APPELLATE CIVIL.

Before Mr. Justice Ranade and Mr. Justice Crowe.

1900. *November 5.*

VENKAPPA BAPU AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* JIVAJI KRISHNA AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Adoption—Adoption by a mother succeeding to her son who has been married—Ceremonial competency of the son no bar to the adoption—Only limitation to a mother's right to adopt—Hindu Law.

A mother succeeding as heir to her deceased son who has left neither widow nor issue, is competent to adopt, notwithstanding the fact that her deceased son had attained ceremonial competency by marriage, investiture or otherwise before his death.

The real limitation on a mother's right to adopt when she succeeds as heir to her son does not depend upon the investiture, marriage or ceremonial competency of her deceased son, but upon the question whether by such adoption she derogates from any other rights save her own.

Jivaji Krishna, the holder of a kulkarni vatan, mortgaged the vatan lands to the defendants in 1879. He died in 1884 at the age of thirty without issue. His wife had predeceased him, and his mother Tulsava therefore succeeded as heir. In 1894 she adopted the plaintiff and died shortly afterwards. In 1896 the plaintiff brought this suit to set aside the mortgage and recover the mortgaged lands. The defendants contended (*inter alia*) that Tulsava's right to adopt had been extinguished because her deceased son had been married and had attained ceremonial competency, and that the plaintiff's adoption was therefore invalid and his suit could not be maintained.

Held, that the plaintiff's adoption by Tulsava was valid, inasmuch as it only affected her own interests and did not affect the vested rights of others.

SECOND appeal from the decision of T. Walker, District Judge of Dhárwár, confirming the decree of Ráo Bahádur V. V. Wagle, First Class Subordinate Judge at Dhárwár.

Suit by an adopted son to set aside the alienation of vatan lands.

One Jivaji Krishna, the holder of a kulkarni vatan, mortgaged the vatan lands in 1879 to the defendants who were his kinsmen. In 1884 he died at the age of thirty without issue. His wife had predeceased him.

On his death his mother Tulsava succeeded him as his heir. She adopted the plaintiff Jivaji, and shortly after the adoption she died.

* Second Appeal, No. 24 of 1900.

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In 1896 plaintiff Jivaji brought this suit to set aside the mortgage effected by the deceased Jivaji and to recover possession of the mortgaged lands.

Defendants contended (*inter alia*) that plaintiff's adoption was invalid; that Tulsava was not competent to adopt, her own son having reached the age of ceremonial competency before his death.

The Subordinate Judge decreed the plaintiff's claim, holding that his adoption was valid.

This decision was upheld in appeal by the District Judge.

Defendants preferred a second appeal to the High Court.

Shamrao Vithal (with *P. M. Mehta*) for appellants (defendants):—The adoption of the plaintiff was not valid. Tulsava's own son had been married and had reached the age of thirty before he died. A mother who succeeds as heir to her son is competent to adopt if her son has died unmarried. But if he has been married and dies, she has no power to adopt.—*Payapa* v. *Appanna*[1]; *Amava* v. *Mahadgauda*[2]; *Sangapa* v. *Vyasapa*[3]: see also *Ram Soondur Singh* v. *Surbanee Dossee*.[4] The same rule is laid down by the Privy Council in *Bhoobun Moye* v. *Ram Kishore*.[5] When the son is married, he attains full ceremonial competency, and his mother's power to adopt is extinguished. Tulsava therefore was not competent to adopt the plaintiff, and the adoption by her is invalid.

Setlur (with *K. H. Kelkar*) for respondents (plaintiffs):—A mother who inherits property directly from her son can always adopt—*Gavdappa* v. *Girimallappa*[6]; *Payapa* v. *Appanna*.[7] This is a necessary corollary of the recognition of the power given to widows to adopt several sons in succession—*Vellanki Venkata* v. *Venkata Rama*.[8] The cases which limit the power of the mother to adopt are cases in which property has come to the mother after having descended to another heir of the son—*Bhoobun Moye* v. *Ram Kishore*[9]; *Pudmacoomari* v. *Court of Wards*[10];

(1) (1898) 23 Bom. 327.
(2) (1896) 22 Bom. 421.
(3) (1896) P. J. 528.
(4) (1874) 22 Cal. W. R. 121.
(5) (1865) 10 M. I. A. 279 at p. 311.
(6) (1894) 19 Bom. 331.
(7) (1898) 23 Bom. 327.
(8) (1876) 4 I. A. 1; 1 Mad. 174.
(9) (1865) 10 M. I. A. 279.
(10) (1881) 8 I. A. 229; 8 Cal. 302.

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Thayammal v. *Venkatarama*(1); *Krishnarav* v. *Shankarrav*(2); *Taracharn* v. *Sureshchandra.*(3) There is no reason why marriage should be taken as the period of ceremonial competency. It is one of the sixteen ceremonies enjoined on the twice-born classes, and as compared with the ceremony of *upanayana* it is secondary in importance. On this point our contention is twofold. We say, first, that the doctrine of ceremonial competency has in the most recent cases been held to be unimportant—*Sangappa* v. *Vyasappa.*(4) Secondly, even if that test be applied, the question of marriage or no marriage is immaterial. Here the ceremonial capacity obviously refers to funeral and religious ceremonies. The chief authorities on the ceremonial law in this Presidency are Nirnaya Sindhu and Dharma Sindhu. They lay down that a boy attains competency to perform his father's *shradha* on the performance of *bhudakarma*, which may be at the end of the first year according to some, and at the end of the third year according to others. But the true principle as laid down in *Vellanki Venkata's* case(5) is that so long as the mother does not divest any estate but her own, she may adopt.

RANADE, J.:—In this appeal the only point argued before us had reference to the validity or otherwise of the adoption of the plaintiff-respondent No. 1 by one Tulsawa. This Tulsawa had succeeded as heir to her natural son who died at the age of thirty in 1884, leaving no nearer heir to him than his mother as he left no issue and his wife had died before him. Tulsawa, it appears, had at first adopted her daughter's son, but this adoption was set aside by the Civil Court in 1893. Thereupon she adopted the present plaintiff No. 1 as her son in 1894. The natural son of Tulsawa, with his mother's consent, had mortgaged some vatan lands in 1879 with the defendants who were his distant cousins, and the present suit was brought to set aside this alienation.

The defence was that plaintiff No. 1's adoption was not valid

(1) (1887) 14 I. A. 67; 10 Mad. 205.
(2) (1892) 17 Bom. 164.
(3) (1889) 16 I. A. 166; 17 Cal. 122.
(4) (1896) P. J. 525.
(5) (1876) 4 I. A. 1; 1 Mad. 174.

as Tulsawa had no power to adopt the plaintiff, when her natural son had died at the age of thirty. The other objections under the Vatan Act &c. need not be noticed as they were not pressed in appeal. Both Courts held that plaintiff No. 1's adoption was valid as Tulsawa had succeeded as heir to her son who died without issue and whose wife had died before him, and she had therefore the right to adopt the plaintiff.

The only question we have to consider is whether under the circumstances the adoption was properly held valid. Mr. Shamrao, who appeared for the appellants, contended that a mother who succeeded as heir to her son might make a valid adoption if her natural son died unmarried. But if he was married, the mother's power to adopt was extinguished and the estate must go to the reversionary heir of the son, especially in the case of a Brahmin family such as the one to which the parties belonged. This contention of Mr. Shamrao was apparently based on what is stated in *Payapa* v. *Appanna*,[1] where on page 331 occurs the remark that the widow's power to make an adoption is recognized when she succeeds as mother and heir to an *unmarried son*. In *Sangapa* v. *Vyasapa*[2] there is a similar remark of Mr. Justice Fulton, which says that in such a case the test is whether the son died *unmarried* rather than whether he had attained ceremonial competency. This test of the son dying unmarried appears to have been also mentioned in *Ram Soondur Singh* v. *Surbanee Dossee*.[3] In the leading case on the subject—*Mussumat Bhoobun Mojee* v. *Ram Kishore*[4]—the same test is suggested in the remarks of their Lordships of the Privy Council. In West and Bühler, page 986, the remark appears that it is the investiture of the son which gives him ceremonial competency. If the son dies before that period the widow may adopt. But after that stage it does not appear that the capacity of adoption can revert to the mother. It will be noted that this passage from West and Bühler fixes the competency of the mother at a much earlier stage than even Mr. Shamrao admitted was reasonable and proper. Mr. Shamrao would fix the limit at marriage and not

(1) (1898) 23 Bom. 327.
(2) P. J. for 1896, p. 528.
(3) (1874) 22 W. R. 121.
(4) (1865) 10 M. I. A. 311.

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at the investiture as is done by the writers of the Digest. As regards ceremonial competency Mr. Justice Fulton would assign to it a more subordinate place than to the test of marriage—*Amava* v. *Mahadgauda*.(1)

We have thus tried to sum up the points raised on behalf of the appellants. It appears to us, however, that the real limitation on the mother's right to adopt when she succeeds as heir to her son really does not depend upon either investiture, or marriage, or competency of the son to whom she succeeds as heir. The mention of marriage or ceremonial competency or investiture may have had reference to the particular facts of each case. When the authors of the Digest laid down the limits of investiture or ceremonial competency they had obviously in mind the religious law. When they come to discuss the decided cases they refer to *Bhoobun Moye* v. *Ram Kishore*(2) as laying down the law that the widow can exercise the authority *when her son dies unmarried or leaves no child or widow behind*. The true principle was first enunciated in express terms by the Privy Council in *Rajah Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narsayya*,(3) where the law was laid down that the mother may adopt when by such adoption she derogates from no other rights save her own as her son's heir. Whatever ceremonial defects there may be, the principle that the widow succeeding as heir to her son—which implies that the son has left neither widow nor issue, may adopt—has been now confirmed by a series of decisions commencing with *Bhoobun Moyee Debi's* case and coming down to our own time—*Bhoobun Moye* v. *Ram Kishore*,(4) *Rajendro Nath* v. *Jogendro Nath*,(5) *Sri Raghunadha* v. *Sri Brozo Kishoro*,(6) *Rajah Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narsayya*,(7) *Pudma Coomari Debi* v. *The Court of Wards*,(8) *Thayammal* v. *Venkatarama*,(9) *Rakhmabai* v. *Radhabai*,(10) *Rupchand* v. *Rakhmabai*,(11) *Annammah* v. *Mabbu*

(1) (1896) 22 Bom. 421.
(2) (1865) 10 M. I. A. 279.
(3) (1876) L. R. 4 I. A. 1.
(4) (1865) 10 M. I. A. 279.
(5) (1869) 14 M. I. A. 67.
(6) (1876) L. R. 3 I. A. 154 at p. 193.
(7) (1876) L. R. 4 I. A. 1.
(8) (1881) L. R. 8 I. A. 229.
(9) (1887) L. R. 14 I. A. 67.
(10) (1868) 5 Bom. H. C. R. (A.C.J.) 181.
(11) (1871) 8 B. H. C. R. (A.C.J.) 114.

Bali,(1) *Kally Prosonno* v. *Gocool Chunder*,(2) *Sri Dharnidhar* v. *Chinto*.(3) The argument that the *sacra* are in proper hands when the widow takes possession of them as heir to a son who dies before marriage but after investiture applies equally to a widow who adopts because her married son dies without leaving issue or widow.

The text writers on the Dattaka Law permit a man to adopt a son not only when he has no male issue born to him, but also when such male issue dies. The husband can confer this same double power on the widow, and though in this Presidency the husband's expressed permission is not required by the widow, the mother who adopts a son, because the son born to her is dead and has left no issue or widow behind, really exercises the authority conferred on her by implication by her husband. Where, therefore, she divests by her act of adoption no other estate but her own, her power cannot properly be questioned. This was the view taken by Ranade, J., in *Gavdappa* v. *Girimallappa*(4) where he distinguished the decision in *Kishnarav* v. *Shankarrav*(5) on the ground that in this last case the son's widow survived her husband and it was therefore held that the general rule that no vested interest can be divested by the act of adoption applied. Mr. Justice Parsons and Mr. Justice Ranade reaffirmed this view in *Tayapa* v. *Appanna*.(6) Mr. Justice Fulton in *Amava* v. *Mahadgauda*(7) took the same view. In *Sangapa* v. *Vyasapa*(8) the Court (Bayley and Fulton, JJ.) was asked to hold that the mother's authority was at an end when the son dies unmarried after attaining full age and ceremonial competency. But it declined to lay down such a proposition. In *Ram Soondur Singh* v. *Surbanee Dossee*(9) the second adoption was made after the first adopted son had lived twelve years and it was contended that the second adoption was invalid because the first adoption had served all religious purposes. This contention, however, was disallowed on the ground that the continuance

(1) (1875) 8 M. H. C. R. 108.
(2) (1877) 2 Cal. 295 at p. 307.
(3) (1895) 20 Bom. 250.
(4) (1894) 19 Bom. 331.
(5) (1892) 17 Bom. 164.
(6) (1898) 23 Bom. 327.
(7) (1896) 22 Bom. 416.
(8) (1896) P. J. 528.
(9) (1874) 22 Cal. W. R. 121.

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of spiritual purposes was not exhausted by the first adoption. The second adoption was necessary to perform those rites which had to be repeated every year. The attainment of ceremonial competency by reason of investiture or marriage of the first son, whether natural or adopted, could not dispense with this necessity of second adoption to continue these rites. As has been shown above the sacra represent not only the idols in the place of worship, but also the rites and the services to the manes which have to be performed in memory of the father at least twice a year though not more. The argument of ceremonial competency is thus without much force. Spiritual efficacy of worship and oblation really represent the services the son has to render to his father all his life and that makes it necessary for the widow to adopt when her son dies without issue. The mention of investiture, marriage or competency as limitations on the widow's power has reference more to the ceremonial law than to the civil law as administered by the Court, and the whole current of recent decisions has been to base this limitation solely on the question whether the widow's act of adoption derogated from her own rights or the vested rights of others. The vested rights of no other relations were affected by Tulsawa's adoption of the plaintiff.

We therefore confirm the decree of the Lower Court and dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Ranade and Mr. Justice Crowe.

1900. *November* 5.

LAKSHMAN (ORIGINAL PLAINTIFF), APPELLANT, *v.* ANTAJI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Land Revenue Code (Bombay Act V of 1879), secs. 119, 120 and 121—Boundary dispute—Settlement of such dispute by Collector—Civil Court's jurisdiction—Jurisdiction.

Section 121 of the Land Revenue Code (Bombay Act V of 1879) must be read along with sections 119 and 120 of the Code.

It is only when a boundary dispute arises between the owners of adjoining lands, and the Collector is called upon to determine the dispute, that his determi-

* Second Appeal, No. 346 of 1900.