daughter's son was not available the husband prohibited the adoption of any one else. The appeal is dismissed with costs.

SHAH, J. :—I agree.

Appeal dismissed.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

YEKNATH NARAYAN KULKARNI AND ANOTHER (ORIGINAL DEFENDANTS NO. 3 AND 4), APPELLANTS *v.* LAXMIBAI BHRATAR KESHO GOPAL (ORIGINAL PLAINTIFF), RESPONDENT*.

1922.
April 9.

Hindu law—Adoption—Widow in a joint Hindu family—Widow of a gotraja sapinda*—Power to adopt.*

The decision of the Bombay High Court that a widow of a *gotraja sapinda* cannot adopt so as to defeat the rights of the reversioners has not in any way been shaken by the decision in *Yadao* v. *Namdeo*[1].

FIRST appeal from the decision of V. P. Raverkar, First Class Subordinate Judge at Satara.

Suit for declaration.

A Hindu joint family, governed by the Mitakshara, consisted of three brothers : Ramchandra, Balkrishna and Ganpati. Ganpati died leaving a widow (defendant No. 2). Balkrishna died leaving a son Narayan him surviving. Both Ramchandra and Narayan died on the same day. Afterwards, Narayan's widow Lakshmibai (defendant No. 1) adopted Vasudeo (defendant No. 3). The property of the family was sold to defendant No. 4.

The plaintiff, a separated nephew, sued for a declaration that Vasudeo's adoption was invalid.

*First Appeal No. 486 of 1920.

[1](1921) L. R. 48 I. A. 513.

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It was held by the trial Court that Narayan died first and his widow therefore had no power to adopt.

Defendants Nos. 3 and 4 appealed to the High Court.

K. N. Koyajee, for the appellants, submitted that evidence showed that Narayan was the last to die. Even assuming that Narayan died first, his widow had power to adopt : see *Yadao* v. *Namdeo*[1].

[*Nadkarni*, for the respondent:—The question before the Court is not whether the widow of a co-parcener could adopt without the consent of other co-parceners, but whether the estate which has already vested in the heir of the last male holder can be divested by reason of subsequent adoption made by a widow in the family: see *Madana Mohana* v. *Purushothama*[2] ; *Ramkrishna* v. *Shamrao*[3] ; *Datto Govind* v. *Pandurang Vinayak*[4] ; and *Dattatraya Bhimrao* v. *Gangabai*[5].]

Koyajee:—The case of *Ramkrishna* v. *Shamrao*[3] approved of in *Madana Mohana* v. *Purushothama*[2] is good law ; but the case of *Datto Govind* v. *Pandurang Vinayak*[4] is overruled by *Yadao* v. *Namdeo*.[1]

Where the future right of a remote reversioner is affected by an adoption the ratio of *Ramkrishna* v. *Shamrao*[3] will not apply ; but *Yadao* v. *Namdeo*[1] will have application. No vested estate is here divested, not even that of the adopting widow.

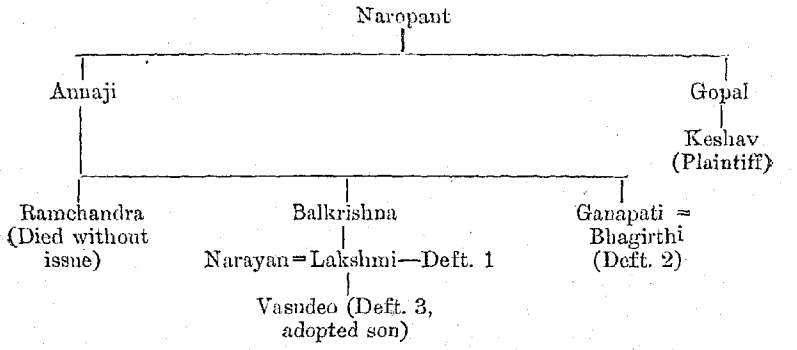
Nadkarni, with *P. B. Shingne*, for the respondent, was not called upon to reply on question of law. On facts, he submitted that Ramchandra died last.

MACLEOD, C. J. :—The plaintiff claiming to be the heir of one Ramchandra sued for declarations (1) that

[1] (1921) L. R. 48 I. A. 513.
[2] (1918) L. R. 45 I. A. 156.
[3] (1902) 26 Bom. 526.
[4] (1908) 32 Bom. 499.
[5] (1921) 46 Bom. 541.

defendant No. 3 was not adopted by defendant No. 1 and that, if he was adopted, the adoption was invalid, (2) that the sale-deed passed to defendant No. 4 by defendants Nos. 1 to 3 was not binding on the plaintiff.

The following pedigree will explain the relationship of the parties :—



Annaji died in the first half of 1899 leaving him surviving his son Ramchandra, his grandson Narayan by a predeceased son Balkrishna and Bhagirthibai the widow of a predeceased son Ganapati. Ramchandra and Narayan died on the 1st of November 1899. If Narayan survived Ramchandra then he would be the last male holder of the family property, and his widow Lakshmibai would have taken a widow's estate. In 1915, she adopted the present defendant No. 3. The plaintiff who was a separated nephew of Annaji filed this suit in 1919 against Lakshmibai, Bhagirthibai, the 3rd defendant and the 4th defendant, an assignee from the 3rd defendant. He contended that the property belonged to his cousin Ramchandra ; that on Ramchandra's death Bhagirthi as the widow of Ganapati, a *gotraja sapinda*, succeeded, while Lakshmi had only a right to maintenance, and had therefore, no right to adopt the 3rd defendant.

The learned Judge who decided the case unfortunately did not see the witnesses as the evidence was recorded

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by his predecessor. Therefore in dealing with the question of fact he was in no better position than we are, as we have the same written record before us as the learned Judge. He came to the conclusion on the evidence that Ramchandra died last. The evidence of Exhibit 53 and Exhibit 55 supports the story that Ramchandra died last, while the evidence of Exhibits 61, 62, 64, 66 and 67 supports the defendants' case. It must be remembered that all these witnesses were talking of what happened twenty years ago, and all of them were likely to make mistakes quite honestly. But the plaintiff placed great reliance on the village Death Register which showed that Narayan died on the 1st November and Ramchandra on 2nd November. Now it is admitted that both of them died on the 1st, one early in the morning, the other in the afternoon, and the evidence of the defendants' witnesses shows that they were both cremated on the same day, so that in any event the Register is incorrect. I do not see any reason why the Court should attach such importance to the Register as to hold that what it states must be absolutely correct. When a village has been attacked by an epidemic of plague, it is probable that all the officials would be fully occupied, and it may very well be that the information they received with regard to births and deaths would not be accurately recorded.

On a careful perusal of the evidence, therefore, I do not see any reason why we should believe the witnesses for the plaintiff rather than the witnesses for the defendants, while I may point out that one of the witnesses, Exhibit 55, for the plaintiff actually went so far as to say that Ramchandra died at least two days after Narayan.

Thereafter the name of Lakshmibai was entered in the Vatan Register, but the suggested explanation of

the preference given to her is not sufficiently convincing. It is just as probable that Lakshmi was considered by the authorities to be the rightful heir as the widow of the last male holder, as that the daughter-in-law of the senior son was preferred to the widow of the junior son. It seems to me, therefore, that, as we are in the same position with regard to the appreciation of evidence as the learned Judge, there is no sufficient reason for holding on the evidence that Ramchandra died last. I think that some importance must be given to the fact that Narayan was considerably the younger man. He was only eighteen compared with Ramchandra who was sixty—therefore when the evidence on the question who died first is so evenly balanced I think we are entitled to say that the probabilities are in favour of the younger man surviving the elder.

That is also a desirable conclusion to arrive at as otherwise the property would go away from the family. Our finding that Narayan died last is sufficient to dispose of the case. But an interesting question was raised whether, if Ramchandra died last, the adoption of the 3rd defendant by Lakshmi could defeat the rights of the plaintiff. In *Ramkrishna* v. *Shamrao*[1], it was decided 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 sons 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. That decision was approved by the Privy Council in *Madana Mohana Deo* v. *Purushotthama Deo*[2].

Then in *Datto Govind* v. *Pandurang Vinayak*[3] it was held that a Hindu widow who succeeds to an estate not her husband's but as a *gotraja sapinda* of the last

(1) (1902) 26 Bom. 526. (2) (1918) 41 Mad. 855 at p. 859.
(3) (1908) 32 Bom. 499.

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male holder under the rule established by *Lulloobhoy Bappoobhoy* v. *Cassibai*[1] and in consequence of the absence of nearer heirs, cannot make a valid adoption.

That decision would be binding upon us unless it has been reversed. But that decision was based on the decision in *Ramkrishna* v. *Shamrao*[2] which as I have already stated, has since been approved by the Privy Council.

The appellants, however, relied on the case of *Yadao* v. *Namdeo*[3]. There was a joint Hindu family consisting of Pundlik, his cousin Namdeo, and the two sons of Namdeo. On Pundlik's death his senior widow, Champabai, acting under the authority of her husband, adopted Pandurang, one of Namdeo's sons. Pandurang died in childhood unmarried, but it was held that at the time of his adoption there was a separation between Pandurang on the one hand, and Namdeo and his remaining son on the other. On his death, therefore, his estate vested in Champabai who then adopted the plaintiff. Namdeo disputed the capacity of Champabai to adopt but it was held that, as her husband had not forbidden her to adopt if the boy named was not available or died, she had the power to adopt the plaintiff. The head-note to the case says:

"In the Mahratta country of the Bombay Presidency and in Gujerat a Hindu widow, whose husband has not expressly forbidden her to adopt a son to him, has power to do so, without the consent of her husband's kinsmen, whether or not her husband's estate is vested in her, and whether he died joint or separate in family."

The Bombay Full Bench decisions in *Ramji* v. *Ghamau*[4] and *Dinkar Sitaram* v. *Ganesh Shivram*[5] were disapproved. In those cases the widow of a deceased co-parcener who had not the family

(1) (1880) L. R. 7 I. A. 212.
(2) (1902) 26 Bom. 526.
(3) (1921) L. R. 48 I. A. 513.
(4) (1879) 6 Bom. 498.
(5) (1879) 6 Bom. 505.

estate vested in her and whose husband was not separated at the time of his death sought to adopt without the authority of her husband and without the consent of the surviving co-parceners. The case of an adoption by a widow who has succeeded to the estate of her son,—and she can only do so if he was separated from the family,—would appear to be different. By such an adoption the widow does not bring a new member into the family, she merely endangers the expectations of the reversioners. Their Lordships, however, appear to have considered the question of the validity of an adoption by a Hindu widow made as a religious duty to her husband apart from the question whether the adopted son would acquire thereby any rights to property, so that in the event of a case coming before this Court in which surviving co-parceners dispute an adoption by the widow of a deceased co-parcener, the question at issue will probably be whether the adopted son acquired, by virtue of his adoption, any rights in the joint family property and not whether the adoption was valid.

In *Mallappa* v. *Hanmappa*[1] the facts were very similar to the facts in *Yadao* v. *Namdeo*[2] except that the deceased son was the natural son of the husband and not an adopted son. It was decided that the rights of the widow to adopt did not definitely come to an end, because a natural son was born, so that if that natural son died without leaving a son or a widow and the mother succeeded as his heiress, her rights to adopt to her husband which had been in suspense revived. Then in *Dattatraya Bhimrao* v. *Gangabai*[3] my brother Shah expressed the opinion that the principle underlying the rulings in *Ramkrishna* v. *Shamrao*[4] and *Datto Govind* v. *Pandurang Vinayak*[5] was not

(1) (1919) 44 Bom. 297.
(2) (1921) L. R. 48 I. A. 513.
(3) (1921) 46 Bom. 541.
(4) (1902) 26 Bom. 526.
(5) (1908) 32 Bom. 499.

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in any way affected by the observation in *Yadao* v. *Namdeo*[1].

It cannot be said, therefore, that the decision of this Court that a widow of a *gotraja sapinda* cannot adopt *so as to defeat the rights of the reversioners* has in any way been shaken by the decision in *Yadao* v. *Namdeo*.[1]

If, therefore, Bhagirthi, though she took a life estate as a widow of a *gotraja sapinda*, had no power to adopt so as to defeat the rights of the reversioners, it equally follows that Lakshmi, who in the life time of Bhagirthi had only a right of maintenance, had no power to adopt so as to exclude the reversioners. The question whether those widows could have adopted so as to secure religious benefit to their husbands is an entirely different question from the one whether by such adoption they could defeat rights of inheritance. We think, therefore, that the appeal must be allowed and the plaintiff's suit dismissed with costs throughout.

SHAH, J. :—I concur.

Appeal allowed.

R. R.

[1] (1921) L. R. 48 I. A. 513.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

1922
April 10

MARUTI BABAJI TOTRE AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS *v.* MARTAND NARAYAN KULKARNI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS*.

Dekkhan Agriculturists' Relief Act (XVII of 1879), section 22—Decree against an agriculturist—Execution—Attachment and sale—Death of judgment-debtor—Legal representative non-agriculturist—Property not protected from attachment—Civil Procedure Code (Act V of 1908), sections 50, 53.

The protection from attachment afforded to immoveable property belonging to an agriculturist by section 22 of the Dekkhan Agriculturists' Relief Act

* Second Appeal No. 350 of 1921.