the accused, in defiance of remonstrances on the part of the complainant, lately opend a saw-pit on this part of the plot and within a few yards of the spot at which some relatives of the complainant have been buried.

On these facts the Magistrate has convicted the accused of having committed trespass on a place of sepulchre or a place set apart as a depository for the remains of the dead, knowing it likely the religious feelings of the complainant would be wounded, and has fined each of the accused 50 rupees.

The Magistrate did not consider it proved the accused had disturbed any of the graves.

The points which appear doubtful are the following:—Whether the part of the plot on which the saw-pit was opened had been set apart as a place of burial, and whether the accused as co-owners can be convicted of trespass.

"It is undoubtedly settled law a co-tenant cannot maintain *trespass* unless there has been ouster." Per Lord *Westbury* in *Jacobs* v. *Seward* (L.R. 5, H.L., 478.)

The accused as co-owners were in possession, and, unless they have ousted the complainant from possession, which is not asserted, or have committed some destruction or waste of the common property as by pulling down a common wall as in *Cubitt* v. *Porter* (8 B. & C., 257) or by carrying away a portion of the common property as by digging and carrying away turf, they cannot be held to have committed trespass.

[180] Although the plot of land was originally held in common, it may be perhaps inferred that each of the co-owners has assented to the appropriation by a co-owner of so much as he has actually appropriated to the grave of a relative, and, had a grave been disturbed, a trespass might, in this view, be held established; but it is not shown that the accused actually disturbed a grave, nor that any specific portion of the plot was set apart as a place of sepulchre.

We direct that the conviction be quashed.

NOTES.

[I BURIAL PLACE—CRIMINAL TRESPASS—

Persons entering upon a burial place and ploughing up the graves there were held guilty of Criminal Trespass even though they entered on the land with the consent of the owner:—(1896) 18 All. 395.

II. CRIMINAL TRESPASS—MEANING OF—

See (1896) 18 All. 395.]

[3 Mad. 180]

APPELLATE CIVIL.

The 29th April, 1881.

PRESENT:

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, AND MR. JUSTICE INNES.

Nagabhushanam.....(Plaintiff), Appellant

versus

Seshammagaru.....(Defendant) ,Respondent.*

Hindu Law—Adoption with knowledge of pregnancy of wife.

An adoption by a Hindu with knowledge of his wife's pregnancy is not invalid. *Narayana Reddi* v. *Vardachala Reddi* (S.A. No. 223 of 1859. M.S.D., 1859, p. 97.) dissented from.

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* Appeal No. 86 of 1880 against the decree of J. Kelsall, Acting District Judge of Godavari, dated 16th December 1879.

IN this suit the plaintiff, as the adopted son of *Venkata Reddi*, sought to recover a certain village from the defendant.

The defendant's first plea was that the plaintiff could not sue, as his adoption was invalid.

Venkata Reddi, on his death-bed, executed a document acknowledging that he had adopted the plaintiff, and that his wife was then pregnant, and therein directed that if a son was born the plaintiff and the son were to divide his estate.

The District Judge dismissed the suit on the ground that he was bound to follow the decision in *Narayana Reddi* v. *Vardachala Reddi* (S.A. No. 223 of 1859, M.S.D., 1859, p. 97) which had not been overruled.

The plaintiff appealed.

Mr. *Johnstone* for the Appellant.

The Advocate-General (Hon. *P. O'Sullivan*) for the Respondent.

The arguments sufficiently appear in the Judgment of the Court (TURNER, C.J., and INNES, J.)

[181] Judgment:—The question raised in this appeal is, whether or not an adoption is invalid, if, at the time of the adoption, the adopter is aware his wife is pregnant?

The respondent, in support of the contention that the adoption is invalid, relies on the decision of the Sadr Adalut in *Narayana Reddi* v. *Vardachala Reddi* (S.A. No. 223 of 1859, M.S.D., 1859, p. 97). In that case, the Court, observing that the Pandits of the Sadr Court had supported the opinion of the provincial Pandits, expressed itself as having no doubt of the soundness of the opinion "it being of the essence of the power to adopt that the party adopting should be hopeless of having issue." In support of this ruling, we have not been referred to any Hindu Shaster nor to any writer of authority on Hindu Law. The case cited is discussed by Mr. *Mayne*, § 96, who observes that "the principle, if sound, would preclude a man ever adopting until extreme old age or until he was on his death-bed," and that "it is also opposed to the rules which provide for the son born after an adoption." Mr. *Mayne*, however, suggests that "if a wife, known to be pregnant at the time of adoption, afterwards brought forth a son, it might fairly be held he was then in existence to the extent of precluding an adoption," and he refers to the case in which an infant in the womb is regarded as in existence at the time of the testator's death so as to be the object of a valid gift, and to the case in which, if a partition be made while there is a child in the womb who, if born, would be entitled to a share, the child, when born, is entitled to a redistribution.

The Judgment of the Sadr Court citing as authority only the opinion of the Pandits, we have searched the record in that suit to see whether the Pandits referred to any text of Hindu Law in support of it. It appears two questions were addressed to the Pandits:—

(1) Is an adoption made during the pregnancy of the wife valid?

(2) Supposing the offspring of the woman pregnant should prove to be a daughter, will an adoption made during such pregnancy be valid?

[182] To the first question, the Pandits replied: "The right of adoption vests only in him who is certain of having no sons. When the wife is pregnant, there is a probability of begetting a son, and the husband is not, therefore, in the certainty of not getting a son. Hence, the husband of a pregnant woman

has no right to adopt a son at such a time. Therefore, the adoption made by the husband of the pregnant woman at such a time being the act of an incompetent person is invalid under the established principles of *Mimamsa—vide* paragraphs 2-6, Section I of *Nanda Pandita.*"

To the second question, the Pandits replied: "The effect of an adoption thus invalidated cannot be removed on the birth of a daughter." *Nanda Pandita*, in the sections of the *Dattaka Mimamsa*, to which the Pandits referred, cites a text of *Atri* "by a man destitute of a son only must a substitute for the same be adopted," and a text of *Cankha*' "one to whom no son has been born, or whose son has died having fasted, &c." In Section 13 he explains that the term "destitute of a son" must be understood to include a son's son and grandson.

There is obviously nothing in either of these texts or in the commentary on them which justifies the opinion of the Pandits that the right of adoption vests only in him who is certain of having no sons, or the *dictum* of the Sadr Court that it is of the essence of the power to adopt that the party adopting should be *hopeless* of having issue, nor is there anything to make the enjoyment of the power of adoption contingent on knowledge or ignorance on the part of the adopter of his wife's pregnancy. Indeed, the cases to which Mr. *Mayne* alludes as possibly justifying the opinion that the known pregnancy of the wife suspends the exercise of the right would, by parity of reasoning, show the right of the child in the womb could not be affected by ignorance of it. As Mr. *Mayne* points out in § 96, when the pregnancy is known, the partition should be postponed till its result is ascertained. yet "if it is not known and a son is afterwards born, a redistribution must take place." And in like manner, an infant in the womb, who, as a member of a class, would be entitled to the benefit of a gift, is not deprived of his rights because the pregnancy of his mother was unknown.

If, by the analogy of these instances, the suspension of the exercise of the power during the pregnancy of the wife is sup-**[183]**ported, the validity of the adoption can hardly be made to be dependent on knowledge or ignorance of the fact of pregnancy. But unless the condition of ignorance of the fact of pregnancy be imported, for which there is no authority, the validity of a rite, second to none in importance, must, in many cases, remain for a season in uncertainty. Again, the limitation on the power of adoption for which the respondent contends can only be supported by holding that the term "destitute of sons" includes sons yet in the womb; but, inasmuch as the term "destitute of sons" includes son's son and grandson, it follows that, if the expression includes also those who are in the womb, the exercise of the power must be suspended not only during the pregnancy of a wife, but during the pregnancy of a son's wife or grandson's were when the son or grandson has died leaving his wife pregnant.

It would not be safe to deduce any conclusion from the terms of the texts of *Cankha* cited in the *Dattaka Mimamsa*—"one to whom no son *has been born*, or whose son has died," for, in the *Dattaka Chandrika* the same text is cited in different words "one destitute of a son"—Sec. I, § 4; "one having no male issue"—Sec. II, § 1. But the observation is fair that *Nanda Pandita* would not have permitted himself to cite a text so loosely as to warrant an interpretation of it which would contradict a rule well known to him, namely, that the exercise of the power was not suspended only by the birth of a son, but by the possibility that a son was in the womb.

The whole text of *Cankha* is given in the 2nd section of the *Dattaka Chandrikâ* and each part of it carefully explained; thus, the expression "having

fasted for a son," which might be quoted to support the judgment of the Sadr Court that an adoption would be vaild only if made by a man hopeless of issue, if it were interpreted as meaning that the person proposing to adopt must have previously sought by prayer and penance the natural accomplishment of his desire, is explained by the author of the *Dattaka Chandrika* as directing that the penance of fasting is to precede the performance of the religious duty of making an adoption. "Having fasted for a son" is declared by the commentator to mean "having observed a fast on the day preceding the adoption."

[184] Respect for the rights of a child in the womb may make it expedient to postpone the exercise of the power until the result of known pregnancy be ascertained, but if this doctrine be carried to its legitimate conclusions, and the validity of the exercise of the power be made to depend on an event which may not be known, it follows that an element of uncertainty is introduced in an act regarded as highly religious.

Seeing that the *Dattaka Chandrika* and the *Dattaka Mimamsa* are treatises specially composed on the single subject of adoption, it can hardly be doubted that, had any such rule, suspending the exercise of the power or affecting the validity of its exercise, been known to the authors of those treatises, it would have been explicitly declared. In the absence of authority to support the ruling of the Sadr Court, we are unable to follow it.

Seeing that the decision of the issue as to the legal validity of the adoption disposed of the appeal, the Lower Court properly abstained from entering on the other questions raised in the suit. As we have overruled its decision on that issue, we must set aside the decree and order that the suit be reheard.

The cost of this appeal will abide and follow the result.

NOTES.

[ADOPTION DURING PREGNANCY OF WIFE.—

Is held valid and the adopted son, on the birth of the posthumous *aurasa* son takes only one-fourth share :—(1887) 12 Bom. 105 ; (1907) 29 All. 310.

The logical result of a rule prohibiting an adoption during pregnancy of the adopter's wife, would be to suspend an adoption not only during the pregnancy of the adopter's wife but also of the wives of his sons and grandsons, since the term "issue" includes a son, grandson, and great grandson:— *See* Bhattacharya's Hindu Law, Vol. I, p. 350, 3rd Ed.**]**

[3 Mad. 184]

APPELLATE CIVIL.

The 29th April, 1881.

PRESENT :

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, AND

MR. JUSTICE HUTCHINS.

Kalpagathachi.....(Plaintiff) Appellant

versus

Ganapathi Pillai and another.....(Defendants) Respondents.*

A widow's right to maintenance constitutes no interest, vested or contingent, in the

* Second Appeal No. 802 of 1880 against the decree of J. H. Nelson, District Judge of South Arcot, reversing the decree of the District Munsif of Chidambaram, dated 27th August 1880.