CRIMINAL REVISION.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1904. *March 3.*

EMPEROR *v.* BAL GANGADHAR TILAK.*

Indian Penal Code (Act XLV of 1860), section 193—Criminal Procedure Code (Act V of 1898), sections 435, 439—Indian Evidence Act (I of 1872)—Intentionally giving false evidene in a judicial proceeding—Absence of discussion of evidence for the defence—Explaining away the statement of the accused to his prejudice—Assignment of perjury—Proof—Misreading of documentary evidence—Fundamental errors in principle—Revisional jurisdiction.

According to the Criminal Law in England from which the Indian system is largely drawn, the assignment of perjury must be proved by two witnesses, or by one witness and the proof of other material and relevant facts confirming his testimony. This "is not a mere technical rule but a rule founded on substantial justice." The Indian Evidence Act (I of 1872) does not provide that there must be corroboration to support a conviction, but in ordinary cases and where the provisions peculiar to Indian Law do not apply, a rule which is founded on substantial justice may well serve as a safe guide to those who have to administer the criminal law in India.

Where with reference to an adoption the accused made a statement and where no other expression would with equal propriety have been used to express the corporeal act (of giving and taking in adoption), it is antagonistic to the first principles of criminal jurisdiction to explain away to the prejudice of the accused that statement which in its legitimate sense indicated a corporeal giving and taking.

Per Jenkins, C. J.:—A conviction for perjury cannot stand where the *onus* has been wrongly placed; explanations have been demanded from the accused when no occasion for them existed; and the rule that there must be something in the case to make the oath of the prosecution witness preferable to the oath of the accused has not been satisfied.

For silence to carry incriminating force in a case like the present there must have been circumstances which not only afforded the accused an opportunity to speak, but naturally and properly called for the declaration which is said to be absent.

APPLICATION for criminal revision against the order of A. Lucas, Sessions Judge of Poona, confirming the conviction of the accused on one of two counts under which he was convicted and sentenced by E. Clements, First Class Magistrate of Poona.

* Criminal application for revision No. 1 of 1904.

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The facts were as under;—

Shri Vasudeo Harihar Pandit *alias* Shri Baba Maharaj, a First Class Sardar of the Dekkhan, residing at Poona, died leaving a will dated the 7th August, 1897. Under the will the testator appointed five trustees or *panchas*, namely (1) Bal Gangadhar Tilak (accused), (2) Rao Saheb Kirtikar, Huzur Chitins, *nisbat* Karvir (Kolhapur) Sarkar, (3) Ganesh Shrikrishna Khaparde, Vakil, Amraoti (4) Shripad Sakharam Kumbhojkar and (5) Balvant Martand Nagpurkar. The will provided as follows:—

My wife Shri Sakvar (Shri Tai Maharaj) is at present pregnant. If no son is born to her, or if one is born and dies prematurely, a son should be given in adoption with the advice of the above-named gentlemen, in the lap of my wife in accordance with the *shastras*, as many times as it may be found necessary, in order to continue the name of my family; and the above-named *panchas* should manage the moveable and immoveable estate on behalf of that son until he attains majority.

Out of the above-named five persons Rao Saheb Kirtikar declined to act as trustee and probate of the will was granted to the remaining four persons by the District Court at Poona on the 16th February, 1898.

Shri Sakvarbai *alias* Shri Tai Maharaj gave brith to a posthumous son who died an infant aged about four months. Owing to the death of the posthumous son there arose the necessity of selecting a boy for adoption as provided for in the will of Shri Baba Maharaj. Sometime passed in finding out a suitable boy for adoption and on the 18th June, 1901, a meeting of the four trustees was held in Shri Baba Maharaj's wada at Poona and it was then resolved that the several boys of Shri Maharaj family at Kolhapur were not fit for adoption and that a boy out of the descendants of the brother of Sidheswar Maharaj at Babre near Aurangabad should be selected for adoption and that no other boy from other families should be adopted. Accordingly Shri Tai Maharaj, Tilak and Khaparde went to Aurangabad on the 20th June, 1901, and on the next day, Tilak and Khaparde accompanied by some other men went to a place called Nidhone near Babre where the descendants of the brother of Sidhesvar Maharaj lived. From Nidhone they took some boys

to Aurangabad for the selection of Shri Tai Maharaj. Out of the said boys, a boy named Jagannath, a son of Malhar Manohar Dev, was approved by Shri Tai Maharaj, Tilak, Khaparde and other persons. On the 27th June, 1901, a meeting of respectable and learned persons was called at Aurangabad and in their presence a verbal gift and acceptance of the boy to be adopted was made and on the same day a *dattakpatra* (deed of adoption) was also written bearing the signatures of Malhar Manohar Dev and Tai Maharaj, and attestations of witnesses. After these and other minor proceedings were finished, Shri Tai Maharaj, Tilak and other persons returned to Poona on the 28th June, 1901, Khaparde in the meanwhile having gone to Amraoti. After her return to Poona, Shri Tai Maharaj changed her mind and began to show clear indications that she wanted to adopt Bala Maharaj of Kolhapur and that the adoption would come off on the 13th or 16th July next. This circumstance led to a disagreement between Tilak, Khaparde and Kumbhojkar on one hand and Shri Tai Maharaj on the other, Nagpurkar who was the *karbhari* (manager) of Shri Tai Maharaj siding with her. There were various proceedings between the parties and among them there was an application, No 112, dated the 29th July, 1901, made by Shri Tai Maharaj to the District Judge of Poona (Mr. Aston) who was also the Agent of Sardars in the Dekkhan, against the trustees for the revocation of the probate of Shri Baba Maharaj's will, on the ground that the will was invalid and that she succeeded to the estate as the heir of her deceased posthumous son. In the said application Shri Tai Maharaj alleged that:—

Opponents 1 and 2 (Tilak and Khaparde) taking advantage of petitioner's weakness as a woman, induced her to go to Aurangabad and forced her to sign some documents relating to adoption. After her return to Poona she took legal advice and was about to take steps to protect her rights when the accused (opponents ?) by unlawful acts prevented her and ultimately by keeping her in confinement for six days attempted to coerce her into consenting to certain matters. Fortunately an event occurred which put an end to her confinement.

During the progress of the inquiry under the said application, Tilak was examined as a witness for the applicant Shri Tai Maharaj and his examination lasted from the 16th November, 1902, to the 3rd April, 1903, sometimes from day to day. After

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the examination was closed, the District Judge gave sanction for the prosecution of Tilak, *inter alia,* under section 193 of the Indian Penal Code for giving false evidence in a judicial proceeding, as follows:—

In that he made the following statements under examination as a witness during the hearing of the Miscellaneous Application, No. 112 of 1901, in the District Court at Poona,

(1). The boy was formally placed by his father on the lap of Tai Maharaj and Tai Maharaj gave him sweetmeats and then the father said to Tai Maharaj, "Now you should protect the boy—the boy has now become your son: whether fool or wise, he is yours."

(2) We never kept her (Tai Maharaj) under restraint nor intended to do so.

The case was tried by E. Clements, First Class Magistrate of Poona, who after rejecting certain applications of the accused for the examination of witnesses whose evidence was considered to be material by the defence, found the accused guilty on both the counts of the charge and sentenced him to rigorous imprisonment for eighteen months and a fine of one thousand rupees; in default, further rigorous imprisonment for two months.

On appeal by the accused the Sessions Judge acquitted him on the second count of the charge, but confirmed the conviction on the first count and reduced the sentence to six months rigorous imprisonment and a fine of rupees one thousand or in default further rigorous imprisonment for two months.

The accused having preferred an application for revision,

Branson (with *D. A. Khare*) appeared for the accused:—

Our first grievance is that the Magistrate should have examined certain witnesses whose evidence even the Sessions Judge considered was essential. We applied for a commission to examine them, but the Magistrate without giving any reasons cancelled the commission he had already granted. Most of the witnesses were so intimately connected with the facts of the case that our case has been prejudiced by their evidence not being on the record.

Secondly, we submit that the Judge should not have brushed aside the whole of the Aurangabad evidence. That evidence was also intimately connected with the principal allegations as to what took place at Aurangabad.

Thirdly, the Judge bases the conviction of the accused not on any positive evidence but rather upon what he considered to be the omission in certain of the letters addressed by the accused of the full description of what took place at Aurangabad. We contend that there is in fact no omission as in the earliest of such letters the fact of the adoption is mentioned. It is not at all necessary to give a complete description of all the ceremonies that take place at an adoption. The word adoption would connote that all the necessary ceremonies have been performed. There was no occasion to give a detailed description as the fact of the physical giving and taking of the boy was not challenged by anybody. (At this stage several Exhibits were gone through and consistency therein was pointed out).

Scott (Advocate General) with *Rao Bahadur V. J. Kirtikar*, Government Pleader, appeared for the Crown :—We submit that the High Court has no power to consider evidence in matters coming before it in revision.

As to the omission to call certain witnesses, the Magistrate has given reasons why he did not call them. The matter being within the discretion of the Magistrate, this Court has only to see whether he has exercised that discretion improperly and whether he had any data before him in the light of which he could exercise it. The Magistrate has referred to such data and has given his reasons. The Aurangabad evidence has been disbelieved by the Magistrate and the Judge also has disbelieved it by implication. The Magistrate and the Judge have very carefully sifted the several statements made by the accused in writing and we submit that the conclusion to which they have arrived with respect to the guilt of the accused is inevitable. In the letters the accused described the other ceremonies and expressly omitted to state anything about the physical giving and taking of the boy. The subsequent conduct of the accused is a piece of evidence which the Judge was competent to take into consideration. (Here several Exhibits were gone through to show that the physical giving and taking did not take place).

Branson (in reply) :—The High Court has power to interfere in revision. Section 435 of the Criminal Procedure Code

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expressly authorizes the High Court to see whether the order of the Subordinate Court is proper.

JENKINS, C. J.:—The charge on which the accused has been tried is under section 193 of the Indian Penal Code with intentionally giving false evidence in a judicial proceeding in that he made the following statements while under examination as a witness during the hearing of Miscellaneous Application No. 112 of 1901 in the District Court of Poona:—

"(1) The boy was formally placed by his father on the lap of Tai Maharaj and Tai Maharaj gave him sweetmeats and then the father said to Tai Maharaj, 'now you should protect the boy, the boy has now become your son: whether fool or wise he is yours.'

"(2) We never kept her under restraint nor intended to do so."

Mr. Clements, the Magistrate appointed to hear the case, found the accused guilty in respect of both statements, and, convicting him of the offence, passed on him a sentence of eighteen months rigorous imprisonment, and a fine of Rs. 1,000, with two months further rigorous imprisonment in default.

On appeal, Mr. Lucas, the Sessions Judge of Poona, has found the accused guilty in respect of the first statement alone, and reduced the sentence of eighteen months to six months rigorous imprisonment.

The accused has now applied to us in revision, basing his application principally on the grounds, first that the Magistrate and the Sessions Judge have failed to call evidence necessary for the proper determination of the case, and secondly, that the reasons of the Sessions Judge are insufficient to support the conviction. To understand the case a brief outline of the admitted facts is desirable.

On the 7th August, 1897, Shrimant Shri Vasudev Harihar Pandit *alias* Baba Maharaj a Sirdar of considerable position in the Deccan, died leaving a will, whereby he appointed as his representatives, the accused, Rao Saheb Kirtikar of Kolhapur, Mr. Khaparde, Mr. Kumbhojkar and Mr. Nagpurkar, and to them he committed wide powers of management over his property. Rao Saheb Kirtikar declined to act, and probate was

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granted to the rest. The testator was survived by his widow Tai Maharaj, who was pregnant at the time, and by his will he directed in the events there indicated that she should adopt a son with the advice of the trustees.

A posthumous son was born, but he died, and then the necessity arose of making an adoption. After some dicussion in which the trustees and Tai Maharaj took part, it was determined that a visit should be paid to Aurangabad in connection with the adoption of a son, and accordingly on the 19th of June, 1901, Tai Maharaj and Messrs. Tilak and Khaparde with a number of attendants left Poona for Aurangabad. Several boys were seen, and ultimately the choice fell on Jagannath, the son of Bhausaheb Dev, as the most suitable of those who had been inspected. Documents were executed in relation to the adoption, and on the 28th of June the party started for Poona.

The first of the two statements charged as false evidence in this case relates to what is alleged to have occurred at Aurangabad on the morning of the 28th. Soon after the return of the party to Poona, Tai Maharaj expressed her intention to adopt a young man from Kolhapur named Bala Maharaj, and ultimately purported to carry her intention into effect.

This brings us to the judicial proceeding in which the false evidence is stated to have been given. It commenced with a petition by Tai Maharaj to which the executors were parties as opponents, asking that the probate granted to them might be cancelled.

Such an application could only be made under section 50 of the Probate and Administration Act of 1881, and the only grounds stated in that section as a just cause of the cancellation which could have had any application were the 4th and 5th, with neither of which had the alleged adoption at Aurangabad anything whatever to do. Yet the accused, though cited by the petitioner as her witness, was kept in the witness-box, we are told, for no less than 17 days, during the greater part of which he was subjected to a most rigorous cross-examination by the person by whom he was called on matters wholly irrelevant to the subject then under investigation.

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It was in the course of this examination that the accused made the statements on which the present charge is based.

The law of England requires that a false statement in order to support a charge should be material to the question in dispute, but the Penal Code does not impose that qualification, so that we need not consider the question how far the statement became material through the ruling of the Judge, who permitted it to be put.

We have nothing to do with the second of the two statements, for Mr. Lucas has held the charge in respect of it not proved we are only concerned with the first. The prosecution in respect of these statements originated with a document described as an order, sent by the Court before whom the application for cancellation of probate was made to the City Magistrate of Poona.

The offences ascribed by that document to the accused are many, and include forgery, and the using as genuine a forged document; yet, though the accused demanded that those charges should be proceeded with, this was not done, and the Advocate General has stated in this Court that all charges except that in question now before us have been abandoned.

First we will deal briefly with the objection that the Magistrate and Sessions Judge failed to call evidence necessary for the proper determination of the case.

The accused desired that Kumbhojkar should be examined on commission; he lived outside British territory, so his attendance before the Magistrate could not be secured, while it is clear his evidence might have been of considerable value to the accused.

On the 10th of February, 1903, at the accused's instance the Magistrate decided to ask for a commission under section 506 of the Criminal Procedure Code in the case of Kumbhojkar.

On the 26th of February Mr. Strangman, counsel for the prosecution, stated that he had good reasons for believing that Kumbhojkar would appear on the 16th of March if summoned. A summons was therefore issued and further proceedings in the matter of the Kolhapur Commission were stayed.

On the 13th April (to which date proceedings were adjourned on the 16th March) "Mr. Strangman produces the evidence of two witnesses—1 Nagpurkar, 2 Vishnu Narayan—regarding

Kumbhojkar's movements. Yeshwant Ganesh is also examined by the Court......Mr. Karandikar is informed by the Court that the Court does not now consider that there are any grounds to issue a Commission for Kumbhojkar's evidence."

Now what was the evidence on which this conclusion is founded? Nagpurkar and Vishnu say in effect they were told by Yeshwant that Kumbhojkar was in Poona, so that their evidence was merely hearsay: but that is not all, for Yeshwant when called gave a direct denial to this.

How this evidence was made a ground for the decision we cannot conceive. The Sessions Judge thought "it would have been wiser if Mr. Clements had issued a Commission for the examination of Kumbhojkar at Kolhapur": it certainly would.

But this does not exhaust the accused's complaints, for he desired that Shankar Hari Gurav, Laxman Shivram Mhasvade and Anant Narayan Bele should be called by the Court.

The last of these three was an important witness, for not only did he accompany Tai Maharaj to Aurangabad, but also according to Parvati, one of the witnesses for the prosecution (Exhibit 52), "on *Dwadashi* Antoba Behale distributed sweetmeats as Jagannath had become Tai Maharaj's Yajman, *i.e.*, master." Antoba Behale is Anant Bele, we are told, and *dwadashi* is the 28th of June. Anant Bele is also said to have written an Exhibit, which was treated as of considerable importance by the Magistrate, Exhibit 14.

The Sessions Judge has commented on this and expressed the opinion that the prosecution erred in not calling these witnesses. With this we agree.

In explanation of his determination the Magistrate says "there are facts in this case which strongly support the prosecution in saying that these witnesses would not speak the truth."

On this Mr. Branson has commented that nowhere on the record does it appear that counsel for the prosecution made any such case, and this comment has not been displaced by the prosecution.

The considerations which weighed with the Magistrate were:—(*a*) "the extraordinary popularity and influence of

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the accused;" (b) that there was evidence which suggested the inference that the accused took steps to undermine whatever authority Nagpurkar had over the establishment at the *wada*; (c) that there were facts which showed interference on the part of the accused with witnesses and persons, who might have given evidence for the prosecution; (d) that there was a very instructive example of the accused's methods in the case of Parvati; and (e) that it was in evidence that Shankar left his place in the *wada* while the case was going on and that Anant Bele had deserted Tai Maharaj.

It will be seen that only the fifth of these considerations had any direct application to the particular witnesses; the other four can only be noticed to be condemned, and we pass them by without more.

The evidence as to Bele's untruthfulness is Nagpurkar's and as to Shanker's is Tai Maharaj's, and we are of opinion that the Magistrate was wrong in concluding on their testimony they would not have spoken the truth.

The Sessions Judge has pertinently remarked that all the Magistrate could assume was that perhaps they would not speak in favour of the prosecution. No reason personal to Laxman was adduced.

We think the objection urged by Mr. Branson to the course adopted by the Magistrate, and not corrected though disapproved by the Sessions Judge, well founded.

This brings us to the gravest aspect of the case, we mean the objection urged and supported most ably by Mr. Branson, that the reasons of the Sessions Judge are insufficient to support the conviction.

Now what is the evidence as to the truth or falsehood of the first statement?

The direct oral evidence consists of the sworn testimony on the one side of Tai Maharaj to its falsehood, and on the other of the several witnesses called for the defence, who deposed to its truth.

The defence witnesses include (1) Krishna Shastri bin Nathu Shastri Durge, Exhibit D 67, whose occupation is described as the "observance of the daily routine of ceremonial worship"

and who was the astrologer consulted in connection with the Aurangabad adoption; (2) Mahadeo Ganesh Bele, Exhibit D 72, a pleader of Aurangabad; (3) Krishnaji Govind, Exhibit D 73, an acting teacher in a school on a salary of Rs. 75 per month; (4) Laxman Trimbak Parnaik, Exhibit D 74, a pleader in His Highness the Nizam's Courts; (5) Vinayak Balkrishna Dongade, Exhibit D 77, a schoolmaster on Rs. 12 a month; (6) Raghunath Divakar, Exhibit D 78, an Educational Inspector's karkun on Rs. 15 per month; (7) Keshav Vithal Bhide, Exhibit D 80, Head clerk, Educational Inspector's Office, on a pay of Rs. 45 per month and with a private income as an Inamdar of about Rs. 500 per annum; (8) Shankar Balvant Poohle, Exhibit D 81, Assistant Master of the High School, Aurangabad, on a pay of Rs. 20 per month and (9) Malhar Bhausaheb Dev, Exhibit D 82, Jagannath's father.

Here then we have in opposition to Tai Maharaj's interested statement, the testimony of several witnesses of apparent respectability, and yet the whole of their evidence is put on one side without a word of comment, beyond a profitless generalization as to the unreliability of native testimony. These witnesses were not examined before the Sessions Judge, or for the matter of that before the Magistrate, so that this wholesale disregard of their testimony cannot even be defended on an appeal to the opportunities of just appreciation commonly ascribed to the officer before whom witnesses are examined.

"We must be careful," it was said in *Mudhoo Soodun Sundial* v. *Suroop Chunder Sirkar Chowdry*, (1) "not to carry this caution to an extreme length, nor utterly to discard oral evidence, merely because it is oral, and unless the impeaching and discrediting circumstances are clearly found to exist. It would be very dangerous to exercise the judicial function, as if no credit could necessarily be given to witnesses, deposing *vivâ voce*, how necessary however it may be always to sift such evidence with great minuteness and care." What is here said applies with even greater force where the witnesses thus dealt with are called on behalf of the accused, and where in the result action is taken against him. We can find in the judgment of the Sessions Judge

(1) (1849) 4 Moo. I. A. 431 at p. 441.

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no attempt at sifting this large body of Aurangabad evidence, and had it been necessary, we should have been prepared to hold that the absence of any discussion of this evidence called for the defence constituted such a grave omission, that on that ground alone we would be bound to interfere. But we proceed in preference to discuss the case on the further lines on which it has been argued before us.

At the outset it is desirable to observe the foundation on which the Sessions Judge has built up his conclusions. He says "After a very careful consideration of all the evidence I have reluctantly come to the conclusion that it is quite unsafe to believe any of the oral evidence in the case except in the following cases:—(1) when it is borne out by documentary evidence, (2) when the statements and admissions are against the interest of the side on which the witness is examined, (3) when witnesses on either side agree as to any fact." We have already pointed out that the only oral evidence directed against the accused is that of Tai Maharaj, and, as to her and Nagpurkar, the Sessions Judge himself has said not merely that he was not prepared to act on their evidence, but that he was convinced both of them had given false evidence against the accused before Mr. Clements.

Now it is necessary to see what Tai Maharaj's evidence on the point is: it is quoted in some detail in the Sessions Judge's judgment and we need not now repeat it here: suffice it to say that it agrees in no respect with the version given by the accused and his witnesses; she even describes such scene as she admits, as having occurred in her bed-room. It remains then to be seen how her version is borne out by the documentary evidence. This part of the case is rested on the documents to which we will now refer.

They group themselves under two main heads, those prior to the visit to Aurangabad, and those that came into existence during or after that visit; of the first it is said that they do not point to a fixed plan to adopt a boy at Aurangabad, that on the contrary they show Tai Maharaj had by no means abandoned the idea of adopting Bala Maharaj of Kolhapur: of the second group it is said that there is a significant absence from them of reference to a corporeal giving and taking, and that they negative it at any rate by inference.

Now the first group is obviously the less important, and it is doing it no injustice to say that for the purpose in hand it would, standing alone, be of no value: at most it could only give colour of probability.

We therefore pass it by for the present and proceed to a consideration of the second group which falls into two divisions; those documents that came into existence during the visit to Aurangabad and those subsequent to it.

Now the documents in the first of these divisions call for the comment that in the circumstances they could not be, or contain, a narrative of the occurrence to which the accused deposes: they were prior to it, so that all that can be said of them is that they lend a probability to the one version or the other as representing what immediately before the event it was expected would happen. Thus these documents too, it is obvious, are open to the same remark as the first group on which we have already commented.

This brings us to the second division of the second group. As the argument derived from the silence ascribed to the accused has occupied so large a place in the discussion before us, it will be convenient to consider here its value as an incriminating circumstance. It is usual to refer this class of proof to the maxim *qui tacet consentire videtur*, but like most maxims, this must be taken with considerable qualification even in a civil suit, much more when it is used to establish the guilt of an accused. For silence to carry incriminating force in a case like the present there must have been circumstances which not only afforded the accused an opportunity to speak, but naturally and properly called for the declaration which is said to be absent. The first documents that call for notice are Exhibits 68-A and 68-B, both purporting to be sent by Tai Maharaj to Mr. Aston, as Agent for the Sardars in the Dekkhan, the first being written in English by the accused himself, the second in Marathi at his dictation. It is true that in neither of these documents is the corporeal giving and taking mentioned; in Exhibit 68-A it is said that the party went to Aurangabad to see and select a boy eligible for adoption, that Tai Maharaj had selected Jagannath, that preliminary documents had been executed, and that the ceremony

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of adoption would be shortly celebrated. Exhibit 68-B is substantially to the same effect, but special reliance has been placed on the statement that "The celebration of the adoption ceremonies will take place at Poona hereafter when your Honour will of course be invited to the Durbar according to custom."

First then what is the value of the fact that in these documents the corporeal giving and taking is not mentioned in the light of the principle to which we have referred? In our opinion it has no appreciable force as a piece of self-disserving evidence: the proceedings at Aurangabad were not questioned at that time, much less was there any denial of a corporeal giving and taking, so that there was no occasion for the statement as to a detail of whose absence so much is made.

And we may here appropriately allude to the accused's statement in the miscellaneous proceedings that he had never heard that Tai Maharaj disputed the fact of adoption, and in truth it would seem that until those proceedings the corporeal giving and taking had never been questioned or even mooted.

In Exhibit 68-A it is said "*the ceremony of adoption will shortly be celebrated in Poona when due intimation and invitation will be formally given to your Honour*," and stress has been laid on this by the prosecution as imlpying that the giving and taking still remained to be performed. But it has not been suggested, that it would be either necessary or usual for the Agent for the Sardars to be invited to witness the giving and taking of a son in adoption. Next the expression *the ceremony of adoption will be celebrated* is at least ambiguous: it may as well connote commemoration as performance. And even if the phrase be construed in the sense of a performance with appropriate rites and ceremonies, still on the authorities that would not negative the idea of a prior secular giving and taking.

The accused was not even questioned as to the precise force of this English version.

The passage in Exhibit 68-B, which we have read, at first sight appears to tell against the accused, when regard is had to the Marathi words used. Those words are *Datta Vidhan Samarambh*, which have been rendered "the adoption ceremonies." The argument is that inasmuch as the words *Datta Vidhan* mean the "act

of giving" the expression must have meant that there was to be an actual ceremony of giving and taking. But the expression has been clearly explained by the accused in the course of his examination in the miscellaneous proceedings, though the opposing pleader by whom he was examined either could not, or would not, understand the explanation. That explanation is that the words refer to the social functions in connection with the adoption, and if that be so, it does away with the idea of an inconsistency with the statement on which the accused is charged. No evidence has been adduced to show that this explanation is incorrect, and in answer to a question put to him by the Court, the Advocate General on instructions has admitted that if the accused intended to refer to the social ceremonies he names, there was no other expression that he could so appropriately have used. We have parallel expressions in English, where we speak of a wedding breakfast or a christening party without in any way suggesting a performance at those social functions of any ceremonial rites.

The next document is Exhibit 19 in appeal, a letter dated the 30th of June, 1901, and written by Nagpurkar under Tai Maharaj's order to Kumbhojkar.

It is said that there is no reference here to giving and taking: but in the first place this letter was not written by the accused; and next it is to be noted that in describing the events at Aurangabad Tai Maharaj says, "Mr. Dadasaheb Khaparde told me to adopt any one of these, especially, if possible, *the very boy who has now been adopted.*" These words clearly indicated a complete adoption and all that is essential to it, including a taking in the lap, with which every Hindu must be familiar as a necessary act to a complete adoption. This is in accord with what is later said in the letter:—"In short there now remains no work connected with adoption. The ceremony which has to be performed will be performed soon after selection of an auspicious day."

Exhibit D-63 written on the same date in our opinion suggests no valuable inference either way.

The prosecution then refer to Exhibit 63, suggesting that the heading is not consistent with a corporeal giving and taking, and that the mention of gift and acceptance in the item opposite

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the sum Rs. 15-13-6 was an interpolation by the accused. The second of these suggestions is absolutely unwarranted, and appears to have been first made on appeal, while the heading was not written by Tilak, and is not unequivocal.

Then on the the 5th of July we have a report, Exhibit D 14, by the accused to the trustees of the estate, in which it is distinctly stated that the party returned from Aurangabad "after giving a boy in adoption on the lap of Shri Tai Maharaj", and "after finally disposing of this matter as settled." From Exhibits 23 and 22 it appears that this report came to the knowledge of Nagpurkar and that he recorded his assent.

The importance of this is that Nagpurkar, who after the visit to Aurangabad was working throughout with Tai Maharaj and against the accused, never challenged this distinct statement of corporeal giving and taking until several months later. In the face of this statement we are unable to understand how the Sessions Judge can have thought that the corporeal giving and taking was never asserted by the accused, or how he could have been led to explain away that explicit statement as merely metaphorical. It was admitted before us that no other expression could with equal propriety have been used to express the corporeal act, and it appears to us antagonistic to the first principles of Criminal Jurisprudence thus to explain away to the prejudice of the accused a statement, which in its legitimate sense indicates a corporeal giving and taking. The prosecution have attempted before us to get rid of the effect of this document by impugning it as an antedated fabrication, but nothing has been shown to support this contention, which does not seem to have been made before the Magistrate, was not noticed by the Sessions Judge, and is negatived by Exhibit 23. Finally the all-important statement in Exhibit D 14 that the party returned after a boy had been taken on the lap by Shri Tai Maharaj in adoption and after finally disposing of the matter as settled derives complete confirmation from the passage in Nagpurkar's assent in Exhibit 22 wherein he says "I will not help Shri Pandit Maharaj and Shri Tai Maharaj for *setting aside* Aurangabad adoption." On the 6th of July Tai Maharaj went to the Agent of the Sirdars and in Exhibit D 22 we have a complete

statement of all she told him. That document was written by her in his presence and it starts with the assertion, "the son made by Tilak is not pleasing to me." This in our opinion is an admission that the adoption had taken place, but for some reason is passed over without comment by the Sessions Judge. The Advocate General seeks to minimize the force of this sentence by contending that it must be read with Exhibit 19 in appeal, and that its true meaning is that the accused acted for her in the transaction. But this does not take away from the finality of the adoption implied, confirmed as it is by the phrase "the very boy who has been adopted," in Exhibit 19 in appeal.

We now come to the telegrams and letter sent by the accused to Kolhapur on the 11th of July after Tai Maharaj had attempted to proceed with the adoption of Bala Maharaj.

The first is Exhibit 10, a telegram from the accused to the Diwan of Kolhapur, in which it is said "giving and acceptance of a son by Tai Maharaj has been completed by registered deed at Aurangabad with trustees' consent." The prosecution lays stress on the reference to the giving and taking by registered deed, ignoring the effect of the word *completed*, which is certainly susceptible of the meaning that the registered deed was by way of complement to the act of giving and taking, of which it supplies tangible evidence of a character likely to influence the person addressed.

In Exhibit D 41, a telegram from the accused to the Diwan, it is said, "Trustees cannot sanction Bala Maharaj's adoption. Another boy has been already given and taken. Any other adoption would not be *valid* in law." Here the giving and taking is distinctly asserted as a bar to future adoption.

In Exhibit D 42, the accused telegraphs to the Diwan, "Any adoption by Tai Maharaj without trustees' consent is void and illegal according to Baba Maharaj's will and even if sanctioned by the Durbar will be contested." Exhibits D 43 and D 44 to the Sar Nyayadhish and the Chitnis were in the same terms. In these telegrams an additional ground of objection is advanced, but in no way traversing or antagonistic to the others.

Exhibit D 45 is a letter written by the accused to the Diwan, in which he states the objections to Tai Maharaj's proposed adoption of Bala Maharaj.

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Relying on the decision of the Privy Council, the accused maintains that Tai Maharaj cannot appoint any boy without the consent of the trustees, and he then proceeds to state the circumstances connected with the Aurangabad adoption asserting that Tai Maharaj selected and settled to take in adoption a boy named Jagannath, that a registered deed was passed by the father of the boy to Tai Maharaj giving his son in adoption and that Tai Maharaj accepted the gift by a *shera* on the document: the letter then proceeds "the adoption business is thus practically completed so far as the giving and receiving of a boy is concerned, and no other boy can now be adopted according to law. What remains is the ceremony which the trustees have resolved to celebrate soon after His Highness' permission to adopt is obtained in this case."

Later on it is said "when we returned from Aurangabad, it became known both here and at Kolhapur that the trustees were unwilling to adopt a boy above 12 and a boy from the Aurangabad family or branch *has been selected, given and taken for adoption.*"

In our opinion this letter, as will even more clearly appear from the summary of it in Exhibit D 46, a document of the next day's date, was intended to allege that as far as the giving and receiving were concerned, nothing remained to be done. We would here recall the fact that the corporeal giving and taking had been asserted six days before in the report, and it is inconceivable that the accused meant to retire from that position, which had not been challenged.

The next document on which the prosecution relies is the plaint in the Suit No. 237 of 1901 brought by the accused alone on the 12th of July against Tai Maharaj and others to restrain her from adopting without the consent of the trustees.

We are invited to draw an inference adverse to the accused from the fact that a corporeal giving and taking was not alleged and this omission is regarded as a "very significant fact" by the Sessions Judge.

We cannot understand how such an argument can have been seriously advanced, or for a moment entertained. The suit was brought by the accused alone for an injunction, so that the events at Aurangabad were irrelevant, for even a giving and taking

would not have created a right of suit in the plaint. His cause of action was the attempt to adopt without his consent. And yet an inference adverse to the accused has been drawn, because he has refrained from making an allegation that was not relevant.

We cannot for one moment adopt that view.

The Advocate General has suggested that Tilak ought to have joined Jagannath as a party, but the only answer the suggestion calls for is that in fact he did not, but rested his case, as he was entitled to do, on the cause of action appropriate to himself. As a matter of fact the pleader, who is responsible for the plaint, has given an explanation of how it came to be drawn as it was, and we know of no reason why that should not be accepted; but to regard the omission of a statement that there has been a giving and taking as significant is to misappreciate the legal position, and we hold that no inference adverse to the accused can be drawn from the plaint. Moreover Nagpurkar's recorded dissent may well have furnished a reason for avoiding any question as to the Privy Council ruling to which reference was made and on which Nagpurkar was known to rely (see Exhibit D 14).

On the 13th July the accused wrote Exhibit 74 to the Agent for Sirdars a letter in which he said, "as a matter of fact the giving and receiving in adoption of such a boy has been effected with the full consent of Tai Maharaj at Aurangabad.........the adoption now proposed is virtually a second adoption and therefore void in law." Much is made of the expression *virtually a second adoption* and evidently it was not without its influence on the Sessions Judge.

Seeing that the accused regarded the sanction of the Kolhapur Durbar as requisite to make the adoption fully operative on the Kolhapur property, it is not surprising that he should have used such phrases as *virtually* and *practically completed* and deference to the Kolhapur Durbar on this account may have influenced his choice of expression in Exhibits D 42, D 43 and D 44 to which we have already referred.

The next document is Exhibit 20 which throws no certain light on the case, and as far as we are aware no explanation of

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this has been sought from the accused nor can any inference unfavourable to him be drawn from it.

The same remark applies to Exhibit D 49, while Exhibt 21 throws no light on this part of the case.

Then we come to Exhibit No. 44, the petition for cancellation of probate, and the only remark for which this document calls is that in it Tai Maharaj does not deny the *factum* of adoption but merely alleges coercion. We do not however attach importance to this omission.

Exhibit No. 11 is a document prepared by the accused and solemnly affirmed by him on the 15th of November, 1901.

The prosecution attach the greatest importance to it as purporting to give in detail all the proceedings connected with the adoption at Aurangabad, and yet as alleging only a gift oral and in writing without specifically alleging the taking in the lap.

But the fallacy lies in estimating what the document ought to have contained in the light of the subsequent dispute: at that date no dispute had been formulated as to corporeal giving and taking, and the point naturally emphasized was the permanent evidence in the documents executed, for it would not have occurred to any one that it was necessary in stating that a boy had been adopted to reiterate the observance of the details necessarily implied.

Having dealt with the evidence on which the prosecution relies it will be instructive now to observe the standard of caution in relation to charges of perjury observed by the highest authorities.

According to the Criminal Law of England, from which our system is so largely drawn, the assignment of perjury must be proved by two witnesses, or by one witness and the proof of other material and relevant facts confirming his testimony. And we have it on high authority that this "is not a mere technical rule but a rule founded on substantial justice." The Indian Evidence Act, it is true, does not provide that there must be corroboration to support a conviction, but in ordinary cases and where the provisions peculiar to Indian Law do not apply, a rule which is founded on substantial justice may well serve as a safe guide to those who have to administer the criminal law in India.

Judged by this standard the conviction clearly cannot stand, but even if it be discarded, it is in our opinion clear on the face of the Sessions Judge's judgment that there is not enough to support the conviction.

To summarize the position it comes to this: according to the Sessions Judge Tai Maharaj, the only witness for the prosecution on this point, has given false evidence against the accused in this case, and cannot be credited except where her testimony has been borne out in one or other of the three modes named by him: the Advocate General in reply to a question from the Court has been unable to suggest that any but the first of these three modes can apply here; that is that Tai Maharaj's statement is borne out by the documentary evidence: in our opinion the documentary evidence when properly considered absolutely fails to bear out Tai Maharaj's negation.

A practical test of the value of these documents may be furnished by supposing that they constituted the sole evidence in the case, and that the accused was being tried on them before a Judge and a jury: in such circumstances we have not the smallest doubt that it would be an error of law for the Judge to allow the case to go to the jury. And yet we find the Magistrate says that "If it had been found impossible to procure Tai Maharaj's attendance in this Court, the case against the accused on the first and most important part of the charge, at any rate, would have lost none or practically none of its strength."

Our view of these documents is that even on the Sessions Judge's adverse reading of them they could not in reason do more than create suspicion and fall wholly short of legal proof, or even corroboration.

When the judgment is analysed it will be seen that it is really based on the inferences drawn from an assumed silence, but as we have already shown that silence could only be assumed by wresting words from their plain and natural meaning, and even were that not so, the circumstances at no time demanded the deduction on whose absence the conviction is based.

When the accused's statements are given their legitimate effect—we refer in particular to that contained in Exhibit D 14—it will be found that so far from there being a significant silence on his part, there was a distinct assertion by him which

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was never traversed until the proceedings in which he is supposed to have given false evidence. The onus has been wrongly placed; explanations have been demanded from the accused when no occasion for them existed; and the rule that there must be something in the case to make the oath of the prosecution witness preferable to the oath of the accused has not been satisfied.

We have not discussed individually the introductory documents as it follows from our estimate of the direct evidence in the case that they can carry matters no further, for there is nothing established to which they can give support. This applies even to the minute dated the 18th June of the trustees' resolution, which has been much discussed on both sides and we therefore only propose briefly to notice those whose value, such as it is, is derived from their nearness in time to the occurrence. First there is the deed of adoption and as to this it is said that it contains no words indicating a corporeal gift, and that this becomes the more significant in view of the fact that words descriptive of that act were struck out of the draft. On this we would make the comment, that apart from the fact that the documents could not purport to be a narrative of events that had happened, they clearly contemplate that the only thing that would remain to be done would be the ceremonies of *datta homa*, &c., and that all that was essential to make Jagannath the son would be performed at Aurangabad while the ceremonies of *datta homa*, &c., might be performed at any place.

The shastri's certificate invites the same class of comment. Exhibit D 57 must be read as a whole so that though the words "I shall not adopt any boy other than this (your son)" may admit of the view that it was a necessary safeguard, it is impossible to overlook the far more distinct expression "he has the same position as my begotten son would have had, if I had one." In this connection we may refer to the difficulty experienced by the Judge by reason of the accused's assertion that the actual placing on the lap was on the 28th, but only in order to point out that the difficulty solely arises if Tilak's statement is assumed to be false and that is the whole question in dispute. The fallacy into which the learned Judge has fallen is patent.

As we are dealing with this case in revision we have accepted the Judge's appreciation of the oral evidence and refrained from discussing the probabilities, but we find it difficult to understand what improbability can attach to the alleged incident of the placing in the lap, if the influence of the accused was sufficient to secure the execution of the adoption deed, and that as Tai Maharaj alleges, against her will and in spite of her protests.

The Advocate General's opening argument before us was based on the fact that the case is before us in revision and not on appeal. But section 435 of the Criminal Procedure Code vests this Court with power to call for the records of inferior Courts for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the irregularity of the proceedings of an inferior Court while section 439 defines our powers of revision.

We have avoided reappreciating the oral evidence: we have accepted the Sessions Judge's estimate of it, though, as we have shown, the accused had reason to complain of the failure to discuss the testimony of the witnesses called by him.

Our ground of interference, it will be apparent, is the misreading of the documentary evidence and the fundamental errors in principle, which vitiate the conduct and disposal of the case.

Accordingly we set aside the conviction and sentence, and order the fine, if paid, to be refunded.

Conviction and sentence set aside