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were taken to have the property divided by metes and bounds after the preliminary decree and before her death. Yeshodabai, however, had not taken any effective steps to secure her share. She claimed it in the written statement, but did not press for it at the time of the preliminary decree. She did nothing subsequently during her lifetime to obtain her share. It is clear, therefore, that in fact she did not take her share, and that it was not severed from Bhikaji's estate.

It is not necessary to define precisely as to when the mother can be said to take her share, so as to make it part of her estate, quite apart from the question whether it would be non-technical *stridhan* in her hands or whether it would be property inherited from her husband. The question must be decided with reference to the facts of each case. Assuming, without deciding, that the actual division by metes and bounds may not be essential for this purpose, it is clear that in the present case Yeshodabai did not take her share as contemplated by the text, and that the property of Bhikaji became liable to division on her death in equal shares between the plaintiff and defendant No. 1.

Appeal dismissed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

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ADVI BIN FAKIRAPPA CHALWADI (ORIGINAL PLAINTIFF), APPELLANT *v.* FAKIRAPPA ADIVEPPA CHALWADI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.[°]

Hindu Law—Adoption—Adopted person having no son born but having one in conception—Such son passes into the adoptive family.

[°] Second Appeal No. 223 of 1917.

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At the time when a person was adopted he had no son born but had a son who was conceived. A question having arisen whether such a son passed on adoption into the adoptive family :—

Held, that for all purposes of succession and inheritance the legal entity of the after-born son must be taken to date from the date of his birth ; and that, therefore, the after-born son passed into the adoptive family.

SECOND appeal from the decision of E. Clements, District Judge of Dharwar, reversing the decree passed by H. V. Kane, Subordinate Judge at Gadag.

Suit for declaration.

On the 11th December 1912, defendant No. 1 adopted plaintiff's father. At that time, the plaintiff was already in conception ; he was born on the 31st March 1913. Defendant No. 1 adopted another boy (defendant No. 2) on the 1st November 1913. The plaintiff's father died on the 13th December 1913.

The plaintiff brought the present suit on the 13th October 1914, to have it declared that the adoption of defendant No. 2 did not in fact take place ; and that even if it had taken place, it was void in law.

The Court of first instance held that the adoption though it had taken place was invalid as it took place whilst the first adopted son was living. It further held that as the plaintiff was not born at the date of the adoption, he passed with his father into the adoptive family ; and that he was therefore entitled to maintain the suit. The suit was decreed.

The lower appellate Court held following *Kalgavda Tavanappa* v. *Somappa Tamangavda*[1] that the plaintiff remained in the natural family of his father in spite of the latter's adoption. He, therefore, acquired no rights of a legal character under his father's adoption and was not entitled to sue for a declaration. The suit was accordingly dismissed.

[1] (1909) 33 Bom. 669.

The plaintiff appealed to the High Court.

A. G. Desai, for the appellant.

No appearance for the respondents.

BEAMAN, J. :—The general rule of jurisprudence by which the existence of a child as a legal entity is dated from his conception and not from his birth will, on examination, be found to have been intended, I believe in almost every case, for the benefit of the child, and this somewhat fictional extension of the notion of birth to have been devised in order to connect him directly with his father both for the purposes of inheritance and legitimacy as at the time of his conception, where, if the date of his birth should be the date of his coming into being as a legal entity, consequences less favourable to him would necessarily follow. Here we have to deal with the converse case, although it is easy to decide it if the principle I have stated be the true principle. It is, as far as we know, a new case, upon which no Court has yet adjudicated, and it involves a double fiction, if indeed it be a fiction, to say that in law a child is born when he is conceived. For here it is complicated by the Hindu law of adoption under which when a man is adopted, although he continues in every sense a *persona* capable of civil rights, he dies in civil law to his natural family. Speaking for myself, the refined dialectics which eminent Hindu lawyers delight to spin about the ancient texts seem to me utterly unconvincing. There is no single text directly in point. Those which are usually handled for the purpose are so vague that they lend themselves, as it appears to me, to almost any form of dialectical use. A very little ingenuity would turn the argument as easily the other way. It is certain that none of the accredited Hindu lawyers of the past ever directly contemplated such a case. Their attempts at definition

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often appear to me to be defective and the weakest point in the Hindu law might perhaps be thought to be its efforts at scientific classification. I do not, therefore, propose to dwell upon those texts which are commonly cited in connection with allied topics and have been exhaustively dealt with in a judgment of Chandavarkar J. in the case of *Kalgavda Tavanappa* v. *Somappa Tamangavda*[1], where the point was whether when a man was adopted his son then in being remained in his natural or followed his father into his adoptive family. Every effort to obtain clear authority from this confused medley of rather inconsequent pronouncements upon other legal relations is, in my opinion, of little more real value than the interpretations of the prophecies in the Old Testament and the revelations, intended to verify them in later historical events. I think the object of all the Courts to-day should be to lay down as far as possible a principle that can be generally applied, a principle too which rests upon an intelligible reason. Now, if it be granted that the reason underlying the well-known and generally accepted rule of our jurisprudence is to overcome the difficulties which might otherwise arise to the prejudice of the child in question, then its application in converse cases would have to be modified with reference to that paramount consideration. And this can very easily be done when we remember that the rule, though general and wide enough, is by no means universal. For instance, we have statutory authority for disregarding it in the case of domicile. Other cases might also be put, as for example, where the father and mother change their religion during the wife's pregnancy, in which if the Courts were called upon to decide they would probably be guided by the considerations to which I propose to give effect.

[1] (1909) 33 Bom. 669.

Now, in this country I believe that it is so generally true that I might without exaggeration say that it is universally true, that sons taken in adoption are taken from a poorer into a richer family. After the adoption circumstances may of course change. But at the time of the adoption it is extremely unlikely that any parents would consent to give a son at the time vested with wealth or expectancies of wealth into a family where he could have neither wealth nor any expectation of it. It, therefore, becomes apparent that an adoption will give the father, and after him his son, a better position than he would have had, had he remained in his natural family.

I see, therefore, no reason at all why in the very rare cases, of which this is the first, I believe, that has come up for judicial decision, we should not hold in the interest of the after-born child that for all purposes of succession and inheritance his legal entity must be taken to date from the date of his birth. It is upon that principle, and not upon any nice analysis of the Hindu texts, that I should prefer to put my decision. I do not believe that kind of analysis is really profitable. Wherever it is pursued at any length, I detect many points in the reasoning which I at least think may easily be proved to be fallacious. But the rule I am laying down is so simple and rests upon so simple a reason that while it will not conflict as far as I can see with any accepted principle of English jurisprudence or any sentiments of the Hindu law, it can very easily be applied to any set of facts to which it is applicable.

I would, therefore, hold in this case that the plaintiff was born into the family into which his father was adopted and is entitled to succeed to his father in that family. The result of this is that the decree of the learned Judge below must be reversed

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and that of the trial Judge restored with all costs throughout.

Note.—With reference to the opening sentences of this judgment I may note that after it was delivered my attention was drawn to the English cases, *In re Wilmer's Trusts*(1) and *Villar* v. *Gilbey*(2). In the former case what I have said was strongly disapproved by Buckley J. and his view was also taken by the Court of Appeal. But in the latter case the House of Lords emphatically affirmed the general principle upon which I have based this judgment.

HEATON, J.:—I concur. I think that this case, in which we have to decide whether a son who is in his mother's womb at the time of his father's adoption is born into his father's adoptive family or into his father's natural family, can be best decided by the simplest way of looking at the case. I think the simplest way of all is to remember that a child when born becomes the son of his father. This is illustrated by a hypothetical case, the case of the son of a man who becomes a Peer, that son being begotten while the father is still a commoner but born after the Peerage has been conferred. The son, I apprehend, is from his birth the son of a Peer and not the son of a commoner. There are, it is true, exceptions to this very simple conception of the position of a child; but as my learned brother has pointed out those exceptions are invariably for the benefit of the child, and they are in the nature of fictions working in favour of the child and created in order to protect the child against such things as illegitimacy, and poverty. But where no consideration of that kind operates, then I think that the rule must be the natural rule that a child becomes a legal entity at the time of its birth and not at sometime prior to its birth.

(1) (1903) 72 L. J. Ch. 378, 670. (2) (1907) 76 L. J. Ch. 339.

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Such, very briefly stated, are the reasons for which I think the judgment of the lower appellate Court in this case must be set aside and the judgment of the first Court restored.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

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NILKANTH LAXMAN JOSHI AND OTHERS (ORIGINAL APPLICANTS), APPELLANTS *v.* RAGHU *bin* MAHADU PARAB AND OTHERS (ORIGINAL OPPONENTS), RESPONDENTS.*

Indian Limitation Act (IX of 1908), Schedule I, Article 182, Clause 6—Execution of decree—Step-in-aid of execution—Order to issue notice—Actual issue of notice—Time runs from the actual issue.

Clause 6 of Article 182 of the first Schedule to the Indian Limitation Act, 1908, makes the time run, not from the date when the Court passes an order to issue the notice but, from the date on which the notice is actually issued.

SECOND appeal from the decision of P. E. Percival, District Judge of Poona, dismissing an appeal from an order passed by B. R. Mehendale, Subordinate Judge at Haveli.

Execution proceedings.

The decree under execution was passed on the 11th July 1911. An application to execute the decree was made on the 24th February 1913. A notice was ordered by the Court to issue on the 9th April; but it was actually issued on the 13th April 1913. The present application for execution was made on the 10th April 1916.

* Second Appeal No. 280 of 1917.