BOMBAY HIGH COURT

Balu Sakharam Powar

Vs

Lahoo Sambhaji Tetgura

(John Beaumont, Kt., C.J. Rangnekar and N Wadia, JJ.)

16.10.1936

JUDGMENT

John Beaumont, Kt., C.J.

1. In this second appeal certain questions have been referred by a bench consisting of Mr. Justice Divatia and Mr. Justice Macklin to a full bench. The justification for the reference is the doubt which exists as to how far recent decisions of the Privy Council have affected the law of adoption in this Presidency. The question is of great importance since questions relating to adoption form one of the most fruitful sources of litigation, and we are told that a good many pending appeals depend on the answers this bench may make to the questions referred.

2. In dealing with the law of adoption two aspects of the matter have to be bome in mind, first, the right to adopt, and secondly, the effect of a valid adoption upon the vesting or divesting of property. In my opinion, there can be no doubt that recent decisions of the Privy Council, to which reference will be made hereafter, have greatly extended the rights, as formerly understood in this Presidency, of a Hindu widow to adopt, and have established that the right depends on considerations of a religious character, and forms part of the religious system of the Hindu community. The effect of adoption upon the vesting and divesting of property is, however, part of the law of property, and the question which we have to consider is the effect of the Privy Council decisions upon that branch of the law. In considering that matter, those responsible for the practical administration of the law in this Presidency cannot shut their eyes to certain general considerations. In the first place, although the right of a Hindu widow to adopt may be based on considerations of religion and the paramount obligation of providing a son to her deceased husband, so that there may be some one to perform the religious rites for the benefit of the souls of his ancestors, in actual practice the very numerous cases of adoption which come before the Courts are all concerned with questions of property. Whether the widow of a pauper Hindu ever adopts, I know not. She would probably find it difficult to persuade any man to give himself or his son in adoption if he were offered nothing more tangible, in exchange for the position which

he gives up in his own family, than the prospect of performing religious ceremonies for the benefit of the souls of ancestors in the adoptive father's family. At any rate, if adoptions are ever made in families which possess no property, they are not challenged in the Courts. In the second place, the widow of a Hindu is frequently a girl of tender age, who may survive her husband by fifty or sixty years, and self-interest suggests to a widow that she should postpone an adoption till near the close of her life in order that she may not herself be deprived of the enjoyment of her property. I do not suggest that this motive always operates, since, apart from a sense of duty which a Hindu widow may possess, she is usually subjected to much advice of an interested, and often dishonest, character, which takes no account of her own interest. Nevertheless adoptions are often long delayed. If it be held that the effect of a valid adoption by a widow is generally to divest in favour of the adopted son estates which have become vested in or through an heir of the last holder, it must mean that so long as the possibility of adoption exists, no one can safely deal with property the title to which may be affected by such adoption. This practical aspect of the matter was recognized by the Privy Council as long ago as 1876 in Sri *Raghunadha v. Sri Brozo Kishoro*[1] in which their Lordships say (p. 193) :It may be the duty of a Court of Justice administering the Hindu law to consider the religious duty of adopting a son as the essential foundation of the law of adoption; and the effect of an adoption upon the devolution of property aa a mere legal consequence. But it is impossible not to see that there are grave social objections to making the succession of propertyand it may be in the case of collateral succession, as in the present instance, the rights of parties in actual possessiondependent on the caprice of a woman, subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of, or capable of exercising dominion over, property. It seems, therefore, to be the duty of the Courts to keep the power strictly within the limits which the law has assigned to it;....That warning is, in my view, as appropriate now as it was in 1876.

3. The relevant facts in the present case are that there were three brothers, members of a joint family, namely, Babaji, Laxman, and Vithal. Babaji died on July 9, 1919, leaving a son Govind, who died leaving a widow Tayaji and a daughter Bhima. Laxman, who died on July 5, 1919, had two sons, Sakharam and Shankar, both of whom predeceased him, and a daughter. Shankar died unmarried, but Sakharam left a widow Bayaji, who in 1923 adopted Balu, defendant No. 1. Vithal died in 1903 leaving a son Shiva and a daughter Avadi. Shiva died on July 10, 1919, leaving a widow Gouri, who remarried in 1926 or 1927. It has been found by both the lower Courts that when Shiva died he was the last surviving coparcener, and it was not disputed in second appeal that on his death his widow Gouri was his heir, and that on her remarriage the property passed to Avadi as the next heir, and the plaintiff claims by purchase through Avadi. The question which falls for decision in the appeal is whether the adoption by Bayaji, the widow of a deceased coparcener, of defendant No. 1, during the period in which Gouri was the heir of

Shiva, had the effect of vesting the property in the adopted son and divesting it from the heirs of Shiva. On the facts the case falls within the decision of this Court in *Chandra v. Gojarabai* [2]and the argument before us has mainly turned on whether Chandra's case is inconsistent in principle with the recent decisions of the Privy Council, and must be taken to have been impliedly overruled.

4. In Chandra's case there was a joint family consisting of a father and two sons Bhau and Nana. Bhau died first leaving a widow, then the father died, and Nana succeeded to the joint family property. Nana afterwards died leaving him surviving a widow Gojarabai, who got possession of the property. After Nana's death Bhau's widow adopted the plaintiff as son to her husband, and brought a suit against Gojarabai to recover the property from her. The Court held that Nana, as the last surviving coparcener, became the absolute owner of the property, that on his death the coparcenary was at an end, and the property vested in his widow as his heir. The subsequent adoption by Bhau's widow did not divest the estate of Gojarabai since the brother's son was a more remote heir, from the point of view of inheritance, to the last survivor than the widow. The Court did not in terms hold that the adoption by Bhau's widow was invalid, though there is a dictum by the Privy Council in Bhimabai's case, (infra), that such was the effect of the decision. In view of Amarendra's case (infra), I think that the adoption in Chandra's case must be treated as valid, and if the decision was otherwise, it must be treated to that extent as overruled, but the real question is whether the decision stands in relation to its effect upon the vesting of property. Mr. Kane contends that the effect of adoption by the widow of a deceased coparcener has the effect of reviving the coparcenary, and if that is so, there can be no doubt that the adopted son of the deceased coparcener Bhau would take in preference to the widow of Nana. But the decision is directly opposed to the contention of Mr. Kane, and I am not prepared to accept the view that the coparcenary was revived by the adoption of a son to Bhau.

5. I now turn to the relevant decisions of the Privy Council. The first case to notice is P*ratapsing Shivsing v. Agarsingji Raisingji*[3]. In that case by a family custom land had been granted out of the impartible family estate to younger sons for jivai or maintenance. The line of the younger sons became extinct, and thereupon the jivai reverted to the elder branch. Subsequently, the widow of the last holder of a jivai grant, who had died without issue, adopted a son. It was held that the adoption was valid, and that the son inherited the jivai grant. So far as its effect upon property is concerned, that decision seems to be of limited application. It is not really a question of divesting property, but of reviving a grant which had fallen into abeyance, and the question really turns on the effect of the family custom t referred to.

6. The next case is *Yadao v. Namdeo*[4] The question in that case turned mainly on whether a Hindu widow in a joint family could adopt without obtaining the consent of the husband's

kinsmen, and that question has finally been disposed of in favour of the widow by Bhimabai's case, infra. The position with regard to property was that one Pundlik, who was a member of a coparcenary, died childless, and his widow adopted one Pandurang. It was held by the Privy Council that the property was divided in the lifetime of Pandurang. Subsequently Pandurang died, and Pundlik's widow adopted Yadao. The suit was brought by Yadao against Namdeo, who disputed the adoption and claimed to retain the property as the surviving member of a joint Hindu family. It was held by the Privy Council that the adoption of Yadao was good, and that the plaintiff was entitled to his divided share of the joint family. The only real question in dispute was as to the validity of the adoption : if that was valid the plaintiff's title was established. The next case is *Bhimabai v. Gunmathgouda Khandappagouda*[5] In that case it was definitely established, contrary to the view of the law which had prevailed in this Presidency, that a Hindu widow, unless expressly forbidden by her husband to adopt a son to him, could do so, although he had died undivided, and she had not obtained the consent of any of the surviving coparceners. In that case, again, if the adoption was good, the position with regard to the property presented no difficulty. At the date of the adoption a coparcenary was in existence, and the adopted son necessarily took his share in the coparcenary property, and on the death, shortly after the adoption of the only other coparcener, the whole property vested in the adopted son as the last surviving coparcener. Chandra's case was discussed in the judgment of the Board, and was distinguished on the facts. The Board certainly did not overrule the case, or even express disapproval of it, although they stated that in Chandra's case the adoption was held to be invalid.

7. The next case, and the case which has given rise to most difficulty, is *Amarendra Mansingh v. Sanatan Singh*[6] In that case the family property consisted of an impartible zamindari governed by the rule of lineal primogeniture and in which by custom females were excluded from inheritance. The last adult holder of the zamindari died leaving a widow, to whom he had given authority to adopt in the event of his son dying. The son succeeded to the estate, but died unmarried at the age of twenty years and six months, and thereupon the widow adopted a son. It was held that such adoption was valid, and it was admitted by the parties that in that event the appellant was entitled to the property as against the plaintiff, Banamalai, who was in pos-session, and claimed through the younger branch of the family. The Board in their judgment entered into an elaborate discussion of the true principles on which a Hindu widow's right to adopt is based, and they held that the foundation of the Brahminical doctrine of adoption is the duty which every Hindu owes to his ancestors to provide for the continuance of the line and the solemnisation of the necessary rites, and that the vesting of the property on the death of the last holder in some one other than the adopting widow, be it either another coparcener of the joint family or an outsider claiming by reverter or by inheritance, could not be in itseilf the test of the continuance or extinction of the power of adoption. The power continues in existence so long as the widow is the only person to

continue the line. Chandra's case was not mentioned, and I see nothing in the judgment of the Board to suggest that they disapproved of the reasoning upon which that case was based so far as it relates to the vesting or divesting of property.

8. The last case in the Privy Council to which reference need be made is *Vijaysingji Chhatrasingji v. Shivsangji Bhimsangji*[7] That again was the case of an impartible estate governed by the rule of lineal primogeniture. The line of the eldest son had become extinct by the adoption of Chhatrasingji, the son of Chandrasangji, into another family, and thereupon the property vested in Bhimsangji, the younger brother of Chandrasangji. Subsequently, the widow of Chandrasangji adopted to her husband, and it was held that the adoption was valid, and that the adopted son took the estate, thereby divesting the property from the younger branch. The case is. really of the same nature as Amarmdra's case.

9. The point to notice in all these cases before the Privy Council is that a coparcenary was in existence at the time of the adoption. It is true that; in Amarendra's case and Vijaysingji's case, the coparcenary was of a peculiar nature, but an impartible zamindari has been held to be a "coparcenary, though 1 of a special character. The effect of the decisions is to show that in a coparcenary of that nature adoption in the line of the elder son will divest the pro I petty from the line of the younger son, although the latter did not take by survivorship. But we have been referred to no case in the Privy Council, and the learned advocates in this case, to whose industry we are much indebted, have told us that they know of no case, in which the adoption took place after the termination of the coparcenary. There appears to be no authority in the Privy Council directly holding that after the determination of the coparcenary by the death of the last coparcener a subsequent adoption by the widow of a deceased coparcener will vest the coparcenary property in the adopted son to the exclusion of the heir of the last holder, other than the widow herself.

10. It remains to notice certain decisions of this Court, in which the Privy Council decisions have been discussed. In *Vishnu v. Lakshmi*[8], Mr. Justice Shingne held, in a case very similar to the present, that the adoption by the widow of the deceased coparcener was invalid, and that Chandra's case had not been overruled. The decision, I think, cannot be supported in so far as it holds that the adoption itself is invalid. In *Shankar v. Ramrao*[9] the question was discussed before a bench of this Court. Mr. Justice Broomfield expressed the view that Chandra's case did not in fact hold that the adoption then in question was invalid. But he was of opinion that if it did so hold, then it was inconsistent to that extent with Amarendra's case. He expressed the further view, however, that Chandra's case had not been overruled in its effect upon the vesting or divesting of property. I think that the decision in that case was correct. In *Dhondi Dnyanoo v. Rama Bala*[10] the position was that there was a joint Hindu family consisting of an uncle and a nephew. The

nephew had a sister. The uncle died first, and subsequently the nephew died, and thereafter the uncle's widow gifted away part of the property, and then adopted the plaintiff. The plaintiff sued to recover the property. It was held that the adoption by the widow was valid, but that inasmuch as the joint family had come to an end before the date of the adoption, the adopted son could not be treated as becoming a member of the joint family, and he was postponed to the sister of the nephew, who was a nearer heir in point of inheritance. I think this decision was clearly right. The only other case that it is necessary to mention is Umabai v. Nani . In that case a Hindu died leaving him surviving a widow, a daughter and the widow of a predeceased son. After the death of the widow, the daughter-in-law adopted a son. It was held that the adoption was valid, and had the effect of divesting the esta(1935) 38 Mom. L.R. 100 te from the daughter in favour of the adopted son, who was in the position of a superior heir. The case is clearly distinguishable on the facts from Chandra's case, and the appeal giving rise to this reference, because the adopted son was in that case a superior heir, but the question whether it was rightly decided arises on the reference [Question II (a)] and, having regard to the importance of the question and to other pending appeals, I think that we ought to answer it.

11. In my opinion the decision is wrong, but the question appears to me the most difficult one arising on this reference. Assuming that I am right in thinking that Amarendra's case decides that the existence of a widow's right to adopt is independent of any question relating to the vesting or divesting of property, does it follow that the adopted son inherits all property which would have passed to a natural born son of his adoptive father? It is no doubt a general principle of Hindu law that an adopted son acquires all the rights of a natural born son, with certain minor exceptions not material to be here noticed. But there is another well established rule of Hindu law that on the death of a separated householder or last surviving member of a coparcenary, the inheritance passes at once to the nearest heir or group of heirs and cannot be held in suspense subject to a possible adoption. [*See Amava v. Mahadgouda*[11]*]* Hindu law does not recognize, as does English law, an estate vested, but liable to be divested. In the case of undivided property, the inheritance does no doubt open to let in a coparcener subsequently born or adopted, but the law regards the vesting in the existing coparceners as merely temporary to prevent the ownership from being in abeyance. (See Kapur's Law of Adoption, p. 240.) It seems to me impossible, however, to apply that rule to the case of property which has vested in the heir of a divided Hindu. To do so would be to employ the legal fiction that an adopted son is conceived in the lifetime of its adoptive father, not for the purpose of mitigating the difficulties arising from a strict application of the law, but for the purpose of creating difficulty. There are a great many Indian cases dealing with the effect of adoption by a widow of a Hindu divided at the date of his death upon the divesting of his property. The rules established by those cases are summarized in Mulla's Principles of Hindu Law, 8th edn., at p. 553 (published in 1936 after the decision in

Amarendra's case), as establishing that the adoption by such a widow cannot divest any estate by inheritance unless the estate at the time of adoption vested in the adopting widow either as her husband's heir or as the heir of her son dying without leaving any wife, children, or other heir nearer than herself. These rules have existed for many years, and a great number of titles must depend upon them. In my opinion, it would be quite wrong for any Court in this country to hold that the Privy Council intended to cast a doubt on long established rules which were not referred to, and to override cases not cited, on which titles depend. So to hold would in my judgment be mischievous in the extreme, and would open the gates to a flood of litigation. It may be that the reasoning upon which some of the decisions are based is inconsistent with the reasoning in Amarendra's case, but the rules established by the cases may be justified on other grounds.

12. The conclusions to which I have come upon the cases are :

1. That a widow of a deceased member of a Hindu joint family can adopt to her husband without obtaining the consent of her husband's relations.

2. That a Hindu widow's right to adopt is based on religious considerations, and is not affected by any considerations as to the vesting or divesting of property.

3. That where a coparcenary exists at the date of the adoption, the adopted son becomes a member of the coparcenary, and takes his share in the joint property accordingly, and this principle applies although the coparcenary is a zamindari having the peculiar feature of being governed by the rule of lineal primogeniture.

4. That where the adoption takes place after the termination of the coparcenary by the death, actually or fictionally, of the last surviving coparcener, the adoption by a widow of a deceased coparcener has not the effect of reviving the coparcenary, and does not divest property from the heir of the last surviving coparcener (other than the widow) or those claiming through him or her.

13. The actual questions submitted to us are as follows :I. Does the fact of the coparcenary being extinct at the date of an adoption by a widow other than the widow of the last male holder invalidate the adoption?II. If not, does such an adoption have the effect of divesting property in favour of the adopted son in the following cases :

(a) When the property at the date of the adoption has already vested in an heir of the last male holder remoter than a natural born son of the adoptive father?

(b) When the property at the date of the adoption has already vested in an heir of the last male holder nearer than a natural born son of the adoptive father?

III. If so, when does the divestment take placeimmediately, or on the death of the heir in

possession?

I would answer them as follows :

No. I .. .. In the negative.

No. II (a) .. .. In the negative.

No. II (b) .. .. In the negative.

No. Ill .. .. Does not arise.

14. Mr. Justice N.J. Wadia has authorized me to say that he concurs in this judgment.

Rangnekar, J.

15. This case is referred to this full bench by a divisional bench for the determination of some important questions relating to the validity of an adoption by a Hindu widow. The facts upon which the questions are raised may be shortly stated.

16. The pedigree showing the relationship of the parties is printed at page 2 of the lower appellate Court's judgment. One Balu had five sons. Of the five sons Bhiva and Bhagoji separated from the family, and the three remaining sons, Babaji, Laxman and Vithal, continued to live as members of a joint family. Vithal died in 1903 leaving him surviving a son Shiva and a daughter Avadi. Babaji had a son Govind. Laxman had two sons, Sakharam and Shankar, and a daughter Tanhi. Of these, Shankar died first and thereafter Sakharam died in 1908 leaving his widow Bayaji. Then in 1919 there were four deaths in the family within four days. The first was that of Laxman on July 5, 1919. The second was of Babaji on July 9, 1919. Then, Babaji's son Govind died on July 10, 1919, leaving his widow Tayaji and a daughter. Within a few hours thereafter, Shiva, Vithal's son, died leaving his widow Gouri and his sister Avadi. Thus, on July 10, 1919, Shiva was the last surviving coparcener in the family, and on his death the estate vested in his widow Gouri. The family was governed by the law of the Mitakshara applicable to Hindus in this Presidency. In 1923, Sakharam's widow Bayaji adopted Balu as a son to her deceased husband. In 1926, Shiva's widow Gouri remarried, and it is common ground that on her remarriage she forfeited her interest in her husband's estate. In 1929, the plaintiff, who is a stranger to the family but was married to Laxman's daughter Tanhi, purchased the property, which is the subject-matter of the suit, from Avadi, the daughter of Vithal, and in 1931 he brought a suit to recover possession of this property from the defendants. Balu, the adopted son of Sakharam, was defendant No. 1 and the principal contesting party, and his mother, who was the widow of Sakharam, was defendant No. 3. The position of the other defendants to the suit is not material and need not be referred to. It is clear from the facts that at the date of adoption there were only

three widows left in the joint family,Tayaji, the widow of Govind; Bayaji, defendant No. 3; and Gouri, the widow of Shiva. The trial Court held that the adoption was invalid. The first appellate Court held that the adoption was valid, but it could not affect the plaintiff's rights.

17. In second appeal, the contentions on behalf of the appellant (defendant No. 1) were : (1) that his adoption was valid and he was entitled to divest the estate vested in Gouri, and (2) *Chandra v. Gojarabai*[12] on which the plaintiff relied, was impliedly overruled by recent decisions of the Privy Council. On behalf of the plaintiff it was argued that Chandra vi. Gojarabai was not overruled and, therefore, the adoption was invalid, and that, in any event, the adopted son was not entitled to divest the estate which had vested in Shiva's widow. On these facts, three questions set out in the referring judgment are referred to us.

18. It is conceded by Mr. Kane that there is no text of Hindu law as such bearing on the questions and that the answers to the questions must depend upon judicial decisions and general principles of Hindu law. It becomes necessary, therefore, to examine the cases relied upon before us in support of the respective contentions; but, before doing so, it will not, I venture to think, be out of place to repeat that oft-quoted, but often ignored, rule that a case is an authority for what it decides and not for what may seem logically to follow from it, It will also be useful to bear in mind that a Court of law ought to hesitate before upsetting a long course of judicial decisions and particularly where on the faith of such decisions rights of the subjects have for a long time come into' existence and dispositions of property have been made and entered into. In this connection I may refer to the observations of no less an authority than Lord Blackburn in Julius v. Lord Bishop of Oxford (1880) 5 App. Cas. 214, 239. His Lordship (at p. 239) cited the following passage from Lord Justice Bramwell in The *Queen v. Bishop of Chichester*[13]

I cannot but think we are concluded. The decisions and opinions are such and so many that we ought to follow them. This is my conviction. I think at least none but the ultimate Court of Appeal should overrule opinions so expressed, even if that should, as to which I content myself with observing that where the law has been laid down, and generally supposed and taken to be correctly laid down and acted on, great Judges have doubted much whether, if wrong, the only remedy was not in the Legislature.Lord Blackburn then proceeds to observe as follows (p. 239):I quite agree that where, from the nature of the decision, there is reason to believe that rights have been regulated and arrangements as to property made on the faith that the law was as laid down, it may be right to follow the decision even if wrong).The observations of Lord Watson in *Sailing Ship "Blairmore" Co. v. Macredie*[14] are also pertinent (p. 605):The question of Scottish law, which was brought before but was not decided by this House in Robertson, *Forsytk & Co. v. Stewart, Smith and Ors.*[15] is, in my opinion, as open mow as it was in the year 1814. Since that date more than eighty years have elapsed. During that period the English decisions which were

criticised by Lord Eldon have been consistently followed in English Courts; and, to my apprehension, it would be beyond the function of this House to alter them now, as might have been done in the beginning of the century. In Scotland, during the same period, there has not been a single decision upon the point save in the present case.The same principle was accepted by the Privy Council in *Pattabhiramier v. Vencatarow Naicken*[16] in these words (p. 572):

It must not, then, be supposed that in allowing this appeal their Lordships design to disturb any rule of property established by judicial decisions so as to form part of the Law of the Forum, wherever such may prevail, or to affect any title founded thereon.

19. In Chandra v. Gojarabai the facts were, that one Krishnaji and his two sons, Bhau and Nana, were members of an undivided family. Bhau died first, leaving a widow. Then Krishnaji- died. On his death, Nana succeeded to the family property. Nana afterwards died, leaving him surviving his widow, the defendant, Gojarabai, who then got possession of the said property. After Nana's death, however, Bhau's widow adopted the plaintiff as son to her husband, and he brought a suit against Gojarabai to recover possession of the property from her. He alleged that Bhau in his lifetime, with the concurrence of Krishnaji, had given express authority to his wife to adopt a son after his death. The Court of first instance gave the plaintiff a decree. On appeal, the District Judge rejected his claim. The plaintiff appealed to the High Court. The judgment in that case was delivered by Telang J. who, as is well known, was a brilliant Sanskrit scholar and one of our most eminent Judges. After an examination of the cases of *Rupchand Hindumal v. Rakhmabai*[17] *Mussumat Bhoobun Mdyee Debia v. Ram Kishore Acharj Chowdhry*[18], *Sri Raghunadha v. Sri Brozo Kishoro*[19] *Pudma Coomari Debi v. Court of Wards*[20] *Thayammal v. Venkatarama*[21] *and Tarachurn Chatterji v. Sureshchunder Mukerji*[22], the learned Judge deduced the following rule (p. 469):[An] adoption by a widow under her husband's authority has the effect of divesting an estate vested in any member of the undivided family of which the "husband was himself a member; but it does not divest the estate of one on whom the inheritance has devolved from a lineal heir of the husband.Then, after referring to *Bhubaneswari Debi v. Nilkomul Lahiri* [23] the learned Judge observed that the rule must be supplemented by this addition, that the adoption, though authorized by, the husband, cannot divest the estate which has already vested in a collateral relation of the husband in succession to some other person who had himself become owner in the meantime. He then observed as follows (p. 470) :That adoption does not take place till after the death of Nana, the husband of the defendant Gojarabai. At the time of his death, Nana was full owner as. last survivor of the joint family. The property then devolved as his, and a subsequent adoption, however well authorised, to Bhau, a collateral relation of Nana, cannot divest the defendant Gojarabai, who claims under Nana and does not claim through Bhau at all.In an earlier part of the judgment (at p. 468) the learned Judge had observed that if the adoption had taken place during Nana's lifetime, it would have prevented Nana from taking Bhau's joint share

by survivorship, and Bhau's son would on Nana's death without a son have succeeded by survivorship to the whole estate. At p. 471 he observed as follows:When the inheritance devolved from Nana upon his widow Gojarabai, it devolved, not by succession, as in an undivided family, but strictly by inheritance, as if Nana had been a separated house-holder. Strictly speaking, according to-the view taken by our Courts, there was at Nana's death no undivided family remaining into which an adopted son could be admitted by virtue of his adaption.

20. In Bhubaneswari's case the competition was between a person adopted by the widow of a pre-deceased brother of the original owner of the property and the natural son of another brother of the original owner as to the right to succeed to the property on the death of the owner's widow. On the death of the widow the last mentioned nephew succeeded and it was after this that the adoption was made. It was held by the Privy Council that an adoption after the death of a collateral does not entitle the adopted son to come in as heir to the collateral.

21. The question then is, what is the effect of the decision? It is argued that it was not there held in terms that the adoption was invalid. That may be so. The case was decided in 1890, and since then, as correctly observed by the learned author of Mulla's Hindu Law, 8th edn., at p. 533y although the actual decision is that the adopted son could not recover the-property of the family from Nana's widow, the decision has been always, understood in Bombay as laying down that the power of Bhau's widow to adopt had terminated, and has been, therefore, understood on the strength of other decisions of the Privy Council, which will be mentioned presently, that the adoption was invalid. There is, however, high authority for this view. In *Bhimabai v. Gurunathgouda Khandappagouda*[24] Chandra v. Gojarabai was expressly relied upon on behalf of the respondent. Referring, to it Sir Dinshah Mulla observed as follows (p. 40):The question, in that case was whether an adoption by the widow of a coparcener, after the death of the last surviving coparcener, and after the estate had vested in his widow or another person as his heir, was valid, and it was held that it was not.I agree with the learned author of Mulla's Hindu Law that in the face of this dictum it is not permissible now to say that that case did not hold that the adoption was invalid (Mulla's Hindu Law, 8th edn., p. 532). Chandra v. Gojarabai has been also followed for all these years by the Madras High Court. The question as to the position when the power of a widow to-adopt is extinguished will be adverted to later.

22. The question now is, whether Chandra v. Gojarabai is impliedly overruled by the latest Privy Council decisions. In this Presidency the law of adoption is wider than that prevailing even in Madras, and it is well settled that where the husband was separate, his widow can always adopt without any authority from her husband or without the consent of any of his sapindas, unless she was expressly or impliedly prohibited from making an adoption by her husband. Where the

family was joint, the law seems to have been the subject of fluctuations. In 1879, and even before it, this Court had held that the widow of a deceased coparcener in a joint family could not adopt, except when she had her husband's authority or the consent of his undivided coparceners. The consent of the father-in-law was considered to be sufficient. Since then this principle was followed consistently without any dissent by this Court in a series of decisions, to which no reference is now necessary. In 1921, the same question came up in the case of *Yadao v. Namdeo (1921) L.R. 48 I.A. 513 : s.c. 24 Bom. L.R. 609 (Supra)* before the Judicial Committee from the Central Provinces. The parties were Hindus and subject to the law applicable in this Presidency. The facts were that one Pundlik, his cousin Namdeo, and Namdeo's sons Rambhau and Pandurang, were members of a joint family. Pundlik died childless in 1905, leaving his widow Champubai. Soon after, Namdeo gave his son Pandurang in adoption to Champubai. The adoption was evidenced by a deed. The adopted son died unmarried in 1907, and thereafter Champubai adopted Yadao without the consent of Namdeo and his son Rambhau. The Judicial Commissioner of Nagpur held that there was no separation of the joint family of Pandurang (the adopted son) and Namdeo at the time of Pandurang's death and that the adoption of Yadao having been made without the consent of Namdeo and his son Rambhau was invalid. There was an appeal to the Privy Council. The judgment of the Board was delivered by Sir John Edge, and it was held that the adoption was valid. Before the Board the case of *Ramji v. Ghamau*[25] which was the leading case on the subject in this Court, was relied upon. The Board held that the deed of adoption also effected a separation between Pandurang and Namdeo, so that the estate of Pandurang passed to Champubai on his death as his heir. The Board also held that Pundlik had not prohibited the adoption. Then, the Board held, as Sir Dinshah Mulla points out in Bhimabai's case, the estate being vested in Champubai, and there being no prohibition to adopt, she was free to adopt another son to her husband without the consent of Namdeo and his son Rambhau, and she adopted Yadao. An adoption made in these circumstances was obviously valid, and required no further consideration. But then, as pointed out in Bhimabai's case, both sides invited the Boardof this however there is no trace in the report of the caseto decide whether, even if Pandurang had not separated from Namdeo, Namdeo's consent was necessary to the adoption, and this question was considered in the latter part of the judgment. Their Lordships expressed their disapproval of the decision in Ramji v. Ghamau. Thereafter in this Court it was considered that the remarks of the Board with "reference to Ramji v. Ghamau were obiter dicta, and that Ramji v. Ghamau was not, therefore, overruled by the Board, and the principles laid down in that case were reaffirmed by a full bench *1936 in Ishwar Dadu v. Gajabai*[26] The same question came up for consideration before the Board in 1932 *in Bhimabai v. Gurunathgouda Khandappagouda*[27] The facts in that case were as follows. Nilkanthagouda, Khandappagouda and Jivangouda were three brothers of whom Nilkanthagouda and Jivan-Lahoo gouda were undivided and Khandappagouda was divided from them. Khandappagouda died in 1912 leaving

a son Gurunathgouda. Jivangoudadied in 1913 leaving his widow Bhimabai. Nilkanthagouda died in 1915 leaving his son Dyamangouda. In 1919 Dyamangouda died leaving his son Dattatraya, who was born in 1918. During the lifetime of Dattatraya, Jivangouda's widow Bhimabai adopted Narayan in 1919. Afterwards in 1920 Dattatraya died. Gurunathgouda brought a suit questioning the validity of Narayan's adoption. The High Court of Bombay, following the full bench judgment in Ishwar Dadu's case, held that the adoption was invalid as the joint family had not ceased and Bhimabai could not adopt without the consent of the sole coparcener Dattatraya. In the judgment delivered by Sir Dinshah Mulla it was held that Ramji v. Ghamau was overruled by Yadao's case and that the decision in Ishwar Dadu's case was erroneous. The Board reversed the High Court's judgment and held that the adoption was valid. Although that decision has been the subject of strong and weighty criticism in this country, it must now be taken as definitely established that in this presidency the widow of a deceased coparcener in a joint family has an inherent power to make an adoption to her deceased husband without the consent of his coparceners.

23. The next case to be noticed is the case of *Prolapsing Shivsing v. Agarsingji Raisingji*[28] But before proceeding to do so, it would be convenient at this stage to consider what exactly is the position in the case of an impartible zemindary or estate, as that was the nature of the estate in that case and in the other cases to be discussed later. It is now settled, after some fluctuations, that in the case of an ancestral impartible estate, governed by Mitakshara law, the succession will devolve by survivorship upon the eldest coparcener of the senior line in preference to one nearer in blood. But the presumption of lineal primogeniture may be ousted by proof of a different rule of devolution by a special family custom. If the estate is separate or self-acquired property of the deceased zemindar, it will descend in accordance with the ordinary rules of succession to the estate of a Hindu separated from his family, and the degree of nearness of kinship will be the deciding factor. If there are more persons than one standing in the same degree of relationship to the last holder, the eldest, if all belong to the same line, and the eldest in the senior branch, if there are more branches than one, will be the preferable heir. The rules to apply will be the rules which govern succession to partible property, subject to such modifications only as flow from the character of the estate as impartible estate. So that, as Mayne observes, at p. 467, the fiction of such an estate being joint family property is recognized for ascertaining the succession. The cases will be found collected in Chapters 8, 11 and 18 in Mayne on Hindu Law. Then the learned author refers to *Gavuridevamma Yenumula v. Ramandora Garu*[29] and holds at p. 351 that the principle applicable to coparcenary property is applicable to impartible zemindary and points out that in that case the Court held that the zemindary, though impartible, was still coparcenary property, and that the members of the undivided family acquired the same right to it by birth, as they would have done to any other property, subject only to the limitation of the enjoyment to

one.

24. To revert to Pratapshtg's case, the facts were that by the family custom of a Hindu Rajput family in the Bombay Presidency land was granted out of the impartible family estate to younger sons for jivai or maintenance, and reverted to the estate upon a failure of the grantee's male descendants, widows being excluded from inheriting. Prior to 1903 some jivai lands were held by one Kaliansing. He died in October, 1903, without a male issue, but leaving a widow. Shortly after his death, the widow adopted a son to her husband, who was the appellant before the Board. The then Thakur, who was the head of the senior branch, brought an action in ejectment upon the ground that the land reverted to him as the owner of the original estate under the custom referred to above, and his claim was denied by the widow and the adopted son. The Subordinate Judge held that the custom was proved, but he held that the Thakur had failed to establish the custom debarring the widow of a jivaidar from, inheriting his estate or from making an adoption to him. He further held that the defendant was validly adopted but the adoption had not affected the plaintiff's right to resume the jivai, and on certain evidence and in particular some documents executed between the parties in earlier proceedings, he held that the plaintiff was estopped from questioning the title of the adopted son. In the result, he dismissed the plaintiff's claim. In appeal, the High Court agreed with the Subordinate Judge on the question of the custom of reversion, but they disagreed with him on the construction of the documents on the question of estoppel, and held that, although the defendant was validly adopted and was entitled to succeed to other property left by his adoptive father, yet as his adoption took place after the reversion had taken effect and after the land had vested in the plaintiff, which occurred immediately Kaliansing died, the plaintiff was entitled to succeed. Accordingly they reversed the order of the Subordinate Judge and decreed the plaintiff's claim. In the judgment of the Privy Council delivered by Mr. Ameer Ali, their Lordships were inclined to agree with the Subordinate Judge as to the intent and meaning of the documents, but proceeded to consider the question of the rights of the parties upon a larger ground as to whether, if the adoption was valid as held by the Bombay High Court, the decision of that Court, that as the estate had reverted and vested in the Thakur, the adoption could not divest it, was correct. I will take the liberty of quoting their Lordships' observations on this point as they have a material bearing on some of the questions which are referred to this full bench. Their Lordships observed as follows (pp. 106-7):Now it is an explicit principle of the Hindu law that an adopted son becomes for all purposes the son of his father, and that his rights unless curtailed by express texts are in every respect the same as those of a natural-born son. And a learned authority on Hindu law has explained that the only express text by which the heritable rights of an adopted son are contracted refers to the case of his sharing the heritage with an after-born natural (aurasa) son. In every other instance the adopted son and the son of the body stand exactly in the same position.Then they referred to *Bamundoss Mookerjea v. Mussamut Tarinee*[30],

and after explaining it observed as follows (pp. 107-8):But it was also pointed out that there was no power under the Hindu, law to compel a widow to adopt. Unless there is a time limit imposed in the authority which empowers her to adopt, or she is directed to adopt promptly, she may make the adoption so long as the power is not extinguished or exhausted....The right of the widow to make an adoption is not dependent on her inheriting as a Hindu female owner her husband's estate. She can exercise the power, so long as it is not exhausted or extinguished, even though the property was not vested in her....Then, towards the end of the judgment their Lordships observed (p. 108):But it was admitted that a posthumous son would prevent the reversion. If the widow happened to be enceinte the reversion naturally would remain in suspense until the birth of the child, to see whether it was a male or female.... It may be that if a Hindu widow lies by for a considerable time and makes no adoption, and; the property comes into the possession of some one who would take it in the absence of a son, natural or adopted, and such person were to create rights in such property within his competency whilst in possession, in such case totally different considerations would arise. But here there is nothing of the kind to modify the true application of the Hindu law.It is important to notice that the Subordinate Judge in that case had held that the adopted son had failed to establish that his adoption, though valid, had the effect of divesting the estate which had reverted to the Thakur, and he further held that the plaintiff was estopped from disputing the title of the widow and the adopted son by reason of the earlier documents. Their Lordships were inclined to agree with him on the latter question, and, therefore, the adopted son could have succeeded on that ground alone, and it was not necessary to consider the question whether the adoption had the effect of divesting the estate. It was argued for the appellant, however, that the adopted son had all the rights of a posthumous son, and that the adoption divested any estate which would have been divested by a posthumous son, and the cases of *Sri Raghunadha v. Sri Brozo Kishoro*[31] *Madana Mohana v. Purushothama*[32] *and Bachoo Hurkisondas v. Mankorebai* [33]were relied upon. On the other hand, it was argued that the rights of an adopted son dated from his adoption and did not relate back as though he was a posthumous son. It was in reference to these contentions that their Lordships made the observations which I have set out. It is important to note that all the cases on which the appellant relied in support of this part of his case were cases in which the impartible estate was held to be joint and undivided, where the ordinary principles applicable to succession in the case of partible property were held to be applicable. In Sri Raghunadha's case the impartible property was there regarded as joint, in Madana Mohma's case the judgment expressly states that the family was joint, and there can be no doubt that Bachoo v. Mankorebai was a case of an ordinary coparcener holding partible property. Now, if in Pratapsing's case the property was partible, there can be no doubt that the adoption made by Kaliansing's widow would have been valid, as it was made during the lifetime of the Thakur, who was a coparcener or a member of the joint family. The estate was ancestral, and there was no allegation that at any time the family had become divided. In my opinion,

therefore, there is nothing in that case which is in conflict with the rule laid down in Chandra v. Gojarabai, and it is difficult to hold that the coparcenary estate had come to an end as was the case in Chandra v. Gojarabai. The case, moreover, was rested upon a claim to reversion.

25. The next case is *Amarendra Mansingh v. Sanaian Singh* [34] which is very strongly relied upon in support of the contention that Chandra v. Gojarabai must be taken to have been impliedly overruled. This also was a case of an impartible zemindary, and it was proved that there was a custom in the family excluding the females from inheriting. The facts were that Raja Brajendra died leaving his son Raja Bibhudendra and his widow Rani Indumati. He executed a deed by which he authorized Rani Indumati to adopt in the event of the son dying. The son succeeded to the impartible zemindary held by his father but died unmarried at the age of twenty years and six months. Thereupon Rani Indumati, who was his mother, made an adoption to her own deceased husband. A suit was instituted by Banamalai, who was the great-grandson of Krishna Chandra, the common propositus. The zemindary was claimed on the basis that it was separate property. His claim was opposed by Rani Indumati and the adopted son. The Courts in India held the adoption to be invalid on the ground that Rani Indumati could not exercise her power to adopt under the deed so as to divest the estate vested in the plaintiffs, as the adoption was made a few days after the death of the son Raja Bibhudendra. The judgment of the Board was delivered by Sir George Lowndes, and the actual decision of the Board was that as the natural son had left no son to continue the line nor a widow to provide for its continuance by an adoption, the adoption by his mother was valid, although the zemindary was not vested in her, and although the son had attained the age of full ceremonial competence. In coming to that conclusion, after discussing various authorities as to the limits to the exercise of a power to adopt possessed by a Hindu widow, their Lordships followed Pratapsing's case, explained Madana Mohana's case, approved of *Ramkrishna v. Shamrao*[35] doubted the decision in *Bhimabai v. Tayappa Murarrao* [36]Again, for the reasons which I have already given in connection with Pratapsing's case, if this had been the case of an ordinary partible property held under the Mitakshara law by a joint and undivided family, there can be no doubt that the adoption was valid. As in Pratapsing's case, here also succession had to be determined on the principles of coparcenary property, as the adoption was made whilst Banamalai was alive; and, in my opinion, therefore, the decision, which must be confined to the facts of the case, does not affect the correctness of the decision in Chandra v. Gojarabai, where, as pointed out by Telang, J., at the time of adoption, the joint family was extinct. Apart from the fact that Chandra v. Gojarabai is not even referred to, the principle laid down in that case did not at all arise before the Board upon the facts in Amarendra's case. Although the zemindary was separate, the succession devolved on the same principles as would be applicable in the case of partible coparcenary property. Banamalai took the property subject to being divested by the son of a coparcener, natural or adopted.

26. Mr. Kane says that Bhimabai v. Tayappa, which in its turn followed Chandra v. Gojarabai, was considered to be no longer authoritative, and, therefore, Chandra v. Gojarabai must be treated as being overruled. I am unable to accept this contention. Nor does it appear that Chandra v. Gojarabai was expressly relied upon in support of the decision in Bhimabai v. Tayappa. It does not follow that because a case, in which some other case was referred, to, was overruled, therefore the latter must also be taken to have been overruled. Mr. Kane, however, argues that having regard to their Lordships' opinion in Amarendra's case that the true principle must be founded upon. "the religious side" of Hindu doctrine and that the validity of adoption must be judged from the religious and ceremonial side and that the power to adopt does not depend in any way on the vesting of property or divesting of it, the adoption in this case is valid. This contention is opposed on behalf of the respondents.

27. Now, the question is, whether the only test of the validity of an adoption: is the so-called religious efficacy of it, or do other considerations also come in from the point of view of rights to property which would also be material in determining the validity of an adoption? At p. 134 Mayne in his Hindu Law and Usage, 9th edn., observes as follows :It must not be supposed that the religious motive for adoption ever excluded the secular motive. The spiritual theory operated strongly upon the Shastries who invented the rule; but those who followed them were, in all probability, generally unconscious of any other aim than that of securing an heir, on whom to lavish the family affection which is so strong among Hindus.In fact, as Mayne points out, the earliest instances of adoption found in Hindu legend are adoption of daughters.

28. Then Mayne refers to adoptions made in other communities and among; other peoples, such as Jats, Sikhs, Muhammadans. It is not unknown that adoptions are made among Parsees, and were not unknown even among the western nations. Then, after referring to earlier Privy Council decisions, and discussing the question as to the materiality of the motive of the adopting widow, whether she acted from religious motives or not or for supposed religious benefits to flow from the adoption, Mayne observes at p. 170 as follows :It does not seem, quite clear, even now, whether their Lordships are of opinion that the motive which operates upon the mind of a widow in making an adoption, can be material upon the question of its validity, where she has obtained the necessary amount of assent: that is, whether evidence would be admissible which went to show that the widow was indifferent to the religious benefits supposed to flow from an adoption to her husband!, or even disbelieved in the efficacy of such an adoption; and that her real and only object in making an adoption was to enhance her own importance and position, and to prevent the property of her late husband from passing away to distant relations. With the greatest deference to any conclusions to the contrary, which may be drawn from the above passages, it seems to me that the Judicial Committee did not mean to lay down that such evidence would be material or admissible. The fair result of all their judgments appears to be that the assent of one

or more sapindas is necessary, as a sort of judicial decision that the act of adoption is a proper one.Then the learned author points out that in Bombay, where the widow acts on her own discretion, it was for some time laid down that proof that she had been acting from sinful or corrupt motives in making an adoption would vitiate it (pp. 171-72):The Courts, however, were so liberal in placing the most favourable construction upon her acts and motives, that no case appears to have arisen in which an adoption was set aside for such a reason. The whole question was referred to a Full Bench in 1898 when it was decided that, inasmuch as the adoption procured for her husband all the religious benefits which he could have desired, any discussion of her motives was irrelevant.Then the learned author considers the case of an adoption made by a widow with the consent of the only adult sapinda of an undivided family and proceeds to observe as follows (p. 172):But where the assent is fair arid bona fide, it cannot be objected to on the ground that it did not arise from religious motives. I have already suggested that, even according to Brahmanical views, religious grounds were not the only ones for making an adoption, and that among the dissenting sects of Aryans, and all the non-Aryan races, religious motives had absolutely nothing to do with the matter. But farther, when a religious act comes to be indissolubly connected with civil consequences, it follows that the act may be properly performed, either with a view to the religious or the civil results, Not only so, but that if the act is in fact performed the civil consequences must follow, whatever be the motive of the actor.An eminent Hindu lawyer and scholar, Golapchandra Sarkar, Sastri, in his work on Hindu Law, 7th Edn., observes at p. 193 as follows :It is erroneous to suppose that the law of adoption owed its origin to the doctrine of spiritual benefit conferred by sons.Then he observes at p. 194 as follows :If one carefully reads the passages of the Smritis, extolling the importance of sons in a spiritual point of view, he will find that they all relate primarily to the real legitimate sons, and not to the secondary sons.The same learned author observes (p. 200):Most of the spiritual objects may be attained by a man destitute of male issue, through the instrumentality of other relations, such as the brother's son. But the secular object may be gained only by means of a son real or subsidiary. A man again aims at that Moksha...does not require a son and cannot adopt one.Apart from these opinions, it is clear from some of the Smritis and Nibandhas themselves that the practice of adoption originated in the secular notion of perpetuation of race and supplying the want of a natural son. It is true that there are some passages in Manu which are inconsistent with this view, but a careful study of the text shows the author's own opinion to be in favor of the former view. That also seems to be the opinion of Baudhayana and Vasishtha and Apastamba (see Sarcar's Law of Adoption. Tagore Law Lectures, pp. 44 to 46). Thus the learned Lecturer observes at p. 47 1936 as follows:There cannot be any doubt left on the mind of a reader after perusing the above passages that the doctrine of spiritual benefit, instead of being the foundation of the institution of subsidiary sons, was on the contrary invoked for the Very purpose of suppressing it by declaring these sons to be useless to their temporal fathers in a spiritual point of view.Jains

and other Hindu dissenters do not attach any importance to the Brahmanical theory of the importance of sons for spiritual purposes and do not perform or believe in the sraddha ceremonies and yet it is well known that they recognize adoption, and it seems, therefore, that the usage of adoption did not owe its origin to the religious belief that a son is necessary for the salvation of man.

29. The observations of the Privy Council in Sri *Raghunadha v. Sri Brozo Kishoro (1876) L.R. 3 I.A. 154*(Supra) are pertinent on this point. Their Lordships observed as follows (p. 193):It may be the duty of a Court of Justice administering the Hindu law to consider the religious duty of adopting a son as the essential foundation of the law of adoption; and the effect of an adoption upon the devolution of property as a mere legal consequence. But it is impossible not to see that there are grave social objections to making the succession of propertyand it may be in the case of collateral succession, as in the present instance, the rights of parties in actual possessiondependent on the caprice of a woman, subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of, or capable of exercising dominion over, property. It seems, therefore, to be the duty of the Courts to keep the power strictly within the limits which the law has assigned to it.

30. In the well-known Guntur case (*Rajah Vellanki Venkata Krishna Row v. Venkata Rama Lakshmi Narsaiyya*[37]*)* an adoption was made by a widow with the consent of the sapindas but without the authority of her husband, and it was found that the adopting widow had no apparent anxiety or desire for the proper and bona fide performance of any religious duty to her husband. It was held by the Privy Council that the adoption was good, although the High Court had set it aside on the ground that the act was not done by the widow in the proper and bona fide performance of a religious duty. The reason stated by their Lordships is as follows (p. 14):Their Lordships think it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow, and that all which this Committee in the former case intended to lay down was, that there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda, but upon a fair consideration by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband.

31. These authorities certainly support the contention that religious efficacy is not the sole test of the validity of an adoption made by a Hindu widow, and the question now is whether this view was totally discarded in Amarendra's case. I can find no warrant for such a view in the judgment in Amarendra's case. Their Lordships referred to Sri Raghunadhds case as well as to *Mussumat Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdhry*[38] and then observed as follows (pp.

251-52):

But though undoubtedly certain passages in the judgments relied on seemed to suggest that it was the succession to the, estate by the son's widow that was the determining factor, and, as was stated by a learned Hindu Judge in 1900, 'the whole current of recent decisions has been to base this limitation solely on the question whether the widow's act of adoption derogated from her own rights or the vested rights of others' (per Ranade J. in *Verikappa Bapu v. Jivaji Krishna*[39] yet it was never so laid down by the Board in precise terms. The dominant consideration may have been the right of property, and equitable claims may not have been without their influence, but the religious and ceremonial side was not altogether ignored. In Bhoobun Moyee's case Lord Kingsdown evidently relied upon the fact that Bhowanee had died at an age which enabled him to performand it was to be presumed that he had performedall the religious services which a son could perform for a father, and he refers to the doctrine of Hindu law that the husband and wife are one, and that in the widow a half of the husband survives.It may be pointed out incidentally that in Mussumat Bhoobun Moyee's case the question of "religious side" became material, as the deed, by which the power to adopt was given, expressly referred to it; and that is clear from what Lord Kingsdown referring to the deed observed at p. 309 (10 M.I.A.):He [Gour Kishore the father] mentions [in the deed] the objects which induced him to make the deedreligious motives, the perpetuation of his family, and the succession to his property; but it was by the adoption, and only by the adoption, that those objects were to be secured, and' only to the extent in which the adoption could secure them.

32. Then, it is nowhere laid down in Amarendra's case that in every case of adoption the sole test of the validity of an adoption is religious efficacy or benefit, or that spiritual benefit is the sole test of the validity of an adoption in every case. All that was said was (p. 249):Having regard to this well-established doctrine as to the religious efficacy of son-ship, their Lordships feel that great caution should be observed in shutting the door upon any authorized adoption by the widow of a sonless man: see in this connection *Katmepalli Suryanarayana v. Pucha Venkata Ramanu*[40] The Hindu law itself sets no limit to the exercise of the power during the lifetime of the donee, and the validity of successive adoptions in continuance of the line is now well recognized. Nor do the authoritative texts appear to limit the exercise of the power by any considerations of property. But that there must be some limit to its exercise, or at all events some conditions in which it would be either contrary to the spirit of the Hindu doctrine to admit its continuance, or inequitable in the face of other rights to allow it to take effect, has long been recognized both by the Courts in India and by this Board, and it is upon the difficult question of where the line should be drawn, and upon what principle, that the argument in the present case has mainly turned.

33. I have pointed out what was actually decided in the case. I think it is a good rule that opinions or observations in a judgment must be taken to have been used with reference to the actual facts of the case. In my opinion all that was held in Amarendra's case was that the "religious or spiritual side" was at least of primary importance in considering the validity of an adoption made by a widow. But I think it is clear from Amarmdra's case, as will be seen presently from the earlier decisions of the Privy Council also, that even the rule as to the religious benefit has its limits, and that once the power comes to an end it cannot be revived, and any adoption made subsequently would be invalid.

34. Mr. Kane next stressed the rule deduced in Amarendra's case from Pratapsings case and expressed in these words:It necessarily follows, their Lordships think, from this decision, that the vesting of the property on the death of the last holder in some one other than the adopting, widow, be it either another coparcener of the joint family, or an outsider claiming by reverter, or, their Lordships would add, by inheritance, cannot be in itseif the test of the continuance or extinction of the poweti of adoption." (60 I.A., p. 255.) Now it is clear that Amarendra's case followed the earlier judgment in Pratap-sing's case. Moreover Amarendra's case is similar to Sri Raghunadka's case. In the latter case the facts were that a zemindar holding an impartible estate in Madras died leaving a brother and his widow. The widow adopted a son to her husband under his authority. On the zemindar's death the estate vested in the brother. The Privy Council held that the adoption was valid and that by the adoption a new coparcener was introduced in the senior line. The adopted son divested the brother and succeeded to the estate as the property was impartible. Therefore the rule above stated which, as Mr. Kane said, is expressed in very wide terms, must be confined to the facts of the case. In the case of a joint family the interest of a coparcener is never stable. It is liable to change from day to day and even from hour to hour; and it is well established that, in cases of joint family property which is partible, an adoption made by a widow of a coparcener would affect the shares of the other coparceners. But I venture to think that these observations of their Lordships in Amarendrds case must be taken in conjunction with their observations in the earlier part of the judgment, where it was clearly said that there must be some limit to the exercise of the power of a widow; and all that they observed is this, that it is impossible to hold that the sole test of the validity of an adoption is the vesting or divesting of property.

35. I shall leave Amarendra's case for the moment and pass on to consider at this stage the question as to whether there are any limits to a widow's power to adopt, and, if there are, what is the position when those limits are reached?

36. That there are limits to the exercise of the power of a Hindu widow to adopt a son to her deceased husband has been recognised by the Courts including the Privy Council. This was laid

down for the first time in Mussumat Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdhry (1865) 10 M.I.A. 279.9Supra) In that case the facts were that one Gour Kishore died leaving a son Bhowanee and a widow Chundrabullee to whom he gave express authority to adopt in the event of his son's death. Bhowanee married, attained his majority and died leaving a widow Bhoobun Moyee but no issue. Chandrabullee then adopted a son Ram Kishore who sued Bhowanee's widow to recover the estate. Their Lordships, dealing with the question as to the validity of the adoption of Ram Kishore, observed that if the deed of authority relied upon was a genuine instrument, and that, supposing the powers given by it to have been in force when the adoption under it took place, the adoption was good. Then they observed that they were of opinion that at the time when Chundrabullee Debia professed to exercise it, the power was incapable of execution. Then their Lordships gave three illustrations to illustrate how, when the power of adoption was exercised, the power was at an end, and finally held that the power of adoption given to Chundrabullee was at an end, the adoption was invalid and the suit failed. Then comes the oft-quoted passage in the judgment (pp. 311-12):If Bhowanee Kishore had died unmarried, his mother, Chundrabullee Debia, would have been his heir, and the question of adoption would have stood on quite different grounds. By exercising the power of adoption, she would have divested no estate but her own, and this would have brought the case within the ordinary rule; but no case has been produced, no decision has been cited from the Textbooks, and no principle has been stated to show that by the mere gift of a power of adoption to a widow, the estate of the heir of a deceased son vested in possession, can be defeated and divested.After the death of Bhoolbun Moyee, Ram Kishore got possession of the property. Now, if his adoption was good, he was undoubtedly the next heir. But the same matter was before the Court in a subsequent suit, and the Bengal High Court upheld the title of Ram Kishore, considering that the Board in the previous case had only affirmed the prior right of inheritance of Bhoobun Moyee, and had not held the adoption to be invalid. The case again came before the Board (*Pudma Coomari Debi v. Court of Wards*[41]*),* and the decision of the High Court on that point was reversed. It was contended that all that was decided by the Judicial Committee in Bhoobun Moyee's case was that the son adopted by the mother could not recover the estate from the widow of the son, but the Board said (p. 245) :The substitution of a new heir for the widow was no doubt the question to be decided, and such substitution might have been disallowed, the adoption being held valid for all other purposes, which is the view which the lower Courts have taken of the judgment, but their Lordships do not think that this was intended. They consider the 'decision to be that, upon the vesting of the estate in the widow of Bhowani (i.e. the son), the power of adoption was at an end and incapable of execution. And if the question had come before them without any previous decision upon it, they would have been of that opinion.These two cases were relied upon by the Privy Council in Thayammal and *Kuttisami Aiyan v. Venkatarama Aiyan*[42] in which their Lordships held that an adoption with the permission of

sapindas by a Hindu widow to her husband, after her husband's estate had vested in his son's widow, was invalid on the ground that the survival of the son's widow and the vesting of the estate in her put an end to the right of the first widow to adopt. With regard to the passage from Pudma Coomari's case which is cited above their Lordships observed as follows (p. 70): "Nothing can be clearer or more explicit than the language used by the Committee in that case.

37. In *Krishnarav Trimbak Hasabnis v. Shankarrav Vinayak Hasabnis*[43] the same question arose in a different form. There, a Hindu died leaving a widow and a son, and the son died childless leaving his widow, who then died. Upon her death her mother-in-law succeeded as heir and thereafter adopted the plain- tiff to her deceased husband. The latter filed a suit to recover certain property on the strength of his adoption. The High Court, following the Privy Council cases, held that the adoption was invalid. This case was followed in turn by a full bench of this Court in *Ramkrishna v. Shamrao* [44]where it was held that, where a Hindu dies, leaving a widow and a son, and that son himself dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived. The judgment of the Court was delivered by Chandavarkar J. and the learned Judge has critically examined Bkoobun Moyee's case. With regard to this case, the learned Judge observed as follows (p. 529):

One point is indeed beyond all dispute, viz., that in their Lordships' opinion a widow's power to adopt is limited. In Bhoobim Moyee's case the judgment starts with that proposition as the law.Then he referred to Thayammal's case and rejected the argument that the power of a widow may only be suspended so long as the estate is vested in others, but directly it comes to her from those others it is revived, in these words (pp. 529-30) :-The language of the judgment in Bhoobun Moyee's case, however, is so explicit that it is impossible to construe it otherwise than as meaning that there is a limit to the period within which a widow can exercise her power of adoption, and that once that limit is reached the power is at an end. That language is repeated and emphasised by their Lordships in their judgments in Pudma Coomari's case and in Thayammal's case.Then the learned Judge followed Hasabnis' case, and finally he observed as follows (p. 532):-In the view we take of the law as laid down by the Privy Councilviz., that a widow's power of adoption comes to an end and can never be revived after the inheritance has vested in some heir of her son other than the widow herselfit is immaterial whether the estate which she takes when the inheritance comes to her after that vesting is absolute or limited.This case has been approved by their Lordships of the Privy Council in *Madana Mohana v. Purushothama* [45] and in Amarendra's case. I have already referred to their Lordships' observations on this question in Pratapsing's case. In Amarendra's case, Sir George Lowndes' observations on this point are at p. 249, which I have already referred to.

38. These cases establish the principle that there are limits to the power of a widow to adopt, and once the power is at an end by the vesting in an heir of the son whether natural' or adopted other, than the adopting widow, it does not revive on the death of such an heir, even when the estate has come back to the adopting widow and even when by adoption she would be merely divesting her estate, because the power having come to an end is for ever incapable of execution and is not merely suspended during the period the estate is vested in the heir. In *Adivi Suryaprakasa Rao v. Nidamarty Gangaraju (1909) I.L.R. 33 Mad. 228,(Suupra)* the Madras High Court has held that the power of a widow of a pre-deceased coparcener to adopt is at an end once the estate has vested in the widow of the last coparcener.

39. The question, therefore, is, what are those limits? Mr. Kane says that the only limits to a widow's power to adopt are those laid down in the full bench case, to which I have referred, and he relies upon a passage in Pratapsing's case, where it is observed that the circumstances under which the power would be at an end are indicated in Bhaobun Moyee's case and in Thayammal's case. I am unable to agree, and I see no reason or principle why the Courts, in giving effect to the rights of parties before it, cannot hold in any particular instance that the power was at an end. In Amarendra's case the principle that equitable consideration can terminate a widow's power is clearly recognized, and so also in Pratapsing's case. On this point Mr. Mayne observes at p. 153 as follows :It is true that there is no limit of time within whidh a power of adoption must be exercised. Nor is there any rule of law by which] the right of a widow to make successive adoptions is limited, so long as such a limitation is not to be found in the terms of the authority itself. The basis of the rule is to be sought not in the ancient texts, which contain no traces of such a restriction, but in those considerations of expediency by which our courts have been guided so as to avoid frequent disturbances of vested titles.

40. The object of adoption is to perpetuate the line and to have an heir who would succeed to the property. It is true that it is held in Amarendra's case that spiritual efficacy is a primary consideration, but the importance of other considerations is not overlooked and other considerations also have weighed with the Courts, which have to administer not only law but equity, and cannot be ignored. If the grandmother in Ramkrishna v. Shamrao could not adopt, it is difficult to see on what principle the widow of a more distant collateral, who was a member of the family, could adopt so as to disturb the rights, which under the Hindu law a widow as the heir of her husband has acquired. As Mayne observes, there is very little to be found in the texts bearing upon the question as to how far the unlimited power, now recognized to be inherent in the widow of a member of a joint family to adopt, is limited by considerations of the effect of such power on the property involved or on the rights thereto either by survivorship or by inheritance, and the law on the subject is the growth of judicial decisions of the Courts. If there is no property, there would be no litigation as to the validity or invalidity of an adoption made by a

widow. A poor man has also a soul to save but one does not hear of an adoption made by him, or his widow. As I put it to Mr. Kane in the course of argument, a pauper's widow, herself a pauper, may make an adoption to her husband, if she finds somebody willing to give a boy In adoption to her so as to protect her husband's soul from put, and no one would be the wiser for such an adoption. The trouble arises when a question is raised as to the rights of other persons to property which, by right of adoption, ought to go to the adopted son, and commonsense and equity demand that some limit must be put upon this unfettered and wide power of a widow to adopt, so as to avoid confusion of titles. Security of tenures and title in the modern complexity of life makes this necessary, and this principle has clearly been recognized. Thus, as observed in Amarendra's case in explaining Bhoobun Moyee's case, the do minant consideration present to the mind of the Board in Bhoobun Moyee's case was of property, or what may be called the rights of property. It is with this object that the Courts have laid down the principle that the power may be at an end and extinguished. It is true, that in some cases it is broadly said that the power is at an end the moment there is somebody surviving as an heir to carry out the religious injunction to perpetuate the lineage. But would this always satisfy the strict view of the text and the strict notions of Hindus? I respectfully venture to think not. Thus, to take a simple case, if A dies leaving a widow B and a son C, and C then dies leaving his own widow D and D dies without making an adoption to her husband, and B succeeds to the property as the mother of C, it is clear on the authorities to which I have referred that she cannot adopt and her power is at an end (Krishnarav v. Shankarrav). But would this satisfy the text of Vasistha that there is no heavenly region for a sonless man? If you ask B, she would say most emphatically "No". Yet that is the law. Ex hypo-thesi there is no one to perpetuate the lineage or to offer the pindas to the departed males. Why cannot B be allowed to adopt? I only mention this instance to show that even the spiritual need must be left to look after itself sometimes, and that is how the Courts have come to establish the doctrine of the extinguishment of a Hindu widow's power to adopt.

41. So far I have dealt with the case of an undivided family. The result of the authorities as to the impartible estate is that the fact that the estate has passed to a collateral heir by survivorship in a joint impartible zemindary does not terminate the power of adoption given by the last zamindar who held an indefeasible estate, the succession being only of provisional character and subject to defeasance by the emergence of a male heir to the latter (see the observations of Seshagiri J. in *Jagannadha Gajapali v. Kunja Bihari Deo*[46]). This is supported by the observations of the Privy Council in Madana Mohana's case (45 LA. 156 at p. 160).

42. The cases I have referred to would also seem to establish that there is a distinction between estates vesting by inheritance and by survivorship. The vesting of an estate in coparceners does not put an end to the power of a widow of a pre-deceased coparcener to adopt a son to her husband, the principle being that the coparceners take the estate temporarily merely to prevent

the ownership from being in abeyance pending the widow introducing an heir by adoption exactly as if she was enceinte (*Bachoo Hurkisondas v. Mankorebai*[47]). But on partition among coparceners or when the joint family property has devolved by succession on the heir of the last surviving coparcener (Chandra v. Gojarabai) or after it has passed out of the hands of the sole surviving coparcener by sale or mortgage or gift made by him [*Veermna v. Sayam-ma*[48]), the adoption will not be valid and the adopted son does not become a coparcener, for in these cases coparcenary property will be no longer in existence and there can be no question of vesting or divesting of the property in or by the adopted son. The general rule established by Bhoobun Moyee's case and in Raghunadha's case is that a widow cannot adopt if the effect of the adoption is to divest the estate vested in a person as an heir and not by survivorship. The principle underlying the decisions is that if the estate is vested in a person other than the adopting widow, her power is gone for ever, and any adoption made by her is void.

43. There is another principle of Hindu law which has an important bearing on this point, which has now to be considered. As pointed out by their Lordships of the Privy Council in Bkoobun Moyee's case, the rule of Hindu law is that in the case of inheritance a person to succeed must be the heir to the last full owner. After mentioning the rule, their Lordships observed at pp. 311-12 (10 M.I.A.) as follows:In this case, Bhowanee Kishore was the last full owner, and his wife succeeds, as his heir, to a widow's estate. On her death, the person to succeed will again be the heir at that time of Bhowanee Kishore.If Bhowanee Kishore had died unmarried, his mother, Chundrabullee Debia, would have been his heir, and the question of adoption would have stood on quite different grounds. By exercising the power of adoption, she would have divested no estate but her own, and this would have brought the case within the ordinary rule; but no case has been produced, no derision has been cited from the Textbooks, and no principle has been stated to show that by the mere gift of a power of adoption to a widow, the estate of the heir of a deceased son vested in possession, can be defeated or divested.

44. In his valuable work, Mayne has summarized the principles of succession in case of males. After pointing out that els long as a joint family continued, the property passed by survivorship, he says at p. 724 as follows :But the rule of survivorship still governed the devolution of the share where a coparcener left no near heirs, and determined its amount. When, however, property came to belong exclusively to its possessor, either as being his own self-acquisition, or in consequence of his having separated himself from all his coparceners, or having become the last of the coparcenary, then it passed to his heir properly so-called. It must always be remembered, that the Law of Inheritance applies exclusively to property which was held in absolute severalty by its last male owner. His heir is the person who is entitled to the property, whether he takes it at once, or after the interposition of another estate. If the next heir to the property of a male is himself a male, then he becomes the head of the family, and hold the property either in severalty

or in coparcenary...as the case may be. At his death the devolution of the property is traced from him. But if the property of a male descends to a female, she does not, except in Bombay, become a fresh stock of descent. At her death it passes not to her heirs, but to the heirs of the last male holder. And if that heir is also a female, at her death, it reverts again to the heir of the same male, until it ultimately falls upon a male who can himself become the starting point for a fresh line of inheritance.Then the learned author further states as follows (p. 725):The right of succession under Hindu law is a right which vests immediately on the death of the owner of the property. It cannot in any circumstances remain in abeyance in expectation of the birth of a preferable heir, not conceived at the time of the owner's death. A child who is in the mother's womb at the time of the death is, in contemplation of law, actually existing, and will, on his birth, divest the estate of any person with a title inferior to his own, who has taken in the meantime. So, in certain circumstances, will a son who is adopted after the death. But in no other case will an estate be divested by the subsequent birth of a person who would have been a preferable heir if he had been alive at the time of the death.In Bombay, the Courts have always favoured a literal acceptance of the text of the Mitakshara as to devolution of a woman's property at ii., II, Sections 8 and 9, and have held that a woman taking as heir to her son or grandson possessed no more than what is known as a widow's estate, which reverted to the heirs of the last male holder. It has also been held by the Bombay Courts that all the women, like mother, grandmother, etc., who belonged, to the family by marriage and not by birth, took only a limited estate in the property which they inherited from a male member (*Dhondi v. Radha-bai*[49]*, Vrijbhukandas v. Bai Parvati*[50]*.)* Female heirs in Bombay are divided into two classes. Those who by marriage have entered into the gotra of the male whom they succeed take an estate similar to that of a widow. Those who are born in the gotra of the deceased owner, but who upon their marriage will become of a different gotra from that of the last male owner, take absolutely. Under the former head fall a widow, mother, grandmother, etc., and the widow of a sapinda succeeding under circumstances similar to those in which Mankuvarbai succeeded in the case of *Lallubhai Bapubhai v. Mankuvarbai* [51]*(affirmed in Lulloobhoy Bappoobhoy v. Cassibai*[52]*).* Under the latter head are ranked, a daughter, sister, niece, grandniece, father's sister, and the like. In Bengal, on the other hand, even in the case of a joint family the right of a co-sharer does not pass over upon his death to the other co-sharers. It is part of his estate and devolves upon his legatees or natural heirs including his widow.

45. These principles, in my opinion, show that in Bombay the position in the case of a joint family is different from that in the case of a separated Hindu. That seems to be the reason why it was held by this Court that the widow can adopt if the estate is vested in her, but is incapable of adopting unless she has the consent of other coparceners, or she adopts under an express authority from her husband. This view now goes by the board after the decisions in Bhimabai's

case and in Amarendra's case. But if I am right in holding that those cases were cases in which the rights of the parties had to be determined on the footing of there being a joint family, where in one case the property devolved by survivorship and in the other, having regard to its nature by inheritance, then it is clear that when a joint family has come to an end and the coparcenary is extinct as here, the question does not arise. When the property comes into the hands of a sole surviving coparcener, he holds it as a separate householder. He is competent to dispose of the whole property by an alienation or sale, of course, subject to the rights of maintenance of any of the widows alive in the family, and on his death the property would pass as separate property by inheritance to his heir as beneficial owner of it. [*Nagalutchmee Ummal v. Gopoo Nadaraja Chetty*[53]*]*. In this connection, I would refer to the remarks of the Privy Council in Mussumat Bhoobun Mdyee's case at p. 310 (10 M.I.A.):In this case, Bhowanee Kishore had lived to an age which enabled him to performand it is to be presumed that he had performedall the religious services which a son could perform for a father. He had succeeded to the ancestral property as heir; he had full power of disposition over it; he might have alienated it; he might have adopted a son to succeed to it if he had no male issue of his body. He could have defeated every intention which his father entertained with respect to the property.If the heir is his widow, then under the principles to which I have referred, she would take a widow's estate, and on her death succession would go to the next heir of the last full owner. If, on the other hand, she is a female who has not entered into the family by marriage but passes out of the family by marriage into another family, she takes the property absolutely and becomes a fresh stock of descent herself. Unfortunately these principles have not always been kept in mind. Great reliance is placed upon the principle deduced by the Board in Amarendra's case from the decision in Pratapsing's case, which I have set forth above. But all that is said there is that the vesting of property in another person cannot be in itself the test of the continuance or extinction of the power of adoption. In my humble opinion, this observation must be taken to be made with reference to the actual facts of the case. In the first place Yadao v. Namdea was a case where the adoption was made during the lifetime of a coparcener by the widow of another coparcener. In Pratapsing's case the position was exactly the same. Both the cases were cases of a joint family. In the one property went by survivorship; in the other, by reversion. In Amarendra's case there was no custom pleaded similar to that in Pratapsing's case to contend that in the event of a member of the junior family to whom lands were given for maintenance dying childless, the property would revert to the senior branch of the family. But it is clear from Amarendra's case that the claim of Banamalai in that case was put, and was understood by the Board, upon the ground that he was the nearest reversioner. The Board in summarizing the pleadings observed on this point as follows (p. 245):The parties are agreed that if the custom is established and the adoption inoperative, Banamalai was entitled to the estate as the nearest reversioner.Then the judgment starts with the following sentence (p. 244):The issue involved is as to the right of succession (using the word in its widest significance)

to the Dompara Raj....The case before their Lordships was a case of a separate zamindary estate, where, in the absence of a custom similar to that set up in Pratapsing's case, succession would go as if it was coparcenary property, having regard to its nature, in favour of the last surviving coparcener, that is by inheritance.

46. Now, it is a well recognized rare, as Mayne points out, that in Hindu law there is no such thing as succession properly so called. It is either survivorship or inheritance, or reversion where there is a custom in support of it. Therefore, in the passage set out above the first two cases were cases of survivorship and reversion, and then their Lordships said that the same rule would apply if property was taken by inheritance. This latter opinion, which certainly could not be deduced from Yadao v. Namdeo or Prolapsing's case, laid down a proper principle upon the facts before the Board, and must be confined, in my opinion, to the actual facts of the case; and I do not think it was intended by the Board to lay down broadly that in all cases and at all times, when the Property has Passed by inheritance, the widows power to adopt could be exercised to the detriment of the heir as such, or that the adoption would be valid. The zamindary before them was the separate property of Bibhudendra, but the principles of succession in the broad sense applicable to the case of a coparcenary would apply; and though in one sense the heir takes by inheritance, it is clear that he does so as a coparcener or a member of the family. In such cases of zamindary estate, where the property was separate, as I have pointed out, even nearer heirs are excluded, and only the eldest in the senior line takes the estate; and all principles of inheritance do not apply as if the property was the separate property of a separated Hindu, where the property is partible. In my opinion, therefore, the observations should be limited to the facts of the case, if one is not to exclude altogether the rule of Hindu law that succession can never be in abeyance, and when it opens, the nearest heir takes the property and becomes a fresh stock of descent except, of course, in the case of a widow of the last surviving coparcener who, by reason of the fact that her husband was the last owner, succeeds him as an heir. In such cases, therefore, in my opinion, it is difficult to see why it cannot be said that the limits are reached, the power is at an end, and the adoption is invalid. As I have pointed out, from the illustration which I have given, A dies leaving a son and a widow, and the son dies leaving his own widow, and the latter dies without making any adoption, it is clear on the authorities that the mother succeeding to the son cannot make a valid adoption : *Anjirabai v. Pandurang Balkrishna*[54] and if the principle of spiritual efficacy is the sole test of the validity of an adoption, then it is difficult to see why in such a case the mother cannot make a valid adoption. Similarly, and on the same principles, it seems to me that in this case the limits were reached when Shiva died leaving his own widow, who remarried without making an adoption. She was then dead for all practical purposes from the point of view of spiritual efficacy to the joint family; and if Shiva's mother could not have adopted to her own husband, it is difficult to see why a widow of a more distant coparcener

should be permitted to make an adoption. It is obvious that if this is not the correct view to take, complex questions as to rights of property would arise and would be involved.

47. It is argued by Mr. Kane that the only limits laid down by the Privy Council as to the termination of a widow's power to adopt are those laid down in Ramkrishna v. Shamrao, and that case has been approved by the Privy Council in Amarendrds case, and as part of the same contention he says that a coparcenary or joint family is not extinct as long as there is a widow of a deceased coparcener alive who can by adoption revive the family, and he relies in this respect upon Pratapsing' s case.

48. It will be convenient to deal first with the argument that as long as widows are alive, the joint family continues and is not extinct, and I cannot do better than refer to Mayne to point out the distinction between a joint family and a coparcenary. At p. 344 Mayne says as follows:

It is evident that there can be no limit to the number of persons of whom a Hindu joint family consists, or to the remoteness of their descent from the common ancestor, and consequently to the distance of their relationship from each other. But the Hindu coparcenary, properly so called, constitutes a much narrower body. When we speak of a Hindu joint family as constituting a coparcenary, we refer not to the entire number of persons Who can trace from a common ancestor, and amongst whom no partition has ever taken place; we include only those persons who, by virtue of relationship, have the right to enjoy and hold the joint property, to restrain the acts of each other in respect of it, to burthen it with their debts, and at their pleasure to enforce its partition. Outside this body there is a fringe of persons who possess inferior rights such as that of maintenance, or who may, under certain contingencies, hope to enter into the coparcenary.

Then, at pp. 344-5, he observes:

There is no such thing as succession, properly so called, in an undivided Hindu family. The whole body of such a family, consisting of males and females, constitutes a sort of corporation, some of the members of which are coparceners, that is, persons who on partition would be entitled to demand a share, while others are only entitled to maintenance.Therefore, a coparcenary is a body which is clearly distinct from the general body of the undivided family, and it is not every male who may have descended from a common ancestor, who is still alive, can be said to be a coparcener. Suppose the property to have all descended from one ancestor, who is still alive, with five generations of descendants. It by no means follows that on a partition every one of these five generations will be entitled to a share. The answer to the question as to who are coparceners is that they alone are coparceners who have taken an interest in the property by birth. *(Moro Vishvanath v. Ganesh Vithal[55]).*

49. What Mr. Justice Telang pointed out in Chandra v. Gojarabai was that the coparcenary was extinct, and the only members of the larger corporation were two widows, who, of course, cannot be called coparceners.

50. Mr. Kane relies upon a passage in West and Buhler, which is referred to by the Privy Council in Pratapsing's case. It is true that in that passage West and Buhler observed that the Hindu lawyers do not regard the male line to be extinct or a Hindu to have died without male issue until the death of the widow renders the continuation of the line by adoption impossible. In the first place, this is a footnote to the section the heading of which is: "Adoption by a widownot to defeat a vested estate." Then the footnote is to the observation made by the authors in these words:In the case of cosharers standing on an equal footing the Indian lawyers certainly do not recognize any obstacle to adoption by the widow of one as arising from the estate on his death having vested in the other.Therefore, the passage and the footnote merely mean this that where there is a coparcenary, the widow of a coparcener can continue her husband's line though the property has passed by survivorship to other coparceners or is held by the last surviving coparcener. As Telang J. observed in Chandra v. Gojarabai that Bhau's widow could have adopted during Nana's lifetime, in the present case Bayaji could have validly adopted defendant No. 1 as her son before Shiva died. As a matter of fact, West and Buhler (Hindu Law, Vol. I, 3rd edn.) lay down the same principle in these words (p. 994):A right in possession is kept alive by the widow's constant capacity to adopt, so as to blend an additional element retrospectively with the united' family, but a mere possibility once extinguished cannot be revived. Thus adoption in a separated branch cannot divest the estate which the law gave to the then nearest collateral, and which has passed unshared to him who has it. But within a group of united brethren the widow of one may adopt so as to divest an estate wholly or in part.I do not think, therefore, that this footnote supports Mr. Kane's argument. The true rule, therefore, must be that if the widow's power is at an end, then any adoption made by her is invalid, and I do not think that the only limits which terminate the power of a widow to adopt are those mentioned in either Bhoobun Moyee's case or in Ramkriskna v. Shamrao. The observations of Mr. Ameer Ali in lPratapsing's case at p. 108, to which I have referred, are clearly to the contrary, as are those of Sir George Lowndes in Amarendra's case, which also I have cited above. In my opinion, when the coparcenary has become extinct by the death of the last surviving coparcener and the estate has passed by inheritance to his heir, as in Chandra v. Gojarabai, the power of any widow of a pre-deceased coparcener is at an end, and I am unable to hold that Amarendra's case lays down any contrary rule. Chandra v. Gojarabai was not referred to in Amarendra's case. On the other hand, it was expressly referred to in Bhimabai's case, and carefully distinguished from the facts in Bhimabai's case. It was pointed out by Sir Dinshah Mulla in Bhimabai's case that in Chandra v. Gdjarabai Telang J. held the adoption to be invalid. Then his Lordship quoted the reason given by Telang J.

for this conclusion. His Lordship then indicated how the facts in Bhimabai's case were different, and proceeded to observe (at pp. 40-41, 60 LA.):But Nilkanthagouda was not the sole surviving coparcener at the date of his death which, according to the decision cited above, would be the material date. Nor did the estate pass to Dyamangouda by inheritance as his heir. The coparcenary at the death of Nilkanthagouda consisted of himself and Dyamangauda, and the estate passed to Dyamangouda by survivorship. The adoption of appellant No. 2 was not made after the extinction of the coparcenary, but during its subsistence, the last surviving coparcener being Dattatraya. Their Lordships are, therefore, of opinion that the principle of the decision mentioned above does not apply.

51. This brings me now to the recent Bombay cases, to which we have been referred, and upon the decisions in which some of the questions referred to us have been raised.

52. The first case is Vishnu v. Lakshmi (1933) 37 Bom. L.R. 193. The facts there were: A joint Hindu family consisted of father and two sons. The elder son died leaving a widow; thereafter the father died, and after his death his younger son died leaving his widow. Thus there were two widows in the family, of whom the widow of the elder son made an adoption. Thereupon the widow of the younger son, in whom the estate had vested as an heir to her husband, brought a suit for a declaration that the adoption was invalid, and for possession of the property. Mr. Justice Shingne held that Chandra v. Gojarabai was not overruled by the recent Privy Council decisions, and, therefore, the adoption was invalid, and the plaintiff was entitled to succeed. I respectfully agree with that judgment; and, in my opinion, that was the correct view to take on the facts.

53. The same point arose before my brothers Broomfield and Macklin in Shankar v. Ramrao . There, the facts were that there was a joint family consisting of three brothers,Ramrao, Subhanrao and Vishwasrao. They had a stepbrother Ganpatrao, who was, however, separate from them. Of the three brothers, Ramrao died first, and then Subhanrao. So that Vishwasrao became the last full owner. Upon the findings it was held that Vishwasrao had died. Thereafter, Ramrao's widow adopted one Vinayak. She remained in possession of the property till her death in 1928. It will be seen from these facts that upon the death of Vishwasrao legally the estate vested in the step-brother Ganpatrao. After the death of Ramrao's widow, the plaintiffs, who were the grandsons of Ganpatrao, brought a suit for possession of the property, alleging that the adoption of Vinayak by Ramrao's widow Sakhubai was invalid and of no effect. The Subordinate Judge held that the adoption was invalid, but dismissed the suit on the ground that the claim was barred by limitation. On appeal, the question of the validity of the adoption was not raised, but on the question of limitation the Assistant Judge held that the claim was not time-barred, and decreed the suit. Defendant No. 4, the representative of the adopted, son, brought a second appeal. It was held by the Court that the adoption was valid, that Chandra v. Gojarabai, however, was not

overruled, and, that therefore, the adopted son could not divest the estate which had already vested in the step-brother. Mr. Justice Broomfield dissented from the view taken by Mr. Justice Shingne in Vishnu v. Lakshmi.

54. It is beyond doubt that adoption has the effect of transferring the adopted fooy from his natural family into the adoptive family, and it confers upon the adoptee the same rights and privileges in the family of the adopter as a legitimate son. The only cases in which an adopted son is not entitled to the full rights of a natural-born son are: (1) where a son is born to the adoptive father after adoption, in which case on a partition the share of the adopted son is smaller than that of the natural son; and (2) where he has been adopted by a disqualified heir. There are also some restrictions on the adopted son as to marriage and as to his power to make an adoption from his natural family. Naturally he loses all the rights of a son in his natural family including the right to claim any share in the estate of his natural father or natural relations or any share in the coparcenary property of his natural family. There is no authority, as far as I know, for the view that an adoption would be valid, and yet the adopted son would not be entitled to succeed to the property, to which if there was a natural son of the adoptive father, the latter would have succeeded, and logically it seems to me the position is inconsistent; but there is clear authority for the opposite view.

55. In Bhoobun Moyee's case, Gour Kishore died leaving a son Bhowanee and a widow Chundrabullee Debia, to whom he gave authority to adopt in the event of Bhowanee's death. Bhowanee died at the age of twenty-four with out issue. but leaving a widow Bhoobun Moyee, who succeeded by inheritance to his property. Chundrabullee then adopted Ram Kishore, who sued Bhoobun Moyee for the recovery of the estate. It was held by the Board that his claim failed. After the death of Bhoobun Moyee, Ram Kishore got possession of the property, and if his adoption was good he was undoubtedly the next heir. His title, however, was disputed by a distant collateral, and. the validity of his adoption was the subject of another suit.

56. The Calcutta High Court held that the effect of the Privy Council decision in Bhoobun Moyee's case was that the adoption was good, but that the estate could not be divested. In appeal to the Privy Council (Pudma Coomari's case), their Lordships held that their decision in Bhoobun Moyee's case was-misunderstood by the Calcutta High Court, and they reversed the Calcutta High Court's decision, making it clear that what they had decided in Bhoobun Moyee's case was not merely that a vested estate could not be divested, but on that account no adoption which had that effect could be valid, as the power to adopt was at an end and incapable of execution. I have quoted above their Lordships' observations.

57. In Pratapsing's case the High Court had held that though the adoption was good for spiritual purposes and for inheritance of any private property of Kaliansing, the circumstances of the case

were such that the defendants had to prove that it divested the estate which had passed to the reversioner, and they, therefore, held that the adopted son did not divest the estate which passed to the Thakur by the custom of reversion. In appeal to the Board, the appellants' argument was that the adoption divests any estate which would have been divested by a posthumous son. On behalf of the respondents it was argued that the rights of an adopted son date from his adoption and they do not relate back as though he were a posthumous son. Mr, Ameer Ali's observations on this point are at p. 106 which I have already set forth above. The same view was taken in Thayammal's case. In Thayammal's case it was argued that the adoption itself might be perfectly good, though it was ineffectual against the person in possession. This view was rejected by the Board who treated the adoption as invalid for every purpose. It seems to me to be clear upon these authorities, that the distinction made by my brother Broomfield is not warranted either upon any principle of Hindu law or upon any judicial decision. I would, therefore, most respectfully dissent from that view.

58. The next case is Dhondi Dnyanoo v. Rama Bala (1935) 38 Bom. L.R. 94.(Supra) There a joint Hindu family consisted of an uncle and a nephew. The nephew had a sister. The uncle died first and was followed by the nephew. Upon that, it is clear that the estate would vest in the nephew's sister. The uncle's widow gifted away a portion of the estate to the defendant and then adopted the plaintiff. The plaintiff brought a suit to recover possession of the property which had been gifted away by his adopting mother before his adoption. The trial Court dismissed the suit on the ground that the adoption was not valid. The plaintiff appealed to the High Court. It was held by this Court that the adoption was a valid adoption, but it could not divest the estate vested in the nephew's sister. On behalf of the respondents Mr. Kane, who has argued this case before us, argued as follows (p. 96):We do not admit that the widow could make a valid adoption in this case, but even, if she could, it is enough for us to contend that the adoption cannot have the effect of divesting the estate which vested after the husband's death in his joint nephew by survivorship, and after the latter's death in the latter's sister by inheritance and succession, before the adoption took place.Mr. Justice Sen, who delivered judgment, held that the adoption was valid, but it could not divest the estate which had vested in the nephew's sister. In referring to the respondents' argument, Mr. Justice Sen made another distinction which, I venture to think respectfully, has no support from any decided case. This is what the learned Judge observed (p. 99):This, it is contended, is not a case of property devolving by survivorship, as the plaint property, on Nivritti's death, went by rules of succession to his sister Banu, and the argument is that on the date of adoption the property in question having already been inherited by Banu, and the adopted son, being a more distant heir to Nivritti than Banu, viz., an uncle's son, could not claim the said property.All that Mr. Kane argued in that case was that he did not admit the adoption was valid, but even if it was valid, upon the authority of Chandra v. Gojarabm, it could not divest the estate.

It is not clear whether the decision that the adopted son could not divest the estates vested in the nephew's sister was based upon Chandra v. Gojarabai, though the case is referred to and noticed in the judgment. With all respect to the learned Judge, I am unable to agree that the adoption in that case was valid if Chandra v. Gojarabai was good law, or that the adoption being valid it could not divest the estate vested in the nephew's sister on the ground that the adopted son was a more distant heir to the nephew than his own sister, and I think respectfully that the decision that the adoption was valid is wrong.

59. The next case to notice came before the same Judges. It is the case of Umabai v. Nani (1935) 38 Bom. L.R. 100. There the facts were, one Rajaram had a son Bhagwant and a daughter Nani. Bhagwant died during the lifetime of his father leaving a widow Umabai. Thereafter, the father Rajaram died, leaving him surviving his widow Krishnabai and, of course, Nani and Umabai, the widow of the pre-deceased son. This happened in 1915. The property clearly under the Hindu law vested in Krishnabai as the heir of Rajaram, who was the last full owner. She died in 1923. In 1927 Umabai adopted a son Murlidhar. After the adoption Nani sued for a declaration that she was the legal heir of Rajaram, and that the adoption of Murlidhar was illegal, and for possession of the property. It is clear that on the death of Krishnabai succession opened, and Nani became the owner as the nearest heir to Rajaram from whom succession had to be traced. Nani succeeded in the trial Court. Umabai and the adopted son appealed to this Court. It was held that the adoption was valid, and that the adopted son was entitled to the estate in preference to Nani. Now, logically, if the adoption is valid, then the judgment is right; but I respectfully dissent from the view taken that the adoption was valid, for the reasons which I have already given.

60. In my opinion, the confusion seems to be due to ignoring the principles to be gathered from the decided cases. These are very clearly set forth in Mulla's Hindu Law; and, having regard to the importance of the subject, I make no apology for summarising them here. In Section 471 at p. 530 the learned author deals with the subject "Termination of widow's power to adopt." He first deals with the case of a separated Hindu dying. He then refers to Bhoobun Moyee's case, Pudma Coomari's case and Ramkriskna v. Shamrao. In Sub-section (3) he observes as follows :The power to adopt once it comes to an end becomes extinguished for ever, and it does not revive even when, on the death of the son's nearer heirs, the estate reverts to the widow and becomes vested in her.In Section 472 the learned author lays down an additional rule where the husband was not divided at the time of his death. In that section he first considers the case where the husband was a member of a joint family at the time of his death, and he observes that where the widow had a son, natural born or adopted, and he died leaving a wife, child or other heir nearer than the widow, then the widow's power was at an end. Then the learned author considers the case where the family ceases to be joint, that is where the joint family property has passed by succession from the sole surviving coparcener to his heirs such as his widow, in which

connection he refers to the casewhich he calls the leading caseof Chandra v. Gojarabai. Then he quotes the statement of the Judicial Committee in Bhimabai's case, which I have already set forth, and deduces the principle that the adoption in such a case would be invalid. In Part VI of the same Chapter the learned author deals with the subject "Divesting of estate on adoption by widow." Mr. Justice Broom-field in his judgment has apparently given an extract from the preliminary note made by the learned author, but, with respect, he has not noticed the observation of the learned author that the subject-matter of Section 502, which occurs in this part of the book, is connected with that of Section 471, namely, "Termination of widow's power to adopt," as to which the learned author says "The two sections relate to the same subject in different forms." In Section 501 the learned author says:A valid adoption by a widow, if her husband was divided at the time of his death, may divest an estate of inheritance. It may, if her husband was a member of a joint family governed by the Mitakshara law, divest rights acquired; by survivorship.Then he says: "The question what estate of inheritance is divested by adoption, is dealt with in Sections 502 and 503." Section 502 deals inter alia with the case where the husband was divided at the time of his death. In that case, a valid adoption by a widow divests the following estates, and vests them in the adopted son. There are three cases given by the learned author, and they are as follows :

(i) The estate of her husband which vested in her on his 'death as his heir....

(ii) The estate of her son which vested in her on the death of the son leaving her (his mother) as his nearest heir....;

(iii) The estate of her husband which vested in a co-widow jointly with her, whether the co-widow was a consenting party to the adoption or not.... But where a Hindu dies leaving two widows A and B and a son by B, an adoption by A after the son's death cannot divest B of the estate which became vested in B on the death of her son.

The general principle is laid down in these words :

In other words, it may be said, omitting for the present the exceptional case of co-widows, that adoption by a widow cannot divest any estate of inheritance, unless the estate is at the time of adoption vested in the adopting widow

(a) either as her husband's heir,

(b) or as the heir of her son dying without leaving any wife, children, or other heir nearer than herself (his mother).

Sub-section (2) is in these words :

If the estate is vested in a person other than the adopting widow...or if it is vested in the adopting widow not as the immediate heir of her son, but as his heir after the death of a nearer heir of the son...the adoption will not have the) effect of divesting the estate.

61. The questions raised in this case are not free from difficulty, but upon the whole I have reached the conclusion that the adoption in this case is invalid. Mr. Kane, who has argued this case with great ability, stated that before the referring bench he contended that, having regard to the recent Privy Council decisions, the adoption was valid, and that was the only contention which he had advanced. Mr. Kane is supported by the observations of Mr. Justice Divatia at p. 5 of the referring judgment. It is in these words:Mr. Kane invokes the principle in his favour and contends that the adopted son takes the property as a natural born son in the joint family and his being a nearer or remoter heir of the last coparcener is irrelevant.The learned Judges, however, referred questions 2 and 3, having regard to the recent Bombay decisions, which I have discussed above.

62. The principles, then, which I gather from the decisions discussed above, are, as follows:

(1) Where the family is joint and undivided, a widow of a coparcener can make a valid adoption to her deceased husband without the consent of the surviving coparceners, unless she was prohibited either expressly or impliedly by her husband from making an adoption and unless her power is at an end.

(2) A widow of a separated Hindu can always make a valid adoption to her husband unless prohibited expressly or impliedly by her husband and unless her power to adopt is at an end.

(3) Where the coparcenary is extinct and the estate of the last surviving coparcener has passed by inheritance to his heir, the power of a widow of a pre-deceased coparcener to adopt a son to her husband is at an end and she cannot make a valid adoption to her deceased husband.

(4) There are limits to the exercise of the power of a widow to adopt a son to her husband, and when those limits are reached, the power is at an end and can never be revived.

(5) Succession can never be in abeyance except in the case of a widow in a joint family who is enceinte at the time of the death of the last coparcener. The nearest heir succeeds as beneficial owner and becomes a fresh stock of descent, except in the case of those widows who take a widow's estate only.

(6) Chandra v. Gojarabai is not impliedly overruled by the recent Privy Council decisions and is still good law.

(7) If the adoption is valid, it is valid for all purposes, and the adopted son has all the rights of a

posthumous son.

63. I would, therefore, answer the first question in the affirmative. The adoption in this case, therefore, is invalid.

64. In this view, the other questions do not survive and need not be answered.

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2(1890) I.L.R. 14 Bom. 463
3(1918) L.R. 46 I.A. 97 : s.c. 21 Bom. L.R. 496
4(1921) L.R. 48 I.A. 513 : s.c. 24 Bom. L.R. 609
5(1932) L.R. 60 I.A. 25 : s.c. 35 Bom. L.R. 200
6(1933) L.R. 60 I.A. 242 : s.c. 35 Bom. L.R. 859
7(1935) L.R. 62 I.A. 161 : s.c. 37 Bom. L.R. 562
8(1933) 37 Bom. L.R. 193
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17(1871) 8 B.H.C.R. (A.C.J.) 114
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