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ADOPTION AND CIVIL DEATH IN GENETIVE FAMILY.

Saunaka described the adopted son as the reflection of a son. Out of the description was evolved the fiction of the adoptee being procreated on the mother of the boy by the adopter through niyoga etc., according to Nandapandita and through the possibility of marriage according to Sutherland. Another fiction to develop was that adoption is rebirth in the adoptive family. The date of rebirth is the date of adoption. Where the adoption was by a woman after her husband's death, the rebirth was to be antedated to the date of the death of the woman's husband. And this, even if the adoptee had not been physically existent at that time. Yet another fiction to follow was that the adoptee is to be deemed not merely as born to the adopter but born to him through his wife. So much so, where the adoption is by a widower it will relate back to the death of the predeceased wife of the adopter.

Adoption is rebirth in the adoptive family. Consequently it must be civil death in the genetive family. In *Birbhadra* v. *Kalpataru*[1], Mukherji, J., observed : " an absolute adoption appears to operate as birth of the boy in the family of adoption and as civil death in the family of birth having regard to the legal consequences that are incidents of such adoption." One may pause to comment that far from the theory of civil death being a deduction from the legal consequences, it has, at any rate, in later times become the apex for evaluating the results of adoption by applying the theory of civil death in the natural family and rebirth in the adoptive family. In *Ganga Sahai* v. *Lekhraj Singh*[2], Mahmood, J., remarked : " Adoption is itself ' second birth ' proceeding upon the fiction of law that the adopted son is ' born again ' into the adoptive family by the rites of initiation." In regard to the nature of such civil death and rebirth, in *Uma Sunkar Moitro* v. *Kali Komul Muzumdar*[3], it was stated : " The theory of adoption depends upon the principle of a *complete severance* of the child adopted from the family in which he is born both in respect to the paternal and maternal line and his *complete substitution* into the adopter's family as if he were born in it." The position was, however, more guardedly stated by the Privy Council in *Pratapsingji* v. *Agarsingji*[4], where it was observed : " Now it is an explicit principle of the Hindu law that an adopted son becomes for all purposes the son of his father . . . . . Again, it is to be remembered that an adopted son is the continuator of his adoptive father's line exactly as an aurasa son, and that an adoption, so far as the continuity of the line is concerned, has a retrospective effect ; whenever the adoption may be made there is no hiatus of the continuity of the line." This would suggest that it is only for a limited purpose, namely, the continuity of the line of the adopter and for matters associated with it, that adoption operates as a rebirth. A wider scope was, however, given to the doctrine of rebirth in the adoptive family and civil death in the natural family, by Scott, C.J., in *Ramchandra* v. *Manubai*[5], where he held that the adopted son is to be treated as having been from his very birth in the family of his adoptive father and he cannot for any purpose be regarded as having

1. (1905) 1 Cal.L.J. 388.
2. (1887) I.L.R. 9 All. 253.
3. (1881) I.L.R. 6 Cal. 256 (F.B.).
4. (1918) 36 M.L.J. 511 : L.R. 46 I.A. 97 : I.L.R. 43 Bom. 778 (P.C.).
5. (1918) I.L.R. 43 Bom. 774.

existed in the natural family. According to him the fiction is that the adopted son is non-existent in the natural family all the time and has been always existent in the adoptive family only. That the doctrine of " civil death " and " rebirth " will have to be applied with caution and not as universally true is incidentally brought out in *Raghuraj Chandra* v. *Subhadra Kunwar*[1] by the Privy Council. In that case, Lord Sumner observed : " It is quite true that for certain purposes the blood relationship of an adopted Hindu remains real and binding after the adoption. For example, his born sister is within the prohibited degrees of affinity. It is true also that authoritative texts of the writings in which the Mitakshara law was originally expressed, dwell on the matter of inheritance and succession in connection with adoption in a way that leaves some of the consequences of adoption unexpressed. They define the rights of the person adopted as a member of his adoptive family, but they do not in terms complete the matter by prescribing his entire expulsion from his original family . . . . . It is not true to say that by Hindu law the adoptee only loses his consanguinity for purposes of succession. Adoption has been spoken of as ' new birth ' in many cases, a term sanctioned by the theory of Hindu Law. Nor is the expression a mere figure of speech. The theory itself involves the principle ' of a complete severance of the child adopted from the family in which he is born . . . . and complete substitution into the adoptive family as if he were born in it.' *Nagindas* v. *Bachoo*[2]. ' The fundamental idea is that the boy given in adoption gives up the natural family and everything connected with the family,' *Dattatraya* v. *Govind*[3] . . . . . As has been more than once observed the expressions ' civilly dead ' or ' as if he had never been born in the family ' are not for all purposes correct or logically applicable but they are complementary to the term ' new birth '." These observations suggest that (*i*) the expression " civil death " in the natural family, though more than a mere figure of speech is not to be literally understood or applied, (*ii*) adoption means more than the loss of consanguinity for purposes of succession in the natural family but does not imply an entire expulsion from it, (*iii*) the incidents of civil death in the natural family are always complementary to the incidents recognised as attaching to the new birth in the adoptive family.

The chief textual authority with reference to which the scope of the doctrine of civil death in the natural family is generally sought to be expounded is a text of Manu :

गोत्ररिक्थे जनयितुर्न हरेत् दत्रिमः सुतः ।
गोत्ररिक्थानुगः पिण्डोव्यपैतिददतः स्वधा[4] ॥

In some versions the term क्वचित occurs instead of सुतः and भजेत् instead of हरेत् . There are also differences in the English renderings of the texts. Two which are typical may be cited. Sir Willima Jones' version is :

> " A given son must never *claim* the family and estate of his natural father ; the funeral cake follows the family and estate ; but of him who has given away the son, the funeral oblation is extinct."

Mr. Golap Chandra Sarkar Sastri's translation of Manu's text is :

> " The adopted son is not to *take away* (with him when he is passing from the family of his birth to that of adoption) the *gotra* and *riktha* of the progenitor ; the *pinda* is follower of the *gotra* and the *riktha* ; the *swadha* (or spritual food) goes away absolutely from the giver."

The term हरेत् has been rendered as " claim "[5], " take "[6], and " take away " and भजेत् as " share ". It is matter of great importance as to how हरेत् is to

1. (1928) 55 M.L.J. 778 : L.R. 55 I.A. 139 : I.L.R. 3 Luck. 76 (P.C.).
2. (1915) I.L.R. 40 Bom. 270 (P.C.).
3. (1916) I.L.R. 40 Bom. 429.
4. Manu, IX. 142.
5. Stokes, Hindu Law, 65.
6. Buhler, Sacred Books of the East, Vol. 25, p. 355.

be construed. If it signifies " take away ", it would *prima facie* appear that adoption precludes the carrying into the new family by the adopted son of whatever property he has already obtained in the natural family by succession to his father or at a partition of the paternal estate. The meaning of the word would, however, have to be determined in conjunction with *janaitu riktham* in the text of Manu.

Before considering, however, the meaning of *janaitu riktham*, it would be well to assess the manner in which Manu's text has been applied by the commentaries. According to these latter what is extinguished on adoption is not the blood relationship with the members of the natural family but only the connection through the *pinda*[1]. The Dattaka Mimamsa cites a text of Brihat Manu : " Sons given, purchased and the rest retain the relation of *sapinda* to the natural father as extending to the 5th or 7th degrees : like this general family (which is) also that of their adopter." Pollution and mourning will have to be observed in connection with the natural parents. The Vaidyanatha Dikshitiyam provides[2] that if the adopted son dies, both the natural and adoptive fathers should observe impurity and *vice versa*. The Sarasvati Vilasa states[3] that the adopted son should according to a text of Vishnu perform *sraddha* and offer oblations to the natural father, that is, in the absence of other issue of the natural father. The adopted son for purposes of marriage is reckoned as a member of the original *gotra* also and will have to avoid girls there within the prohibited degrees of relationship. The rulings in *Bai Kesarba* v. *Shivsangji*[4] and *Basappa* v. *Gurlingappa*[5] have recognised these factors. The Dattaka Chandrika provides that adoption does not cancel or in any way affect the efficacy of *samskaras* performed already in the natural family[6]. Also where the adoptee is a married person with children—as it might well be in the Bombay Presidency—adoption would carry the adoptee and his wife alone into the new family and the children already born to them would continue to be members of the original family. The theory of the adoptee being regarded as having been from his birth a member of the adoptive family and as having never been in the natural family is rejected, *Manikbai* v. *Gokuldas*[7], *Bai Kesarba* v. *Shivsangji*[4]. The theory of civil death in the natural family and rebirth in the adoptive family is thus not fully accepted but only for certain purposes. The effect of adoption is not to efface the past but to invest the son with a new status for the future and mainly with reference to matters spritual *vis a vis* the adoptive father directly and with reference to others incidentally only. Manu's text has been applied by the commentaries only in that way.

In regard to secular rights, it falls to be noted that the text of Manu adverts to the estate of the natural father only and precludes the taking of interest therein. All the High Courts excepting the Bombay High Court have generally taken the view that it is only future succession that is barred and there is no forfeiture of property already taken by succession or at partition prior to the adoption. According to the Bombay High Court even such property would be forfeited. It will be convenient to examine how the Commentaries have in this respect applied the text of Manu. The Dattaka Mimamsa states[8] :

" The son given must never claim his natural father's family and estate. Thus the ' obsequies '—that is, the *sapindikarana etc.* (which would have been) performed by the son given fails of him who has given away his son."

" The author of the Chandrika thus explains, ' By this it is declared that by the act alone, creating the filial relation, property of the son given in the estate of the adopter is established and connection to him as belonging to the same family ensues. But through extinction of the filial relation from the mere gift, the pro-

1. Dattaka Chandrika, III. 18 & 24; Dattaka Mimamsa, VI. 9, 10 & 21.
2. Collection of Hindu Law Books on Inheritance, Setlur, II. 578.
3. *Ibid.* I. 162.
4. (1931) I.L.R. 56 Bom. 619.
5. (1932) I.L.R. 57 Bom. 74.
6. II. 20.
7. (1924) I.L.R. 49 Bom. 520.
8. VI. 7 & 8.

perty of the son given in the estate of the giver is extinguished and connection to the family of the giver annulled'."

The Dattaka Chandrika cites Manu's text and states[1]: "It is declared by this, that through the extinction of the filial relation from gift alone the property of the son given in the estate of the giver ceases; and his relation to the family of that person is annulled." In explaining Manu's text, the Vyavahara Mayukha lays down[2]: ". . . . . even so, in this place having merely exemplified the acts connected with the obligation of the funeral oblation for the natural father and the rest, by the terms, 'family', 'estate', 'funeral oblation' and 'obsequies' the cessation of them is declared. From this also results, the establishment of the cessation of the family connection with the father's whole brother and the rest." On the basis of these passages two arguments have been advanced in support of the contention that on adoption even property of the father taken by succession or at partition by the adoptee prior to his adoption would be lost to him, and his heir in the natural family at the time of the adoption would succeed to such property. One of the arguments is that the terms *gotra* and *riktha* are inextricably linked in a *dvandva* in Manu's text and it must necessarily follow that if the *gotra* is lost on adoption the property also should be lost and the adoptee cannot lose the one and retain the other. The other argument is that to talk of cessation of property rights would have no meaning unless such rights had already vested prior to the adoption. It was on such considerations the Bombay High Court had held that under Manu's text there would be a forfeiture of the father's property taken by the son even prior to his being given in adoption, *Dattatraya* v. *Govind*[3], *Manikbai* v. *Gokuldas*[4], *Bai Kesarba* v. *Shivsangji*[5]. A similar view seems to have commended itself to one of the Judges in *Birbhadra* v. *Kalpataru*[6]. In the first of these cases, adverting to Manu's text, Shah, J., remarked: "The text generally prohibits the taking by the adopted son and does not restrict the taking to that which would devolve on him after the adoption. It lays down that the adopted son shall never take or claim the estate of his natural father. The words are wide enough to include the estate vested in him at the time of adoption provided it is the estate of his natural father. In my opinion, the text should be so read as to give effect to the fundamental idea underlying an adoption, *viz.*, that the boy given in adoption gives up the natural family and every thing connected with the family and takes his place in the adoptive family as if he had been born there as far as possible." One may pause to note that even according to the Bombay High Court property taken at a family partition prior to the adoption could not be regarded as property of the father within the meaning of the above rule, *Mahableshwar* v. *Subramania*[7]. The view of Shah, J., overlooks that the sastras do not ordain anything like an 'entire expulsion' or complete civil death in the natural family or a complete rebirth in the adoptive family. The argument based on the *dvandva* character of *gotra-riktha* does not solve what in the context is '*riktha*'. The other argument that cessation of rights will be unintelligible unless there had been a prior acquisition does not allow for the fact that property already taken by the boy by succession or partition would no longer be the property of the father and cannot be so described. There are a number of weighty considerations which suggest that the prohibition ordained by Manu's text is of future rights only. (*i*) Forfeiture cannot be worked by implication or analogy. To declare forfeited the property taken by an infant on his father's death or at a family partition by the conduct of some one else, say his mother, in giving him in adoption—conduct over which he has no control—is to say the least unreasonable, *Behari Lal* v. *Kailas Chander*[8], see also *Rallia Ram* v. *Mt. Sodhan*[9]. (*ii*) Even according to sastraic literature there is no theory of complete extinction in the natural family on adoption so as to compel an extinction of everything connected with it, *Sri Raja Venkata Narasimha Appa Rao* v. *Sri Raja Rangayya Appa Rao*[10]. (*iii*) It is a

1. II. 19.
2. Ch.V. 22 & 23.
3. (1916) I.L.R. 40 Bom. 429.
4. (1924) I.L.R. 49 Bom. 520.
5. (1931) I.L.R. 56 Bom. 619.
6. (1905) 1 Cal.L.J. 388.
7. (1922) I.L.R. 47 Bom. 542.
8. (1896) 1 Cal.W.N. 121.
9. A.I.R. 1930 Lah. 470.
10. (1905) I.L.R. 29 Mad. 437.

principle of interpretation that what is *ex facie* a single *vakya* should not be construed as containing two co-ordinate ideas so as to render it in effect into two *vakyas*. If Manu's text is understood as ordaining that on adoption the boy would not take not only his natural father's property but also of what had already become his own by cessation or extinguishment of the father's interest therein there would arise *vakya bheda dosha*. (*iv*) A harmonius construction of the verse of Manu in question with the verse immediately prior to it requires that the prohibition should be held to relate to the taking of rights in the natural family subsequent to the adoption. The earlier verse[1] declares : "Of the man who has an adopted son possessing all good qualities, that same (son) shall take the inheritance (हरेत् तद् धिक्थं) though brought from another family." The text deals with a right to arise on or after adoption and would be complementary to any loss of rights in the natural family on or after the adoption. (*v*) Manu's text prohibits the taking of *janaitu riktham* on adoption and it is clear from other texts of Manu that the term relates to that alone which at the time of the adoption could be predicated as the property of the natural father. Thus according to one text[2] : " After the death of the father and of the mother, the brothers being assembled may divide among themselves the paternal estate—*Paitrikam riktham*—for they have no power (*anisa*) over it while the parents are alive." In the next verse,[3] it is stated : " Or the eldest brother alone may take the whole of the paternal estate—*pitram dhanam*—and the others shall live under him just as under their father." In yet another verse[4] Manu lays down : " But a son born after partition shall alone take the property of his father (*paitram dhanam*) or if any (of the other sons) be reunited (with the father) he shall share with him." Verse 115 expressly recognises inheritance and partition among the sources of acquisition of property. It would therefore follow that expressions like *paitrikam dhanam* refer to property over which the father has absolute power and the sons are *anisa*. Likewise *janaitu riktham* will also connote property of which the father is the owner and the son is *anisa* which can only be where the father's property has not already passed by way of succession to his son or has not been taken by the son at a partition. The text prohibiting the taking of the father's estate in the natural family after adoption cannot therefore operate in regard to property obtained by the son prior to his adoption either by way of succession to his father or at partition. This conclusion has been reached by the Calcutta High Court in *Rakhalraj* v. *Debendra Nath*[5] and is fully in accord both with the textual law as sell as of precedents.

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SUMMARY OF ENGLISH CASES.

HICKMAN'S WILL TRUSTS, (1948) 2 All.E.R. 303 (Ch.D.).

Will—Construction—Gift of necklace to daughter-in-law X *for life and then the " wife of my grandson* Y "—Y *unmarried when testatrix died—*Y *married twice thereafter—Second marriage with* D *after dissolution of first marriage with* L *both after the death of testatrix and before the death of* X—*Person entitled to necklace as " wife of grandson."*

A testatrix provided by a codicil " . . . . . I bequeath my pearl necklace to my daughter-in-law *X* so that she may have the use and enjoyment thereof for her life and at her death I bequeath the same to the *wife of my grandson Y* absolutely or in the event of my said grandson not marrying then in that case I bequeath the same to my grand-daughter *Z*." When the testatrix died in 1914 *Y* was unmarried. *X* was the holder of the necklace until her death on October, 1946, but in the meanwhile *Y* married twice, first on January 16, 1919, *L* (and that marriage was dissolved) and again in 1940 *D*. *Y* himself survived *X* and died on March 11, 1947. In a contest between *L* the first wife and *D* the widow of *Y* who claimed the necklace,

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1. Manu, IX. 141.
2. Manu, IX. 104.
3. *Ibid*, 105.
4. *Ibid*, 216.
5. (1948) 52 Cal.W.N. 771.

Held, that on a proper construction of the will the necklace was a gift to *L* who, was the first person to answer to the description " wife of my grandson."

DIPLOCK'S ESTATE, *Re*, (1948) 2 All.E.R. 318 (C.A.).

Equity—Money paid under invalid bequests—Right to recover—Tracing.

Pursuant to a direction in a will to the executors to apply the residuary estate for such charitable institutions or objects as they in their absolute discretion should select the executors had by 1939 paid over £ 200,000 to 139 charitable institutions. On the next of kin challenging the direction, the executors in October 18, 1939, intimated the challenge to the institutions calling on them not to deal with the money paid till they heard further from them. The House of Lords ultimately held in 1944 that the residuary bequest was void for uncertainty. The next of kin claimed the money paid from the various institutions.

Held: The next of kin were entitled to recover in equity though the money had been paid under mistake of law by the executors to the institutions. If it was possible to identify or disentangle the money where it had been mixed with the assets of the recipients the next of kin can trace the money.

SMITH'S POTATO ESTATES, LTD. *v.* BOLLAND, (1948) 2 All.E.R. 367 (H.L.).
RUSHDEN HEEL CO. *v.* KEENE, (1948) 2 All.E.R. 378 (H.L.).

Income-tax and Excess Profits Tax—Costs of litigation—Legal and accountancy charges for ascertaining amount of tax payable—If deductible item of expense in computing tax.

In computing the profits for income-tax and excess profits tax purposes the assessee is not entitled to deduct the legal and accountancy expenses incurred in prosecuting an appeal to the Board of Referees against a decision of the Commissioners of Inland Revenue on a question as to excess profits tax. It cannot be said that such expenses were " wholly and exclusively " laid out or expended or the purposes of the trade.

HAMPS *v.* DARBY, (1948) 2 All.E.R. 474 (C.A.).

Tort—Owner of field shooting and killing homing pigeons marauding on peas growing on the field—Right of owner of pigeons to sue for damages.

The owner of tamed or reclaimed pigeons continues to have property in and possession of his birds after they have flown from his dovecote, so long as the birds retain in fact an *animus revertendi* to his control and he is entitled to maintain an action for damages in respect of their destruction and wounding by the owner of a field by shooting them. Where the owner of the field claims to have shot the pigeons to prevent their feeding on the peas growing in his land, the onus is on him to justify the preventive measure of shooting and he has also to prove that in fact there was no other practical means of stopping and preventing the renewal of such pigeons eating his peas.

(1948) K.B. 241, applied.

(As there was evidence on which the County Court Judge found that the defendant had failed to prove that there was no other practical means of stopping the birds, and as he was the final Judge on questions of fact the Court of appeal did not interfere with the finding and affirmed the judgment for plaintiff.)

HILL, *Re*, (1948) 2 All.E.R. 489 (P.D.A.).

Evidence—Proof by solicitor's clerk who died before action—Solicitor propounding will Statements in the proof—Admissibility.

A partner in a firm of solicitors was propounding a will. A clerk of the firm who in anticipation of proceedings had prepared a proof of his evidence as to the validity of the will had died.

Held: The statement is admissible in evidence as it cannot be said that the clerk was a " person interested " in making such statement (Tests as to " interest " discussed).
