

of the bill: *In re Jones*⁽¹⁾. Assuming that the clients do so in this case, it may be they will be satisfied with the result of the taxation, in which case it is possible that a suit by the attorney will not be necessary.

I, therefore, make an order in the terms of the prayer of the petition. But it is to be hoped that the Taxing Master will scrutinize with great care the correspondence that has been produced before me in this matter, the greater bulk of which, in my opinion, is wholly unnecessary.

The costs of this application are reserved and will abide the result of the taxation or the subsequent suit.

Attorneys for the applicants: Messrs. *Madhavji, Kamdar and Chhotubhai*.

Attorneys for opponents: Messrs. *Dinsha and Dharamsey*.

B. N. L.

(1) (1887) 36 Ch. D. 105.

APPELLATE CIVIL.

Before the Honourable Mr. Justice Chandavarkar, Acting Chief Justice, and Mr. Justice Hexton.

KALGAVDA TAVANAPPA PATIL (ORIGINAL DEFENDANT 1), APPELLANT,
v. SOMAPPA TAMANGAVDA PATIL AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1909.

June 15.

Hindu law—Adoption—Adoption of a married man having a son—The son's gotra and rights of inheritance in the family of his birth.

When a married Hindu having a son, is given in adoption, the son does not like his father lose the *gotra* and rights of inheritance in the family of his birth and does not acquire the *gotra* and a right of succession to the property of the family into which his father is adopted.

In the absence of any special custom, Jains are governed by the ordinary Hindu law.

FIRST appeal against the decision of V. V. Phadke, First Class Subordinate Judge of Belgaum, in original Suit No. 379 of 1906.

Suit to recover possession of vatan property.

The property in suit belonged to one Annappagavda. He had a son Tavnappa, defendant 2, and two step-brothers, Somappa-

* First Appeal No. 41 of 1908.

1909.

KALGAVDA
TAVANAPPA
v.
SOMAPPA
TAMANGAVDA.

gavda and Devendragavda, plaintiffs 1 and 2. Tavnappa had a son Kalgavda, defendant 1. Annappa gave his son Tavnappa in adoption to one Apaya after the birth of Kalgavda, defendant 1. Annappa died in the year 1904 after making a will, whereby he bequeathed all his property to his grandson Kalgavda. In the year 1906 Annappa's two step-brothers, plaintiffs 1 and 2, brought the present suit against defendants 1 and 2 to recover possession of the property in suit, alleging that as defendant 1 was already born at the time of the adoption of his father, defendant 2, he went along with his father into the adoptive family and the defendants had no right to Annappa's property to which the plaintiffs were entitled to succeed as Annappa's heirs. They further urged that Annappa had no authority to will away his property in favour of defendant 1.

Defendant 1 contended *inter alia* that though his father was given in adoption, still as he was born before the adoption, his rights in the family of his birth were not affected by his father's adoption and that he was the heir to deceased Annappa's estate. He also set up his right to the property under Annappa's will.

Defendant 2 did not file a written statement.

The Subordinate Judge found that the plaintiffs were entitled to succeed to the estate of Annappa in preference to the defendants and that defendant 1 was not entitled to succeed on the strength of the alleged will in his favour and he had no right of inheritance in the family of his birth. The plaintiff's claim was therefore allowed for the following reasons :—

With the exception of a single case noted at page 1148 of West and Buhler's Hindu Law, there is no direct authority on the point. Neither has the case been provided for by any of the text-writers. The analogy of the Roman Law on the point may be taken for a guide under such circumstances. According to that law, a son born before adoption of the father, passes with the father into the adoptive family (Justinian's Institutes, pages 46 and 47).

It is admitted that by adoption of a man his wife passes with him into the adoptive family. Why then should not a son pass *as well*? As to this it is said that a wife by her marriage becomes the life companion of her husband and must pass with him. The relationship of father and son is equally sacred. It cannot be done away with, except when the son is given away in adoption.

I think we should accept the common sense view of the matter. The question is, whose son the boy is after adoption of his father? There can, I

think, be no two answers to this question and everybody would be bound to admit that he remains the son of the adopted man. If that is so, he must look for his birth rights in the family of adoption. The case in West and Buhler noted above appears to have been decided on this principle.

It is, however, contended for defendants that the son of the man given in adoption might remain his son, but that no body can divest him of the interest which he has acquired by birth in the natural family. That argument is a weighty one and must be carefully considered. I attempt to consider it below.

A grandson acquires by birth a vested interest in the ancestral property. That is true enough. But that interest is not one fixed once for all, but is liable to be varied or done away with altogether. Suppose there is a family consisting of a man, his son and grandson. The property is ancestral of the man. The interest of the grandson extends to a fourth share in the property and it was acquired by him as soon as he was born. But subsequently to his birth other sons are born to the man or to his son or both, the interest of the first son is diminished thereby. He cannot be allowed to say that since he was at his birth entitled to a fourth share that share must be allotted to him notwithstanding births of other sons. This is an instance of diminution of the vested interest. Under a different state of facts the vested interest would be increased. These are of course cases in which neither the man himself nor his son have any control.

But the man or his son may for proper necessary purposes alienate the property and in that case the vested interest of the son is altogether destroyed. Likewise the vested interest of the grandson is done away with if he is given away in adoption by his father.

Thus it will appear that the vested interest of the grandson is liable to decrease or increase or to be done away with altogether. If his father can do away with the vested interest of the grandson by giving him away in adoption why should he not have the power of destroying that interest by severing all connection with the natural family by himself being given into adoption in another family? All these considerations lead me to conclude that the grandson passes by adoption of his father into another family and cannot succeed as an heir in the natural family in preference to other nearer heirs. Hence I hold that defendant 1 in this case cannot succeed in preference to plaintiffs.

Defendant 1 appealed.

M. B. Chaubal (Government Pleader) and *C. A. Rele* appeared for the appellant (defendant 1):—In spite of our father's adoption into another family we retained our right and status in the family of our birth. The parties are Jains and they do not perform *shraddhas* (annual obsequial ceremonies). Amongst them adoption is not made for spiritual purposes. It is made for secular purposes only. The theories of Hindu law based on

1909.

KALGAJDA
TAVANAPPA
S.
SOMAPPA
TAMANGAYDA.

1909.

KALGAYDA
TAVANAPPA
v.
SOMAPPA
TAMANGAYDA.

spiritual notions and *shrāddha* do not affect them: Mayne's Hindu Law, page 168, 7th Ed.; West and Buhler, p. 1148, 3rd Ed.

The Subordinate Judge has attempted to romanize the Hindu Law and has wrongly decided the case against us on the analogy of Roman Law. The case ought to have been decided according to the recognized principles of Hindu Law.

Secondly, the Subordinate Judge has held that a son born before his father's adoption goes with his father into the adoptive family in the same way as the wife goes with her husband when he is adopted. This is a wrong view. The case of a wife is different from that of a son. The wife takes through her husband while the son acquires a right by birth and takes along with the father. Besides according to the texts a wife is part and parcel of her husband.

The third ground on which the case is decided against us is that although a Hindu acquires an interest by birth, that interest is not a fixed one and is liable to be varied. But his interest as joint owner does not cease. Circumstances may increase or diminish the *quantum* of that interest. This interest acquired by birth can be taken away only in particular cases and under particular circumstances. It is a right created by a text and it can only be taken away by a text. The adopted person loses his right on account of a text: Mandlik's Translation of the Vyavahar Mayukh, p. 59. The text applies only to the person adopted. There is no text which takes away the right of a grandson, that is, a son born before adoption.

The effect of adoption is personal. It only passes the person given in adoption into the adoptive family. The forms of the ceremony of adoption do not speak of a vicarious effect on the son of the person adopted. Adoption is the civil death of a person in the family of his birth and is his re-birth in the adoptive family: Sarkar's Hindu Law, p. 150, 3rd Ed.

The opinion of the Shastri given at p. 1148 of West and Buhler should not be accepted. It is neither supported by any reason nor by any text. Even if the son's son passes out, he will not lose his interest in the family of birth. It is vested and indefeasible interest. He does not cease to be a grandson

because his father has ceased to be a son. The capacity of the adopted person's son to inherit in the family into which his father is adopted, even if allowed, will not destroy his capacity to inherit in the family of his birth, since such capacity is based on blood relationship and the rights by birth remain intact in spite of the father's adoption.

The will made by our grandfather and the other evidence in the case show that the intention of both, the grandfather and father, was that we should remain in the natural family.

Jayakar with *S. S. Patkar* appeared for the respondents (plaintiffs):—According to Hindu law the son of a person given in adoption passes with his father in the adoptive family by implication. There is no direct authority on the point either in the Text Books or British Indian Works, except one case in West and Buhler, p. 1148, which supports our contention. We submit that the rules laying the age-limit of the son to be adopted are of later growth and that the practice of giving away sons, having sons, in adoption, must have been rare: Dattak Chandrika II, 33; Sarkar's Hindu Law, p. 152, 3rd Ed.; Sarkar on Adoption, p. 359, 3rd Ed.; *Sree Brijbhookunjee Muharaj v. Sree Gokoolotsaojee Muharaj*⁽¹⁾, *Nathaji Krishnaji v. Hari Jagoji*⁽²⁾. The original texts which we rely on will have to be interpreted on this footing.

In the absence of direct authority except as aforesaid, the question will have to be determined with reference to, *first*, the principles and analogies known to Hindu law, and *secondly*, the broad equities of the case. That the parties are Jains is immaterial for no contrary custom is pleaded in this case and the general Hindu law will, therefore, apply: Mayne's Hindu law, p. 134, 7th Ed.; *Bhagwan Koer v. Bose*⁽³⁾; *Sundarji Damji v. Dahibai*⁽⁴⁾; *Manohar Lal v. Banarsi Das*⁽⁵⁾; *Amava v. Mahadgauda*⁽⁶⁾.

I. If we consider the question by the principles and analogies known to Hindu law, we find,—

(1) (1816) 1 Borr. 202 at p. 216.

(3) (1903) 31 Cal. 11.

(2) (1871) 8 Bom. H. C. R., A. C. J., 67
at p. 72.

(4) (1904) 29 Bom. 316.

(5) (1907) 29 All. 495.

(6) (1896) 22 Bom. 416 at p. 422.

1909.

KALGAUDA
TAVANAPPA
v.
SOMAPPA
TAMANGAYDA.

1909.

KALGAYDA
TAYANAPPA
v.
SOMAPPA
TAMANGAYDA.

(a) That the father, wife and son constitute a unity of Hindu family, the main idea being that the wife is the other half of the husband, and the son is the soul of the father re-incarnated. The wife and the son are both the body of the father as it were; so complete is their identification: Manu IV, 184; Mandlik's Manava Dharmashastra, p. 554; Bapu Shastri Moghe's Mitakshara, p. 15, 3rd Ed., interpretation of the term *jāyā* (wife). This identification is more complete in the case of the son than the wife: *Gangu v. Chundrabhagabri*⁽¹⁾. If therefore the wife passes with the husband, as is conceded, *a fortiori* should the son pass with the father on the adoption of the latter. The grandfather has nowhere been given the power of sending his son out of his line by adoption so as to encroach on this essential unity of the father, mother and son in Hindu law.

(b) There is also another feature of similarity between a wife and son in Hindu law, *viz.*, that the father enjoys a *patria potestas* or qualified ownership over them both: Bapu Shastri Moghe's Mitakshara, p. 225, 3rd Ed.; Yajnyavalkya Smriti II, 175 and following. If the father, therefore, is given away in adoption by the grandfather, he must pass out along with those who are recognized by Hindu law, for the purposes of developing and perfecting the domestic life, to be within the pale of the father's influence and *patria potestas* and to whose society and up-bringing he is entitled according to law. The grandfather, by the act of giving away his son, cannot deprive him of the objects over which the son enjoys such ownership. To allow the grandfather the double power (1) of tearing his son out of his natural environment, and (2) of depriving him of the right of taking his wife and sons with him, would be against the conception of Hindu law and an unjustifiable widening of the texts allowing the gift of a son in adoption, to say nothing about such a power being harsh and inequitable.

There is a passage in the Vyavahar Mayukh, Chapter IV, section 1, pl. 11, which at first sight seems to be against our contention but if rightly construed it is in our favour,

(1) (1907) 32 Bom. 275.

for it only denies that the father has over his wife and son the same kind of physical ownership as over his cow. The passage, however, admits that the father does enjoy a qualified or secondary (*gauna*) ownership over them. Medhatithi supports the same view: Manava Dharmshastra, Vol. I, p. 296. Instances of qualified ownership over the son are also to be found in the rule of Hindu law that father's dominion over the son extends to the power of giving away the son in adoption: Vyavahar Mayukh, IV, pl. 15; West and Buhler, 1146, 3rd Ed.; Sarkar's Hindu Law, pp. 117, 119, 3rd Ed. If therefore the father can transfer the son into another family by his voluntary act of giving away, there is nothing opposed to Hindu notions in holding that such a transfer takes place by implication in Hindu law by the father himself going out of his family under the gift in adoption made by the grandfather.

(c) The texts declaring the effect which adoption has on the severance of connection between parties are also in our favour. Adoption cuts away the *gotra* (line), *riktha* (inheritance) and *pinda* (funeral oblations) of the son and the father: Manu IX, 242; *Rachava v. Kalingapa* ⁽¹⁾.

Adoption, therefore, has the effect not merely of destroying the individual relationship of the father giving and the son given; its effects extend to a disconnection of the lines of the father and son, meaning thereby that the son given away and his own issue become disconnected from the father and his relations in the ascending and the descending line.

This view is confirmed by the interpretation put on the above text of Manu (IX, 242) by the Vyavahar Mayukha, Chapter IV, section 5, pl. 22, where the author after pointing out that words *gotra*, *riktha* and *pinda* have to be understood in a wide and liberal sense as inclusive of all acts, connected therewith, proceeds to state that adoption brings about the extinction of all such acts, and by way of illustration mentions that "from this also follows, as a matter of course, the cessation of family connection with the uterine brother and the father's brother and

(1) (1892) 16 Bom. 716 at p. 719.

1909.
KALGAUDA
TAVANAPPA
v.
SOMAPPA
TAMANGAYDA

1909.

KALGAYDA
TAVANAPPA
v.
SOMAPPA
TAMANGAYDA.

the rest." The author thereby illustrates the principle that the disconnecting effects of adoption are extended beyond the two individuals concerned.

The Vyavahar Mayukha, Chapter IV, section 5, pl. 37, 38 develops the same idea. The giver and taker of the boy both intend, by the adoption, to affect not only the single relationship of father and son, but the various other relations dependent on that relationship: Dattak Mimansa, VI, 8; Dattak Chandrika, II, 18 and 19. Sarkar's view (Sarkar's Hindu Law, pp. 156, 158, 3rd Ed.) that adoption is only a civil death of the person given, is not quite accurate and has not been accepted to be so: *Sri Rajah Venkata Narasimha Appa Row v. Sri Rajah Rangayya Appa Row* ⁽¹⁾.

It thus follows that the two lines having been disconnected as aforesaid by the adoption and the son being identified with the father and being also under his dominion, on the father passing out by adoption, the son also goes out with him.

(d) The relationship between the father and the son is sacred and inviolable in Hindu law; nothing can destroy it, not even the grandfather's act of giving away the father in adoption. The son, as the offspring of his father, has the *duty*, and the father, as his progenitor, the *right* of giving and receiving *shraddhas* and other obsequial rights. This nexus is indissoluble and even in cases where it is replaced by another tie based on legal fictions, as for example, the son by adoption becoming the son of the adoptive father, or the damsel's son (*kanin*) becoming in certain cases the son of his mother's father, the same is allowed as an exception in consequence of special texts: Mitakshara, I, pl. 7. Even in such exceptional cases, if by some chance the artificial tie happens to snap, the natural relationship revives and the son comes back to his genitive father as an heir or sharer: Manu, IX, 162, 181 and Medhatithi's comments thereon at pp. 1189, 1198 and 1207 of Manava Dharmashastra, Vol. II.

It was argued that the single ceremony of adoption can only affect the son who is the object of the ceremony, it cannot affect

(1) (1905) 29 Mad, 437 at p. 438.

the son's son. To this our answer is twofold—(1) The son's son passes not in consequence of any vicarious effect of the said ceremonies, but by implication of Hindu law, and (2) even the doctrine of ceremonial identification between the father and son, in the sense that ceremonies performed by the one or on the one have their effect on the other, is not unknown to Hindu law: *Manu* II, 27, 37; *Manav Dharmshastra*, Vol. I, pp. 119, 129, 130; *Yajnyavalkya* I, 56; *Bapu Shastri Moghe's Mitakshara*, p. 15.

It was further argued that the son takes by birth a vested and indefeasible interest in his paternal property which would be defeated if our contention be allowed. But adoption is an exception to this rule assuming the so-called rule is as binding and definite as alleged; as for example, if a son gives his own son in adoption can the grandfather raise this doctrine as a bar? In Hindu law the grandson's relationship to the grandfather is through the father as the word *putra* (son's son) itself indicates. If, therefore, the sonship ceases, *ipso facto*, the grandsonship must come to an end. Besides adoption wipes out all relationship traceable through the father, like that of uncle, brother and the rest: *Vyavahar Mayukh*, IV, pl. 23. The grandfather being the father's father must cease to be so the moment the father ceases to be his son. All vested rights of property being based on this relationship, as was conceded, will also end: *Mitakshara*, I, pl. 2; *Gangu v. Chandrabhagabai* ⁽¹⁾; *Ananta Balacharya v. Damodhar Makund* ⁽²⁾; *Kandasami v. Doraisami Ayyar* ⁽³⁾; *Baldeo Das v. Sham Lal* ⁽⁴⁾, *Colebrooke's Digest*, Vol. II, p. 552. The doctrine of the grandson's taking a vested interest by birth is qualified by another doctrine of Hindu law that the said vested interest works itself out through the father, as for example, for purposes of partition. The rule of Hindu law that on the father becoming disqualified, the disqualification of the son would necessarily follow unless saved by special texts, also illustrates the principle that the son's interest, though vested by birth, is traceable and works out through the father: *Mitakshara*, II, pl. 9; *prapta* in the sense of "necessarily implied."

(1) (1907) 32 Bom. 275.

(2) (1898) 13 Bom. 25.

(3) (1880) 2 Mad. 317.

(4) (1875) 1 All. 77.

1909.

KALGAYDA
TAVANAPPA
SOMAPPA
TAMANGAYDA.

1909.

KALGAYDA
TAYANAPPA
SOMAPPA
TAMANGAYDA.

If we test the question by applying the theory of *shraddhas*, the texts prescribing the *shraddhas* which the son of the adopted son has to perform support our contention: Vyavahar Mayukha, IV, pl. 23; Dattak Chandrika, III, 20, 21. The opposite contention, if allowed, will lead to a double anomaly, *first*, the son's son remaining in the old family would have no father for whom to perform the *shraddhas* and *second*, the grandfather in the old family would have no *shraddha* after his death, except for a year during which his grandson would perform it, but at the end of that period his grandson could offer the *shraddha* to him only as *pārvan* rite through his own father which is impossible *ex hypothesi*.

II. Even the broad equities of the case are in our favour for holding that the son should pass out with his father on the latter's adoption. The main tests will be—(1) What is for the welfare of the son, and (2) What would be fair and equitable from the stand point of the father going out by adoption.

(1) It is obvious that the son's welfare would be better promoted by allowing him to go out with his father for the following reasons:—(a) Pecuniarily his position would certainly be better, for generally it is only the poor or the comparatively poor who give their sons in adoption into a richer family, (b) his genitive father and mother would certainly take better care of him than the decrepit old grandfather, or the rival coparcener uncles in the family of his birth and (c) if he is a minor of tender age who would be his guardian? Unless our contention is allowed, his genitive mother and father would not be his guardians, for having gone out of the family by adoption, they would be strangers.

(2) It is unfair that the grandfather should have the power of sending the father out of the family without allowing him to take with him his sons to whose company and upbringing he has an indefeasible right. Why is his wife allowed to go with him? In order that there may be no void in his domestic existence in his new environment, a doctrine expressed in Hindu spiritual conception of the identity of the husband and wife. Is there not a similar, if not a greater, identity

with his sons, who in the strict conception of Hindu law, are his own soul re-born and his saviours in the next world by reason of the *shraddhas* they would offer him? Why should the grandfather's act of giving him away in adoption, over which in strict theory, he has no control, be allowed to deprive him of the society of his children, any more than his wife. There is no authority for the proposition that a father cannot give his adult son in adoption except with the consent of such son.

Chaubal in reply :—The motive for adoption among the Jains being purely secular, the argument based upon the theory of performing *shraddhas* and offering of *pidas* can have no application. The cases relied on are cases of succession and special custom.

The term *gotra* as used in the texts cannot mean anything else than family.

CHANDAVARKAR, Ag. C. J. :—This appeal raises an important question of Hindu law, which may be stated as follows :—When a married Hindu, having a son, is given in adoption by his natural father, does the Hindu's son also, like his father, lose the *gotra* and rights of inheritance in the family of his birth and acquire the *gotra* and a right of succession to the property of the family, into which the Hindu is adopted?

The parties to this first appeal are Jains, but, in the absence of any special custom, Jains are governed by the ordinary Hindu law: *Bhagvandas Tejmal v. Rajmal* ⁽¹⁾; *Sheo Singh Rai v. Mussumut Dakho*.⁽²⁾

No special custom, departing from the ordinary Hindu law of adoption, has been set up in the present case, and the question above stated must be determined with reference to that law.

The Subordinate Judge (Mr. V. V. Phadke), who tried the suit out of which this appeal arises, has decided the question in the affirmative, mainly on the strength of a *vyavastha* (rule) quoted as from a manuscript at page 1148 of West and Buhler's Digest of the Hindu law, 3rd Ed., and on the analogy of the Roman law. The *vyavastha* apparently represents the view of a shastri,

(1) (1873) 10 Bom. H. C. R. 241.

(2) (1878) L. R. 5 I. A. 87 at p. 108.

1909.

KALGAUDA
TAVANAPPA
SOMAPPA
TAMANGAUDA.

1909.

KALGAVIDA
TAVANAPPA
o.SOMAPPA
TAMANGAVDA.

and is one of the opinions collected on different points of Hindu law by the learned authors of the Digest. The *vyavastha* is as follows :—

“A man having a son is adopted and then dies. His son takes his place as heir in the adoptive family.”

“This is so, though another son is born (to the adopted) after the adoption.”

“The son born before his father's adoption not only is heir to the adoptive grandfather's estate, but is answerable for a debt of the grandfather admitted by his father.”

No reason is given, no text cited in support of this opinion. We cannot, therefore, accept it, unless a close and careful consideration of the principles of Hindu law, bearing on the question under consideration, satisfies us that it is correct.

The Subordinate Judge has also adopted for a basis of his decision “the analogy of the Roman law on the point” as “a guide under such circumstances”, as if the Hindu law were barren of light on the subject. That law is a jurisprudence by itself and contains within its limits all the principles necessary for application to any given case. It is doing scant justice to Hindu law as a science to suppose that, because there is no express text providing for a concrete point arising for adjudication, therefore there is nothing in it to guide a Judge in deciding that point and he must import analogies from foreign laws to help him. The Hindu law-givers have not indeed laid down a rule in express terms on every conceivable point. But having provided texts for such cases as had arisen before or in their time, they left others to be determined either with reference to certain general principles laid down by them in clear terms or by the analogy of similar cases governed by express texts. Had the Subordinate Judge (a Hindu) gone into the question in this case a little deeper and considered the authorities on Hindu law a little more carefully than he seems to have done, he would have found that there was no need of romanising the Hindu law for the purposes of his decision.

In determining the question before us, we must bear in mind the exact position which the son, born to an adopted Hindu before the adoption, occupied at that time. By birth he acquired the *gotra* or

family of his birth; and, if that family was joint and owned ancestral property (as was the case with the parties before us), he acquired by the very fact of birth, joint ownership over that property with his father. "Grandsons," says the Mitakshara, (Ch. I, Sec. V, pl. 2), "have by birth a right in the grandfather's estate equally with sons." "The grandson has a right of prohibition, if his unseparated father is making a donation, or a sale, of effects inherited from the grandfather," (pl. 9). It is true that this right of ownership by birth, which grandsons acquire, is subject to the qualification that at partition "the distribution of the grandfather's property must be adjusted through their fathers, and not with reference to themselves," (pl. 2); but that qualification merely fixes the measure of their share. It does not destroy the vested right of equal ownership with the father, which exists all the same in the grandsons. As explained in the *Viramitrodaya*:—"Thus the competency being equal, and the right by birth also being equal, equal participation would have followed but is prevented by the text: 'Among grandsons by different fathers, the allotment of shares is according to the fathers'" (*Vir. Mit.*, Mr. Golapchandra Sarcara's Translation, p. 90).

The Subordinate Judge admits all this in his judgment, but he gets over it by observing that the interest acquired by a grandson "is not fixed once for all but is liable to be varied or done away with altogether," because his share may be increased or decreased according as his father or grandfather has more or less sons and because the father has power to alienate the property. This is a fanciful mode of explaining away the grandson's interest acquired by birth. A man's interest in property as joint owner does not cease because circumstances may increase or diminish the quantum of that interest. As for alienation, it is allowed only in special cases. But that does not affect the question of the grandson's vested right. To quote the *Viramitrodaya* again:—"It has been established that in the grandfather's property the grandsons also acquire ownership by birth; hence the equality of the grandson's share (with a son's share) in the grandfather's property is based upon the authority of the texts and not founded upon any equitable principle." (Page 91.)

1909.

KALGAUDA
TAVANAPPA
v.
SOMAPPA
TAMANGAYDA.

1909.

KALGAYDA
TAVANAPPA
v.
SOMAPPA
TAMANGAYDA.

The son, then, begotten by an adopted Hindu before adoption, has vested rights in the ancestral property of the family of his birth. Rights of property once vested cannot be taken away except in the mode or modes prescribed by Hindu law. They cease either by death, sale, gift, degradation, disqualification or by adoption. In the case of a son, whose father has been given in adoption after his birth, if none of these modes for the extinction of his vested rights of property applies, there must be the clear authority of some text for holding that the rights in question are extinguished because the father of the owner of those rights, having been given in adoption, has his rights in his natural family extinguished by the act of adoption.

So also as to the *gotra*. That is determined by birth and it adheres to a Hindu male throughout, unless it is changed by *his* adoption into another family.

It is urged by Mr. Jayakar, who has argued the case for the respondent with his usual ability and learning, that clear authority for the extinction of the rights and *gotra* is to be found, first of all, in the text of Manu which says:—

“A given son shall never claim the family and estate of his natural father; the *pinda* (the obsequial oblation) which follows the family and heritage, and the *shraddha* and other funeral ceremonies of the giver cease.” (Manu Ch. IX, Verse 242: see Mandlik's Hindu Law, p. 59, lines 10 to 13.)

The original word for “family” in this text of Manu is *gotra*. Mr. Jayakar argues that *gotra* means *santāna*, literally, continuation, as observed by Telang, J., in *Rachava v. Kalingapa* ⁽¹⁾; or *santati*, literally, a line of descendants, as explained in the *Dattaka Mimansa* (p. 25, Shiromani's Edition), and the *Samskara Kaustubha*.

These words are not always used of *descendants* only. They are often used as meaning “family,” the whole group of ascendants and descendants. Medhatithi says that, according to some, *gotra* means *vamsha*, which applies both to the line of ascendants and of descendants. The author of the *Samskara Kaustubha* cites a *smṛiti* of Trikandi, which says, that *santati*, *gotra*, *janana* and *kula* are synonymous terms. *Kula* means, literally, family.

(1) (1892) 16 Bom. 716.

For the purposes of his argument, to make it logical, Mr. Jayakar must contend that the word *gotra* is used in Manu's text as applying only to the descendants of the man giving his son in adoption. The argument is that when the son is given, his son too ceases to belong to the family of his birth; and that because Manu's text says that the man given in adoption is cut off by the adoption from the *gotra*, meaning, the descending line of the giver. If that is the meaning of the word, what becomes of the adopted man's connection with the ascending line of his natural father? Does that continue? Mr. Jayakar is forced to admit it does not.

Vijñāneshvara in the *Mitakshara* gives us the meaning of *gotra* (*Mit. Sec. V, pl. 6*) on the authority of *Vrihat Manu*. "It reaches as far as the memory of birth and name extends." If *gotra* means both the ascending and the descending line of the natural father of the man given in adoption, the latter, according to Manu's text, ceases, after adoption, to have connection with both the lines. That includes his own sons born before the adoption.

The text of Manu, which we are now discussing, in terms relates to the personal *status* of the man given in adoption. It predicates certain things of him, and him only, as the result of adoption. They are the extinction in his case of the *gotra* (family) of his natural father and the right of succession to his property. And according to Hindu logicians (*Naiyayikas*), where in a text certain qualities are predicated of a person, they apply to him only and the rule in the text should not be extended to others.⁽¹⁾ Manu's text, therefore, must be confined in its application to the person of whom it speaks, that is, the man given in adoption, and not extended to his son born before the adoption.

But Mr. Jayakar contends that the explanation of the text given by Nilakantha in the *Vyavahara Mayukha* brings that son within its operation. That explanation is as follows:—

"Therefore the son begotten by the simple adopted son should likewise perform his father's *sapindikarana*, *paravana*, *shraddha*, and the like cere-

(1) The rule is— उद्देश्य विधेय भावस्थले उद्देशावच्छेदकव्यापकत्वम् विधेये भासते ।

1909.

KALGAYDA
TAVANAPPASOMAPPA
TABANGAYDA.

monies in conjunction even with the (original) adopter." (Mandlik's Hindu Law, p. 59, lines 32 to 35.)

"The son begotten by the *simple* adopted son" means, according to Mr. Jayakar, a son begotten whether before or after adoption. But the original words used for that expression do not support that construction. The words are *kevala dattaka janyah putrah*, that is, a son begotten by the *simple adopted son*. The begetter is specified as one endowed with a particular status—that of adoption. The special reference to the *status* shows that the son begotten by such a person is one begotten after that person has acquired the *status*. That is the natural and grammatical construction of the words. Take, for instance, the word *vibhaktaja* (a son begotten by a separated co-parcener), used in a *smṛiti* quoted in the *Mitakshara* (Ch. I, Sec. VI, pl. 4). It means, "one begotten after partition." So also the word *patitastajjah* used in the text relating to exclusion from inheritance. It means "the offspring of an outcaste" that is, as explained by all the commentators, not one begotten by the person outcasted before excommunication, but one begotten while the begetter was under that disability. Similarly, "a son begotten by a simple adopted son" must mean one begotten after, not before, adoption.

The declarations, which have to be made at the ceremony of adoption by the person giving and the person taking respectively, are relied upon by Mr. Jayakar as supporting his case. The declaration made by the natural father of the boy is as follows:—

"I am going to give my son in adoption in order to create (between my son and his adopter) those various reciprocal obligations which arise from the various relations, such as that of father and son (at present) existing between me and the like on the one hand, and this (my) son on the other." (Mandlik's Hindu Law, p. 64, lines 6 to 10.)

This declaration refers to extinction of the "reciprocal relations" which exist at the time of the adoption ceremony between the boy and his natural father. They do not in terms refer to the reciprocal relations existing then between that father and his grandson, that is, a son begotten already by the son who is being given in adoption. A grandson stands in the place of a son to his grandfather; there are reciprocal relations between them just

as there are between the father and the grandfather. They arise no doubt through the father, but nevertheless they become, after they have arisen, independent of the relations between the father and the grandfather. And there is nothing in the language of the declaration above cited to show that these reciprocal relations between the grandfather and the grandson are affected by the gift of the father in adoption.

But Mr. Jayakar maintains that the reciprocal relations of grandfather and grandson are not independent of those between the former and the father. The grandson, he argues, is related to his grandfather through the father; the father is the principal link which binds the grandson to the grandfather, and he asks, if the link is cut off, what is left to bind the grandson to his grandfather?

This ingenious argument would seem to derive some support from the doctrine of Jimuta Vahana on the subject of a grandson's right of ownership acquired by birth in his grandfather's property while the father is alive. According to him "the grandsons and the great-grandsons whose fathers are alive cannot confer oblations on the *parva* occasions; they are not, therefore, entitled to the estate of their grandfather and great-grandfather respectively. . . Their interest in the grandfather's wealth is founded on their relation by birth to their own father; consequently they have a right to just so much as should have been their father's share."

This is not, however, the doctrine of the Mitakshara school. The author of the *Viramitrodaya*, who is substantially a follower of that school, quotes the abovementioned remarks of Jimuta Vahana and combats his view. He says "that view is not acceptable" (see the *Viramitrodaya*, translated by Mr. Golap-chandra Sarkar, pp. 90 and 91. Sec. 23a., paras 2 and 3). The reason he gives is that "in the grandfather's property the grandsons also acquire ownership by birth." That is the cardinal principle of the Mitakshara school, which divides it from the school of Jimuta Vahana. It is not correct to say that the father is the link so binding the grandson to the grandfather that, if it breaks, it carries with it the grandson too. The father is a link

1909.

KALGAYDA
TAVANAPPA
v.
SOMAPPA
TAMANGAYDA.

1909.

KALGAYDA
TAVANAPPA
v.
SOMAPPA
TAMANGAYDA.

so far that through him *sapinda* relationship between grandfather and grandson is brought about. This is pointed out by Vijnaneshwara in the chapter on *Achara* (ceremonies) in the *Mitakshara*, while explaining the term *sapindata* as "connection by particles of one body" (see the passage cited in translation in *Lallubhai Babubhai v. Mankuvarbai*)⁽¹⁾. But when the relation has once been brought about by birth, the grandson becomes an entity by himself, and the continuance of that relation does not depend on the continuance of the father's relation to the grandfather. Even if the father die or become an ascetic, or outcaste, and thereby cease to have any right to the grandfather's property, the rights of the grandson, born before any of those events, do not cease but continue.

One of the obligations, which the *Shastras* impose upon every Hindu as arising from his relation to his paternal ancestors, is to beget a son and thereby discharge a debt called *piru runa* or paternal debt due to those ancestors. This reciprocal obligation, it is urged, is extinguished when the Hindu is given in adoption by his father, and the extinction means the wiping out of the line of son, grandson, etc., represented by the son given in adoption, so far as the giver and other members of his family are concerned. The answer to that is that, when the Hindu has begotten a son before he is given in adoption, the paternal obligation has been discharged; the debt has been paid off; and that particular "reciprocal obligation" has as obligation ceased to exist. "Immediately on the birth of his first-born a man is called the father of a son and is freed from the debt to the manes." [Manu IX, 106.] The son born to the Hindu has taken the place of the debt; as grandson born in the family he has acquired certain rights; and there is no question of reciprocal obligation with reference to him between the Hindu and his father giving him in adoption. A debt discharged in the mode prescribed by the *Shastras* ceases to be a debt and with it the obligation as to it dies, so far as the father is concerned. The grandson becomes charged with a similar obligation, he becomes a continuer of the line himself⁽²⁾ being both

(1) (1876) 2 Bom. 388 at p. 423.

(2) See on this point section 23A of the *Virmitrodaya*, p. 90 of Mr. Golapchandra Sarcar's translation.

for religious and secular purposes of as much value to the grandfather as the father. The obligation and the line represented by the grandson must continue unless it is extinguished altogether in the mode or modes prescribed by the *Shastras*, that is, by death or excommunication or by the giving of the grandson himself in adoption by his father. Nowhere do the *Shastras* say that they are extinguished by the mere fact of the father having been given in adoption.

1909.
KALGAYDA
TAVANAPPA
v.
SOMAPPA
TAMANGAYDA.

The declaration, made by the person taking the Hindu in adoption at the adoption ceremony, runs as follows:—

“In order to create between this person on the one hand, and me and the like on the other hand, various reciprocal obligations consequent on the various mutual relations, such as those of father and son; I am going to adopt (this person as) a son.” (Mandlik's Hindu Law, p. 64, lines 19 to 23.)

Here again, “the reciprocal obligations” spoken of are those to arise in future, that is, after the adoption, as a consequence of it. One of those obligations is for the adopted son to beget a son and thereby discharge the *pitru runa* or paternal debt. That cannot mean discharging a debt by means of a son born before the adoption, who has already served to discharge another debt, due to the ancestors in the natural family of the adopted son.

So far, then, as the texts and commentaries bearing directly on the question of adoption are concerned, they do not support the case for the respondent. They deal merely with the personal *status* of the man or boy given in adoption; and do not purport to affect the *status* of his son, begotten before adoption.

But it is argued that when a married man is given in adoption, his wife passes with him into the adoptive family—she, like him, acquires the new *gotra*; that what applies to the wife of the man adopted must apply to his son also, begotten before the adoption, because, both according to the Smriti writers and their commentators, a man's wife and sons go together. In support of this argument reliance is placed on a text of Narada cited by Vijnaneshvara in his chapter on “Resumption of Gifts” in the *Mitakshara* (p. 225, Moghe's 3rd Ed.).

That text says that a man shall not make a gift or sale of his sons and wife. The reason for that rule, as given by Nilakantha

1909.

KALGAUDA
TAVANAPPA
SOMAPPA
TAMANGAUDA.

in the *Vyavahara Mayukha*, is that "there being no ownership over a wife as there is in a cow, &c., there cannot be any property in the children begotten on her," (Mandlik's Hindu Law, p. 35, lines 32 and 33.) This merely propounds the law so far as a man's power to make a gift or sale of his wife and children is concerned. It does not follow from it that the man's relations to the children are the same in every respect as his relations to his wife. When he is given in adoption, his wife passes with him into the adoptive family, because, according to the *Shastras*, husband and wife form one body. A woman can be given in marriage but once. (Mandlik's Hindu Law, p. 169, para. 65.) For the purposes of *dharma* (religion), *artha* (wealth), and *kāma* (desires), she and her husband are inseparably united; as long as her husband is alive, the wife is dependent on him; with her he has to worship the domestic fire; she is necessary to him for family sacrifices; in short, as a commentator puts it, "the relation of husband and wife is one of close proximity." If the husband becomes contaminated by one of the deadly sins (*mahā pātaka*), the wife has to wait till he is purified. On her death, her funeral ceremonies have to be performed by the family (*gotra*) of her husband, if her marriage has been according to one of the approved forms. That is, by the *gotra* to which the husband belonged at her death. This intimate relation between husband and wife makes it necessary and natural that when the husband is given in adoption, his wife should pass too, because the lot of the one is cast with that of the other. But that kind of intimate relation does not exist as between a father and his son. It is true that, according to the *shastras*, there is a certain kind of identity between them. "The father," it is said, "is reproduced in the son." The meaning and import of that is explained in the judgment of this Court in *Gangai v. Chandrabhagabai* ⁽¹⁾ which deals with the question of the exclusion of persons under disability from inheritance.

The theory of identity between a father and his son recognised by the *shastras* does not mean that they are one body as husband and wife are. It means that they are to some extent co-equals. Adoption does not disqualify a man for inheritance or a share

(1) (1907) 32 Bom, 275 at p. 284.

at a partition in the same way as disqualifying causes such as impotence, excommunication from caste, blindness, lunacy, and the like. The latter deprive a man absolutely of the right to inherit and the right to partition. Adoption, on the other hand, substitutes those rights in the family of adoption for those acquired in the family of birth. No complete analogy can, therefore, be drawn for the purposes of the question we are now discussing from the texts on the subject of exclusion from inheritance or partition of persons disqualified.

But, assuming that an analogy can properly be drawn, it is rather against than in favour of the respondent's case. The leading text on the subject of disinherison mentions the persons disqualified, but does not mention their sons except in the case of the outcaste. Even in that case, it is only the son born after the father's excommunication who is included among disqualified heirs. The next text refers to the *aurasa* and *kshetraja* sons of the persons disqualified. In the case of these sons, that text says, no disqualification can exist, if they are personally free from the disabilities mentioned in the preceding text. This second text, says Vijnaneshvara in his gloss in the *Mitakshara*, became necessary because of the preceding text "implying" that the father's disqualification leads also to the son's disqualification. Not that it necessarily implies, but that the second text is intended to remove a doubt which might arise in consequence of the mutual relations of father and son.

Now, in dealing with the question of exclusion from inheritance, the *smriti* writers and the commentators have taken care to point out expressly that certain kinds of sons do not but other kinds of sons do share their father's disqualification. But they have not done that in dealing with the subject of adoption.

If it be argued that the reason for providing a special text, exempting the *aurasa* and *kshetraja* sons from sharing their father's disqualification for inheritance, could only be that, but for that special text, those sons with the other kinds of sons would have been included in the father on the ground of the *Shastrie* identity, the answer is furnished by the language of the leading text on the subject of disinherison. If, because of that identity, what disqualifies the father must disqualify the son also in all

1009
KALGAUDA
TATAPAPPA
v.
SOMAPPA
TAMANGAUDA

1909.

KALGAYDA
TAYANAPPA
v.
SOMAPPA
TAMANGAYDA.

matters and especially in those relating to property, where was the necessity of specially referring in that text to the son begotten by an outcaste after the latter's excommunication and not mentioning at the same time the sons of the other disqualified persons? If a father and his son are identical so that what happens to the one must happen to the other, then it must follow that, if a father becomes an outcaste, or contract some other impurity, the son must also necessarily contract it. And yet every Hindu knows that is not the law or *shastra*.

But then, argues Mr. Jayakar, if it be held that the son of a Hindu, begotten before the latter's adoption, does not pass with the Hindu into his adoptive family but remains a member of the family of his birth, this result must follow that the son in question cannot, on the Hindu's death, perform the different obsequial ceremonies, due from every son to his deceased father, and that because the father in such a case has ceased to be his father by going into another *gotra* or family. The son can perform the *shraddha* and other death ceremonies of his grandfather, but the *Shastras* prescribe that in all these ceremonies the oblations must be offered to the soul of the father first, where the father has died. Here there is no father, he having gone into another family, and, if there is no father, the oblations to the grandfather and other ancestors cannot be given. This argument involves the assumption that, when a married man having a son is given in adoption, one result of the adoption is that it destroys the natural relation of father and son between them for the purposes of obsequial ceremonies. All that Manu's text, to which reference has been made in the foregoing part of this judgment, lays down is that *the man given in adoption* loses his natural *gotra* or family and the right to inherit the property of his natural father, and with them his right to offer *pinda* or funeral oblations to *his* natural father. But the text does not say that the son of that man, born before his adoption, ceases to be his son and loses the right to offer funeral oblations to his soul, in case of his death. For one thing, according to the Hindu *Shastras*, "by no means can you make your father cease to be" (Jaimini, *Bibliotheca Indica Series*, Vol. I, p. 742). The mere fact that the father has gone into another family by adoption and ceased to be of his son's *gotra* or family cannot unmake what he naturally is—the son's

father. The *gotras* of the two may differ in consequence of the adoption, but it is not always necessary for funeral ceremonies that the person performing them should be of the same *gotra* as the deceased. A sister's son and a son-in-law can perform those ceremonies and yet they are not of the same *gotra*. So a son begotten before the adoption of his father would be entitled to perform the latter's funeral ceremonies. All the *Smṛiti* says is that such ceremonies "shall be performed by a son." It does not make the obligation dependent upon the continuance of the father in the same *gotra* as the son.

In that case, argues Mr. Jayakar, the son must be also entitled to the father's property in his adoptive family. That is a *non sequiter*. According to Aparārka, a son must perform the funeral ceremonies of his father even where the father has left no property for the son to inherit. (Aparārka, Anandashrama series, p: 463.)

Manu's text says that the funeral oblation follows the inheritance, not the inheritance the funeral oblation. Nilakantha in the Vyavahara Mayukha makes this clearer. "The funeral rites of the deceased, as far as the 10th day inclusive, should be performed by whoever takes his wealth, including the king himself. And Vishnu says the same: 'He who takes the wealth is declared (to be) the giver of the *pinda* or funeral oblations.'" (Mandlik's Hindu Law, p. 84, lines 15 to 20.) And Balambhatta explains in his commentary on the Mitakshara that "the right to offer funeral oblations and the right to take the deceased's property by right of heirship are not always co-extensive but they may be opposed" ⁽¹⁾. So also the Viramitrodaya:—

"The capacity for presenting funeral oblations is not alone the criterion of the right to heritage, since the younger brothers are entitled to the heritage although they are not competent to offer oblations while there is the eldest brother." (The Viramitrodaya, translated by Mr. Golapchandra Sarkar, p. 91.)

But, Mr. Jayakar asks, what if the man giving his son in adoption dies after the adoption, leaving him surviving that son and his son begotten before adoption? The man's son cannot

⁽¹⁾ पिण्डदत्तं न रिक्थहारिन् व्याप्यमपितु विपरीत् ।

909.

KALGAYDA
TAVANAPPA
v.
SOMAPPA
TAMANGAYDA.

perform his funeral ceremonies, because Manu's text ordains that to be a necessary result of the adoption. Nor can that son's son perform it, because it is laid down ⁽¹⁾ that no one who has his father alive shall perform any *shraddha*.

The answer is, that is the general rule, but to it there are several exceptions. It is unnecessary to specify the latter here. They are given in detail by Nilakantha in his *Shraddha Mayukha*⁽²⁾. Among the exceptions is a case where the father has become an ascetic (*sanyasta*) or an outcaste (*patita*). In such a case, says Nilakantha, the grandson has the right to perform all the ten *Shraddhas*⁽³⁾. The general rule in fact applies only where the grandfather has left a son qualified to perform the ceremonies. This is clear from a *Smriti* of Katyayana quoted by Madhavacharya in his *Parashara Samhita* (Bombay Oriental series, Vol. I, Part II, p. 462), which says:—

“A grandson should not perform the funeral ceremonies of the grandfather if the grandfather has (died leaving) a son.”

If the grandfather dies after having given his son in adoption, he must be regarded as having died sonless for the purposes of his funeral ceremonies, and of succession to his property. The grandson in that case takes the son's place. It is not correct, therefore, to say that a grandson has no power in any case to present oblations so long as the father is alive. As is pointed out by Mitra Misra in the *Viramitrodaya* “the fitness for presenting oblations is not wanting in grandsons too (while their father is alive)” (Translation by Mr. Golapchandra Sarkar, p. 91)

For these reasons the question argued in this appeal and stated at the commencement of this judgment must be answered in the negative. The result is that the appeal must be allowed, the decree of the Subordinate Judge reversed, and the claim of the appellant awarded with costs throughout on the respondents.

Decree reversed.

G. P. R.

(1) जीवे पितरि वै पुत्रः श्राद्धकारं विवर्जयेत्।

(*Shraddha Mayukha*.)

(2) नैव पौत्रेण कर्तव्यं पुत्रवांश्चेत् पितामहः।

(3) The reference is to pages 22, 23 and 24 of the edition published by Mahadeo Gopal Sastri Amrapurkar, J. and Durpan Press.