious services which it is now decided are not essential for them in addition to the giving and taking in adoption. It would seem, therefore, that, according to Hindu usage, which the Courts should accept as governing the law, the giving and taking in adoption ought to take place by the father handing over the child to the adoptive mother, and the adoptive mother declaring that she accepts the child in adop-

(1) 10 Bom. H. C. Rep., note, at p. 265. (2) L. R., 7 Ind. Ap., 250.

(3) 10 Bom. H. C. Rep., 241, at p. 265. (4) L. R., 7 Ind. Ap., 250, at p. 256.

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tion." In the face of that general expression of the law I should hesitate long before holding that an adoption is valid among Bráhmans, even in Western India, without the performance of the essential religious ceremonies. The only direct authority in support of the proposition is the unreported case of *Jagannáth v. Rádhábái* <sup>(1)</sup>. The earlier-quoted passage from Steel only inferentially supports, while the later passage inferentially negatives, it, as also does a subsequent opinion from the Poona College, given at foot of page 184. The opinion, also, of the authors of West and Bühler, as stated above, accords also, I think, with the law as laid down by the Privy Council; see also page 1084 of the work. Mr. Mayne (see Mayne's Hindu Law, para. 138) admitting that the question is an open one yet seems to lean to the view that, in Madras and Bombay at any rate, no ceremonies are essentially necessary, except the giving and receiving of the boy in the case of Bráhmans. I do not, however, consider that it is necessary for me actually to decide the point. It appears, from the evidence, that in this case the requisite religious services were performed. Before the defendant took part in them, Shástris were consulted as to whether the defendant while untoured could properly do so, and on making certain expiatory gifts she was pronounced competent. How can I now decide that she was, in fact, incompetent? Even if other Shástris were of a different opinion, it would be a delicate task for the Court to decide between conflicting opinions upon such a question of ecclesiastical etiquette. Civil rights cannot, I apprehend, be rested upon such a delicate basis; and I am prepared to hold that, if an adoption be performed with all requisite rites, with the assistance of priests, and in accordance with the opinions of Shástris, the Court will uphold it even against the opinions of other Shástris entertaining or expressing contrary views. The passages already cited from West and Bühler do not convey, I apprehend, the expression of the opinion of the learned authors of the work. They are in parantheses, and indicate only the views of Shástris expressed in former times; but under what circumstances, and whether expiatory sacrifices had been performed by the adopting mother, there is nothing to show. At page 997 of West and

(1) S. A. 165 of 1865.

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Bühler this opinion is also expressed by a Shástri—"a widow of ten years, unshorn, and not yet arrived at puberty, may, in pursuance of her husband's wish or assent, adopt from another *gotra*." The Shástris of old, therefore, did not forbid an untoured widow in all cases to adopt. No doubt, it was held in *Sayámálál Dutt v. Soudamini Dási*<sup>(1)</sup> that an unchaste widow, pregnant in concubinage, could not adopt; but impurity arising even from this cause may be removed by penance—*Thukoo Báee Bhidé v. Ramá báí Báee Bhidé*<sup>(2)</sup>. The same remark applies to the case of *Rámalingá Pillái v. Sadásiva Pillái*<sup>(3)</sup>, and in that case there was no decision at all on the question of impurity. If the line of reasoning adopted in that case were applied to the present case, it would be conclusive in favour of the adoption. I must for these reasons hold that the adoption is valid.

I also consider that it is not open to the defendant actively to assert, in a Court of law, that the adoption is invalid. She it was who took the plaintiff in adoption and brought him up and married him as the adopted son of her husband, and put herself forward as his mother in Courts of law. How can she now, when he may have lost all right in his natural family, assert that she has not adopted him validly? The cases of *Sadashiv Moreswar v. Hari Moreswar*<sup>(4)</sup> and *Chintu v. Dhondu*<sup>(5)</sup> are authorities in favour of the plaintiff on this point: see, too, West and Bühler, p. 1097; and Mayne's Hindu Law, pl. 143. It may be that an adoption is not effectual to confer all spiritual benefit upon the manes of the deceased husband, and yet is effectual to give the boy the civil *status* of son to the adopting widow—a *status*, which, like the *status* of the impotent party to a marriage voidable on that ground, the widow is by her own act estopped from denying. Lapse of time, as against the natural heirs of Vináyakráv after his widow's death, has apparently cured defects, (if any), in the plaintiff's adoption—*Jagadamba Chowdhurani v. Dakhina Mohun*<sup>(6)</sup>; Act XV of 1877, Sch. II, art. 118. It would be strange if the adopting mother could now controvert it. Assuming that, under

(1) 5 Beng. L. R., 362.

(4) 11 Bom. H. C. Rep., 190.

(2) 2 Borr., p. 488 (2nd ed.)

(5) 11 Bom. H. C. Rep., note (a), at p. 192.

(3) 9 Moore's Ind. Ap., 506.

(6) L. R., 13 Ind. Ap., 84.

ordinary circumstances, the defendant is so estopped, how can the fact that the plaintiff now asserts what he insists are his rights as an adopted son, release the defendant from that estoppel? I do not think that it can, and I decide the second issue in favour of the plaintiff.

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The third issue is one which raises a very delicate question of Hindu law. Vináyakráv left two sons: the survivor of them, Bhowánishankar, died a child of seven years of age, after tonsure, but before *munja*. Lakshmibái, Vináyakráv's widow, then adopted the plaintiff. Does he succeed to the property as the heir of Vináyakráv, or of Bhowánishankar, or as the surviving undivided brother of the latter? In *Rámasawmi Aiyán v. Venkataramaiyan*<sup>(1)</sup> the Privy Council treat the question as still open. This Court, however, on the 20th February, 1883, treating the expression of opinion by their Lordships in *Rajah Vellanki Venkata Krishnaraw v. Venkata Ráma Lakshmi Narsayya*<sup>(2)</sup> as one which it was bound to follow, decided that a Hindu widow who adopts a son after the death of her natural-born son divests herself of her estate—*Jamnábái v. Rayachand Nahalchand*<sup>(3)</sup>. The Calcutta High Court in *Puddo Kumaree Debee v. Juggut Kishore Acharjee*<sup>(4)</sup> expressed the view that, in such a case, the adopted son succeeds his adopting mother in the line of heirs. Mr. Mayne in his work on Hindu Law (paras. 170-178) supports the view of the Calcutta High Court, while the authors of West and Bühler are ranged on the opposite side (see page 985), and especially so when the natural son dies an infant and untensured, p. 1178. Sitting as a Court of original jurisdiction I consider myself bound by the decision in *Jamnábái v. Rayachand Nahalchand*<sup>(5)</sup>, notwithstanding that the Court there acted upon the assumption of the Judicial Committee in *Rajah Vellanki Venkata v. Venkata Ráma*<sup>(6)</sup> as though it were a decision. I concur, however, in the decision of this High Court. It seems to me entirely anomalous, according to Hindu notions, that a widow of Vináyakráv should be by Hindu law entitled to the estate which was his, while his son is alive. Though that son may be but the image of a son accord-

(1) L. R., 6 Ind. Ap. at p. 208.

(2) I. L. R., 5 Calc., 614.

(3) L. R., 4 Ind. Ap., p. 1.

(4) I. L. R., 7 Bom., 225.

(5) I. L. R., 7 Bom., 225.

(6) L. R., 4 Ind. Ap., 1.

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ing to Western ideas, he is, in truth, according to Hindu notions, an actual son. While the widow of a natural son is alive, the mother of that son cannot adopt to her husband, because the estate of her husband is vested in such widow—*Pudma Coomari Debi v. The Court of Wards*<sup>(1)</sup>. The same objection would seem to apply to the mother adopting, if the estate after such adoption remained vested in herself. The law is, however, upon this point uncertain, and was still more unsettled in Bombay in April, 1878. Now, however, bound by authority I find the third issue for the plaintiff. The unsettled state of the law must, however, be taken into consideration when considering the next issue.

This fourth issue is one of immense practical importance. The spread of education and enlightenment amongst Hindu women will render it still more so. Before discussing, however, the validity of the agreement entered into by the defendant with the natural father of the plaintiff when the latter was adopted, I must consider the proper construction and effect of the agreement itself.

The first clause sets out the terms and conditions upon, and subject to, which the plaintiff was adopted, namely, that Laksh-mibái shall have, during her lifetime, absolute power and control over the whole of the immoveable and moveable property, estate, and effects inherited by her as the heir of Bhowánishankar, and shall be at liberty to deal with and manage the same according to her own absolute discretion, as she may in the exercise of such discretion deem most advantageous.

The second clause provides for the maintenance of the plaintiff during the lifetime of Laksh-mibái.

The third provides that the plaintiff, his heirs, and legal representatives shall be entitled to inherit, for his and their own absolute use and benefit, all the moveable and immoveable property, estate, and effects of which Laksh-mibái shall be possessed at her death.

The effect of that agreement is to give Laksh-mibái a widow's estate, or life estate, in all the property, moveable and immoveable, with such powers of management as, or perhaps with wider

(1) L. R., 8 Ind. Ap., p. 229.

powers of management than, a Hindu father possesses over the family property. In my judgment, it gives her no more. There are no words actually giving her a life estate, but the circumstance that the plaintiff's maintenance is provided for during her lifetime shows that to be intended; and the phrase, that she shall have absolute power and control during her lifetime, contains words not unapt to a native mind to convey that intention. That she is to have no more than a life estate with absolute discretionary power of management and investment, is shown by the concluding words of the first clause, which, I think, govern the whole. If she were intended to be the absolute owner of all the property, it would be senseless to go on to give discretionary powers of management. Again, when it is intended, as in clause 3, to give an absolute beneficiary estate, the words used are, "shall inherit for his own absolute use and benefit," and no words giving powers of management are superadded. It is impossible, upon the wording of the agreement, to draw any distinction between moveable and immoveable property; the same power and control is given over both. To suppose, however, that the parties intended that Lakshmi**ba** should have the power to give away the immoveable property is so repugnant to all Hindu ideas as to render it well nigh impossible to accept a construction which would involve that consequence. The circumstances under which the agreement was executed, and the object the parties to it had in view—and they may be looked to in aid of its construction—show, I think, that the above view is correct.

There had been instances, in the caste, of adopted sons wasting the family property. The plaintiff's brother about this time was apparently adopting that course. The agreement was suggested at the instance of the plaintiff's father. Its primary object was, therefore, we may presume, the preservation of the estate. This would hardly be effected by reserving to Lakshmi**ba** unlimited power of disposition over it. The estate, though comparatively large, was heavily in debt; hence the necessity of giving to the life tenant the largest possible discretionary powers of management. Such, then, I think is the true construction and effect of the agreement. Lakshmi**ba** was by it secured the beneficial ownership of

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the estate for her life, with the widest possible discretionary power of management, subject to the duty of maintaining and educating the plaintiff—*Ramgutte Acharjee v. Kristo Soondurce Debia*<sup>(1)</sup>.

The question now arises, whether it was competent for the plaintiff's father on his behalf to enter into an agreement which secured such rights to the adopting mother. The defendant upon this point relies on the authority of *Chitko v. Jánki*<sup>(2)</sup>, a decision by an Appellate Bench of this Court, where it was held that an agreement, couched in terms almost identical with those of the agreement under consideration, was binding upon the adopted son. The plaintiff contends that the authority of that case is so weakened by the remarks of the Privy Council in *Rámásawmi Aiyán v. Venkataramaiyan*<sup>(3)</sup> that it can no longer be regarded as an authority. The passage is this: "How far the natural father can by agreement before adoption renounce all or part of his son's rights so as to bind that son when he becomes of age, is also a question not altogether unattended with difficulty: although the case of *Chitko v. Jánki*<sup>(4)</sup> certainly decides that an agreement on the part of the father, that his son's interest shall be postponed to the life interest of the widow, is valid and binding. In this case their Lordships think it enough to decide that the agreement of the natural father, which has been set out, was not void, but was, at the least, capable of ratification when his son became of age." I do not understand that to be an expression of opinion, on the part of their Lordships, that *Chitko v. Jánki*<sup>(5)</sup> was not rightly decided, but as a reservation of their right to consider the question when it should come before them in a case necessarily involving a decision upon it. Of the same purport is the remark, *per Westropp, C.J.*, of the Court in *Rádhábái v. Ganesh*<sup>(6)</sup>. "If the Assistant Judge had referred to the cases of *Vináyak N. Jog v. Govindráv C. Jog*<sup>(7)</sup> and *Chitko v. Jánki*<sup>(8)</sup>, he would have seen that there is, at all events, authority for holding that the rights of a minor given in adoption may be defined and restricted by agreement between the

(1) 20 Calc. W. R. Civ. Rul., 472.

(2) 11 Bom. H. C. Rep., p. 199.

(3) L. R., 6 Ind. Ap. at p. 208.

(4) 11 Bom. H. C. Rep., 199.

(5) 11 Bom. H. C. Rep., 199.

(6) I. L. R., 3 Bom., at p. 8.

(7) 6 Bom. H. C. Rep., A. C. J., 224.

(8) 11 Bom. H. C. Rep., 199.

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natural and adoptive parents." The language of the judgment in *Vináyak N. Jog v. Govindráv C. Jog*<sup>(1)</sup> favours the validity of such an agreement as the one before me. On the other hand, the High Court at Madras in *Lakshmana Ráu v. Lakshmi Ammal*<sup>(2)</sup> say that "we are disposed to think that a child taken in adoption cannot be bound by the assent of his natural father to terms imposed as a condition of the adoption, and that, like other agreements made on behalf of minors for other than necessary purposes, it would lie with the minor, when he came of age, to assent to or to repudiate them. This, we understand, to be the effect of the ruling of the Judicial Committee in *Rámasami Aiyar v. Venkata-ramaiyan*<sup>(3)</sup>, in which the judgment of the learned Judges of the Bombay High Court in *Chitko v. Jánki*<sup>(4)</sup> was noticed, but \* \* \* \* it is unnecessary for us to decide the point." Seeing, however, that the Judicial Committee in express terms declined to decide the point which the learned Judges of the Madras High Court understand to be the effect of their ruling, I do not consider the *obiter dictum* just cited entitled to much weight. The result of the authorities I have referred to, seems to me to be this, that it is open to the Appellate Bench of this Court, and of course to the Privy Council, to reconsider and overrule the decision of the Appellate Court in *Chitko v. Jánki*<sup>(5)</sup>; but that no such doubt has been expressed by competent authority regarding it as to justify a Court of original jurisdiction in refusing to follow it.

We have not the opinion of Mr. Mayne expressed upon the point. In para. 177 he treats the question as an open one. I have referred to the several passages in West and Bühler, to which my attention has been drawn, at pp. 187, 188 and 1102—1117. They are too numerous for citation. The result seems to be that, in the opinion of the learned authors of that work, agreements depriving an adopted son of his immediate right of inheritance are inadmissible in accordance with the strict principles of Hindu law, but are not uncommon in practice, and have been usually upheld by the caste, and frequently by the Court.

It would not, I think, be difficult to prove, almost to demon-

(1) 6 Bom. H. C. Rep., A. C. J., at p. 231. (3) L. R., 6. Ind. Ap., 196.

(2) I. L. R., 4 Mad., at p. 163.

(4) 11 Bom. H. C. Rep., 199.

(5) 11 Bom. H. C. Rep., 199.

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stration, that agreements in every case in which an adopted son is deprived of his immediate rights in the property of his adopted father, are opposed to the principles of strict Hindu law, and, *a fortiori*, that such agreements, entered into on behalf of a minor about to be adopted, are so opposed. The adoption invests the adopted with the estate as a support for the *sacra*. The support of the *sacra* is a duty. Any attempt to separate the two must be futile. An agreement which deprives a minor of the means of performing his religious offices towards the manes of his adoptive father and his ancestors must be inoperative. The early Shástris were logical in their deductions. An agreement was declared null by the Shástris, whereby an adoptive mother obtained from the son whom she adopted a resignation to her of the bulk of the family property—West and Bühler, p. 187; and see a similar Shástri opinion in the case of a Lingáyat of full age at p. 1104 of the same work. The authors sum up their argument thus at p. 1106: "It would seem, from the considerations that have been stated, that the Shástris' view of this subject can hardly be contested on the ground which they have chosen."

It is, however, futile to argue logically what would be the correct deduction to draw from the strict principles of the law when custom and practice are allowed to mould and develop the law in accordance with the conceptions of a later age. The possibility of such an agreement is nowhere negatived by a direct text. The last-quoted passage accordingly concludes thus: "But it is certain that it is not allowed to govern the actual practice of the people amongst whom fair arrangements for the protection of the widow's interest, during her life, are commonly made, and are always supported by the authority of the caste." The actual decision of the Privy Council, that such an agreement, made on behalf of an infant, is not void, but is, at the least, capable of ratification when he becomes of age, is irreconcilable with the strict view taken by the Shástris.

Custom, therefore, upholding such agreements, and no text of law absolutely forbidding them, and they being by the highest authority pronounced to be capable of being entered into by an adult, and ratified by an infant on attaining majority, is there

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any principle which renders them under all circumstances null when entered into on behalf of an infant? In England a valid settlement can on his or her marriage be made by, or on behalf of, an infant with the sanction of the Court (Stat. 18 and 19 Vic., cap. 43.) That, no doubt, is a creature of statute, but it may be presumed to be an improvement in the law. By Hindu law an infant "will be bound by the act of his guardian, when *boná fide* and for his interest, and when it is such as the infant might reasonably and prudently have done for himself if he had been of full age, but not where the act appears not to have been for his benefit, unless he has ratified it on reaching his majority."—Mayne's Hindu Law, para. 193. I cannot but think that this principle ought to guide the Court in considering whether agreements, like the one under consideration, can be upheld or not. If the stipulations are unreasonable, such as giving to the widow an absolute power of disposition over the property, they should be rejected as *ultra vires* of the father; if reasonable, such as only to define and limit the son's enjoyment of the property, they should be upheld. The reasoning in the judgment of the Court in *Chitko v. Jánki*<sup>(1)</sup> goes far beyond this view, but the actual decision upon the facts is in accord with it. The Appellate Court must for this Presidency decide to what extent it is to be followed. Great weight, I think, ought to be attached to that decision, though the reasoning of part of the judgment may be open to objection, as it is the decision of a Hindu Judge of great experience upon a question which I regard as a question of Hindu law modified and developed by Hindu custom and usage.

Assuming that an agreement of the nature of the agreement before me is one which a natural father could enter into on behalf of a minor son, there are circumstances in this case which call upon this Court, if possible, to uphold its provisions.

The family into which the plaintiff was to be admitted by adoption was a distinguished one, possessed of considerable property; but encumbered with debt. The boy's parents were poor, dependents, to a considerable extent, upon the bounty of the Shankarsetts, and, I think, I may say, upon the evidence show-

(1) 11 Bom. H. C. Rep., 199.

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ing indications of being of an improvident disposition. The advisability of not entrusting the plaintiff, under these circumstances, with the uncontrolled management of the Shankarsett estate upon his attaining his eighteenth year, hardly needs to be pointed out. The law as to the power of the plaintiff's father to enter into such an arrangement had been, some years previously, declared by this Court; and legal opinion was obtained as to that law, which, no doubt, (the opinion has not been produced by the plaintiff), was based upon that decision. After the possibility of such an arrangement was pointed out to the defendant, I do not doubt her statement that she would not have adopted the plaintiff upon any other conditions. There were other aspirants to the honour. The defendant's power over the property inherited from her son was supposed to be extensive; its source was particularly indicated in the agreement; the plaintiff's rights over that property were doubtful. The agreement limited and defined them, and ought to have prevented litigation. The defendant was possessed of *stridhan* of some value. In the absence of such an agreement she would hardly apply it for the benefit of the estate; in the presence of it she would not hesitate to do so. She says that she has so applied a considerable portion of her *peculium*. Lastly, the terms of the agreement are sufficiently wide to entitle the plaintiff to all the property, including her *stridhan*, of which the defendant may die possessed. I do not, of course, now decide that they will do so.

For these reasons I decide that the agreement was valid, and is binding upon the plaintiff.

I do not find, upon the record, any evidence leading to the conclusion that the plaintiff has ratified the agreement. His acquiescence in it, after he came of age, does not affect his legal rights and is natural considering the hands to which the management of the estate was then entrusted. I must find the fifth issue for the plaintiff.

The sixth issue, *viz.*, whether the defendant waived all rights to which she was entitled under the agreement, remains to be considered. The plaintiff's case upon this issue is this:—On the *Dassará*-day, which fell in the year 1883, the defendant—without

previous intimation of her intention to any one, and without advice, asked or received, from any one—invited to the family house the natural father of the plaintiff, Bálkrishna Ganobá, and the plaintiff's father-in-law, Ráv Sáheb Ganpatráv Morobá Pitalé, and other relations, and when they had assembled in the *mája-ghar*, or inner hall, came in, and standing near the staircase with her hands joined made an oration as follows:—"Excuse me for the trouble I have given you in calling you together to-day, but this is the *Dassará* and an auspicious day. I have resolved henceforth to lead a religious life, and I am going to give the whole of the property, whatever there is, into the charge of the Ráv Sáheb, the plaintiff; and as he is a minor, the management of the estate will be carried on by Pitalé and Bábáji Káshináth till he is of age. As for me, Rs. 200 shall be paid to me every month from the rent of the Girgaum bungalow and Rs. 5,000 in one sum when I shall require it, and I shall then divulge the reason for which I need it. I shall myself live upon what the Ráv Sáheb will allow as maintenance." After this she took from her waist a bunch of keys containing those of the safes and important boxes, and gave them to the plaintiff, and a pair of *todás* and an *áptá* leaf. She then prostrated herself at the plaintiff's feet. Seeing this the plaintiff and the others rebuked her for thus humbling herself to her son, when she said: "As I have placed this man on the *gádi* of Jaggannáth Shankarsett, and made him the owner of his property, out of respect to that *gádi* I prostrate myself at his feet." She then brought several ornaments from the treasure room, and made presents of these to Pitalé's son and others, saying that they were the last gifts she would make, and then the assembly broke up. The important passage in the speech I have taken from the evidence of the plaintiff, and have supplemented it from the evidence of those who were present at the meeting. Pitalé gives perhaps the fullest account of the speech. He puts the words of gift in the present and past tenses.

The next day, Lakshmbái sent for Pitalé and Bábáji Káshináth, and told them that they must manage all the matters in connection with her husband's *shrádhas*, which were then approaching. She then called her *mehtás*, and told them that their services from that day and the services of all other servants were entirely at

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the disposal of the plaintiff and the managers, and that they should not go to her for any instructions in regard to business matters. From that time the two managers managed the property till disputes arose, and the defendant withdrew her authority from them. Soon after that the present suit was filed.

The defendant admits that she gave some keys to the plaintiff on the *Dassará* day and made some presents; but denies that she then or ever assigned to him her interest in the estate. She also denies many of the words and incidents deposed to by the witnesses for the plaintiff. Notwithstanding that denial I have little doubt but that she made the speech, and went through the dramatic performance substantially to the effect and in the manner in which I have set them forth. The high character and general intelligence of several of the plaintiff's witnesses, and especially of Ráv Sáheb G. M. Pitalé, preclude me from coming to any other conclusion. Behind that, however, remains the question, whether the defendant ever intended to do or did more than go through a theatrical performance,—in other words, whether she validly assigned her interest in the property to the plaintiff, and whether the Court will give effect to such an assignment as she made. To solve that question it will be necessary to consider the circumstances which took place before the *Dassará* of 1883 and the legal position of the parties then as well as those which occurred after that day.

On the 21st April, 1879, letters of administration, with the will annexed, were granted of the estate of Jaggannáth Shankarsett to the defendant. Before that, the defendant had in the Poona Court filed a suit in the name of her son, and had experienced difficulty in obtaining a decree, as the defendant in that suit relied upon the agreement of the 18th April as depriving the present plaintiff of his right to maintain the suit. Under such letters she was clothed with the legal title to the estate, and was responsible to the Court for its due administration. Her management of the property had not been prudent or successful. She had borrowed money from Márwáris on onerous terms, and must have been living extravagantly in the sense of spending more than her income. In March or April,

1883, Pitalé had come forward to assist her, and had advanced her a sum of Rs. 20,000 on the mortgage of two bungalows at Mátherán and Mahábleshvar, and he thenceforward became her financial minister; and it is not too much to assert that in that position he urged on her the policy of retrenchment. Bábáji Káshináth had also assisted her with his advice in her management. On the *Dassará* day she evidently decided to make a new departure. Her speech may be regarded in two aspects as (1) an indication of a present intention to renounce the advantages secured to her by the agreement in favour of the plaintiff, and a symbolical carrying out of that intention by giving over her principal keys to the plaintiff; (2) a sort of self-denying ordinance curbing her own expenditure for the benefit of the plaintiff and of the estate which was to be his, and a giving effect to that resolution by appointing her trusted friends, Pitalé and Bábáji, to manage the estate, and the plaintiff to manage the household. The actual words used, if we can rely on their having been faithfully remembered, and deposed to, certainly favour the former view; but it is difficult to rely upon the faithful reproduction, by witnesses, of actual words; such a little colouring on the side of the wish which is uppermost in the mind of the narrator at the time of giving his evidence, makes sometimes such an immense difference in the result produced in the mind of the listener. The defendant denies that she had the intention which the plaintiff attributes to her. She also denies that she made use of the words attributed to her.

There are circumstances to be noted which tend to negative the intention on her part to cancel the effect of the agreement. It is admitted that she did not mention the agreement in her speech, which is strange, if it were her intention to cancel it. One witness says that she mentioned it to him in conversation; but, as no one else heard her do so, I cannot rely upon his statement as accurate. The lady did not, before the *Dassará* day, mention her intention to any one. She was then hovering between two firms of solicitors. Messrs. Prescott and Winter were her regular solicitors; but Bhái, the managing clerk of Messrs. Crawford and Boevey, was a great friend of Pitalé, and for that

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reason the agreement had been drawn up by the latter firm. The lady took no legal advice as to how she could carry out her intention. If by her speech she, in fact, relinquished her power over the estate, how could she then proceed to make gifts out of it to her friends and relations? The plaintiff at this time had not succeeded in ingratiating himself in his adoptive mother's favour. She remembers, evidently with bitterness, some slight which at Ghodbandar he had subjected her to a few months before. He also had not shown any marked ability or industry in his line of studies, though every effort was made to push him on. The danger, remote when the agreement was made, was on the *Dassará* day of 1883 an immediate one. The plaintiff was not of age, but had nearly attained majority. It does seem strange that she should, in fact, make him "the owner" while still a minor. To the plaintiff the whole proceeding must have seemed a farce, for he swears that he did not know of the adoption agreement till the beginning of 1885.

There are legal difficulties in the way of treating the defendant's action and words on the day in question as amounting, in fact, to an actual relinquishment of her right. She was personally liable for debts to a large amount. If she gave all the property over to the plaintiff, what provision was made for the repayment of these debts? What security had she that the Rs. 200 per month would be paid her, or the Rs. 5,000 when she required it? The plaintiff was a minor, and could not bind himself, nor is it alleged that he did so, or any one on his behalf. No delivery of possession was made of the immoveable property. As indicative of the giving effect to an intention to give, this is a most important element in Hindu law. The handing over of the keys, even assuming them to be the principal keys, was, at the utmost, but a symbolical delivery of the contents of the safes and boxes, to which the keys belonged. The safes and boxes contained the residue of the defendant's *stridhan*. It is not clear whether the plaintiff contends that it passed by the gift. The letters of administration create a further difficulty. The defendant's words could not effect a legal transfer of the estate thereby vested in her. These difficulties would lead me to hesitate long before treating the

defendant's words of the *Dassará* day as operating to presently transfer the defendant's interest in the property to the plaintiff, or to extinguish, in *presenti*, her interest in that property. If they operated only as an expression of intention, or as a promise, on her part, to do so, it is an expression of intention or a promise, which, in the absence of consideration, this Court will not compel her to carry out.

If the language of the defendant is regarded in the second of the two aspects in which it may be viewed, then the above difficulties and doubts disappear.

Passing to a consideration of the occurrences subsequent to the *Dassará*, we find that nothing was ever done to carry out the transfer of the defendant's rights to, or the relinquishment of them in favour of, the plaintiff. The tenants were not asked to, or did not, attorn to him either then or on his attaining his majority. The rent accounts, contracts, and receipts continued to be made out in the name of the defendant as the owner of the property. The books were kept as before. No change was made at the *Diváli* succeeding. The defendant, under the letters of administration of April, 1879, continued to administer the estate. Pitalé and Bábáji no doubt were the active managers of it, but all the documents and papers connected with its administration continued to be signed by the defendant. She did not execute any power of attorney in their favour until she went on a pilgrimage in July, 1885, when she executed exhibits Nos. 2 and 3. These documents indicate no trace of the defendant's being regarded as other than the legal owner of the property, and the recitals in exhibit No. 3, in especial, indicate the contrary. The plaintiff was then of full age. All the supplies needed for the household and the materials required for the up-keep of the immoveable property were procured in the defendant's name. In her name suits were brought. Old loans were renewed and new loans were taken on the responsibility and in the name of the defendant. To the world at large the defendant was the owner of the estate, and Pitalé and Bábáji were her managers. And such, I think, was their true legal position. The following special considerations show this to be so.

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(1). In a suit brought by some Márwáris against Lakshmibái upon certain promissory notes alleged to be signed by her, Pitalé was called as a witness in August, 1885, to prove, in effect, that she could not have signed them. He then swore that he had been, since March, 1883, in charge of Lakshmibái's affairs at her request, and that Bábáji was appointed to assist and to be co-manager with him of Lakshmibái's affairs at the *Dassará* of 1883; and that under their directions the rents of Lakshmibái's property were collected by a clerk. He mentioned the agreement of April, 1878, and said nothing about its cancellation. Lakshmibái herself gave evidence to the same effect. No doubt the exact legal position of the defendant with reference to the property was not then in question; but, if at the *Dassará* of 1883 the defendant had really relinquished all management and interest in favour of the plaintiff, and had not subsequently taken any interest in the estate or share in its management, it would have put her in an immensely strong position for her defence to allege and prove that fact.

(2). No document was executed cancelling the agreement, and when the plaintiff came of age, nothing was done to transfer the legal management to him. Pitalé says that it would have been expensive to have taken out fresh letters then, but he did not consult his legal advisers on the point, nor did the plaintiff; and, I think, that, at any rate, the defendant would have executed an irrevocable power of attorney in the plaintiff's favour if she really made over the management of, and the control over, the estate to him. When she executed powers of attorney in July, 1885, they were in favour, not of the plaintiff, but of the managers, and when she returned they were no longer acted on.

(2 a). When Pitalé let a bungalow at Mátherán to Mr. Fox, he expressly represented himself to the tenant as the manager of Lakshmibái.

(3). When some property was mortgaged in February, 1886, to Cursandás, the plaintiff did not join in the mortgage, but signed a letter such as a reversioner and not an owner would sign agreeing to the mortgage.

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(4). When the plaintiff in 1885 had a quarrel with the defendant, and wished to assert himself, both Pitalé and Bábáji threatened him with the agreement, and said that it would be enforced against him if he did not keep on good terms with his mother—an idle threat, if the property had been then made over to the plaintiff, and the agreement cancelled.

(5). When the defendant was going on her pilgrimage she directed the plaintiff to take out of the strong box such utensils and valuables as he would need to use in her absence, and the plaintiff made a list of them at her desire.

(6). It is doubtful, upon the evidence, what keys the defendant handed to the plaintiff upon the *Dassará* day; but the plaintiff's story, that the defendant subsequently took the keys from him by force, and that he complained to no one, and took no steps to get them back, is inconsistent with the view that he regarded himself as lord of all. He has not been on particularly good terms with the defendant since he grew up, and, consequently, I do not think his feelings of respect for her would have led him to rest quietly after such an assertion, by her, of her authority if he had really considered himself unfettered by the agreement.

(7). Until the defendant quarrelled with, and dismissed, the managers, there is no trace of any assertion, on their part or on the part of the plaintiff, that they were the managers of the latter, and not of the defendant. Such assertion is made only after the quarrel.

(8). The plaintiff himself admits that he, when he came of age, took no active part in the management. He says he was busy with his studies.

Against these considerations there is the present evidence of Pitalé and Bábáji that since the *Dassará* of 1883 they have been managing for the plaintiff, and not for the defendant. That, no doubt, is their present conception of their legal position. It is a mixed question of law and fact upon which they may be held to be mistaken without impugning their desire to tell the truth. Not unnaturally they are biassed in favour of the plaintiff's case. I have no doubt that they consider that it would be better for

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the estate and his position that he should succeed in removing the defendant from the management. Had the plaintiff withdrawn himself from their influence, and the defendant continued under it, their conception of their legal position might have been modified. When the managers say that after the *Dassará* of 1883 the defendant never interfered in the management, they are speaking to a fact. I think they slightly exaggerate in saying so; but, after all, it only shows that the defendant kept within the lines which she had marked out for herself on the *Dassará* day. The letters, written to her and by her when on her pilgrimage or absent from Bombay, show that her servants looked up to her as their mistress in the last resort, and do not, I think, show that they or she considered that she had abandoned that position. Weighing the evidence as a whole, I have come to the conclusion that I must find the sixth and seventh issues in favour of the defendant. The plaintiff's alternative case, as made in the eighth issue, must now, if persisted in, be proceeded with.

Attorneys for the plaintiff:—Messrs. *Crawford and Buckland*.

Attorneys for the defendant:—Messrs. *Craigie, Lynch, and Owen*.

## ORIGINAL CIVIL.

*Before Mr. Justice Jardine.*

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MULJI THAKERSEY AND TWO OTHERS, (PLAINTIFFS), v. GOMTI AND KASTUR, (DEFENDANTS).\*

*Marriage—Betrothal—Breach of promise of marriage—Reciprocal contingent contract—Damages—Upariyáman—Haldí Bhátiá caste.*

The plaintiffs alleged that by a written agreement dated the 18th March, 1882, the first defendant and her deceased son, Ladhá, agreed that the second defendant, Kastur, who was the daughter of the first defendant, should be given in marriage to the second plaintiff, who was the son of plaintiff No. 1; and that the betrothal of these two persons took place accordingly. The agreement was executed by the said Ladhá, as eldest male member of his family, in the name of his deceased father. In pursuance of this agreement, the plaintiffs paid to the first defendant Rá. 700 as "*upariyáman*," and they presented Kastur with ornaments and clothes of considerable value. The plaintiffs complained that the first defendant sub-

\* Suit No. 391 of 1886.