

the application may be disposed of on the merits here. But the lower Court has decided the application on a preliminary ground and it would not be right to say anything as to the merits at this stage. This appeal is decided only on the allegations made in the petition, which contains an averment that the applicant is a guardian of the minor as defined by the Act and that the ward is removed from his custody.

It follows, therefore, that the order of the lower Court must be set aside and the application sent back to that Court for disposal according to law.

Costs to be costs in the application.

*Order set aside.*

R. R.

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PRIVY COUNCIL.\*

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BAL GANGADHAR TILAK AND OTHERS, PLAINTIFFS, v. SHIRINIVAS  
PANDIT AND OTHERS, DEFENDANTS.

P. C.<sup>o</sup>  
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[On appeal from the High Court of Judicature at Bombay.]

January 21,  
22, 25, 26,  
27, 28, 29.  
March 26.

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*Hindu law—Adoption—Validity of adoption—Non-performance of ceremony of datta homam—Will giving power to widow to adopt with consent of trustees where one declines to act—Omission to follow provisions of section 145 of Evidence Act as to using documents to contradict witnesses—Inferences drawn from documents so used, and basing decision on them to prejudice of witnesses—General allegations of undue influence and fraud without specific issues or pleas.*

On this appeal, their Lordships of the Judicial Committee, in a suit to establish the validity of an adoption, *Held* (reversing the decision of the High Court) that on the evidence and under the circumstances of the case the adoption was valid.

Where the boy to be adopted is of the same *gotra* as the adoptive father the performance of the ceremony of *datta homam* is not essential to the validity of the adoption among Maratha Brahmins in Bombay.

\* *Present* :—Lord Shaw, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

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*Valubai v. Govind Kashinath*<sup>(1)</sup> approved, as being based not on the particular degree of relationship, but upon the broad ground of the identity of *gotra*.

A Hindu testator by his will appointed five trustees of his property and gave power to his widow to adopt a son with their consent and advice; and one of the trustees declined to act, *Held* that the consent of the declining trustee was not necessary, and the adoption made with the consent of the other four trustees was valid.

It is a general, salutary, and intelligible rule, and one substantially embodied in section 145 of the Evidence Act (I of 1872) that if a witness is under cross-examination on oath, he should be given the opportunity, if documents are to be used against him, to tender his explanation and clear up the particular point of ambiguity or dispute: and the duty of enforcing such a rule is clear, especially where a witness' reputation or character is at stake. In this case, where the general principle of this rule and the specific provisions of section 145 had not been followed, but documents had been used for the purpose of contradicting witnesses without calling their attention to the portions of the documents so used, their Lordships were of opinion that the decision of the High Court on the evidence amounted to an inferential verdict of perjury against the witnesses which was not justified.

*Seemle*: Where coercion, undue influence, fraud and misrepresentation are set up as rendering a transaction invalid, each one should be specifically pleaded, and a definite issue upon it settled. In attacking an adoption an issue, "whether the plaintiff is a validly adopted son," is not one on which any of the above grounds should be permitted to be raised by general allegations.

*Wallingford v. Mutual Society*<sup>(2)</sup> per Lord Selborne; and *Gunga Narain Gupta v. Tiluckram Chowdhry*<sup>(3)</sup> referred to as to the defence of fraud.

APPEAL 33 of 1914 from a judgment and decree (23rd September 1910) of the High Court of Bombay which reversed a judgment and decree (31st July 1906) of the Subordinate Judge of Poona.

The main question for determination in this appeal was whether appellant 4, Shri Jagannath Vasudev Pandit Maharaj, was the duly adopted son of the late Vasudev Harihar Pandit, *alias* Shri Baba Maharaj.

The suit was brought by the appellants Bal Gangadhar Tilak, Ganesh Shrikrishna Khaparde, Shripad

(1) (1899) 24 Bom. 218 at p. 221. (2) (1880) 5 App. Cas. 685 at p. 697.

(3) (1888) 15 Cal. 533 : L. R. 15 I. A. 119.

Sakharam Kumbhojkar, and the abovenamed 4th appellants to establish the adoption of the 4th appellant, and to enforce the alleged rights of the other appellants to manage the estate of the deceased Baba Maharaj, who died on 7th August 1897 leaving him surviving his widow, Shri Sakwarbai (referred to generally as Tai Maharaj) who was then enceinte, a daughter the second respondent Shri Saubhagyavati Shantaka, and two other daughters by a previous wife who were not concerned with this appeal. On the day of his death Baba Maharaj executed a will whereby he appointed the first three appellants, and two other persons, B. M. Nagpurkar and Rao Sahib Kirtikar trustees to carry on the management and administration of his estates after his death, and directed that if a son were not born to his wife, or if the son born should be short-lived, a boy should be adopted by his wife with the consent and advice of the trustees, and that the trustees should carry on the management of the estate on behalf of the son so adopted until he attained majority.

After the testator's death Rao Sahib Kirtikar declined to act as trustee or to join in an application for probate of the will, but the appellants 1 to 3 and Nagpurkar duly obtained probate from the District Court of Poona, and from the Kolhapur Court (where some of his properties were situate) and took charge of and proceeded to manage the estates.

On 18th January 1898 Tai Maharaj, the testator's widow, gave birth to a son who, however, died on 9th March 1898.

The circumstances relating and preliminary to the adoption of the 4th appellant, and the evidence as to his eventual adoption are sufficiently stated in the judgment of their Lordships of the Judicial Committee.

Subsequently to that adoption the widow, Tai Maharaj, was induced, as alleged by Nagpurkar and other persons,

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to repudiate all that had taken place with respect to it, and eventually on 19th August 1901 she purported to adopt the first respondent, Shri Shrinivas Pandit, as a son to her husband.

Thereupon, on 23rd September 1901 the appellants instituted the suit, which gave rise to the present appeal, against Tai Maharaj, Nagpurkar, and Shrinivas Pandit for (*inter alia*) a declaration that the 4th appellant was the duly adopted son of the testator.

Tai Maharaj in her written statement denied that she had adopted the 4th appellant, and stated (*inter alia*) that she had no trustworthy person to advise her at Aurangabad (where the adoption of the 4th appellant had taken place); that the appellants 1 and 2 had threatened her that they would not return to Poona themselves, nor allow her to do so, until she had selected one of the Babre boys; that under the compulsion of these and other threats she was forced by those appellants to sign the documents, neither of which (though she was told they were about the selection of a boy) was read or explained to her; and she submitted that the documents were not binding upon her.

The other defendants filed written statements denying the adoption of the 4th appellant, and setting up that of the first respondent.

On 30th September 1903, during the pendency of the suit, Tai Maharaj died and her daughter the second respondent was substituted for her on the record and filed a written statement denying both the adoptions and claiming the estate of the testator in her own right.

The only issue now material of those settled was the 5th which was, "whether the plaintiff No. 4 is the validly adopted son of Baba Maharaj." There was no specific issue raised as to coercion or undue influence.

The Subordinate Judge found on the evidence that the corporeal giving and taking of the 4th plaintiff in adoption was proved, and that no religious ceremonies were legally necessary inasmuch as the boy adopted was of the same *gotra* as his adopter, and the adoption was intended to be complete without them. He believed the evidence of the plaintiffs 1 and 2 and their witness as to what had taken place at Aurangabad and disbelieved that of the witnesses called by the defendants. And he made a decree in favour of the plaintiffs.

From that decision Shri Shrinivas Pandit, the third defendant, appealed to the High Court, and on the hearing of the appeal by Chandavarkar and Heaton, JJ., raised the point that the adoption was, if otherwise complete and valid, the result of undue influence exercised on the widow by the plaintiffs 1 and 2. For the plaintiffs it was contended that that point had not been pleaded or raised as an issue, that no evidence had been given of it, that it had not been argued in the lower Court, and that it ought not to be allowed to be raised for the first time on the hearing of the appeal; but these objections were overruled.

The High Court held that there had not in fact been any corporeal giving and taking of the boy in adoption; and that the adoption had been brought about by undue influence exercised by the plaintiffs 1 and 2 over the widow Tai Maharaj. The High Court accordingly reversed the decision of the Subordinate Judge, and dismissed the suit with costs.

On this appeal,

*Sir H. Erle Richards, K.C., Sir W. Garth, and J. M. Parikh* for the appellants contended that Jagannath Pandit, the fourth appellant, was the duly adopted son of the deceased Vasudev Pandit. The undue influence with which the appellants Tilak and Khaparde were

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charged should not have been allowed as a ground for the alleged invalidity of the adoption. The circumstances of the case made such a charge most improbable. The persons charged with using it had no personal interest in the adoption, and derived no benefit whatever from it, and the widow herself was anxious to make the adoption. There was in fact no evidence of any exercise of undue influence which could only have occurred by coercion or fraud. None of these grounds were pleaded, nor was any specific issue raised on them: the case of undue influence was only raised by general allegations in the High Court on appeal. Reference was made to *Abdul Hossein Zenail Abadi v. Charles Agnew Turner*<sup>(1)</sup> [LORD SHAW referred to *Wallingford v. Mutual Society*<sup>(2)</sup>], *Gunga Narain Gupta v. Tiluckram Chowdhry*<sup>(3)</sup> was also cited, and as to raising and amending issues sections 146 and 149 of the Civil Procedure Code (Act XIV of 1882) were referred to. The High Court, therefore, should not have made the above grounds the foundation of relief to the respondents in respect of the invalidity of the adoption. *Bayabai v. Bala Venkatesh Ramakant*<sup>(4)</sup> was distinguished.

The findings of the High Court as to the facts of the adoption (putting the boy into the lap of the adoptive mother, &c.) were contrary to the weight of evidence. They were founded on inferences drawn from portions of certain documents put in and the oral evidence of Tilak and Khaparde was disbelieved. But the portions of the documents which were said to discredit their evidence were never shown to them in cross-examination, as should have been done in accordance with the provisions of section 145 of the Evidence Act (I of 1872). On this ground also the decision of the High Court as

<sup>(1)</sup> (1887) 11 Bom. 620 : L. R. 14  
I. A. 111.

<sup>(3)</sup> (1888) 15 Cal. 533 : L. R. 15  
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<sup>(2)</sup> (1880) 5 App. Cas. 685 at p. 697.

<sup>(4)</sup> (1866) 7 Bom. H. C. R. Appx. 1.

to undue influence, and as to there having been no real giving and taking of the boy in adoption should be set aside. The documents themselves, it was submitted, were not inconsistent with the appellants' oral evidence, but on the contrary supported it.

It was also contended that the performance of the ceremony of *datta homam*, among Maratha Brahmins in Bombay, was optional and not essential to the validity of the adoption, if, as was the case here, the boy to be adopted was of the same *gotra* as the adoptive father. The question was one on which the Indian authorities differ : see Trevelyan's Hindu Law (Ed. 1912) 147 : *Valubai v. Govind Kashinath*<sup>(1)</sup> ; *Atma Ram v. Madho Rao*<sup>(2)</sup> ; *V. Singamma v. Vinjamuri Venkatacharlu*<sup>(3)</sup> ; and *Govindayyar v. Dorasami*<sup>(4)</sup>. A formal giving and taking of the boy, as had occurred here, is considered to be a complete adoption amongst all classes in Bombay. West and Buhler's Hindu Law (3rd Ed.) 922. Where the *gotra* is different the ceremony of *datta homam* may be necessary. It was not necessary amongst Sudras because they have no *gotras* ; Strange's Hindu Law, Vol. I, 96 ; and Strange's Hindu Law, Vol. II, 89, 104 and 218 to 220. For the meaning of "*gotra*" reference was made to *Ramchandra Martand Waikar v. Vinayak Venkatesh Kothekar*<sup>(5)</sup> ; and Mitakshara, Chap. II, section 5 ; and also cited were Sarkar's Hindu Law (4th Ed.) 67, 68 : Stoke's Hindu Law Books 446, note 1 ; Vyavastha Chandrika, Vol. II, 79, 455, 456 ; and Sacred Books of the East, Vol. II, 127, and Vol. VII, 106.

*Sir R. Finlay, K.C., De Gruyther, K.C., and G. R. Lowndes* for the first respondent contended that the adoption was not completed. On the date when it was said to have been performed, the intention was only to

<sup>(1)</sup> (1899) 24 Bom. 218.

<sup>(3)</sup> (1868) 4 Mad. H. C. R. 165.

<sup>(2)</sup> (1884) 6 All. 276 at p. 278.

<sup>(4)</sup> (1887) 11 Mad. 5 at p. 10.

<sup>(5)</sup> (1914) 42 Cal. 384 : L. R. 41 I. A. 290.

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select a boy then, whom it was proposed to adopt on a later date. The resolution of the trustees of 18th June 1901 referred only to the selection of a boy to be approved of for the purpose of adoption, and it was submitted that nothing more than that was done. The giving and acceptance of the boy in adoption (placing him on the adoptive mother's lap) was admittedly necessary, but there was nothing in the evidence to show that it took place, at any rate not with the intention of constituting an adoption or with the express words necessary to make the adoption valid. Even if such giving and acceptance did take place, it was not done with the consent of Tai Maharaj and was therefore not her free act, but was brought about by the undue influence of the appellants Tilak and Khaparde. The High Court, it was contended, was entitled to rely on the documentary evidence, and to draw inferences from statements in them which justified it in discrediting the evidence of the appellants' witnesses. [LORD SHAW referred to section 145 of the Evidence Act, and said the statements in the documents could not be so used unless the witnesses had been given an opportunity of explaining them in accordance with the provisions of that section.] It was too late now to take such an objection which should have been taken when the documents were produced in the first Court. The High Court had rightly found that there was undue influence, and that there was no corporeal giving and acceptance of the boy in adoption. Reference was made to the Evidence Act, sections 17, 18, 21 and 32, and the Civil Procedure Code, 1882, section 59.

But the main contention was that, the parties being Brahmins, the adoption was not valid without the performance of the religious ceremony of *datta homam* which had been omitted. The performance of that ceremony was, it was submitted, among Brahmins

except in Madras, necessary to the validity of an adoption : see Mitakshara, Chap. I, section 11, paragraph 13 ; Dattaka Chandrika, section 2, paragraphs 5 and 17 ; Dattaka Mimansa, section 5, paragraphs 31, 45, 46, 47, and 56 ; Manu, Book IX, verse 182 ; West and Buhler's Hindu Law (3rd Ed.) pages 1082, 1084, 1123 to 1128, and 1130 ; and *Ganga Baksh v. Janaki Singh*<sup>(1)</sup>. The only cases in which the *datta homam* is dispensed with are those of a brother's son, and a daughter's son ; the former being regarded as one's own son, and the latter the son of a sonless father. The case of the daughter's son shows that the necessity for the ceremony of *datta homam* is not governed by the rule of the *gotra* being the same, because a daughter's son is not of the same *gotra* as her father, and the adoption of her son by her father necessitates a change of *gotra*. There are no other exceptions to the strict rule which makes the *datta homam* essential to the validity of an adoption. There was no authority binding on this board that the *datta homam* was unnecessary when the boy to be adopted belongs to the same *gotra* as his adoptive father. The cases of *Huebut Rao v. Govindrao*<sup>(2)</sup> ; *Vahubai v. Govind Kashinath*<sup>(3)</sup> ; and *Atma Ram v. Madho Rao*<sup>(4)</sup> are cases of the adoption of a brother's son, and are distinguishable from the present case. *Govindayyar v. Dorasami*<sup>(5)</sup> followed *V. Singamma v. Vingamuri Venkatacharlu*<sup>(6)</sup>, which is based on the opinion of Mr. Ellis given in Strange's Hindu Law, Vol. II, 104 : it appeared therefore that the only authority for the doctrine of dispensing with the ceremony of *datta homam* is Mr. Ellis, a mere opinion only and not a judicial decision. Reference was also made to *Ranganayakamma v. Alwar*

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<sup>(1)</sup> (1887) Oudh. Rul. 1874 to 1893,      <sup>(3)</sup> (1899) 24 Bom. 218.

p. 81.

<sup>(4)</sup> (1884) 6 All. 276.

<sup>(2)</sup> (1821) 2 Borr. Rep. 83.

<sup>(5)</sup> (1887) 11 Mad. 5.

<sup>(6)</sup> (1868) 4 Mad. H. C. R. 165.

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*Setti*<sup>(1)</sup>; *Ravji Vinayakrav Jaggannath Shankarsett v. Lakshmibai*<sup>(2)</sup>; *Thayammal v. Venkatarama*<sup>(3)</sup>; *Bhairabnath Sye v. Mahes Chandra Bhadury*<sup>(4)</sup>; *Sayamalal Dutt v. Saudamini Dasi*<sup>(5)</sup>; *Strange's Hindu Law*, Vol. II, 87 to 89, 103, 104, 113, 131, 218 and 219; *Sarkar's Hindu Law of Adoption* (Ed. 1891), 381; *Sarkar's Hindu Law* (4th Ed.), 160; *Mayne's Hindu Law* (7th Ed.), 193 note, 200; and "Hinduism and Brahminism," by Monier Williams (3rd Ed. 1887), 366. In this case there was not merely a non-performance of the *datta homam* as being unnecessary, for the parties had the intention of performing it, so that there was an omission to perform what had been considered necessary. That omission, it was submitted, invalidated the adoption, and justified the High Court in looking upon it with suspicion in the absence of any religious ceremony: see *Sootrugun Sutputty v. Sabitra Dye*<sup>(6)</sup>. If the ceremony of *datta homam* was not necessary; the actual giving and taking of the boy must be proved, see *Shoshinath Ghose v. Krishnasunderi Dasi*<sup>(7)</sup>; but that had not been done, the actual placing the boy on the lap of the adoptive mother not having been established by the evidence. The rule for investigating cases of conflicting evidence where perjury and fraud must exist on one side or the other given in *Meer Usd-oollah v. Mussumat Beeby Imaman*<sup>(8)</sup> was referred to.

There was no evidence to show that Tai Maharaj was informed of her rights as being the heiress of her deceased son, and that her act in making the adoption would be to deprive her of the estate which had vested in her as heiress. Where there was such a concealment

(1) (1889) 13 Mad. 214 at p. 215.

(2) (1887) 11 Bom. 381 at p. 393.

(3) (1887) 10 Mad. 205.

(4) (1870) 4 Ben. L. R. 162 A. J.

(5) (1870) 5 Ben. L. R. 362 at p. 366.

(6) (1834) 2 Knapp. 287 at p. 290.

(7) (1880) 6 Cal. 381 at p. 388:

L. R. 7 I. A. 250 at p. 255.

(8) (1836) 1 Moo. I. A. 19 at pp.

44, 45.

and suppression of facts from a widow exercising her right to adopt a son, the Court declared the adoption invalid: see *Bayabai v. Bala Venkatesh Ramakant*<sup>(1)</sup>.

*A. M. Dunne* and *Abdul Majid* for the second respondent contended that the adoption was invalid as not having been made with the "consent and advice" of the trustees named in the will. That condition was in the mind of the testator at the time of his making the will; and the intention of the testator must be looked at and carried out. An adoption made without the consent of all the trustees could not therefore be valid. The adoption was not in accord with the will. Reference was made to *Narasimha v. Parthasarathy*<sup>(2)</sup>; *Beemchurn Sein v. Heeraloll Seal*<sup>(3)</sup>; and *Amrito Lal Dutt v. Surnomoye Dasi*<sup>(4)</sup>. The authority given to the widow to adopt must be strictly pursued: *Mutasaddi Lal v. Kundan Lal*<sup>(5)</sup>.

The appellants were not called on to reply.

LORD SHAW :—This is an appeal from a decree of the High Court of Judicature at Bombay, dated 23rd September 1910, which reversed the decree of the First Class Subordinate Judge at Poona, dated 31st July 1906.

The main question to be determined on the appeal has reference to the validity of the adoption by the widow of the late Shri Vasudev Harihar Pandit, *alias* Shri Baba Maharaj, of a son to her late husband. The appellant Jagannath claims to be the duly adopted son. This claim is resisted by the defendants and forms the issue in the case.

The adoption is challenged substantially upon three grounds—first, that it was never completed in fact.

<sup>(1)</sup> (1866) 7 Bom. H. C. R. Appx. 1.

<sup>(2)</sup> (1913) 37 Mad. 199 at p. 224 :  
L. R. 41 I. A. 51 at pp. 73, 74.

<sup>(3)</sup> (1867) 2 Ind. Jur. N. S. 225 at  
p. 227.

<sup>(4)</sup> (1900) 27 Cal. 996 at p. 1002 :  
L. R. 27 I. A. 128 at p. 133.

<sup>(5)</sup> (1906) 28 All. 377 at p. 380.

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This in argument was reduced to the proposition that the whole transaction had been left at the stage of a proposal to be afterwards carried into effect. As to the adoption itself, it is maintained that there was never a complete giving and taking of the child, and in particular he was not taken upon the lap of the adoptive mother. Secondly, that the religious ceremony of *datta homam*, namely, the sacrificial burning of the clarified butter in accordance with the practice of the Hindu religion, was an essential requisite, and was not performed, and that on this ground also the adoption remained inchoate.

These grounds of challenge affect the completion and formalities of the ceremony itself. The third ground, however, is one of general law. There are difficulties on the pleadings and arguments in placing it within any definite category, and to this allusion will afterwards be made. But it may at least be said that almost every known ground of challenge is imported into the case by suggestion. Allegations amounting to or compounded of fraud, circumvention, coercion, and undue influence are all mixed together. The disentangling of these separate and separable grounds of action must undoubtedly have caused certain difficulties in the Court below. But the challenge appeared to their Lordships to preserve even at the bar of the Board this mixed or jumbled character.

The facts of the case, briefly stated, are these: The late Baba Maharaj was a First Class sardar of the Deccan. He died at Poona on 7th August 1897, leaving a young widow, Tai Maharaj.

At the date of his death he made a will appointing five gentlemen as his trustees. One of these, Rao Sahib Kirtikar declined to act; the other four obtained probate of the will on 2nd December 1897. These were Messrs. Tilak, Khaparde and Kumbhojkar, the

appellants. The fourth, Mr. Nagpurkar, while remaining a trustee, after a time dissociated himself in action from his three colleagues, and was properly convened as a defendant in the suit. The suit itself was brought in defence of the validity of the adoption (the adopted child being, of course, one of the plaintiffs), and for the administration of the estate in terms of the will.

In the will the clause material to the questions of adoption and succession is as follows :—

“ My wife, Saubhagyavati, Shri Sakvarbai, is now pregnant. If she does not give birth to a son, or if the son after birth is short-lived, then, for the purpose of continuing the name of my family with the *Vichare* of the above-mentioned gentlemen, a boy should be given as often as may be necessary in adoption on the lap of my wife in accordance with the *Shastras*, and the above-mentioned *Panch* should, on behalf of that son, carry on the management of the immovable and movable estate until he attains majority.”

On 18th January 1898 the widow gave birth to a son, but he died within two months thereafter, namely, on the 9th March. The circumstances for giving effect to the testator's intentions by his widow performing an act of adoption thus arose. And it is an admitted fact in the case that for a period of over three years she and the four acting trustees made frequent enquiries and numerous efforts towards the securing of a suitable boy. The circle of relations was considerable, but for various reasons, none of which bear upon the present case, a suitable adoptee could not be found in the Kolhapur or Poona branches of her husband's family.

On the 18th June 1901 a meeting of the trustees was held, at which Tai Maharaj was present, and the facts which were otherwise spoken to by the witnesses are recorded in the minute, the substance of which was that there were no boys available in the Kolhapur family, that of all those available in the Poona family none were approved. The minute in this particular is

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of importance, because it shows that an anxious search had been made, that deference was paid to the wishes of the widow, and that objection is made to certain suggested adoptees on the ground of their being too old. One boy, the youngest named, of eleven years, being, however, stated to be in point of age suitable, although delicate. The minute then proceeds :—

“The only family which remains, therefore, is that descended from the brother of Shri Siddeshwar Maharaj at Babre. It is not yet known whether there is a boy or not in that family. But if there is a boy of that family, fit in point of age, &c., for adoption, it is our unanimous opinion that one should not be taken from any other family. And Shri Tai Maharaj is of the same opinion.

“Shri Tai Maharaj suggests that Messrs. Bal Gangadhar Tilak and Ganes Shrikrishna Khaparde should both go to Babre, select boys, and return after settling as regards that family.

“Shri Tai Maharaj should go, see boys, and approve.”

It should be mentioned that the trustees were, and had been since the testator's death, duly administering the testator's estate.

What followed upon the proceedings of the 18th June was that Messrs. Tilak and Khaparde accompanied the widow to Aurangabad, where the widow remained ; the two trustees proceeded to Nidhone, a place near the Babre village, and selected five boys within the circle of relationship, and they came back, accompanied by their parents, to Aurangabad. The boys stayed with the widow for several days, being entertained and kept under observation. Certain astrologers, including Durga Shastri, who was one of her suite who had accompanied her to Aurangabad, cast the horoscopes of the children. These proved favourable to the appellant, Jagannath ; and her personal likings appeared to point in the same direction.

All this course of conduct pointed to the entire acquiescence on the part of the widow in the testator's

wishes and directions, and so far there is no substantial suggestion to the contrary. As to what happened at Aurangabad it is sufficient to say that, in their Lordships' opinion, the sworn testimony is abundant, is clear, and is overwhelming. It amounts to this. The widow's desire, the arrangement of all parties, and the horoscopes of the astrologers all pointing in one direction, on the 27th June a meeting of the Shastris and of other persons in Aurangabad was summoned. The father of the boy being present, it was announced by the trustees that the boy had been selected. The father was taken to the widow; in pursuance of the familiar procedure she asked him to give her his boy in adoption, and he agreed. The fact of the arrangement was announced to the assembled guests, and there and then duplicate deeds of adoption were drawn up, the one being impressed with a Mouglai, and the other with a British stamp, and both intended to be signed and attested by the widow. This deed was in due form and bore that the father gave the son in adoption. The second document was a letter from the widow addressed to the father and agreeing to take the boy in adoption. So far as giving and receiving of the child these documents were prepared for and pointed to actual adoption in fact.

The preparation of the documents, however, occupied time, and the hour being late the proceedings were stopped, but were resumed early next morning. A gathering was accordingly again held early on the 28th. The deeds of adoption and the letter were duly executed, the boy was given in fact by its natural father to its adopted mother, he was received in fact by her on her lap in performance of the requisite essential in this caste of Hindus on occasion of adoption and—all being completed—the formal ceremonies and festivities were

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postponed, to take place afterwards at Poona, and the widow left Aurangabad.

The Subordinate Judge of Poona has gone into the circumstances with the utmost minuteness and detail, and he has weighed and considered every argument presented, and he comes to the conclusion that adoption was in fact completed. Notwithstanding the judgment of the learned Judges of the High Court of Bombay, their Lordships have no hesitation whatever in entirely agreeing with the Judge of first instance. Reference in a little time will be made to the reasons assigned by the High Court for differing from him. But in the meantime it may be said that it appears to their Lordships that, viewed as a matter of evidence, no other conclusion was possible than that come to by the Subordinate Judge.

Their Lordships do not stop to examine the oral testimony in detail. It is really all one way. Upon the crucial question of whether the boy was received by being taken on the lap of the adoptive mother there can be no doubt. Witness after witness speaks of it. It would be very strange if it had not taken place, because it is conceded that it is among the very elements of the ceremonial of adoption, and entirely familiar. It is not only that Hindus of various classes were present and saw it, but it has to be borne in mind what the nature of the challenge of the transaction now is. It has come to be one in which the trustees, men of high position, and some of them of learning and legal training, are accused of conspiring by fraud, duress, undue influence, and nearly everything that is improper, to have procured from the widow this act of adoption. It is not to be believed that if such a scheme were afoot, if deeds had been signed, horoscopes taken, and meetings gathered, the scheme would have failed because of

the omission of that which was elementary to the knowledge of everybody, namely, the taking of the child upon the mother's lap.

It must, however, be borne in mind that against a body of evidence of ten or twelve witnesses, five witnesses are produced for the defendants. It is sufficient to say of this evidence that most of it was entirely irrelevant to any issue in the case, and such of it as was not was disbelieved by the Judge of first instance, a verdict with which the High Court saw no ground for interfering.

It may be added that when the party returned to Poona, Mr. Tilak wrote out a full account of the transaction, which was recorded in the minutes, and the trustees who had not taken part in the mission to Aurangabad were communicated with, to the effect that the adoption was complete. The sworn evidence is entirely in accordance with what has now been stated. Here and there, there are expressions in the letters out of which it may with ingenuity be possible to suggest a doubtful meaning; for instance, that the word "selected" and "decided" refer to something in the future. And it is also undoubtedly true that both the minutes of the trustees, and the letters, date the adoption as the 27th, whereas in point of fact, as has been seen, it began upon the 27th and was concluded on the 28th. But so far as oral evidence goes, their Lordships see no reason to doubt that it represented the truth, and that the fact of adoption was by it proved.

The Subordinate Judge says:

"Here there was a clear direction of the husband to his wife to adopt, the wife after his death was anxious to carry out the direction. There is no evidence to prove that any effort or cajolery was practised upon her, or that there was any suppression or concealment of facts from her; the plaintiffs had no personal interest whatever."

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In another passage of his judgment he remarks :

"The evidence clearly shows, and it is undisputed, that on the 27th there was selection and verbal gift, and acceptance, and preparation of necessary documents. On the 28th there was execution of documents under corporeal acts of giving and taking."

In their Lordships' view these conclusions are well justified.

It is an admitted fact in the case that neither the trustees nor any of the witnesses for the plaintiffs had any interest whatsoever in the subject-matter of the suit, and that no motive can be reasonably suggested for them maintaining or testifying that the adoption of the boy mentioned was made, except that this represented the actual truth which occurred.

It is in these circumstances that their Lordships have viewed with surprise the charge which is made not only against the trustees, but against the whole body of the plaintiffs' witnesses, ten or twelve persons in all.

"The account unquestionably, to my mind,"  
says Mr. Justice Chandavarkar,

"given by the witnesses appears to be a true account of many of the series of events, and a false account of at least one, and that the most important."

This event is the taking of the child on the lap. Later on in his judgment he states :

"We are driven to believe that a considerable number of men of good position have conspired together to give false evidence."

The conclusion thus made is of the most serious character, amounting to a plain judicial finding of conspiracy and of perjury.

Their Lordships will presently refer to one or two circumstances accompanying such a verdict, but meantime they will only observe that they do not think that one word of it is justified by the evidence in the case. Referring to Messrs. Tilak and Khaparde, Mr. Justice Chandavarkar observes that—

"they were men of mature years, of exceptional education and mental qualities, lawyers and men of affairs of great repute and good standing, and both men of dominating personality."

Some of the witnesses who gave evidence for the plaintiffs are also persons of considerable standing. It is *a priori* difficult to understand how these men, with no object to gain and no interest to serve, could be supposed to have entered into the conspiracy and committed the perjury which the High Court judgment found. Their Lordships think the conclusion come to by the learned Judges to be entirely unwarranted on the facts.

Their Lordships find themselves constrained to observe upon certain procedure in the case, the result of which was to introduce into it large masses of irrelevant matter.

It should be mentioned that, subsequent to the adoption at Aurungabad, the widow, upon returning to Poona and after having been a party to certain communications naturally following the adoption which had been made, fell under other influences, and in the month of July expressed a change of mind. And on the 19th August she went through the form of another adoption, *viz.*, of Bala Maharaj—a married man older than herself—as her son. It is unnecessary to make any observations upon his claim. The widow, who, while she was a litigant, maintained that adoption, died on 30th September 1903. Her daughter who was, on her death, admitted to the suit as defendant, challenges not only the first adoption, but the second adoption also—her interest being to maintain that the provisions of the testator's will with regard to adoption had failed, that the widow became the owner of the estate as heiress to her infant son who died, and that the property passes in this way to her heir.

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It appears that the widow and Bala Maharaj left no stone unturned in the way of litigation. In July proceedings were begun to revoke the probate granted to the trustees, and subsequently criminal proceedings were instituted in respect of perjury. Their Lordships regret to observe that not only are the circumstances with regard to the criminal proceedings referred to in the present litigation by the parties, but that the depositions therein become matter apparently of materiality in the judgment of the learned Judges of the High Court.

In the opinion of the Board this was an irregularity of a somewhat serious character. They refer particularly to the depositions in the criminal case, which seem to have been imported in bulk into the present. There is a risk by such procedure of justice being perverted. A civil cause must be conducted in the ordinary and regular way, and judged of by the evidence led therein. Under section 33 of the Indian Evidence Act, 1872, evidence given by a witness in a judicial proceeding in a criminal trial is relevant for the purpose of proving in a subsequent proceeding the truth of the fact which it states, but this only, as the section proceeds—

“when the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way, &c.”

Not one of these circumstances was proved in the present case, and the depositions could not have been used with propriety even to support the evidence of the plaintiffs, which they appear to have done. But there appears to have been no warrant whatsoever for using them for the purpose of either contradicting or discounting the evidence of the witnesses, given in this suit, unless the particular matter or point had been placed before the witness as one for explanation in view of its discrepancy with the evidence then being tendered. It

was stated to their Lordships that the prosecution for perjury had in the end completely failed. With that their Lordships have nothing to do. The judgment now given is pronounced irrespective of the result of the criminal suit. Successful or unsuccessful, the introduction and use in this civil action of these criminal proceedings, as above described, were illegitimate.

A further mischance in point of procedure must now be mentioned. As already stated, the testimony of the plaintiffs' witnesses is not contradicted orally, and is internally a consistent body of evidence. But various minutes and documents are the subject of minute analysis, observation, and comment by the learned Judges of the High Court with a view to rebutting it. Their Lordships think it right to observe that in view of the serious nature of the verdict of the High Court, they have considered it within their province themselves to peruse the documents. Having done so, they are of the opinion that, taken together, they completely confirm the case made in the witness-box, and that there is no ground, in fact, for the conclusion that they either contradict the testimony or cast any reasonable doubt upon it.

But they must also record their dissent from the view that the use made of these documents in this case was justified by law. On general principles it would appear to be sound that if a witness is under cross-examination on oath he should be given the opportunity, if documents are to be used against him, to tender his explanation and to clear up the particular point of ambiguity or dispute. This is a general, salutary, and intelligible rule, and where a witness's reputation and character are at stake the duty of enforcing this rule would appear to be singularly clear.

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Fortunately the law of India pronounces no uncertain sound upon the same matter. By section 145 of the Indian Evidence Act, 1872, it is provided that—

“A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved ; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.”

Their Lordships have observed with regret and with surprise that the general principle and the specific statutory provisions have not been followed. The verdict of the High Court is an inferential verdict—none the less sweeping on that account—but an inferential verdict actually of perjury. What are the premises upon which this inference proceeds? In no inconsiderable degree they consist of documents, statements, even turns of expression, which are used to confound the spoken word. Had the safeguards set up by the law with respect to the use of documents been observed? Not at all. Not only have documents been used for the purpose of contradicting witnesses without obeying the injunctions prescribed by law, but the inference thus derived, and improperly derived, from these documents has resulted, as stated, in an inferential verdict of perjury.

Heaton J. deals elaborately with this portion of the case, and one example taken from his judgment will suffice. One letter out of many is taken, passages are cited from it, and a minute argument proceeds as to the expressions used, and why this was mentioned and that other omitted. Mr. Tilak was for five days under cross-examination before the Subordinate Judge ; but not one of these things was put to him ; and he was not asked in the witness-box to give one single explanation with regard to any of those expressions or omissions which

are now alleged to compromise him. On this point of the case no more need be said.

One other matter of procedure may be mentioned. One of the trustees, Mr. Nagpurkar, dissociated himself from his colleagues, and in July appears to have written a minute of doubt or dissent with regard to certain proceedings. A letter from him resiling from this position is also produced.

The learned Judges have come to a conclusion which would be in some respect in accord with the so-called dissent. It is a striking circumstance that Mr. Nagpurkar, a relevant witness, intimately acquainted with what had gone on, and with the position both of the trustees and widow as regards adoption, and a party in the case aware of the charges launched against his colleagues, does not appear as a witness to explain the one or to support the other.

In result, their Lordships are unable to agree with the view taken by the High Court on this part of the case.

The next argument is that the adoption was void because it lacked the ceremonial of *datta homam*, which ceremonial is declared to be essential to its legal validity.

*Datta homam* is the service of the burning of clarified butter, which is offered as a sacrifice by fire by way of religious propitiation or oblation. It is admitted that in this case the ceremony was not performed, and it seems to be fairly clear that it was one of those things which it was intended afterwards to carry out at Poona as part of the general ceremonial and festivities which were to be carried through there.

In certain circumstances the point might be the subject of a prolonged and very conflicting argument, as the authorities, ancient and modern, are not in accord on

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the point as to whether this is a legal as well as a religious requisite. There is a danger, on the one hand, of not paying due respect to those religious rites which are observed and followed among large classes of Indian belief, while, on the other hand, the danger must also be avoided of carrying these—except when the law is clear—into the legal sphere, so as to affect or impair personal or patrimonial rights. The subject of the requisites for adoption has, in recent years, been the matter of not infrequent consideration by this Board, and their Lordships refer, in especial, to the elaborate examinations of the authorities made by Lord Hobhouse in *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma*<sup>(1)</sup> and by Mr. Ameer Ali in *Ramchandra Martand Waikar v. Vinayek Venkatesh Kothekar*<sup>(2)</sup>.

The former case had reference to the validity of the adoption of an only son. From the religious point of view this is, in many writings of great authority, forbidden. There was, however, in India, considerable difference in the view as to whether the religious and legal injunctions on the subject were co-extensive. It must be admitted that if one has recourse to the ancient writings when Brahminical influence was most predominant one finds the ceremonial part of adoption the subject of highly elaborate detail; and it is beyond all question that in the course of ages many of these details have disappeared as essentials within the legal sphere. As Lord Hobhouse observes:

“The further study of the subject necessary for the decision of these appeals has still more impressed them with the necessity of great caution in interpreting books of mixed religion, morality, and law, lest foreign lawyers, accustomed to treat as law what they found in authoritative books, and to administer a fixed legal system, should too hastily take for strict law precepts which are meant to appeal to the moral sense, and should thus fetter individual

<sup>(1)</sup> (1899) 22 Mad. 398 : L. R. 26  
I. A. 113 at p. 126,

<sup>(2)</sup> (1914) 42 Cal. 384 at p. 401 :  
L. R. 41 I. A. 290 at p. 300,

judgments in private affairs, should introduce restrictions into Hindu society, and impart to it an inflexible rigidity never contemplated by the original law-givers."

The case resulted in the decision that the adoption of an only son is not null and void under the Hindu law.

The question whether the *datta homam* is a legal requisite in Bombay for adoption among the three twice-born classes does not, however, in the view of their Lordships, broadly arise in the present case. It is in no way necessary to canvas or call in question any dicta upon that general point, nor does the question arise whether, for instance, the principle extends to India at large of the decision of the Madras Full Bench in *Govindayyar v. Dorasami*<sup>(1)</sup> or of the Madras High Court in *V. Singamma v. Vingamuri Venkatacharlu*<sup>(2)</sup>, both decisions being of value as containing a careful study of the authorities, and affirming that the ceremony of *datta homam* is not essential to a valid adoption among Brahmins in Southern India, for, in the opinion of the Board, the necessity does not arise where the child to be adopted belongs to the same *gotra* as that of the adoptive father. It is an admitted fact that this was so in the present case. And their Lordships have come clearly to the conclusion that where this is so in fact then the Law of India is that the celebration of the ceremony of *datta homam* is not an essential to the legal validity of an adoption. It is conceded in argument that certain exceptions to the alleged general rule do exist, but it is maintained that these exceptions are limited to the case of the adoption of a nephew, or of a daughter's son. In decided cases this may have been the relationship in fact, but the principle of all the decisions, and in their Lordships' opinion, of all the authorities, is that within the same

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(1) (1887) 11 Mad. 5,

(2) (1868) 4 Mad. H. C. R.165.

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*gotra* the ceremony is unnecessary. They agree with what, in their opinion, is the full and careful judgment of Chief Justice Jenkins, in the case of *Valubai v. Govind Kashinath*<sup>(1)</sup>, the decision being to the effect that among Brahmins in the Presidency of Bombay, the performance of the *datta homam* ceremony is not essential to the validity of the adoption of a brother's son. An examination of the judgment shows that it was not based upon the narrow particular degree of relationship but upon the broad ground of the identity of *gotra*.

Mr. Colebrooke's annotation upon *Mitakshara*, Chap. II, s. 5, is as follows :—

“*Gotraja* or persons belonging to the same general family (*gotra*) distinguished by a common name, these answer nearly to the gentiles of the Roman law.”

A good illustration of the point has reference to the law applicable to the Sudra caste. The use of the *datta homam* is not necessary for adoption within that caste, and why? The explanation is given in a sentence by Strange in his “Hindu Law,” volume II, page 89, in which it is laid down that—

“Ceremonial adoption cannot be necessary in the case of a Sudra, since, by the *datta homam*, the adopted son is converted from the stock (*gotram*) of the natural, to that of his adoptive father ; and Sudras have no *gotra*.”

It may be added that in the treatment in the same volume, page 104, of the celebration of the *Upanayana* rite, or the investiture with the sacred thread, this is laid down :—

“With respect to the ineligibility of a person for adoption, on whom the *Upanayana* rites have been performed, it is much disputed.... The more reasonable opinion would appear to be that he is eligible, if of the same *gotra* (family) ; ineligible if of a different *gotra* from the adopter ; for if of the same *gotra*, the *datta homam*, though proper, is not necessary.”

(1) (1899) 24 Bom. 218 at p. 221.

Their Lordships do not pursue the investigation of the authorities further, adopting, as they do, the survey made in the last-mentioned judgment of the learned Chief Justice Jenkins.

In their opinion accordingly this part of the respondents' case also fails.

What remains is the attack which was made upon the transaction of the adoption itself, an attack in which the various grounds of rescission applicable to contracts in general were alluded to. Their Lordships hold that it is impossible to discover what it is that is really put forward by the defendants. Under the contract law of India, as well as by ordinary principles, coercion, undue influence, fraud, and misrepresentation are all separate and separable categories in law. It is true that they may overlap or may be combined. But in the present case it is impossible to discover what ground or grounds are really taken up. There is a well-known rule of pleading expressed in the frequently quoted language of Lord Selborne<sup>(1)</sup> that—

“With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice.”

The law of India is in no way different from this, and it has been decided over and over again, *e. g.*, in *Gunga Narain Gupta v. Tiluckram Chowdhry*<sup>(2)</sup>.

It is, in their Lordships' opinion, much to be regretted that the rule is not more strictly observed, and their Lordships are of opinion that in the present case much confusion and contention have been caused, together with much expense to the parties, in consequence of its neglect. No definite issue upon any one of the well-

(1) See *Wallington v. Mutual Society* (1880) 5 App. Cas. 685 at p. 697

(2) (1888) 15 Cal. 533 : L. R. 15 I. A. 119.

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known categories of attack was settled for trial, the only issue on the subject being—Whether the plaintiff, No. 4, is a validly-adopted son of Baba Maharaj. From time to time, in the course of this case, it is clear that specific pleadings in Indian procedure have been abandoned altogether. In short, several of the careful prescriptions of the law and of the Legislature, all of which were intended to bring litigation within definite compass and to make articulate and clear the points of difference between the parties, have been lost sight of. Their Lordships, however, are unwilling, confused though the charges be, to dismiss this part of the case on such a ground.

The position upon the facts was this: The will of the testator prescribing an adoption was clear; the wish of the widow and the trustees alike to follow it was clear; the trustees, so long as the testator's wishes were carried into effect, had no interest of any kind as to who the adoptee should be. It was also clear that the testator's will indicated that a minor should be adopted, because express provision was made for the management of the estate till that minor should come of age. It was manifest that every consideration pointed to the advantage of keeping, if possible, within the *gotra*, and it was further clear that the trustees, in advising the widow, should pay due regard to her wishes, and that, so far as this could be accomplished, they and she should act together.

It is in these circumstances a strange situation that the adoption should be challenged upon the ground, nebulously stated as it is, of fraud. There is no evidence, says the Subordinate Judge, to prove that any fraud or cajolery was practised upon her, or that there was any suppression or concealment of facts from her. With this judgment it does not appear that the High Court differs, and their Lordships entirely agree

with it. It was for some reason, however, held that the general issue above quoted did include allegations of coercion and undue influence. Coercion is by admission out of the case. There was nothing of the sort; and this is not now maintained. What remains accordingly is the judgment of the High Court to this effect that—

“The question here is difficult, she was indeed willing to adopt, but was she a free agent when she adopted the fourth plaintiff, assuming that she adopted him, or was she forced into it against her will by unconscientious means used by the first two plaintiffs, that is, Messrs. Tilak and Khaparde, and unfair advantage taken by them of her ignorance and youth, and of other fiduciary relations between them?”

The citation just made is from the notes of Mr. Justice Chandavarkar. With much respect to the learned Judge, it is, notwithstanding the protracted argument before their Lordships, even now somewhat difficult to gather what are the legal categories under which the attack upon this transaction is made. Unconscientious means are mentioned and unfair advantage is mentioned. It is needless to ask whether this implies fraud because their Lordships are of opinion that no sort of unconscientious means was employed by these trustees from beginning to end of the transaction, and that no unfair advantage was either taken or meant throughout their whole course. It is true that the adoptive mother was a young widow, probably easily guided, and that the trustees are admitted to have been men of great influence and strong personality, but their Lordships are of opinion that these were used in no respect unduly, but with propriety and entirely in the interests of the proper administration of the estate. Their Lordships cannot approve of the idea that in India the law would make the possession of reputation or high standing an element of suspicion. If it were so, then the result in India would be to import *pro tanto* a disqualification and disability into the position of reputable men.

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A reference is made in the Court of Appeal to the fiduciary relations in which the trustees stood to the widow, and in one part of the judgment impropriety of conduct upon the part of the trustees is alleged to lie in this, that they failed in their duty of informing her as to her rights. Upon inquiry as to what was meant by this, their Lordships were informed that the reference was to this effect, that if the widow had failed to adopt, then by doing so she would herself have come into the position of being heiress to her infant deceased child. The meaning of this is accordingly as follows :— Among Hindus the ceremony of adoption is held to be necessary not only for the continuation of the line of the childless father, but as part of the religious means whereby a son can be provided who will make those oblations and religious sacrifices which would permit of the soul of the deceased passing from Hades into Paradise.

The widow in the present case is said to have been injured because she had not been informed that she could win for herself his temporal estate, by violation of her husband's dying wishes, and at the price of sacrificing his soul's happiness. Their Lordships are not of opinion that it was any part of the duty of the trustees to suggest this infamous alternative to her mind. Their duty was to give effect to his wishes, and his wishes were in accord with the religious belief of Hindus in regard to adoption. It is to be recorded further that the widow herself did not put forward, during her life, any plea or suggestion of this sort; she was as anxious as the trustees that an adoption should be made.

Only a word need be said as to the argument put forward on behalf of the daughter, that neither the first nor second adoption was valid. The only separate

point put forward was to the effect that the trustees' consent had not been unanimous, one trustee out of five having declined to act. In their Lordships' opinion his consent in these circumstances was not required. Of the acting trustees it was said that one, Nagpurkar, dissented. Whether he did so or not, the question would remain as to the action of the majority of the trustees; but in their Lordships' opinion that question does not arise; because he did in fact not dissent, but consent. His dissent, or alleged dissent, was subsequently made under circumstances in which it is not necessary to inquire.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, the decree of the High Court set aside, and the decree of the Subordinate Judge restored. The appellants will have their costs here and in the Courts below.

Solicitors for the appellants: Messrs. *Downer and Johnson*.

Solicitors for the first respondent: Messrs. *T. L. Wilson and Co.*

Solicitors for respondent Shri Soubhagyavati Shantaka: *Mr. E. Dalgado*.

*Appeal allowed*

J. V. W.

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