QUEEN EMPRESS v. LAKSHMANA.

stated that he differed from that part of the verdict which declared Nos. 2 and 3 not guilty of dacoity, and, therefore, referred the case to this Court under s. 307.

Various questions have been raised in consequence of this irregular procedure, but upon the view which we take of the merits of the case it is not necessary to determine them all. In our judgment the unanimous opinion of the jury on the second and third heads of charge must be treated as a formal verdict; the law made them the proper judges of the evidence and the facts, and the irregularity on the part of the Court could not deprive them of that power, or their opinion of its proper legal effect.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusámi Ayyar, and Mr. Justice Brandt.

1881. September 30. 1883. May 5. 1885. April 24.

VAYIDINÁDA (PLAINTIFF), APPELLANT,
and
APPU (DEFENDANT), RESPONDENT.*

Hindú law—Custom—Bráhmans—Adoption of daughter's and sister's sons.

In Southern India the custom which exists among Bráhmans of adopting a sister's or daughter's son is valid.

THIS was an appeal from the decree of M. Cross, Subordinate Judge at Kumbakónam, reversing the decree of H. Krishna Ráu, District Múnsif of Mannargudi, in suit 189 of 1880.

The plaintiff, Vayidináda Ayyan, a minor, represented by his natural father, sued the defendant, Appuváyyan, his alleged adoptive father, to recover Rs. 399 for the cost of his upanáyanam ceremony which the defendant had failed to perform, and for a decree that defendant should pay him Rs. 5 a month for maintenance during his minority.

It was alleged, in the plaint, that the family property was worth Rs. 1,50,000.

The defendant denied the adoption, alleging that, though he had intended to adopt plaintiff and had executed a will stating that he had adopted him, he had given up the intention on being informed that the adoption of a brother's daughter's son was contrary to the Hindú law and the decision of the High Court.

* Second Appeal 328 of 1881.

The Múnsif was of opinion that the rule prohibiting the adoption of a daughter's son did not apply to the case of a brother's daughter's son.

Referring to *Gopál Narhar Safray* v. *Hanmant Ganesh Safray*,(1) he held that an exception to the rule could be established by proof of custom, and on the evidence he found that such a custom did exist in the district of Tanjore.

Judgment for plaintiff.

Defendant appealed.

The Subordinate Judge held that, whatever the custom might be among Bráhmans, the adoption of a daughter's son was invalid.

Judgment for defendant.

Plaintiff appealed to the High Court.

The case was referred to a Full Bench by Turner, C.J., and Kindersley, J., on the 30th September 1881.

On the 5th May 1883 the Full Bench (Turner, C.J., Innes, Kindersley, and Muttusámi Ayyar, JJ.) delivered the following

JUDGMENT.—We have come to the conclusion that sufficient ground exists for remitting for trial the issue—Whether, by the custom of Southern India, it is competent to a Bráhman to adopt the son of a sister or daughter; and we take occasion to correct the inference that has been erroneously drawn from the decision of this Court in *Gopálayyan* v. *Rághupati Ayyan* (2) that this Court is not prepared to recognize the existence of a customary law in the case of Bráhmans, of which no trace appears in any written authority of the place to which they belong. All that the Court intended by the observations from which this inference is drawn was that strong proof must be produced to establish a customary law at variance with the law declared in written treatises of which the authority is still recognized in the place in which the custom is alleged to exist. To the proposition thus stated no reasonable objection can be urged. As to the degree of proof required to warrant the Court in recognizing as customary law a usage at variance with the law established either by a uniform course of judicial decisions or by the dicta of received treatises, we adhere to the ruling of this Court in *S. Perumál Séthuráyar* v. *M. Rámalinga Séthuráyar*.(3)

(1) I.L.R., 3 Bom., 273. (2) 7 M.H.C.R., 250.
(3) 3 M.H.C.R., 77.

VAYIDINÁDA v. APPU.

There must be satisfactory evidence of usage so long and invariably acted upon in practice as to show that it has become by common consent a governing rule of the family, class, or country; and, as observed in another case, it must be shown that the usage has been followed in pursuance of a custom understood to have the force of law, and not merely that there have been repeated instances of violation of the law.

The Judicial Committee, in *Rámalakshmi Ammál* v. *Sivanantha Perumál Séthuráyar*, (1) observed it is the essence of special usages modifying the law . . . . . that they should be ancient and invariable, and it is further essential that they should be established to be so by clear and unambiguous evidence.

The Subordinate Judge is directed to try the foregoing issue upon the evidence already recorded and upon such further evidence as the parties may adduce, and to return his finding together with the evidence to this Court.

In compliance with the above order, the Subordinate Judge submitted the following

FINDING:—"This second appeal has been referred by the Special Appellate Court for the trial of the following issue, on the evidence already recorded, and any additional evidence that the parties may offer.

"Whether, by the custom of Southern India, it is competent to a Bráhman to adopt the son of a sister or daughter?

* * *

"Of plaintiff's thirty-nine witnesses, twenty-two belong to the Tanjore district, sixteen to Trichinopoly district, and one to Madura district. The majority of these witnesses speak to their own adoption as sons of daughters, others are relatives in families where such adoptions have been made, and others speak to the usage of such adoption. Four documents have been filed by the 12th, 15th, 17th, and 39th witnesses in respect to their adoption varying in dates from 1847 to 1882.

"The traditional evidence of some of these witnesses as to such adoptions having been made compasses a period of 100 years.

"In addition to this evidence there is the testimony of eleven witnesses taken on commission by the Tinnevelly Subordinate Judge's Court of like adoption being the usage in that district.

(1) 14 M.I.A., 585.

"Defendant (respondent) offers no evidence in this inquiry. He states he knows nothing of the truth or otherwise of the evidence adduced by appellant.

"The Appellate Court sees no cause to disbelieve the evidence recorded in this Court and the Lower Court of such adoptions, and on that evidence it finds that it is competent to a Bráhman, by the custom of Southern India, to adopt the son of a daughter.

"No evidence has been adduced on the point of adoption of a sister's son."

On the 10th March 1884, the case was again argued before Turner, C.J., Kernan, Muttusámi Ayyar, and Brandt, JJ., and judgment was reserved.

Mr. *Subramanyam*, Hon. *Rámá Ráu*, and *Bháshyam Ayyangár* for appellant.

Mr. *Shephard* for respondent.

On the 24th April 1885 the Court delivered the following

JUDGMENT.—There is, it must be admitted, a very considerable quantity of evidence as to the fact of adoption of daughters' sons by Bráhmans in the Tanjore and Trichinopoly districts. One witness speaks to the custom as obtaining in the Madura district; and thirteen witnesses to the adoption of both daughters' and sisters' sons in the Tinnevelly district. In six cases witnesses (viz., the plaintiff's 9th, 10th, 12th, 13th, 32nd, and 46th witnesses) being the natural fathers of the adopted sons, depose to the adoption of their children by maternal grandfathers.

In thirty-one cases the adopted sons depose to having been adopted by their maternal grandfathers (viz., plaintiff's 13th, 14th, 15th, 18th, 19th, 20th, 21st, 22nd, 23rd, 25th, 26th, 27th, 28th, 29th, 31st, 33rd, 34th, 36th, 38th, 39th, 40th, 41st, 42nd, 43rd, 45th, 50th, and respondent's 1st, 2nd, 6th, 11th, and 12th witnesses). Of the natural fathers of sons so adopted, the plaintiff's 9th witness, Sadagopa Ayyangár, is a Vaishnavite Bráhman of the Nannilam taluk, Tanjore district; the 10th, Sambamurti Ayyan, is a Vaishnavite Bráhman of Mannargudi in the same district; the 12th is a Bráhman of the same sect of Srirangam, Trichinopoly taluk; the 13th witness for the respondent is a Bráhman of Tinnevelly taluk, one Surya Sekarayyar; the plaintiff's 32nd and 46th witnesses, Sambamurthi Ayyar and Rajagopalácháryar, are Vaishnavite Bráhmans of the Mannargudi and Kumbakónam taluks, Tanjore district. Of the adopted sons

VAYIDINÁDA v. APPU.

who give evidence seventeen are from the Tanjore district, seven from the Trichinopoly district, one from Madura, and five from Tinnevelly.

In two cases the adoption is spoken to by the adopting fathers: the plaintiff's 30th and 35th witnesses, Krishnayyan and Pitchu Josyar, Sivite Bráhmans of the Tanjore district, depose to having adopted each a son of his daughter. In eight cases relatives depose to the adoption of daughters' sons in their families. Of these, four—the 16th, 24th, 27th and 48th witnesses—two from Trichinopoly and two from Tanjore, say that their fathers were so adopted; two, the 17th and 37th witnesses, speak to their brothers having been given in such adoption; the 44th witness deposes to his elder brother's son having been adopted by his mother's father; and the 45th witness, himself, as he says, adopted by his maternal grandmother, states that the son of his (witness') maternal grandmother's sister was adopted by his (the adopted son's) maternal grandfather.

Twenty-one of the witnesses speak with more or less detail as to not less than forty adoptions of this character, mostly within their own knowledge, and as having taken place in their own or neighbouring villages.

The plaintiff's 2nd, 7th, 10th, 12th and 13th witnesses speak to the custom generally as "recognized from time immemorial" or as "sanctioned by the usage of the elders," while the defendant's 2nd witness, Venkata Subba Sástri, who, in examination-in-chief, stated that he could not say whether such adoptions were sanctioned by the "Shastras" or not, in cross-examination admitted that "it is customary in this" (the Tanjore) "country to adopt daughter's sons" and that "they have also made such adoptions."

It must then, we consider, be taken as proved by this evidence that the practice is prevalent among Bráhmans in the Tanjore, Trichinopoly and Tinnevelly districts; that it has obtained for the last 80 years at all events, while, for reasons to be stated further on, we think it must be held to have obtained for not less than 150 or 200 years, and probably from time immemorial.

The 26th witness for plaintiff, Sivarámáyyar, says that from documents in his possession it would appear that such adoptions have been made for the last 200 years; but as the documents referred to were not produced, little or no weight can be attached to this assertion. It would further appear that such adoptions have been of more frequent occurrence in later years, excluding

perhaps the last 10 or 12 years since the passing of the decision in *Gópálayyan* v. *Rághupati Ayyan* (1), in which it was held that "in the case of Bráhmans it is impossible in any case to believe in the existence of a customary law of which no trace appears in any written authority of the place to which they belong," and that there did not exist evidence of a usage so continuous, public and uniform, as to establish a rule of customary law affirming the legality of the adoption of a sister's son by a Bráhman.

The evidence recorded in the present case shows, however, that such adoptions have been made more than once in the same family; that the practice has obtained in several instances in the same village; and that it obtains alike among both Vaishnavites and Sivites; and there is no evidence on the side of the respondent showing that other members of the Bráhman community have declined to recognize sons so adopted as validly adopted sons, or that the custom is repugnant to the general sense of the community, or that it is regarded as made in violation of the law.

Direct authorities are, moreover, referred to in this case by Sheshayyángár (respondent's 9th witness), who says there are texts found in Vayidináda Díkshatar and Thôlappa's book; the witness adds that "there is custom long sanctioned by the said books in regard to them."

The first of the works so referred to is a commentary by Vayidináda Díkshatar, who is reputed to have lived not less than 150 or 200 years ago, and the work of Thôlappa is the "Sudhi Vilóchanam."

The former author lived in the district of Tanjore, and the latter about the same time in Conjevaram.

The texts and the commentaries to which the witness referred will be treated of in due course.

It is, however, desirable first to add a few more words on the evidence.

The plaintiff's 14th witness states that for the last 7, 8, or 10 years such adoptions have been challenged "by the people;" this, it may be presumed, is in consequence of the decision of this Court in 1873 above referred to.

No inference, either for or against the validity of such adoptions, can be drawn from the statement of the plaintiff's 7th witness,

(1) 7 M.H.C.R., 250.

VAYIDINÁDA v. APPU.

Pitchuváyyan, who admits that he cannot say whether such adoptions are valid or not according to the Shastras, as he says he is not conversant with the Shastras; and the omission of the plaintiff's 9th witness to consult any authorities on the subject before making such an adoption may have been the result of his having had no doubt as to the validity of the act, or of other reasons, not explained.

The plaintiff's 10th witness says he only gave his son in adoption after consulting a person skilled in the "Shastras," but there is no reason for inferring from this only that he had doubts on the subject; in this case as well as in the case of the plaintiff's 31st witness who states that at the time of his adoption, 50 years ago, question was raised as to the validity of the act, the result was, as the witnesses say, that the elders or authorities consulted declared that such adoptions were permissible. It was suggested in the argument on behalf of the respondent that, in several instances, the adoption was acquiesced in or not contested by reason of gifts or concessions made to other members of the family who would have taken by inheritance, but for such adoption, or that the arrangement under which the adopted son succeeded to property was in virtue of a testamentary disposition acquiesced in for similar reasons. It is unnecessary to go in detail through the cases in which there is evidence of such arrangement. We do not attach much importance to the fact. It is not unnatural, and we believe not unusual, for a person adopting a son to make, at his pleasure, some provision for daughters and other relatives, and we do not think that it is at all a necessary inference that this was done in the cases as to which there is evidence in the record with the object suggested on behalf of the respondent.

Before passing on to the authorities referred to by the appellant's 9th witness, we would refer to a case in Strange's Hindú Law (Appendix, Vol. II, p. 100), in which, in the year 1806, it was said that: "In practice the adoption of a sister's son by persons of all castes is not uncommon." The case was, it is true, one from the more northern part of the Presidency, Cuddapah, but the learned Judge, in his remarks, speaks of the custom as prevalent generally, after referring to the text which we quote elsewhere: "in distress (apadi) when no other son can be procured, &c."

We have further ascertained that in a case decided on the Original Side of this Court in the year 1859, in which unfortu-

nately the judgment is not forthcoming, a decree was made by Sir H. Davidson and Sir A. Bittleston, dated the 22nd of March 1859, in the case of *Inguva Bráhmani* v. *Venkatalakshmi Ammál*, in which the adoption by a Bráhman of his sister's son was upheld as valid. Evidence had been given of the practice amongst Bráhmans of making adoptions of daughters' and sisters' sons. This decision is valuable as it was made after the express point was raised and pandits were examined as witnesses.

In Thôlappa's work on Sradhas, and on the subject of competency to offer funeral oblations, which is the only part of that author's writings of which we have been able to obtain a copy, we do not find anything bearing on the point now before us, although there is in the treatise obtained a brief notice on adoption. The text of Caunaka as given in Vayidináda Díkshatar's commentary does not differ from the text as given in the Vyavahára Mayuka, chap. IV, sec. V, verses 9 and 10; in the Dattaká Mímánsá, sec. II, para. 74; and in the Dattaká Chandriká, sec. I, para. 17, until we come to the point to be specially noted further on. The latter texts are as follows: "The adoption, of a son by any Bráhman must be made from among sapindas, or on failure of these an asapinda may be adopted—not from others (than sagotras) (or, 'otherwise let him not adopt'). Of Kshatryas in their own class positively and (on default of a sapinda, insman) even in the general family following the same spiritual ide (guru). Of Vaiçyas from amongst those of the Vaiçya ss; of Sudras from (their own) class only, and not otherwise. f all, and the tribes likewise in (their own) classes only, and ot otherwise."

Then comes a material divergence between the text as given by the authorities above quoted and that given by Vayidináda. The text, as given in the Vyavahára Mayuka, Dattaká Mímánsá, and the Dattaká Chandriká (as translated, the two latter by Sutherland and the former by Borradaile), runs thus: "But a daughter's son and a sister's son are affiliated by Sudras;" and in the text, as it is found both in the Dattaká Mímánsá and the Dattaká Chandriká, then follow these words: "For the three superior tribes a sister's son is nowhere (mentioned as) a son." But the text as given by Vayidináda Díkshatar is as follows: "Of all" or "as to all tribes (or classes) from (or in) their own classes only, daughter's son or sister's son; as for Sudras in time of distress only;" and

VAYIDINÁDA v. APPU.

the words "For the three superior tribes a sister's son is nowhere (mentioned as) a son" are wholly omitted.

On these words, omitted in the text given by Vaiydináda, there follows in the Dattaká Mímánsá, an elaborate dissertation, paras. 75 to 105 inclusive, the later clauses being devoted to showing that the words "sister's son" must include the daughter's son also.

The commentary of Vayidináda on the text, as given by him, is as follows: "as to all, from gnátis (a) son is to be taken, either daughter's son or sister's son (is) to be taken; as for Sudras in distress, daughter's son, &c., is to be taken"—"this is the meaning."

It is clear that if the words—"For the three superior tribes a sister's son is nowhere mentioned as a son"—were before the commentator when he wrote his gloss or if he had allowed them to remain, it would not have been possible for him to represent the permission to adopt a daughter's or a sister's son as applicable to the three superior classes; and it is not material whether the full text was not before him, or whether he intentionally omitted these words. But taking the text as given by him, the adoption of daughters' or sisters' sons being declared permissible among the three superior classes, it would seem to be wholly superfluous to add that such adoption was allowed in the case of Sudras; still less does it appear why the permission should have been apparently further limited in the case of Sudras by the words "in (time of) distress" or necessity.

We cannot but conclude that the text was intentionally given by the commentator in the shape in which we find it, if indeed the whole of the concluding sentence as given in the other authorities was not also intentionally omitted, and the cause of this is not, we think, incapable of explanation.

The practice of making an appointed daughter whose son, if she had one, became the son of the father making the appointed daughter, if he had no male issue, was a mode of affiliation prevalent from the earliest times, even before the widow and daughter had a place assigned to them by the Mitákshará in the line of heirs. The law of adoption obtained a considerable extension in the Káli-yúg when only two sorts of sons, the "aurasa" (natural, or ordinary) and the "dattaká," (given) were recognized; and the Dattaká Mímánsá and Dattaká Chandriká show that the theory as to the prohibition of the adoption of a son born of a woman with whom the adoptive father could not legally have married arose out

of a commentary on a passage in the Smriti of Manu or Çaunaka (it is uncertain which) to the effect that the adopted son should have or be "the reflection of a son," and it is probable that from this were developed other restrictions and rules intended to ensure that the adopted son should be as far as possible an imitation of a real son. Whatever doubt we may have as to how far the adoption of a daughter's son is inconsistent with the theory as to the invalidity of the adoption of a son within the prohibited degrees of connection, the usage may still be fairly referred to those texts which recognize the practice of creating a daughter's son heir by appointment, the only difference being one of form and not of principle, the consent being given in the one case at the time of marriage, and in the other at the time of adoption.

Among Sudras the adoption of daughters' and sisters' sons has always obtained, and whether the Bráhmans who settled in the south of India never recognized that such adoptions were prohibited in their case, or whether they adopted the practice which they found prevalent among the people of the country in which they settled, we are satisfied that the practice of making such adoptions has prevailed among Bráhmans in what are now the southern districts of this Presidency from time immemorial.

There is in West and Bühler's Digest of Hindú Law, Vol. II, pp. 884 to 888, 3rd edition, a passage bearing on the subject now before us, which deserves to be quoted at length—"The gradual abolition of the grosser means of supplementing a family in favor of the system of adoption is itself a striking evidence of progress in civilization. The appointment of a daughter held an intermediate place between this and the coarse materialism of the earliest modes of substitution. It is no longer recognized, but traces of the institution still remain in the existing law. From it, on the one hand, has been derived the right of succession of the daughter and the daughter's son, while, on the other, it is connected with the fitness of a daughter's son for adoption. As an imitation of a real son the adopted son ought to be born of some woman whom the adoptive father could have married. This excludes the son of a daughter, and such is the law generally received amongst the highest castes, but amongst the lower castes sub-divisions of the great Sudra class, almost everywhere, and amongst some of the higher castes by their customary law, the daughter's son is deemed fit for adoption, and even the most fit on

VAYIDINÁDA v. APPU.

account of the place he might formerly have taken as a son by appointment, as well as of the blood connection on which the system of appointment itself was founded. The passage of Vasishtha which directs that a man desiring to adopt shall make his selection from amongst near relatives, and for choice take the nearest, is so obscurely expressed as to admit of various interpretations. How the ingenuity of commentators has been exercised upon it may be seen in Colebrook's note to the Mitákshará, chap. I, sec. XI, verse 13. The Samskara Kaustubha, and the Nirnáya Sindhu, construing the direction most liberally, approve the adoption, failing a sagotra sapinda, of a daughter's or a sister's son. The Sástris, following Vyvahára Mayuka, are almost uniformly opposed to this, except in the case of Sudras. They rely on the impossibility of a real paternal and filial relation between the fictitious father and a son so born; and the decisions in Bombay must be considered, perhaps, to have confirmed the Sástris' view, but the customary law seems in a measure at least to have been represented by the doctrine of the two works referred to. These were, no doubt, written under the influence of ideas which shaped the customary law, and they afford an example in their divergence from the more generally received authorities of parallel growths of doctrine springing from the same original source, yet taking quite different lines of development according to the medium in which they were placed. The real nearness of the daughter's son once procured ready acceptance for the doctrine of appointment, and this in its turn has facilitated the admission of the daughter's son as fit for adoption. The Shastra had, however, to be interpreted accordingly, and this interpretation, setting aside the ordinary doctrine of a necessary difference in the families of birth of the real mother and the adoptive father, paved a way for the admission of the sister's son. In the south of India the Bráhmanical law was, for the most part, apparently accepted only with this qualification, adapting it to previously existing customs, as in the case of marriage between the children of a brother and a sister rejected by the stricter law of the north, but allowed in the south, because it could not be prevented."

The divergence between the generally accepted authorities and actually existing customs, and the survival of the customs sanctioned by the earlier law appear to us to be accounted for in the above passage on sound historical principles, and the conclusions

therein arrived at to receive confirmation from what we find to be established by evidence in the case before us.

Even supposing the custom, which we find to be established by the evidence to have sprung up after the text-books which distinctly prohibit these adoptions were written, though it cannot be affirmed that it did so, that fact will not of itself invalidate the custom; and the alteration in the text of Çaunaka as given by Vayidináda Díkshatar and his comments thereon, are, in our opinion, to be explained in this manner: the commentator finding, at the time when he wrote, that the custom was actually prevalent among the Bráhmans in the south of this Presidency, gave the version of Çaunaka's text which we find in his commentary together with his gloss thereon, with a view to the adoption of daughters' sons and sisters' sons being recognized as made in accordance with the authorities; and we are of opinion that the inception or prevalence of the custom is not the result of an innovation introduced by the commentator, but that the practice was followed and recognized as not only not inconsistent with the customary law of the land at the time when the commentator wrote, but as a custom having the force of law, and that the local authority simply gave or purported to give the color of authoritative sanction to such usage; and we consider that we ought judicially to recognize such usage.

The decree of the Subordinate Judge is reversed and that of the District Múnsif restored; but in view of the former ruling and of the relationship we have found to exist between the parties, we direct that each party do bear his own costs in the Lower Appellate Court and in this Court.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Parker.

KRISTAYA (DEFENDANT), APPELLANT,

and

KASIPATI AND OTHERS (PLAINTIFFS), RESPONDENTS.*

1885. September 17.

Cause of action—Suit by debtor to compel creditor to accept money due.

A bond having been executed, whereby it was stipulated that a debt should be paid by instalments subject to the condition that if any one instalment were not

* Second Appeal 278 of 1885.