PRIVY COUNCIL.

LACHMAN LAL CHOWDHRI (DEFENDANT) *v.* KANHAYA LAL MOWAR (PLAINTIFF).

P. C.* 1894 *November* 16. *December* 15.

[On appeal from the High Court at Calcutta.]

Limitation Act (XV of 1877), Schedule II, Articles 118 and 141—Adoption—Practice among the Gayawals of Goya of adopting sons—Findings of fact on documentary evidence apart from construction.

Against a claim for the proprietary right by inheritance brought by the nearest *bandhu*, or cognate heir, of the deceased, the defendant, in possession, set up his adoption by the widow under her husband's authority. The Courts below had found that no such authority had been given, and that the widow, not adopting to her husband, had adopted the defendant as her son: *Held*, that on the facts found, this was not a suit to which limitation under Article 118, Schedule II, Act XV of 1877, was applicable.

The Courts below had also concurred in finding against the fact of a *dattaka* adoption having taken place, which would have had the effect of removing one of the plaintiff's ancestors into another family, whereby a necessary link in the succession would have been lost to the plaintiff's title had this adoption been proved.

As a ground for interference with these findings of fact, it was suggested that the evidence consisted, in a great measure, of documents, of which the construction had been matter for decision, thus rendering the questions to be other than of fact. But it was held that they turned on the effect of the evidence afforded by the documents, and not on the construction, so that there was no reason for departing from the ordinary rule as to the concurrence of two Courts upon fact.

The proved practice of the Gayawals in adopting sons did not sever the adopted child from the family of his natural father, so that he did not lose his rights therein.

APPEAL from a decree (12th September 1890) of the High Court at Calcutta, affirming a decree (1st February 1889) of the Subordinate Judge of Gaya.

The respondent's father, Srikishen Lal, now represented by his son, the respondent Kanhaya Lal Mowar, sued, on the 9th January 1888, to recover from the defendant, now appellant, possession of land and property in Gaya, which had belonged to Kishen Lal Chowdhri, who died on the 16th February

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1846. This estate had then remained in the possession of his childless widow, Bhuina Chowdhrain, down to her death on the 30th October 1886. The common ancestor of both the plaintiff and of Kishen Lal was Amir Chand Chowdhri, paternal great-grandfather of Kishen Lal. The plaintiff was the son of the daughter of Kishen Lal's paternal uncle, and he claimed to inherit, on the death of the widow Bhuina, as the nearest *bandhu*, or cognate, and therefore heir, of Kishen Lal. The defendant, who was nephew (brother's son) to the widow Bhuina, was in possession of the property, and defended the suit on the grounds, *first*, that he had been adopted by her to her deceased husband, Kishen Lal, under an authority from the latter; *secondly*, that Mulchand, father of the plaintiff's mother, had passed by adoption into another family, so that through him the plaintiff could not make title.

The parties to this litigation, and those through whom they claimed, belonged to a tribe of Brahmins in Gaya known as Gayawals, who were divided into several *gotras*, or families, having various patronymics, such as the Mowars, to whom the plaintiff belonged, the Chowdhris, to whom the appellant alleged that he belonged, and the Nakphophas, into whose family this appellant contended that Mulchand, the grandfather of the plaintiff, through whom the latter sought to make title as a *bandhu*, had been adopted, arguing that the line of succession had thus been broken.

The Courts below having found that the defendant had failed to prove that Bhuina Chowdhrain had authority to adopt him to her husband, or that she had, in fact, so adopted him, but that she had adopted the defendant as her son, and having also found that she retained her husband's estate down to her death, the questions raised on this appeal were the following: Was the plaintiff barred by limitation under Article 118 of Schedule II of Act XV of 1877, by reason of his not having sued to obtain a declaration that the defendant's alleged adoption was invalid or never took place within six years from the time when he first knew of the adoption? *Secondly*, was Mulchand so adopted by his uncle Terbhawan Nakphopha into his family *gotra*, as to have ceased in law and fact to be of the Chowdhri family, and thereby had it

become impossible for title to be made through him as a *bandhu* of Kishen Chowdhri?

The first Court, on the issue of limitation, held that as the suit was brought within two years of Bhuina's death, and as she had possession of the estate in dispute in her own right, and not for a widow's estate, the plaintiff's suit was not barred. Also, that the adoption of Mulchand by Tirbhawan had been, at most, an arrangement such as those practised among the Gayawals, which had not altered the status of the adopted boy or changed him from being the child of one family to be one of another family.

The High Court taking into consideration the 118th Article of Schedule II of the Limitation Act (XV of 1877) and the decision in *Jagadamba Chowdhrani* v. *Dakhina Mohun Roy Chowdhri* (1), that the Article 129, Schedule II of Act IX of 1871, corresponding to Article 118 of the later Act, applied to all suits which could not succeed unless without an apparent adoption having to be displaced, held that the present case did not fall thereunder, but rather resembled *Raj Bahadur Singh* v. *Achumbit Lal* (2), where the adoption had been made to the widow herself, and not to her husband. On the question of the adoption of Mulchand by Tirbhawan, the Judges were of opinion that it had not caused Mulchand to be severed from the *gotra* of his natural family, and they considered that his adoption by his maternal uncle Tirbhawan having been so related to him, would not, in any case, have been valid by Hindu law.

The plaintiff's claim was decreed on the finding that he was, as he claimed to be, the nearest *bandhu* to the deceased, and on the failure of both the above grounds of defence.

On this appeal,—

Mr. *R. V. Doyne*, for the appellant, argued that the plaintiff's suit was time-barred under the 118th Article, Schedule II of Act XV of 1877. He referred to the evidence which seemed to shew that the plaintiff had knowledge of an adoption, carrying with it the succession to the property, having taken place, and that he had known of it more than six years before he sued. The construction placed on the 118th Article, by reference to the law enacted in

(1) I. L. R., 13 Calc., 308; L. R., 13 I. A., 84.

(2) L. R., 6 I. A., 110.

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1871, as interpreted by *Jagadamba Chowdhrani* v. *Dakhina Mohun Roy Chowdhri* (1) was that the limitation of six years applied to suits which could not succeed without displacing an apparent adoption. Here Bhuina might be understood to have purported to adopt to her husband, whether validly or not; and the question of validity could not now be raised. In the "Hibanama for adoption," executed by her on the 15th April 1849, and registered on the 19th June following, she described herself as "widow and heiress of Kishen Lal," and declared that, by reason of being childless, she had, according to the permission of her deceased husband, adopted, as her son, Lachman Lal, giving him that name, and that she had made a gift to him of the estate left by her husband.

After adverting to other evidence in support of the second ground of defence, *viz.*, the alleged adoption of Mulchand by his uncle, Tirbhawan Nakphopha, which was said to have had the effect of severing him from the *gotra* of his natural father, the learned Counsel referred to the decision of the Provincial Court of Azimabad in a suit instituted by Mulchand in 1797 to establish his title as the adopted son of Tirbhawan and his wife Jhuna to the estate of his adoptive father. After proceedings in the District with varying results, the judgment of the Provincial Court, in 1800, was that the adoption had been established as "in accordance with a custom prevailing in a certain community for many centuries." It was submitted that this judgment alone proved conclusively against the plaintiff, who by his plaint claimed through Mulchand, the valid adoption of the latter by Tirbhawan Nakphopha; and on this, and further documentary evidence, it was argued that the finding of the High Court against the adoption of Mulchand was erroneous in law and fact, having proceeded upon a misconstruction of the documents adduced, which clearly established a complete severance of Mulchand after his adoption from his natural father's family. This would be a ground for considering the evidence.

Mr. *J. D. Mayne* for the respondent was not called upon.

Afterwards, on the 15th December, their Lordships' judgment was delivered by

(1) I. L. R., 13 Calc., 308; L. R., 13 I. A., 84.

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LORD SHAND.—The plaintiff, the respondent in the present appeal, is, according to natural relationship, the nearest *bandhu* or heir of Kishen Lal Chowdhri, who died on the 16th February 1846 without issue, but survived by his widow Bhuina Chowdhrain, who possessed his estates till her death on the 30th October 1886, when the appellant took possession.

The present suit was instituted on the 9th January 1888. The respondent asked that his right of inheritance in respect of the properties left by Kishen Lal Chowdhri should be declared by decree, and that he should be awarded possession. The title set up by the defendant and appellant was that of a son, on the statement that Kishen Lal Chowdhri before his death had given permission to his wife to adopt a son to him, and that after his death she had exercised the power given to her and had adopted him as the son of her deceased husband.

This ground of defence has failed. There are concurrent findings of the Subordinate Judge of Gaya and of the High Court, that the appellant had failed to prove that Bhuina Chowdhrain had authority from her husband to adopt, or that she did validly adopt the appellant as a son to her husband. Accordingly the argument for the appellant under this appeal was not rested on any title which he himself had, but entirely on the possession he had gained of the properties in dispute.

In this view his Counsel maintained two grounds of defence: The first of these was that the respondent had no title to succeed, because, admitting his natural relationship to the deceased Kishen Lal Chowdhri, it was alleged by the appellant, and had been proved, that the respondent had been adopted into another family, with the result that he ceased in law and in fact to be a member of the Chowdhri family, and therefore could not take up the succession of Kishen Lal Chowdhri. The second was the defence of limitation. The judgments of both Courts were against the appellant on these grounds of defence also.

It will be convenient to deal with the plea of limitation in the first instance. The Subordinate Judge held that the limitation of twelve years which was pleaded had no application, because the suit had been raised within two years of Bhuina Chowdhrain's

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death, and she alone in her own right and not as representing her alleged adopted son had after her husband's death possessed his properties till she died. The High Court held that the alleged adoption, even if made, was to the widow herself, and not to her husband, and that such adoption could not give any right to the property of the husband and could not, therefore, found any plea of limitation against the respondent's claim to that property.

The appellant's Counsel, founding on section 118 of the Schedule to the Limitation Act, argued that the limitation of six years from the date of the alleged adoption of the appellant barred the suit. It was maintained that the suit was one in effect to obtain a declaration that the adoption of the appellant was invalid, or had never in fact been made, and that six years had elapsed after the alleged adoption had become known to the respondent before the suit was instituted. If the adoption was really made by Bhuina Chowdhrain of a son to herself and not to her husband, which the High Court has held to be the true construction of the deed of adoption produced, the plea of limitation could have no application in this suit, which relates entirely to the husband's estate. But, in the opinion of their Lordships, there is another ground in respect of which also this defence clearly fails, *viz.*, that it has not been proved that the alleged adoption did become known to the respondent till the death of Bhuina Chowdhrain, which occurred within two years of the institution of the suit. It has been held by both Courts that the appellant, who is said to have been adopted about two years after the death of Kishen Lal Chowdhri, when he was about five years of age, had no possession until after Bhuina Chowdhrain's death. So far as possession was concerned the respondent had, therefore, no notice of the alleged adoption so long as Bhuina Chowdhrain lived. Further, there is no direct evidence that the respondent was in any way made aware of the appellant's alleged adoption until after her death. The only evidence to a different effect to which the appellant's Counsel could refer in order to show the requisite knowledge was a passage in the respondent's own deposition (Record, p. 143), in which, after a denial that the appellant had been adopted, he says: "Had Bhuina Chowdhrain adopted the defendant, I must have known it," on which it was said that his knowledge must be

inferred, as it was proved that he was frequently in Bhuina Chowdhrain's house after the alleged adoption took place, and that in this way he must have become aware of it. It is clear that such evidence is plainly insufficient to prove the requisite knowledge, and the plea of limitation therefore fails.

The other ground of appeal maintained, and which formed the subject of the third issue settled by the Subordinate Judge, was that the respondent's deceased grandfather, Mulchand, through whom the respondent now claims, and who with Kishen Lal was descended from Amir Chand as their common ancestor, had been adopted into the family of Tirbhawan Nakphopha, and thereby for himself and his descendants "went out of his father's family into the family of Tirbhawan Nakphopha who adopted him." (Appellant's written statement, para. 5, p. 8). This averment was denied in the written statement of the respondent who alleged (para. 2, p. 11) "that Mulchand Chowdhri was never adopted as a *dattaka* son by his maternal uncle Tirbhawan Nakphopha, nor could he have been adopted according to the *Shastras*, nor was he severed from his Chowdhri family."

The third issue relating to this defence was in these terms (Record, p. 175): "Was Mulchand Chowdhri adopted in *dattaka* form by Tirbhawan Nakphopha, and was that adoption valid? Whether by that adoption, even if invalid, he had lost his status in his father's family?" The evidence showed that amongst the Gayawals, a sect of Brahmins residing in the district of Gaya, to which the parties to the present suit and their families belong, there exist peculiar and loose customs in regard to adoption; and in particular that, although adoption of a son may be made soas to give him rights of succession to his adopting father, this will not necessarily sever his connection with his own natural father or his family. In the district of Gaya there exist many places of sanctity connected with the ancient Buddhism, and the Gayawal Brahmins have the privilege of acting as guides to the pilgrims who visit these places, and thereby make considerable sums; and by adoption into different families, facilities are given for the acquisition of property, without severing the adopted son's connection with his own family. The witness Kishen Lal Kharkhoka (Record, p. 172) deponed that a Gayawal might become the *malik*,

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or successor, of four families, and be called the adopted son of all the families, adding to his own name the designation of all those families in which he became the *malik;* and various other witnesses give evidence to the same effect.

On this part of the case the Subordinate Judge says: "There is no direct evidence to prove that Mulchand was adopted, and much less in *dattaka* form, by his maternal uncle Tirbhawan Nakphopha. In some documents allusions to and inferences of Mulchand's adoption appear; but the question is how far those will establish an adoption in *dattaka* form. None of those documents show that Mulchand was adopted in that form." And after a reference to certain of the documents produced, he again observes in dealing with the evidence (Record, p. 177):—

"It further appears from the evidence of witnesses adduced by both parties that very loose practices prevail amongst the Gayawals regarding adoption. Even a person who gets another's property by gift assumes the surname of his donor and calls himself as his adopted son. This loose practice had its origin in order to induce the pilgrims of his donor to acknowledge the donee. These form the bulk of their property and the greatest source of income of these Gayawals. In adoption, even, they adopt anybody quite contrary to Hindu law. They adopt daughter's and sister's sons, and only sons; and widows even adopt without their husband's authority previously given. From what time such practices arose does not appear from the evidence; but apparently from the decline of the Gayawal dynasty. These people are found in Gaya alone, and their marriages, &c, are confined to this place. The fabulous 1,484 families of Gayawals have now dwindled to 200 or 300. Hence every one, more for the pilgrims than for their properties, makes such gifts or adoption in favour of those whom he or she loves, and the donees call themselves adopted sons. This practice also does away with escheats.

"In face of such loose practices and change of surnames, I cannot, without any satisfactory evidence of adoption, hold that Mulchand was adopted by his maternal uncle, and much less in the *dattaka* form. The fact of Mulchand retaining his surname Chowdhri, and being described in Kishen Lal's lease (exhibit E) as his grand-uncle or grandfather's brother in 1836, leaves no room to doubt that even after Gopal Chand's adoption by Sahar Chand, he continued to be a member of Chowdhri family, and was the manager and guardian of Kishen Lal in respect of properties inherited by him from Sahar Chand. Mulchand's adoption by his maternal uncle is also invalid under Hindu law as it obtains in Bengal and is established by case law of the Calcutta High Court. Under such circumstances, I cannot hold that Mulchand was totally estranged from the family of Chowdhri or lost the status in his father's family. I find the third issue against defendant."

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On appeal the High Court came to the same conclusion. The learned Judges say (Record, p. 188) :—

"The first point strongly pressed for the appellant is, that Mulchand was adopted in the *dattaka* form by his maternal uncle Tirbhawan Nakphopha ; and of course, if this be established, the plaintiff's suit must fail, because he claims through Mulchand. Now there is, as the Subordinate Judge observes, no direct evidence that Mulchand was adopted in the *dattaka* form by Tirbhawan Nakphopha, and such an adoption, too, would not be valid under Hindu law, which prohibits a brother from adopting his sister's son. Several documents are relied upon as evidencing the adoption. One of these (exhibit B), being a copy of a copy, is, we think, clearly inadmissible and was rightly so treated by the Subordinate Judge ; and even if admitted, it does not show that Mulchand was adopted by Tirbhawan Nakphopha in the *dattaka* form. Exhibit A (a judgment of the Principal Sudder Amin, dated the 24th August 1844) shows that the adoption of Mulchand was alleged by the defendant Kishen Lal in that suit, but the question was not determined. We observe also that in this document Mulchand is called Chowdhri and Nakphopha, as if he belonged to both families. In exhibit E, dated 4th July 1836, he is described as Mulchand Nakphopha and Mulchand Chowdhri, and in exhibit L, dated 18th October 1866, he is described as Nakphopha only, so that we cannot infer from these documents that he had completely lost his status in his natural family. The strongest point in favour of the appellant's contention is, that the family properties in suit all vested in Sahar Chand, Mulchand's elder brother. This appears from exhibit A, which we have just referred to ; but we do not think that this fact is of itself conclusive proof that Mulchand was completely severed from his natural family. In several documents, extending from 1820 to 1841 (see exhibits LIV, LII, LVI, LVII, LVIII, LX and LI) he is called Mulchand Chowdhri and not Nakphopha, which, we think, indicates that he had not ceased to belong to his natural family. Again, in exhibit E, he is described as the grand-uncle of Kishen Lal Chowdhri, which he would be if he was still a member of his natural family, and if his son Gopal, Kishen Lal's father, had, as is alleged by the plaintiff, been adopted by Sahar Chand. We think, therefore, that the Subordinate Judge's view as to Mulchand's status in his natural family is correct, whatever may have been his status by some sort of *quasi* adoption in the family of Tirbhawan Nakphopha, according to the undefined customs and usages prevailing amongst the Gayawals.'

There are thus concurrent findings against the appellant on this question, which is a question of fact, and the determination of which depends on the evidence. It was argued for the appellant that, as this evidence to an important extent consists of writings, the ordinary rule that this Board will not disturb the judgment of both Courts on facts does not apply. Their Lordships cannot accept

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this view. The question is not one of construction of one or more deeds, which would be a question of law, but is a question as to the effect to be given to decrees, leases, and other documents as evidence of the fact of adoption, and its consequences. Their Lordships may add, however, that having heard the appellant's argument on the documents on which he specially founded, they see no reason for holding that there was any such adoption of Mulchand by this maternal uncle as took away from him his status or right of succession in his own natural family.

The decree of 1800 printed as a separate appendix does not appear to be specially mentioned in either of the judgments appealed against. It no doubt orders "that Mulchand as heir, *i.e.*, adopted son, be put in possession of the property left by Tirbhawan and Mussummat Jhuna," but the judgment is based on the special and peculiar customs of the Gayawals which are twice referred to in the grounds of judgment stated. In its concluding part it bears :—

"Since Mulchand has been adopted in accordance with the customs prevailing among his caste people, therefore the Judges of this Court think that there is left no room for the question that the adoption was not made according to the *Shastras*, because a custom which prevails in a certain community for many centuries and from the time of forefathers cannot be stopped, and it is proper that such custom should be acted upon. This is in accordance with and not opposed to the *Shastras*."

Although the adoption was so made, it has not been shown, and it does not follow, that Mulchand ceased to be a member of his own natural family or lost his right of succession in that character.

The appellant's Counsel further referred to the decrees in 1843 and 1844 by the Principal Sudder Amin of Behar, and by the District Judge of Behar on appeal, in a suit between Sunker Lal Nakphopha, alleging himself to be the "adopted son-and-heir of Mulchand Nakphopha Chowdhri," against Kishen Lal Chowdhri. The claim made was for one-half of certain properties to which Kishen Lal Chowdhri had succeeded on the death of his father Gopal Chand, the son of Mulchand who had been adopted into the family of Sahar Chand and who had succeeded to the properties on the death of his adoptive father. The ground of the claim was that Sahar Chand and Mulchand, who were brothers, had, on their father's death, jointly succeeded to the

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properties in dispute, and that one-half of these belonged to Mulchand, and afterwards to his heir, being the plaintiff, as his adopted son. The defence was that no part of the properties ever belonged to Mulchand; that they were acquired exclusively by Sahar Chand and were settled in title entirely in his name; and it was added that Mulchand had been adopted as the son of Tirbhawan Nakphopha and had no connection with the properties. The suit was dismissed on the ground that, from all the documents produced, it appeared that the properties in question had been acquired by Sahar Chand himself, and that in his name only the title to these properties stood, and the Court had no occasion to consider or decide any question as to Mulchand's alleged adoption into the family of Nakphopha, or the effect of such adoption if it took place as removing him from his own family of Chowdhri. The statements of the parties made in that litigation for the purposes of that suit cannot be taken as evidence in this case on the matter now in dispute, *viz.*, the alleged adoption of Mulchand into the Nakphopha family so as to take him out of his own natural family.

Their Lordships will humbly advise Her Majesty that the present appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitor for the appellant: Mr. *J. F. Watkins.*

Solicitors for the respondent: Messrs. *T. L. Wilson and Co.*

C. B.

ABUL FATA MAHOMED ISHAK AND OTHERS (PLAINTIFFS) *v.* RASAMAYA DHUR CHOWHDRI AND OTHERS (DEFENDANTS).

P. C.* 1894 *November* 23. *December* 15.

[On appeal from the High Court at Calcutta.]

Mahomedan Law—Wakf—Deed invalid as a wakfnama—Attempted family settlement in perpetuity—Ultimate, but illusory, gift for charitable purposes.

An instrument, nominally a *wakfnama*, expressly purporting to make property *wakf*, settled it in perpetuity on the family of the dedicators, with an ultimate gift for the benefit of the poor, only to take effect upon the failure of the descendants of the family. *Held*, that a gift to the poor might be illusory from the smallness of the amount, or from its uncertainty or remoteness; and that the period when this gift was to take effect was so uncertain, and probably so remote, that the gift was illusory. Therefore, according to Mahomedan law, it did not establish a *wakf*.

* *Present:* LORDS WATSON, HOBHOUSE and SHAND, and SIR R. COUCH