Judgments of the Lords of the Judicial Committee of the Privy Council on the Appeals of (1) *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma and others, from the High Court of Judicature at Madras, and* (2) *Radha Mohun* (*representative of Beni Parshad, deceased*) v. *Hardai Bibi and another, from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered* 11*th March* 1899.

Present at the hearing of the First Appeal:

LORD HOBHOUSE.
LORD MACNAGHTEN.
SIR RICHARD COUCH.

Present at the hearing of the Second Appeal:

LORD HERSCHELL.
LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

The first of these two cases, which comes from Madras, was argued in February 1898, but the judgment was postponed for the hearing of the second which comes from Allahabad. The reason was that each case raises a question of general importance on which different views have been taken by different High Courts, and it was agreed on all hands to be advantageous that the two litigations should be under consideration at the same time. The Allahabad appeal was argued in the month of July last, and their Lordships are now prepared to state their opinions on both cases.

4551. 250.—3/99. [14 & 15] A

2. In the Madras case, the Plaintiff sued as one in the line of succession to the last owner of an estate who had died without issue. The principal Defendant was a boy who had been adopted by the last owner's widow with the consent of the family Gnatis or Sapindas. The Plaintiff claimed a declaration that the adoption was invalid. His main ground was that the adopted boy was the only son of his father. The Defendants showed that the natural father of the boy authorised his widow to give him in adoption in the way which was actually effected between the two widows, and that the Plaintiff himself in his character of Sapinda was a party to the transaction. In addition to asserting the legal validity of the adoption, they pleaded that the Plaintiff was estopped by his concurrence in it.

The District Judge gave no opinion on the point of estoppel. He found that the law in Madras was settled, and he gave judgment in the following terms :—

"The case illustrates how the people of this "Presidency have settled down under the law "as enunciated by the Madras High Court so "long ago as 1862, and re-affirmed in 1887, "and it is impossible to say how many adoptions "of only sons may have been made during the "last thirty years on the faith of such enuncia-"tion of the law, and what innumerable rights "might be disturbed by any contrary decision "after such a lapse of time."

The case was heard on appeal before the late Judge Sir T. Muttusami Ayyar and Mr. Justice Shephard who affirmed the decree below. The learned Judges did not express any original opinion of their own on the main question. They thought that there was no estoppel because at the date of the adoption nobody thought of its being illegal. As to its legal validity they

found that all the Madras decisions had been in its favour and that the Madras Courts were right in following an unbroken current of authority in that Presidency notwithstanding differences of view in other Courts.

At this Bar two points have been taken: first that the gift or reception of an only son in adoption is invalid in law; and secondly that, if not invalid when the boy is received by the adoptive father or given by the natural father, it is so improper that in the absence of express authority given by a husband his widow has no power to effect it.

In the Allahabad appeal it is not necessary to make any statement of facts because the decree appealed from depends entirely on the answer given to a question referred by a division bench of the High Court to a full bench. That question is as follows:—

"The adoption of an only son having taken "place in fact, is such adoption null and void "under the Hindu law?" That abstract question is the only one raised in the case lodged by the Appellant and the only one argued at this Bar. The High Court answered it in the negative. Mr. Arathoon has contended in a learned argument that it ought to be answered in the affirmative.

As regards the second question raised in the Madras case, which is peculiar to that case, their Lordships feel no difficulty. The only authority for the argument of the Appellants is the opinion of the late Sir Michael Westropp delivered in the case of *Lakshmappa* v. *Ramava* which was decided in the High Court of Bombay in the year 1875 and a report of which was after long delay inserted in the 12th Bomb. H. C. R., page 364. That learned Judge held that, assuming that a man's only son may be given in adoption by himself, yet if he has not expressly given to his widow an authority to

make such a gift it cannot be implied by law. Now the authority of a widow to give or take in adoption differs in different schools of Hindu law. Their Lordships are not retrying this Bombay decision. In Madras it is established, as the learned Judge Muttusami Ayyar shows, that, unless there is some express prohibition by the husband, the wife's power, at least with concurrence of Sapindas in cases when that is required, is co-extensive with that of the husband. That is certainly the simplest rule and it seems to their Lordships most consistent with principle. The distinction taken by Westropp C. J. appears to have been quite novel, and also at variance with a decision by his predecessor Sir Michael Sausse. There may be some peculiarity in the school of law which prevails in Bombay to support it, though it has not been brought to their Lordships' notice, but if there is any such it does not apply to these parties in Madras. On this point therefore their Lordships agree with the learned Judges below.

What remains to them is the difficult task of deciding the more general question which is common to both the appeals. The difficulty which first meets the eye is the variety of judicial opinions and of opinions in treatises, which during the last quarter of a century have been gathering into definite opposite channels in the different areas of jurisdiction. There are also other difficulties beyond. Many of the judicial decisions relied upon are embodied in imperfect reports or in mere notes of points. The question is complicated by the use of different modes of adoption not always clearly specified, and by the intrusion of special local or tribal customs. And the original authorities on which all the conflicting opinions alike are based are written in Sanskrit, which for many centuries has been a dead language known only to a few learned people,

which hardly any of those who have been called to judgment have understood, the translations of which are more or less disputed, and of which it is averred probably with truth that its exact phases of meaning cannot be caught except by those who have studied closely and as a whole the language and the works of the particular writer under consideration. Their Lordships have however one advantage over their predecessors in these inquiries. The greater attention paid of late years to the study of Sanskrit has brought with it more translations of the sacred Hindu books, and closer examinations of texts previously translated. And in the Allahabad case especially, the Appellants' side was argued in the High Court by Mr. Banerjee who is stated by the Court to be familiar with Sanskrit, and it is the subject of a very elaborate judgment by Mr. Justice Knox who is a student of Sanskrit and as he tells us has paid special attention to the books of Manu and Vasishtha. Perhaps the most convenient course will be to set out the more important texts which have been brought into discussion, then to see how they have been treated by recent commentators and by judicial decisions, stating finally the conclusions to which their Lordships have with these aids been brought.

The most revered of all the Rishis or sages is Manu, who though he says nothing specific on the point now in issue is referred to as favouring one side or the other. The passages cited are as follows. They are in Cap. IX. :—

"By the eldest son as soon as born a man "becomes the father of male issue, and dis- "charges his debt to his pitris or progenitors. "That son alone by whose birth he discharges "his debt to his forefathers and through whom "he attains immortality was begotten from a "sense of duty." He adds sentences to affirm

the powers privileges and duties of the first-born, and his great importance in the family. *VV.* 106–109.

"By a son a man obtains victory over all "people, by a son's son he attains immortality, "then by the son of that son he reaches the "region of Brahma." *V.* 137.

"Since the son delivers the father from the "region called Put he was therefore called "Putra by Brahma himself." *V.* 138.

"Whom the mother or the father give with "water a son in distress similar endowed with "affection he is to be deemed a datrima one "brought forth."

In the three last quotations their Lordships have followed the words of Mr. Justice Knox who says that he has attempted to follow the text word by word without interpolating or taking away any particle, and that on that account his style is rough. (*See Record, pp.* 247, 248, *and Golap Chandra, Treatise on Adoption, p.* 282.)

Near to Manu in point of antiquity and of authority comes Vasishtha around whose utterance on the point in issue the greater part of subsequent comments has clustered. His writings have been translated by Dr. Bühler and published in the work entitled "Sacred "Books of the East" which has been edited by Professor Max Müller. The passage in that translation is as follows, Ch. XV.:—

(1.) Man formed of uterine blood and virile seed proceeds from his mother and his father as an effect from its cause.

(2.) Therefore the father and the mother have power to give, to sell, and to abandon their son.

(3.) But let him not give or receive in adoption an only son.

(4.) For he must remain to continue the line of ancestors.

(5.) Let a woman neither give or receive a son except with her husband's permission.

On page 249 of the Record Mr. Justice Knox gives his own translation which does not appear to differ substantially, though it does slightly in form, from that of Dr. Bühler.

Another ancient sage is Saunaka of whom a text is quoted in the Dattaka Mimansa of Nunda Pandita as follows:—

Section IV., Par. 1. "In reply to the question "as to the qualification of the person to be "affiliated Saunaka declares: 'By no man "'having an only son (eka putra) is the gift of "'a son to be ever made; by a man having "'several sons (bahu putra) such gift is to be "'made on account of difficulty (prayab natas).'"

Next in time is Yajnavalkya whose writings with comments by Vijnanesvara constitute the Mitakshara, a work of very high authority all over India. The material passages are as follows in Mr. Colebrooke's translation, Ch. 1, Sec. XI.:—

Para. 9. "So Manu declares 'He is called a "'son given (datrima) whom his father or mother "'affectionately gives as a son being alike [by "'class] and in a time of distress confirming the "'gift with water.'"

Para. 10. "By specifying distress it is inti- "mated that the son should not be given unless "there be distress. This prohibition regards the "giver [not the taker]."

Para. 11. "For an only son must not be given "[nor accepted] for Vasishtha ordains 'Let no "'man give or accept an only son.'"

Para. 12. "Nor though a numerous progeny "exist should an eldest son be given, for he "chiefly fulfils the office of a son as is shown by "the following text 'By the eldest son as soon "'as born a man becomes the father of male "'issue.'"

The above mentioned writings are all classed among the Smritis, which are held by orthodox Hindus to have emanated from the Deity,

and to have been recorded, not like the Sruti in the very words uttered by that Being, but still in the language of inspired men. They contain precepts whose authority is beyond dispute, but whose meaning is open to various interpretations and has been and is the subject of much dispute, which must be determined by ordinary processes of reason. The Dattaka Mimansa stands on a different footing. It is not older than the 17th century A.D. and does not claim any but human origin. Indeed its translator Mr. Sutherland says that it is "As "its name denotes an argumentative treatise "or disquisition on the subject of adoption; "and though from the author's extravagant "affectation of logic the work is always tedious, "and his arguments often weak and super- "fluous, and though the style is frequently "obscure and not unrarely inaccurate, it is on "the whole compiled with ability and minute "attention to the subject, and seems not "unworthy of the celebrity which it has "attained." Moreover it was written during Mahomedan rule and cannot be the work of a lawgiver or judge. The date of the Dattaka Chandrika is not certain, but it is at all events very much later than the Smritis and it stands only on the footing of a work by a learned man. Messrs. West and Bühler in their valuable work on Hindoo Law (3rd Edition, page 11) speak thus: "The Dattaka Mimansa and the "Dattaka Chandrika, the latter less than the "former, are supplementary authorities on the "Law of Adoption. Their opinions however "are not considered of so great importance but "that they may be set aside on general grounds "in case they are opposed to the doctrines of the "Vyararahana Mayukha or the Dharmasindhu "and Nirnayesindha." This is spoken with special reference to Bombay or Western India. But both works have had a high place in the

estimation of Hindu lawyers in all parts of India, and having had the advantage of being translated into English at a comparatively early period, have increased their authority during the British rule. Their Lordships cannot concur with Mr. Justice Knox in saying that their authority is open to examination, explanation, criticism, adoption or rejection like any scientific treatises on European jurisprudence. Such treatment would not allow for the effect which long acceptance of written opinions has upon social customs, and it would probably disturb recognised law and settled arrangements. But so far as saying that caution is required in accepting their glosses where they deviate from or add to the Smritis their Lordships are prepared to concur with the learned Judge.

The passages in the Dattaka Mimansa are as follows: They are contained in Section IV. Par. 1. is that which gives the saying of Saunaka already quoted. Par. 2. "He, who has one "son only, is '*eka-putra*' or one having an "only son: by such a one the gift of that son "must not be made; for a text of Vasishtha "declares 'an only son let no man give "'&c.'" Par. 6. The writer comments on the word "ever" as used by Saunaka thus "In "a time of calamity: accordingly, Narada "says, 'a deposit, a son, and a wife, the "'whole estate of a man who has issue living, "'the sages have declared unalienable, even "'by a man oppressed by grievous calamities: "'although the property be solely that of "'the man himself.' This text also regards "an only son, for it is declaratory of the same "import as the texts of Saunaka and Vasishtha." Par. 8. The writer comments on Saunaka's words "By no man having an only son" thus:—"From "this prohibition the gift by one having two "sons being inferrible, this part of the text ('By

" ' one having several sons &c.') is subjoined, to " prohibit the same by one having two sons also."

The Dattaka Chandrika (Section 1, Par. 27) only repeats Vasishtha's saying, and couples it with the obligation to adopt a brother's son if there is one.

Their Lordships do not propose to spend much time in a close examination of the recent commentators. They have been very carefully sifted in the Indian Courts, and naturally so, seeing what was the paucity and obscurity of judicial authority until within the last thirty years or so. The principal effect which they have on the mind is to show the great variety and uncertainty of opinion on the question now in issue. The earliest of those referred to is Jagannatha, a learned Hindu lawyer employed by Sir W. Jones to compile a digest. He thought that the prohibition in the Smritis is only moral and not legal. That also is the opinion of the two latest writers, both deeply versed in the Sanskrit language, Mr. Mandlik who appears to have translated the texts of Saunaka, and Mr. Golap Chandra Sarkar who has written a treatise on adoption. Sir Thomas Strange writing in the year 1830expresses an opinion in the body of his treatise that the prohibition is monitory only, Vol. 1. page 87. On the other hand the weighty opinions of Mr. Colebrooke, Sir Francis Macnaghten and Mr. Sutherland are thrown into the scale; and that of Mr. Justice Strange is also cited to the same effect, and is supposed by some to express the latest opinions of his father Sir Thomas Strange. But it may be observed that Sir Francis Macnaghten and Mr. Justice Strange found their opinions on the wickedness of the act in question, and that the adoption of an eldest son is placed by Mr. Justice Strange on precisely the same footing as that of an only son, and is ranked by Sir F. Macnaghten as a heinous

crime though not so heinous as the adoption of an only son. Their Lordships think that the authority of recent text writers must not be stated more favourably to the present Appellants than is stated in the book of Messrs. West and Bühler. Expressing no opinion of their own, those learned writers say "If he have but one son, the gift of "that one is everywhere reprobated as a grave "spiritual crime. By most the gift is thought "invalid." Their Lordships turn now to the more solid ground of judicial decision.

In Madras the course of decision has been very simple. In 1862 the High Court decided that the adoption of an only son however sinful was valid in law. It has been shown by Mr. Mayne that a previous decision then relied on was misapprehended by the learned Judges. But that was not the sole ground of their decision; they also relied on learned opinions and they agreed with those opinions. And the same High Court has since that time had the same question brought before it more than once; three times, it is stated in one of the judgments below. There has been no fluctuation in their decisions. It must be taken that the law in Madras has ever since been settled in favour of the present Respondents.

In Allahabad also the condition of judicial decisions is simple. In 1879 the question was brought before a full bench of the High Court consisting of Sir Robert Stuart and Sir Charles Turner who were English barristers, and three eminent civilians Justices Pearson, Spankie, and Oldfield. The Court decided in favour of the adoption, Sir C. Turner dissenting. In the year 1889 some doubts were expressed on the point by Justices Straight and Mahmood, and that circumstance, coupled with the delivery of adverse opinions by the High Courts of Calcutta and Bombay, led to the rather unusual course of referring the same question to a full bench, of

which Mr. Justice Mahmood was one. The result has been an unanimous decision supported by judgments of the Chief Justice and Mr. Justice Knox which are remarkable for research and fulness of treatment.

In Bengal there has been more fluctuation of opinion. The law was quite unsettled in the year 1868. It would be of little use now to examine the earlier decisions in the Sudder Dewani Adalut and the Supreme Court. That has been done with great care by Sir William Markby in a case about to be mentioned. The first case which raised the exact question in the High Court was heard in the year 1868 before Justices Dwarkanath Mitter and Louis Jackson. The judgment was delivered by Mr. Justice Mitter. After quoting passages from the two above-mentioned Dattaka treatises the learned Judge lays the law down thus: "The institution " of adoption as it exists among the Hindus is " essentially a religious institution. It originated " chiefly if not wholly from motives of religion; " and an act of adoption is to all intents and pur- " poses a religious act but one of such a nature that " its religious and temporal aspects are wholly " inseparable. 'By a man destitute of male issue " ' only ' says Manu ' must the substitute for a son " ' of some one description always be anxiously " ' adopted for the sake of the funeral cake water " ' and solemn rites.' It is clear therefore that " the subject of adoption is inseparable from the " Hindu religion itself and all distinction between " religious and legal injunctions must be inap- " plicable to it."

There is no doubt that this judgment has exercised very great influence on the controversy; and indeed if the learned Judge's fundamental position were sound there could be no controversy at all. Let us assume for this purpose, though it is matter of grave dispute, that the learned Judge is right in saying that adoptions

originated in motives of religion and not in the ordinary human desire for perpetuation of family properties and names. Still the question is whether certain precepts have a legal or only a religious bearing. What is there in the subject matter of adoption which makes it clear that all precepts relating to it must bear a legal character? The learned Judge does not discuss that question. He begs it, merely stating that his own inference clearly follows from Manu's text. Their Lordships think that the doctrine propounded by him is equally opposed to a reasonable construction of the books apart from decision, and to decided cases. Indeed to show how far the doctrine is from being universally applicable it would not be necessary to go further than the passage which the learned Judge himself cites from Manu, though of course differences may be suggested between prohibitory and mandatory injunctions. Manu prescribes adoption on the score of religion. According to Mr. Justice Mitter this is necessarily a legal injunction, yet nothing is clearer than that there is no legal compulsion upon a Hindu to adopt a son, however irreligious it may be in him not to do it. There is not even any legal compulsion on his widow to do it, when he is dead and cannot have a natural son. But the principle laid down is so important, goes so deep down to the root of these questions, and has exercised such influence, that their Lordships think it necessary to discuss it at length, for which this will be a convenient place.

Their Lordships had occasion in a late case to dwell upon the mixture of morality religion and law in the Smritis. *Rao Balwant Singh* v. *Kishori*, 25 Ind. App. p. 69. They had to decide whether a prohibition on alienation of property away from a man's family, certainly based on religious grounds, had a purely religious or also a legal bearing. They then said:—"All these "old text books and commentaries are apt to

" mingle religious and moral considerations " not being positive laws, with rules intended " for positive laws. In the preface to his " valuable work on Hindu law Sir William " Macnaghten says 'it by no means follows " ' that because an act has been prohibited it " ' should therefore be considered as illegal. The " ' distinction between the vinculum juris and " ' the vinculum pudoris is not always dis- " ' cernible.' " They now add that 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 find 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 judgments in private affairs, should introduce restrictions into Hindu Society, and impart to it an inflexible rigidity, never contemplated by the original lawgivers.

The late extension of the study of Sanskrit has apparently resulted not in weakening but in strengthening the cited opinion of Sir William Macnaghten. Of course their Lordships do not presume to form any opinion on questions of Sanskrit grammar, but they observe that Mr. Golap Chandra, who is frequently referred to in the judgments below, contends as a matter of grammar that words (*e.g.* those of Saunaka) which have been translated in the imperative form of command should take that of recommendation. Mr. Mandlik insists on the same view, and Mr. Justice Knox says that he originally took a contrary view but has been brought round by the authority of Mandlik and another Sanskrit scholar, Mr. Whitney.

Let us see now how Mr. Justice Mitter's principle accords with actual decisions. The

controversy respecting eldest sons, whether or no they can be given in adoption, has a strong bearing on the present question. Manu attaches the highest importance to the character of an eldest son. The relevant passages from his Institutes have been quoted above.

No specific prohibition is contained in these passages but the reasonable inference from them is given in the Mitakshara in Ch. 1. Sec. XI. Par. 12, which has been already quoted. This express prohibition has been taken by some to be a legal rule, and has been enforced by modern writers of weight as before stated, and in legal decisions. It would certainly fall within Mr. Justice Mitter's principle. But it is quite abandoned; all over India as their Lordships understand; and the prohibition is held to be a matter for religious consideration only. It was the subject of careful examination and express decision by Justices Markby and Romesh Chander Mitter in the case of *Jannokee Debea* v. *Gopal Acharjea* reported in 2 Cal. 365.

Again it is laid down that the giver of a son ought to have more than two sons. The text of Saunaka quoted above says that the gift is to be made by one having several sons (Bahu putra). The Dattaka Mimausa Sec. IV. 8 lays it down that the Sanskrit word signifies more than two, and that Saunaka's precept was introduced for the express purpose of excluding the inference that a man with two sons might give one in adoption. The Dattaka Chandrika Sec. 1. 29 & 30 declares the same law. The precepts are precise, and yet their Lordships cannot find that anybody asserts them to be law in any but the religious sense.

23. Another precept is that a Hindu wishing to adopt a son should adopt the son of his whole brother in preference to any other person. That question came before this Board in the year 1878

in a case in which the Subordinate Judge had held the adoption to be invalid for violation of this precept, and the High Court were of a contrary opinion. This Board held that the terms of the precept were contained in both the Dattaka Mimansa and the Dattaka Chandrika, and they are founded on the Mitakshara. Nevertheless they held that it is not a precept of law. They referred to the opinions of English text writers to support them. No decision in point was cited and probably there is none in the books.

One of the conditions for adoption laid down by Manu in the passage first quoted from him is that there must be distress. This is emphasised in the Mitakshara Chap. 1, Sec. 11, Par. 10 "The son shall not be given unless there "be distress" which appears to mean that the giver must be in distress. "This prohibition," it continues, "regards the giver" and then occur the words "not the taker" apparently interpolated by the learned Benares lady who wrote under the name of Balam Bhatta. The Dattaka Mimansa, Sec. IV. 20 says "No distress "existing, the giver commits a sin on account "of the prohibition." If then the giver commits a sin the taker who enables him to do it cannot be free from sin; and if the commission of a sin makes the transaction void in law there can be no gift and consequently no adoption. And yet nobody contends for the legal force of this prohibition. It does not appear that in cases of adoption any inquiry is ever made about the distress of the natural father.

It is clear that the principle laid down so confidently by Mr. Justice Mitter as paramount in cases of adoption is repeatedly repudiated in practice; and in the Bengal case next to be cited the learned Judges while following the conclusion of their predecessors, dissociated

themselves from the fundamental reason assigned for it.

Moreover this sweeping doctrine of Mr. Justice Mitter is not consistent with the prevalence of exceptional customs or other interferences with the law. The extent to which the Smritis admit of special customs has not been argued in these cases and their Lordships cannot easily form any judicial opinion about it. But in a discussion about the sources of Hindu law by Doctor Jolly published in 1883 (*see* p. 33) that learned Sanskrit scholar states grounds for holding that customs are only recognised by the Smritis when they do not contravene Divine laws.

Mr. Arathoon has impressed upon their Lordships more than once during this argument that the texts he relies on are held to emanate from the Divine Power. If then that Power has said that certain modes of adoption shall be null and void how can any human practices lawfully limit its operation? And yet the validity of local or tribal customs to adopt only sons is asserted by every jurist. In the Punjaub such a custom is received as the general law of that large area, and it governs the relations of the eight millions or so of the Hindus (Jats, Brahmans, Rajputs, and others) who live there: and that, though the sources of their law are the same Smritis which are followed in other parts of India. The inference is that among numerous Hindoo communities the prohibition of the Smritis on this point has not been received as invalidating the transaction.

Again if the religious and legal injunctions were co-extensive, it would place both courts of justice and legislatures in a very delicate position when dealing with such matters. Suppose that in this Madras case the Court had upheld the plea of estoppel; it would have set up a judicial rule to bar the working of a Divine law. Suppose that the statutory six years had elapsed and that

the suit had been barred by time; then the legislature would be interfering to bar the working of a Divine law. In each case a separation would have been made between those religious and temporal aspects which Mitter J. declares to be wholly inseparable. Yet the British rulers of India have in few things been more careful than in avoiding interference with the religious tenets of the Indian peoples. They provide for the peace and stability of families by imposing limits on attempts to disturb the possession of propertyand the personal legal status of individuals. With the religious side of such matters they do not pretend to interfere. But the position is altered if the validity of temporal arrangements on which temporal courts are asked to decide is to be made subordinate to inquiries into religious beliefs.

No system of law makes the province of legal obligation co-extensive with that of religious or moral obligation. A man may, in his conduct or in the disposition of his property, disregard the plainest dictates of duty. He may prefer an unworthy stranger to those who have the strongest natural claims upon him. He may be ungrateful, selfish, cruel, treacherous to those who have confided in him and whose affection for him have ruined them. And yet he may be within his legal rights. The Hindu sages doubtless saw this distinction as clearly as we do, and the precepts they have given for the guidance of life must be construed with reference to it. If a transaction is declared to be null and void in law, whether on a religious ground or another, it is so ; and if its nullity is a necessary implication from a condemnation of it the law must be so declared. But the mere fact that a transaction is condemned in books like the Smritis does not necessarily prove it to be void. It raises the question what kind of condemnation is meant.

It is true that the learned Judges Mitter and Jackson refer to the texts of the Dattaka Mimansa and Chandrika. But according to the paramount principle laid down by them those texts could only be read in one way. That principle is in fact the sole ground of the decision, and as it cannot be admitted the decision is deprived of weight.

The next case in Bengal was decided in the year 1878 by Chief Justice Garth and Mr. Justice Markby 3 Ben. L. R. 443. In delivering judgment Sir W. Markby reviews with great care and discrimination the then existing authorities, judicial and non-judicial, and he shows that only in four cases had the point been brought before the Highest Courts of Appeal in India. There had been no decision at that time in Allahabad. The Madras High Court supported the adoption: so apparently did the Bombay High Court, for the judgment of Chief Justice Westropp which threw doubt upon the point, though delivered in 1875 was not reported as early as 1878. The learned Judge states the ground of his decision thus: "It appears to me therefore that the vast "preponderance of authority if not the entire "authority in Bengal is against the validity of "the adoption of an only son, and if we were to "hold the adoption of the plaintiff in this case "to be valid it would be necessary to overrule "both the carefully considered decision of "Jackson and Dwarkanath Mitter J J. and the "equally careful decision of four Judges of the "Sudder Court. This of course could only be "done by a full bench. But we could only "refer the case to a full bench if there is a "conflict of authority, or if we ourselves differ "from these decisions. Having gone through all "the cases with great care I do not think it can be "said that there is any such conflict of authority "in Bengal as to justify us in referring the case "to a full bench on that ground, and I am not

" prepared to refer the case to a full bench upon " the ground that I myself think the adoption " of an only son valid. On the contrary, on the " best consideration I have been able to give to " the authorities I think such an adoption ought " in Bengal to be held to be invalid wherever " the effect of holding such adoption to be valid " would be to extinguish the lineage of the " natural father and so to deprive the ancestors " of the adopted son of the means of salvation."

This is a very instructive judgment and entitled on all grounds to great respect; and it is with great respect that their Lordships, being obliged to differ either from it or from other High Courts, proceed to note some points which detract from its weight. As to the vast preponderance of authority in Bengal there were only two decided cases. One was before the Sudder Dewani Adalat and is reported in 3 Select Reports p. 232. The report does not show any examination of the question by the learned Judges themselves. Their decision appears to rest wholly upon the opinion of Pundits, who in their turn content themselves with a simple citation of texts. The other decision rests entirely on a principle which is untenable, as Sir W. Markby himself showed the year before in the case of *Janokee Debea*. Moreover the Court in 1878 hardly addressed itself to the question why the injunctions relating to the only son are imperative and legal while those which relate to the eldest son are only monitory or religious. In 1877 Sir W. Markby says that while the latter prohibition is only monitory the former is clear; referring, as their Lordships suppose, to the differences of expression in Colebrooke's translation of the Mitakshara. In 1878 he intimates that the stronger objection to the adoption of an only son is based on religious grounds, on which their Lordships remark that Manu ascribes a character to the eldest son which affords strong religious

grounds against his adoption, and that they do not find themselves competent to put such grounds in the balance against one another, so as to decide which is the stronger.

On this point they add that there seems to have been a great deal of exaggeration used in urging the religious topic throughout this controversy; especially in later times. Manu says that by the eldest son as soon as born a man discharges his debt to his progenitors; and it is through that son that he attains immortality. According to him the son serves his father's spiritual welfare at the moment of his birth. There is no intimation that if the boy dies the next day, or fails to have a son, this service is obliterated. Why then should it be so if the boy is adopted? It is true that Manu attributes additional value to the firstborn's son and grandson. It may be that such further benefit is lost by adoption, as it would be by death, but that is a very different thing from depriving the ancestors of the adopted son of the means of salvation, which have been already attained. Vasishtha whose text is the fundamental one does not rest his injunction on spiritual benefit at all, but he says that the only son is to continue the line of his ancestors; one of the very commonest of human motives for desiring legitimate issue. Nor does he make any allusion to "Put" here, or, if Mr. Justice Knox is right, elsewhere. If he was really thinking of the spiritual benefits of the son's ancestors as the ruling consideration, it is inexplicable that he should not have said so. Moreover, their Lordships asked during the argument why a man who had given a natural son in adoption could not afterwards if he was so minded adopt another; and neither authority nor reason was adduced to show that he could not.

That is the state of authorities in Bengal. The question has never come before a full bench,

and it seems to their Lordships that there is only one decision, viz. that of 1878, to which great weight is to be attached.

In Bombay, after a Division Bench had decided in favour of validity, the question was discussed before another Division Bench in the year 1875; *Lakshmappa* v. *Ramava*, 12 Bomb. 364. The case was decided on another ground as has been mentioned above. But the Chief Justice Sir M. Westropp delivered an elaborate judgment containing his reasons for holding the adoption of an only son to be invalid. Those reasons appear to have been adopted by the Court including Sir M. Westropp himself in a subsequent case which was decided in 1879 but has never been reported. In 1889 the question was referred to a full bench who simply followed the unreported case. Sec. 14 Bomb. p. 249. Sir C. Sarjent then Chief Justice delivered judgment. He pointed out that prior to *Lakshmappa* v. *Ramava* the decisions in Bombay were in favour of validity; that the judgment of Sir M. Westropp in that case was the first that treated the point with due consideration; and that as the opinion there expressed had been adopted by a full bench, it was not proper to review it. The decision was necessarily in favour of invalidity. The law in Bombay therefore rests on the authority of the unreported case of 1879 which itself rests on the reasoning contained in the judgment of 1875.

In that judgment the learned Chief Justice makes more elaborate reference to the Smritis than is contained in any judgment earlier than the present Allahabad case. He dwells emphatically on Colebrooke's translation of the Mitakshara, showing that with regard to the only son the expression "must not," and with regard to the eldest the expression "should not," is employed. He adds that the distinction is even more strongly marked in the Mayukha

which is received as a high authority in Bombay. On this point their Lordships interpolate again the remark that they are not retrying the Bombay decision and that the effect of the Mayukha has not been argued before them. He then examines decisions by Bombay Courts prior to the establishment of the High Court, which certainly exhibit a confusion of legal opinion. The authority of the High Court up to 1875, though not perhaps very decisive, was in favour of validity. From this, and from the decision of the Madras Court, the learned Chief Justice differs. He cites the passages of Smritis and law books and English text-writers with which we have now been made familiar. And his decision apparently is founded on the language of Colebrooke's Mitakshara and on the judgment of Mr. Justice Mitter. Their Lordships have already stated their reasons for thinking that the latter of these foundations is unsound. The value of the former will be examined presently. They have also stated above that the point actually decided in this case is a novel suggestion of the learned Chief Justice, and is unsustainable in principle, and unsupported by authority unless there be something peculiar to Bombay to support it.

Before leaving this judgment their Lordships ought to state their concurrence with the learned Chief Justice in his remarks on the so-called doctrine of *factum valet*. That unhappily expressed maxim clearly causes trouble in Indian Courts. Sir M. Westropp is quite right in pointing out that if the *factum*, the external act, is void in law, there is no room for the application of the maxim. The truth is that the two halves of the maxim apply to two different departments of life. Many things which ought not to be done in point of morals or religion are valid in point of law. But it is

nonsensical to apply the whole maxim to the same class of actions and to say that what ought not to be done in morals stands good in morals, or what ought not to be done in law stands good in law. Sir M. Westropp has, not without cause, reduced the ambiguous maxim to its proper meaning.

Such was the state of judicial authority in India prior to the present cases. For as regards the Punjab, it is true that in the early days of the Chief Court Judges have pronounced opinions in favour of the adoption under general Hindoo law; and in 1874 Melvill and Thornton J.J. pointed out that the turning point of the controversy was Mr. Justice Mitter's judgment of 1868. But after the first reported case in 1867 the decisions there have turned on the popular customs into which the Government had the prudence to inquire immediately after the annexation, and which they made the foundation of law. The Punjab therefore may be omitted in our estimate of judicial authority. The reasons against the validity of the adoption of an only son are contained in the three judgments of the learned Judges Mitter, Markby, and Westropp. The point has never come before this Board for decision. It has been alluded to in two cases but in so indirect a way that though the authority of the Board is relied on by both sides it is not available for either. The foregoing remarks represent all the light which has been thrown on the Smritis to which after all we must recur to decide the question.

In addition to the remarks already made on the bearing of Manu's texts, those of Mr. Justice Knox upon his silence are worthy of attention. Manu mentions three conditions for a good gift of a boy in adoption. The natural father must be in distress; the boy must be "similar" apparently meaning of the same caste

with the adoptive father; and he must be affectionate. Nothing is said about his having brothers, which is now represented as a vital condition the breach of which is a sin, a heinous crime as some writers have called it, and as annulling the transaction. It seems very unlikely that Manu should either have viewed it in that light, or with his very high notions of the value of the firstborn should have overlooked the point altogether.

The crucial text is that of Vasishtha. He first states the parents' power in the most sweeping terms, and derives it from causes affecting every child that is born into the world. The power is to later ideas, whether Hindu or English, an extravagant one; but it accords with what we know of the early stages of other nations and probably did not shock the contemporaries of Vasishtha, though the sage Apastamba, who is perhaps of equal antiquity, denies the right to give away or sell a child (Prasna II., Patala 6, Khanda 13, paras. 6–11.) A man may sell his son—no restriction of purpose is expressed—or he may even abandon him. But then comes an injunction expressed in terms which may amount to a command or may be only a recommendation; viz., that an only son should not be given or accepted. The first remark to be made upon this is akin to the one just made upon Manu. If Vasishtha intended to except an only son from the father's power to give in adoption why did he not say so? It would have been much more simple. But he first states the power, and far greater powers, in the broadest terms, and then adds a qualification which is, to put it at the highest, in ambiguous terms. That looks much more like an appeal to the moral sense not to exercise the power than a denial of its existence. In this respect the case resembles that of the father's power to alienate family property: which indeed is the light in which Vasishtha seems to

regard a son. The power is given, while the action is condemned in terms consistent with actual prohibition. After long controversy it has been settled by a great preponderance of Indian authority culminating in a decision by this Board, that the power exists, and that the prohibition, though a solemn warning as to the spiritual responsibility of exercising it, is not efficacious in law.

In examining this question their Lordships are again at great disadvantage in not knowing Sanskrit. In the absence of agreement among Sanskrit students they cannot adopt the representations made, though by learned men, to the effect that as a matter of grammar Vasishtha's injunction imports admonition rather than command. So with respect to what has been called Jaimini's rule, which is so much relied on by Chief Justice Edge. That author who wrote in the 13th century appears to have been received as a high authority in the interpretation of Smriti texts. He lays down the rule that all precepts supported by the assignment of a reason are to be taken as recommendations only. That, if sound, would be conclusive as to Vasishtha's text. But it is rather startling and a very intimate acquaintance with the Smritis would be needed before admitting its truth. It has not been brought forward in any case prior to this case from Allahabad. It may however fairly be argued that one who, having the power to give an absolute command, gives an injunction not expressed in unambiguous terms of absolute command but resting on a reason, is addressing himself rather to the moral sense of his hearers than to their duty of implicit obedience. So far Vasishtha's reason, founded as it is on temporal and not on religious considerations, gives some, though not very strong, support to the Respondent's theory.

The text of Saunaka is open to two obvious

remarks. One is that the injunction not to give an only son is couched in the same terms as the injunction to give a son if there are more than two. The latter of these cannot possibly be obligatory. The other remark is that, as Nanda Pandita in the Dattaka Mimansa points out, Saunaka in effect prohibits a gift in adoption when there are only two sons; and that is a prohibition which has never been regarded as obligatory. Saunaka does not help the Appellants but rather lends weight against them.

Then comes the Mitakshara. We have seen that Sir M. Westropp emphatically, and Sir W. Markby possibly, relies on the difference of expressions in Colebrooke's translation. The passages from their judgments have been quoted above, and so have the passages from the Mitakshara Sec. 1. Ch. XI. paras. 10, 11, 12. Now it has been brought out in the arguments that precisely the same expressions of injunction are used by the author in these three paragraphs. To fortify their knowledge their Lordships have inquired of one of the most eminent of Sanskrit scholars Professor Max Müller, and he has courteously informed them that as a matter of fact the three expressions are identical, and as a matter of grammar are, in his judgment, equally capable of expressing obligation or recommendation. Now paragraphs 10 and 12 have been observed on before. It has been placed beyond dispute in point of law that neither is obligatory. It requires some good reason to show why, when the same expression is used in three consecutive sentences, it should be construed one way in the 1st and 3rd and another way in the middle one. No such reason has been given. It is an unfortunate thing that in translating a law book Colebrooke should have used different English words to represent the same Sanskrit word. He has certainly misled at least one Judge in a leading case. As the

matter is now shown to stand, the Mitakshara must be taken to bear strongly against the Appellants.

In intimating that Sir M. Westropp was misled by Colebrooke their Lordships have not overlooked the fact that in 1889 Sir C. Sarjent thought that Sir M. Westropp was aware of the state of the Sanskrit text. It seems however next to impossible that Sir M. Westropp should have known that Colebrooke's variations of expression were not authorized by the original and should have said nothing about it; seeing that it deprives his emphatic reference to those variations of all meaning. If indeed he knew the state of the Sanskrit text and thought it so immaterial as not to deserve notice, he practically treated Colebrooke as the original authority and his reasoning does not thereby gain but loses in force.

The material passages in the two Dattaka books have been indicated before, and remarks have been made on those which quote and comment on Saunaka. It seems to their Lordships that the authors, who bring in the older texts at every turn, did not mean to do more than repeat and enforce them. If they were clearly laying down any additional precepts or authoritative interpretations of ambiguities, then, though as Mr. Justice Knox points out, such comments should be received with some caution, they should also be received with due regard to the authority which the books have acquired. But on this topic the writers seem anxious to found themselves entirely on the Smritis and to refer their readers back to them. Certainly on the crucial point now in issue they throw no light at all. They do not touch the question whether the injunction not to adopt only sons is a matter of positive law or only addressed to the moral sense. And yet Jaimini's treatise written some centuries earlier than the Dattaka Mimansa must have made the later of the writers if not both familiar with the importance of that distinction.

It is however worth while to observe how Nanda Pandita deals with the consequences of a forbidden adoption. He quotes Manu's requirement that the adopted son should be "similar" and he says (Sec. II, Pars. 22, 23), "Hence it is established that one of a different "class cannot be adopted as a son." In Sec. III. he recurs to that prohibition and asks "should "this rule be transgressed what would be the "case?" Then he deduces from texts of Saunaka and Katyayana that the adopted son shall not share in the inheritance, but shall be entitled to food and raiment. So that the adoption is not void, but the son of the wrong class is reduced to a claim for maintenance only. With this exception which favours the Appellants' theory, it seems to their Lordships that these two treatises leave the question exactly where it stands on the earlier authorities.

From both the Courts below we learn that there is no resentment excited by this kind of adoption. The District Judge of Godavery says "the people have settled down under the law "enunciated in 1862." He can hardly recollect the state of things prior to 1862, but his statement of the present state of things is founded on personal knowledge. Whether the people have settled down under the High Court decision, a result which is usually of very slow growth if it takes place at all, or whether as is more probable that decision was in accordance with the ordinary existing ideas and practice, we are told that in point of fact there is no conflict between the declared law and the feelings of the people. Nor is there any indication that there ever was such a conflict. In Allahabad the parties are Agarwala Banias of Benares, who are, as two of the learned Judges below state, specially careful of caste and religious observance. The adoption was 20 years old and no caste penalties had

followed it. These things do not prove a custom but they do tend to prove that among orthodox Hindus the adoption of only sons has never been so inculcated as a sin by their teachers as to excite abhorrence or social hostility, such as we know to follow some other breaches of their religious laws. That the practice is a frequent one is shown by the frequency of litigated cases, which must be quite insignificant in number as compared with those that actually occur, and from the establishment of customs authorising it in various places. This is not one of the cases in which people are tempted by appetite to break an acknowledged law. It is inconceivable that the choice of an only son for adoption can in any large number of cases proceed from any other cause than a conviction of its suitability to the circumstances. That is a family matter which a wise lawgiver, while warning parties of their spiritual responsibility, would yet leave it possible for them to do. The Hindu sages appear to have taken that course in this and kindred matters.

Their Lordships then, have a case before them of which the broad outlines are as follows. Old books, looked on as divine, give to the father plenary powers over his sons. The same books discountenance the giving of an only son in terms which may be construed as a positive command making the gift void or as a warning pointing out the mischief of the act but leaving individual men to do it at their peril. The books contain no express statement which kind of injunction is meant. The practice of such adoptions is frequent. Over some substantial portions of Hindu society it is established as a legal custom, whatever may be the general law. In other very large portions it is held to be part of the general Hindoo law. Nowhere is it known to be followed by hatred or social penalties.

Pausing there, the case is one in which if the authoritative precepts are evenly balanced between the two constructions, the decision should be in favour of that which does not annul transactions acceptable to multitudes of families, and which allows individual freedom of choice.

But what says authority? Private commentators are at variance with one another; judicial tribunals are at variance with one another; and it has come to this, that in one of the five great divisions of India the practice is established as a legal custom, and of the four High Courts which preside over the other four great divisions, two adopt one of the constructions and two the other. So far as mere official authority goes there is as much in favour of the law of free choice as of the law of restriction. The final judicial authority rests with the Queen in Council. In advising Her Majesty their Lordships have to weigh the several judicial utterances. They find three leading ones in favour of the restrictive construction. The earliest of them (in Bengal 1868) is grounded on a palpably unsound principle and loses its weight. The second in time (Bombay 1875) is grounded in part on the 1st and to that extent shares its infirmity; and in part on texts of the Mitakshara which are found to be misleading. So that it too loses its weight. The third (Bengal 1878) is grounded partly on the first, and to that extent shares its infirmity; but it rests in great measure on more solid ground, viz., an examination of commentators and of decided cases. It fails however to meet the difficulty of distinguishing between the injunction not to adopt an only son and other prohibitive injunctions concerning adoptions which are received as only recommendatory; the only discoverable grounds of distinction being the texts of the Mitakshara which are misleading, and the greater amount of

religious peril incurred by parting with an only son, which is a very uncertain and unsafe subject of comparison. The judicial reasoning then in favour of the restrictive construction is far from convincing. That the earliest Madras decision rested in part on a misapprehension of previous authority has been pointed out; and the Madras reports do not supply any close examination of the old texts or any additional strength to the reasoning on them. The Allahabad Courts have bestowed the greatest care on the examination of those texts, and the main lines of their arguments, not necessarily all the byways of them, command their Lordships' assent. Upon their own examination of the Smritis their Lordships find them by no means equally balanced between the two constructions but with a decided preponderance in favour of that which treats the disputed injunctions as only monitory and as leaving individual freedom of choice. They find themselves able to say with as much confidence as is consistent with the consciousness that able and learned men think otherwise, that the High Courts of Allahabad and Madras have rightly interpreted the law and rightly decided the cases under appeal.

Their Lordships have been reminded of the length of time for which the law must have been considered as settled in Bombay and Calcutta. A similar consideration affected the Courts of Madras and Allahabad and is remarked on by both. The time is not very long in any of the four provinces, but it is long enough to increase the gravity of the questions in these appeals. In estimating the weight of reasoning in the various litigated cases their Lordships have not forgotten the weight of the actual decisions; that they represent the opinions of eminent and responsible men, arrived at after public and anxious discussion, carrying with them an

authority not legally disputable in the provinces under their jurisdiction, and it may be affecting many minds and many titles to property or to personal status. Such decisions are not lightly to be set aside. A Court of Justice, which only declares the law and does not make it, cannot, as the Legislature can, declare it with a reservation of titles acquired under a different view of it. But their Lordships are placed in the position of being forced to differ with one set of Courts or the other. And so far as the fear of disturbance can affect the question, if it can rightly affect it at all, it inclines in favour of the law which gives freedom of choice. People may be disturbed at finding themselves deprived of a power which they believed themselves to possess and may want to use. But they can hardly be disturbed at being told that they possess a power which they did not suspect and need not exercise unless they choose. And so with titles. If these appeals were allowed, every adoption made in the North-West Provinces and in Madras under the views of the law as there laid down may be invalidated, and those cases must be numerous. Whereas in Bengal and Bombay the law now pronounced will only tend to invalidate those titles which have been acquired by the setting aside of completed adoptions of only sons, and such cases are probably very few. Whether they demand statutory protection is a matter for the Legislature and not for their Lordships to consider. It is a matter of some satisfaction to their Lordships that their interpretation of the law results in that course which causes the least amount of disturbance.

Their Lordships will humbly advise Her Majesty to dismiss both appeals and the Appellants must pay the costs.