Mr. *Nihal Chand*, replied.

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JHUNKA PRASAD v. NATHU.

GRIFFIN and CHAMIER, JJ. :—The plaintiff claiming to be the adopted son of defendant sued for partition. His suit was dismissed by both the courts below on the finding that the alleged adoption was invalid. The plaintiff comes here in second appeal. The parties are *ahirs*. The plaintiff at the time of the alleged adoption was a married man. It is admitted that among the twice-born classes a married man cannot be adopted. The court below says that *ahirs* belong to the twice-born classes. This assertion is challenged in appeal. However that may be, there is authority for holding that the adoption of a married man is not valid even amongst Sudras. In the case of *Pichuvayyan* v. *Subbayyan* (1) it was said that an adoption in order to be valid even among Sudras must take place before the marriage of the adopted son. Reference is made to the Dattaka Chandrika. The same rule is to be found in the text-books on the subject. We see no reason to differ from the finding of the court below on this point. As to the question of estoppel we hold that there is no estoppel in a case of this nature. The plea of limitation in our opinion has no force. We dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

KASTURI AND OTHERS (DEFENDANTS) *v.* CHIRANJI LAL (PLAINTIFF)*

1913

February, 25

Hindu law—Marriage—Marriage of a Hindu girl without force or fraud but without consent of legal guardians—Maxim "factum valet."

The marriage of a Hindu girl of some 16 years of age was effected by the maternal grandfather and the maternal uncle of the girl. There was no evidence of force or fraud; but the marriage was against the wishes of the paternal relatives of the girl, who desired to make a profit by marrying her to a rich but one-eyed man called Tulshi. *Held* that the case was one to which the doctrine of *factum valet* should be applied, and the marriage was declared to be valid. *Ghazi* v. *Sukru* (2), *Venkatacharyulu* v. *Rangacharyulu* (3), *Surjyamoni Dasi* v. *Kali Kanta Das* (4), *Mulchand* v. *Bhudhia* (5), and *Khushalchand Lalchand* v. *Bai Mani* (6) referred to.

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* Second Appeal No. 434 of 1912, from a decree of W. H. Webb, Additional Judge of Saharanpur, dated the 5th of March, 1912, confirming a decree of Priya Charan Agarwal, Additional Munsif of Saharanpur, dated the 10th of July, 1911.

(1) (1889) I. L. R., 13 Mad., 128.
(2) (1897) I. L. R., 19 All., 515.
(3) (1890) I. L. R., 14 Mad., 316.
(4) (1900) I. L. R., 28 Calc., 37.
(5) (1897) I. L. R., 22 Bom., 812.
(6) (1886) I. L. R., 11 Bom., 247.

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KASTURI v. CHIRANJI LAL.

THE facts of this case were as follows:—

The appellant Mt. Kasturi, a *sonar* (goldsmith) girl of about 16 years of age, lived after the death of her parents with her paternal relatives, namely, an uncle and two cousins. She had an younger brother. After she had lived for some months with these relatives, they brought her to the house of the plaintiff, a relative of theirs, and she lived there for about a month and a half. The paternal relatives were negotiating a not very suitable marriage for her, for pecuniary consideration. In the meantime the maternal relatives of the girl arranged her marriage with the plaintiff, and she was married to him in the presence and with the consent of her maternal grandfather, but without the knowledge of the paternal relatives. The latter came to the plaintiff's house on the day after the marriage and took the girl away with them. The plaintiff thereupon brought the present suit for restitution of conjugal rights. Mt. Kasturi and the other defendants resisted the claim. Both the lower courts found that the marriage had been performed with all due religious ceremony, that the girl's consent had not been forced, and that no fraud had been employed. Both the courts decreed the suit.

The defendants appealed to the High Court.

Mr. *Nihal Chand*, for the appellants:—

Under the Mitakshara the right of guardianship over a minor girl, including the right of giving her in marriage, vests in the following persons in successive order, namely, father, paternal grand-father, brother, other paternal relations (Sakulya), mother. The maternal grand-father does not find a place on the list. The right is with the paternal relations, and the mother only comes in as the last on the list which ends with her; Macnaghten, Principles and Precedents of Hindu Law (3rd Edition), page 104; and page 204 of the second volume (Appendix). It is only under the Bengal School that the maternal relatives find a place on the list: Banerjee, Hindu Law of Marriage and Stridhan (1879 Edition), page 47; Bhattacharya, Hindu Law (3rd Edition), Vol. I, page, 234. Yajnavalkya's order enumerated above is accepted in the Mitakshara and in the law all over India, except Bengal. The maternal grandfather, accordingly, is not a legal guardian at all and has no authority to bestow the minor in marriage. In

this case, the father and paternal grandfather being dead and the brother being a minor, the paternal uncle is the legal guardian. The marriage is, therefore, invalid and can be set aside. Force or fraud are not the only grounds on which a Hindu marriage can be annulled. Any sufficient reason affecting the propriety of the marriage may afford a ground for avoiding it; Banerjee, Hindu Law of Marriage and Stridhan (1879 Edition), page 53. *Anjona Dossee* v. *Proladh Chunder Ghose* (1). The girl has clearly signified her unwillingness to recognize this marriage. She has attained years of discretion and her wishes should be an important factor in considering the propriety or otherwise of the marriage. She never lived with the plaintiff after the marriage. The cases of *Ghazi* v. *Sukru* (2) and *Venkatacharyulu*, v. *Rangacharyulu* (3), which are relied on by the lower courts, can be distinguished. There the girl was bestowed in marriage by the mother, who is one of legal guardians recognized by the Mitakshara.

Babu *Durga Charan Banerji*, for the respondent :—

Under the Benares School of Hindu Law the maternal grandfather and other maternal relatives do find a place on the list of guardians of a female minor. Yajnavalkya and the Mitakshara stop at the mother. But the list is not exhaustive, and other commentators of the same school continue the list further on and include the maternal grandfather and others, e.g., the sages Narada and Vishnu do so; Bhattacharyya, Hindu Law (3rd Edition) Volume I, pages 233 and 234; Mayne, Hindu Law (7th Edition), page 101.

The difference between the Benares and Bengal Schools on this point is with regard to the relative position of the mother on the list. The former puts the mother before, and the latter after the maternal grandfather and maternal uncle; Trevelyan, Hindu Law, pages 42 and 43. Secondly, the rules relating to guardianship are of importance so long as the marriage rests in contract. A very different question arises where the marriage has actually been celebrated. If the marriage is duly solemnized, and there is no force or fraud, it is irrevocable. The rules are directory and not mandatory; Mayne, Hindu Law (7th Edition),

(1) (1870) 14 W. R., C. R., 403. (2) (1897) I. L. R., 19 All., 515.

(3) (1890) I. L. R., 14 Mad., 316.

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page 102. Golap Chandra Shastri, Hindu Law, pages 109 and 110.

I rely also on the ruling mentioned by the appellants. The finding is that the marriage with the plaintiffs is a fairly suitable one, and that there was no force or fraud employed to compel the consent of the girl to marriage with him. There are no sufficient grounds on which the marriage can be set aside.

Mr. *Nihal Chand*, in reply :—

Narada and Vishnu are not regarded as authorities in the Benares School; Bhattacharyya, Hindu Law (3rd Edition), Volume I, page 78, where Narada and Vishnu are not enumerated in the list of authorities followed by the Benares School. These texts, therefore, cannot override the Mitakshara, which is of paramount authority in these Provinces.

GRIFFIN and CHAMIER, JJ.:—This is an appeal in a suit brought by the respondent for restitution of conjugal rights. The courts below have found that the appellant Musammat Kasturi was given in marriage to the respondent by her maternal grandfather and maternal uncle against the wishes of the appellants, Mangal, Balmakund and Joti, who are paternal uncle and paternal cousins of the girl, and who hoped to make a profit out of marrying her to a rich but one-eyed man named Tulshi. It has been found also that the marriage was not brought about either by force or by fraud.

The question for decision is whether the marriage is valid. The authorities are conflicting. According to Yajnavalkya (I-63-64) the father, paternal grandfather, brother, a Sakulya or member the same family, and the mother, in default of the first among these the next in order, if sound in mind, is to give a damsel in marriage. Vishnu says (XXIV-38-39) :—"The father, the paternal grandfather, the brother, the kinsman, the maternal grandfather, and the mother are the persons by whom a damsel may be given in marriage." Narada says (XII-20-21) :—"The father himself shall give a damsel in marriage or with his assent the brother, the maternal grandfather and maternal uncle and her agnates and her paternal grandfather. In default of all these the mother." The Mitakshara, commentary on the text of Yajnavalkya, is silent about the maternal relations (I. VII, 3-6). Most of the

modern commentators seem to assume that the text of Yajnavalkya and the Mitakshara commentary upon it should not be treated as exhaustive and that the maternal relatives may give a girl in marriage, though the father, brother and other paternal relatives have a preferential right to do so (see Macnaghten's Hindu Law, edition of 1874, page 103; Guru Das Banerjee's Hindu Law of Marriage and Stridhan, page 47; Trevelyan's Hindu Law, page 43; Ghose's Hindu Law, pages 678-688, and Mayne's Hindu Law, 7th edition, page 101). Others, such as J. N. Bhattacharjee, Chapter XIII, and Golap Chandra Shastri, Chapter III, content themselves with noticing the divergence between the authorities. It has been established by a long line of decisions, going back to 1843 that if a girl is given in marriage by her natural guardian even without the consent of her legal guardian and the marriage actually takes place, it is irrevocable [see *Ghazi* v. *Sukru* (1), *Venkatacharyulu* v. *Rangacharyulu* (2), *Surjyamoni Dasi* v. *Kali Kanta Das* (3) and *Mulchand* v. *Bhudhia* (4)] and we are asked to apply this rule to the present case. But on the findings of the courts below it may be doubted whether the persons who gave the girl in marriage were her natural guardians. It appears that her mother died several years ago; that her father died seven or eight months before the marriage now in question, and that she and her brother aged ten lived with their paternal uncle and cousins up to within a month or two before the marriage when they took her to the respondent's house.

We have not been referred to any case at all resembling the present case. But on the other hand, there is no case, of which we are aware in which the marriage of a Hindu girl effected without force and fraud by her relations has, after it has actually taken place, been declared to be invalid for want of the consent of the legal guardian. Neither Yajnavalkya nor the Mitakshara lays down that the marriage of a girl effected without the consent of her legal guardian is invalid. In the case of *Khushalchand* v. *Bai Mani* (5) the Court held that the texts on the subject were directory rather than mandatory, that the consent of the legal guardian was not necessarily of the essence of the marriage, and

(1) (1879) I. L. R., 19 All., 515.
(2) (1890) I. L. R., 14 Mad., 316.
(3) (1900) I. L. R., 28 Calc., 37.
(4) (1897) I. L. R., 22 Bom., 612.
(5) (1886) I. L. R., 11 Bom., 247.

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that it would be proper to apply the principle of *factum valet* to a marriage effected without such consent, but also without either force or fraud. In the present case the girl was sixteen years old at the time of the marriage: she appears to have entered upon it not unwillingly, and the object which her paternal relatives had in view in opposing her marriage with the respondent, and now have in view in resisting this suit, is the getting of a sum of money upon what would be something very like a sale of the girl to the one-eyed man Tulshi. It seems to us that this is eminently a case to which the principle of *factum valet* should be applied. We therefore hold that the marriage cannot now be declared void. The appeal fails and is dismissed with costs.

Appeal dismissed.

1913

February, 26.

Before Mr. Justice Banerji and Mr. Justice Tudball.

INDARJIT AND OTHERS (DEFENDANTS) *v.* GAJADHAR SAHAI (PLAINTIFF) AND DHANPAT RAI AND OTHERS (DEFENDANTS)*

Act No. IX of 1871 *(Indian Limitation Act), section* 21—*Act No. IX of* 1908 *(Indian Limitation Act), section* 31—*Limitation—Mortgage with possession—Realization of rents and profits equivalent to receipt of interest as such under the terms of the mortgage.*

Under the terms of a mortgage deed executed in 1850 the mortgagee was to take possession of the mortgaged property and appropriate the rents and profits in lieu of interest. The mortgagee remained in possession up to 1889 when he was dispossessed. In 1910 he brought a suit for sale. *Held*, that the realization of rents and profits in lieu of interest was equivalent to the receipt of interest as such under the terms of the mortgage and therefore under section 21 of Act No. IX of 1871 the mortgagee was entitled to compute limitation from the year 1889. Act No. XV of 1877 having by that time come into operation, the plaintiff was in 1910 entitled to bring his suit within the limitation provided by section 31 of Act No. IX of 1908.

THIS was a suit for sale upon a mortgage executed in 1850. The mortgage was usufructuary, the rents and profits being taken in lieu of interest on the mortgage money. The plaintiff remained in possession and realized the rents and profits down to the year 1889, when he was dispossessed. The present suit was brought in 1910. Both the lower courts decreed the claim. The defendants mortgagors appealed to the High Court, and the only point raised in appeal was that the suit was barred by limitation before Act

* Second Appeal No. 572 of 1912 from a decree of H. Dupernex, District Judge of Farrukhabad, dated the 3rd of February, 1912, confirming a decree of Joti Sarup, Munsif of Kaimganj, dated the 5th of December, 1910.