APPELLATE CIVIL.

Before Mr. Justice Sankaran-Nair and Mr. Justice Abdur Rahim.

1909. April 6. October 14, 15. December 1.

MUTHUSAMI MUDALIAR AND ANOTHER (DEFENDANTS NOS. 2 AND 3), APPELLANTS,

v.

MASILAMANI *alias* SUBRAMANIA MUDALIAR (DEAD) AND OTHERS (PLAINTIFF), DEFENDANTS NOS. 1, 4 AND 5 AND PLAINTIFF'S LEGAL REPRESENTATIVES.*

Civil Courts Act (Madras), III of 1873, s. 16—Hindu Law—Marriage—Validity of marriage of Hindu with Christian women converted to Hindu religion—Such marriage valid if recognised by the usage of the particular caste, though opposed to orthodox Hindu tenets—Suit, abatement of—Suit by reversioner for declaration on behalf of all reversioners does not abate on death of plaintiff.

A marriage contracted according to Hindu rites by a Hindu with a Christian woman who, before marriage, is converted to Hinduism, is valid when such marriages are common among and recognised as valid by the custom of the caste to which the man belongs, although such marriage may not be in strict accordance with the orthodox Hindu religion.

Under the Hindu system of Law, clear proof of usage will outweigh the written text of the Law. Under section 16 of Madras Act III of 1873 any proved custom concerning marriage must be upheld.

Apart from custom, such a marriage between parties who do not belong to the twice-born classes, is valid under Hindu Law. It is only persons who belong to the twice-born classes that are enjoined to marry in their own class. All other persons must be treated as Sudras and marriages between members of different classes of Sudras are valid.

Where a caste accepts a marriage as valid and treats the parties thereto as members of the caste, the Court will not declare such a marriage null and void.

A declaratory suit by a reversioner brought not only on his own behalf but on behalf of the body of reversioners does not abate on the death of the plaintiff.

SECOND APPEAL against the decree of T. V. Anantan Nair, Subordinate Judge of Tinnevelly, in Appeal Suit No. 364 of 1905, presented against the decree of Syed Tujuddin Sahib, District Munsif of Tinnevelly, in Original Suit No. 290 of 1904.

The facts for the purpose of this report are sufficiently stated in the judgment.

T. R. Ramachandra Aiyar for appellants.

* Second Appeal No. 820 of 1906.

K. Srinivasa Ayyangar and *S. Srinivasa Ayyar* for fifth and sixth respondents.

N. Rajagopalachariar for second respondent.

JUDGMENT (SANKARAN-NAIR, J.).—The plaintiff sues to recover possession of certain properties claiming to be the reversioner of Avudanayaga Mudaliar, the last male owner thereof from the alienees of the first defendant who claims to be, but according to the plaintiff is not according to Hindu Law, his widow, as at the time of her marriage and till her husband's death she was a Christian, or in the event of the first defendant's title as widow to the property being established, for a declaration that the alienations by her are not binding on the reversioners. The lower Appellate Court has found that the plaintiff has established the relationship alleged by him and that the alienation by the first defendant was not made for purposes which would justify a widow under Hindu Law from alienating the property. The only question therefore for decision is whether the first defendant is the widow of the deceased entitled to his property under the Hindu Law. In that case the plaintiff would not now be entitled to possession. The first defendant was a Christian before her marriage to the deceased Avudanayaga. The Subordinate Judge accepts the defence evidence that the marriage between her and Avudanayagam, a Hindu belonging to the Kaikolar class, was performed according to the formalities prescribed by the Hindu Law; a Brahman priest officiated at the marriage, the homum was performed, and the tali was tied round the neck of the bride. They lived together as husband and wife for about 30 or 40 years from the date of marriage to the death of Avudanayagam in 1901. They were living with his parents as members of one family. She lived as a Sivite Hindu like her husband. They were not treated as outcastes or put out of caste. The members of the Kaikolar community including the plaintiff associated with them as Hindus and members of their community. The plaintiff and the other members of the caste took meals cooked by the first defendant. They were also worshipping at the temples. They had a boy who was treated as a Hindu. When Avudanayagam died his funeral ceremonies were performed by the plaintiff's son. These facts are mainly proved by the plaintiff's witnesses themselves. The common purohit of the deceased and the plaintiff, who is a Brahman and also the purohit of the Tinnevelly Kaikolar

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community proves that the first defendant took part in the religious ceremonies performed by her husband at which he was the officiating priest.

The validity of this marriage is assailed on various grounds.

It is first contended that the first defendant was a Christian at the time of her marriage, which is therefore null and void under the Christian Marriage Acts of 1872 and 1865. This question was not raised in the Court of First Instance. If therefore the first defendant was a Christian when she was married without further enquiry it cannot be decided whether the marriage took place while the Act of 1865 or 1872 was in force. But it is unnecessary to consider that question as there is no doubt that the first defendant became a Hindu when she married her husband. She was a Roman Catholic Christian before her marriage. She removed the cross from her neck. Her forehead was smeared with holy ashes. The Brahman priest made homum and had the tali tied round her neck, or in other words with her husband she accepted his religion also. The question then is whether a marriage of a Hindu with a convert from Christianity is valid. It is contended by Mr. Ramachandra Aiyar that it is valid both by custom and the general law of the land. The Subordinate Judge holds that no custom has been proved to validate the marriage and even if proved, the custom cannot be upheld as repugnant to Hindu Law. The District Munsif recorded his finding in these terms. "The evidence let in in the case shows the prevalence of the practice of Hindus marrying Christian girls according to Hindu rites and such girls after their marriage following the Hindu religion." The Subordinate Judge in appeal holds that "the worthless evidence of a couple of witnesses who have no clear conception of what they are talking about is altogether insufficient to establish a custom." It is difficult to understand the Subordinate Judge. If he is referring to the evidence of the four defence witnesses as worthless, he has entirely ignored the evidence given by the plaintiff's witnesses themselves and the facts admitted by the plaintiff which go very far to, if they do not, prove the custom. The plaintiff, as his own first witness, admitted in cross-examination that "among Mudalies, Christian girls used to be married, if no other girls would be available"; and in re-examination said "If marriages of Christian girls be made according to Hindu religion, Hindus will go and

take meals." He proves that one Ponnammal, daughter of Antony, a Christian, married a Hindu, Pichakannu Mudaliar, and succeeded to the property of her husband who died without any issue. Her sister was married to another Hindu Sivite. One Chinna Muttoo married a wife who was a Christian. His son who predeceased him was a Sivite and she succeeded to his property. He refers also to one Myvelo Mudaliar whose mother was a Christian woman. The plaintiff's son and daughter were married by members of these families. Another witness, plaintiff's fifth witness, proves that one Arumazi, daughter of a Christian father Samuel, was married to a Hindu according to Hindu rites. He says "she went to Christian Church before marriage, after marriage she would smear ashes to her forehead." Her daughter was married by the witness's son, a Hindu. He refers also to another intermarriage where both parties remained Hindus after marriage. He states that according to usage "if a Christian girl be married by a Hindu, she would follow her husband's religion." The plaintiff's sixth witness admits that his brother-in-law, a Hindu, married a Christian wife. This evidence given by he plaintiff's witness strongly supports the defence evidence which proves the usage. The evidence establishes beyond all doubt that according to usage the members of the Kaikolar community in that locality used to marry girls who were Christians, who lived as Hindus after their marriage, were accepted as members of the community to which their husbands belonged and were allowed rights of inheritance under the Hindu law. The learned pleader for the respondents did not dispute these facts which prove the custom. The practice is not shown or alleged to be recent. Considering that the Catholic Christian community is an ancient community and their converts did not always give up caste on conversion, there is nothing improbable in the plaintiff's evidence that it is an ancient custom. The pleader for the respondents contended that the custom is so utterly repugnant to the Hindu law as declared by the Courts and in the Dharmasastras that it should not be recognized. The Judicial committee has held "under the Hindu system of law clear proof of usage will outweigh the written text of the law" and under the Madras Civil Courts Act, section 16 of Act III of 1873 any proved custom about marriage must be upheld.

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Apart however from its validity as being in accordance with custom, I am also of opinion that the marriage is valid under Hindu law. It has been settled by a uniform course of decisions in this Presidency that marriages between members belonging to different divisions of the Sudra caste are valid. See *Pandaiya Telaver* v. *Puli Telaver*(1), *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Telaver*(2), where the husband was a Marava and the wife was of Pareevara, an inferior class, and *Ramamani Ammal* v. *Kulanthai Natchear*(3), where the wife was a Vellala, a superior class, and the husband was of an inferior class. These decisions have since been followed. In Calcutta, Bombay and Punjab, the same view is now accepted. See *Upoma Kuchain* v. *Bholaram Dhubi*(4), *Fakirgauda* v. *Gangi*(5), *Haria* v. *Kanhya*(6). In the Punjab case which had reference to a marriage between members of sub-divisions of Kshatriyas the question is fully discussed by Chatterjee, J. But it is argued that as the first defendant was a convert from Christianity she must be treated either as an outcaste or a person who does not belong to any caste, and a marriage between her and a Sudra is invalid, though marriages between different divisions of Sudras might be valid. In my opinion the contention cannot be accepted. It is difficult to find any principle on which any such distinction can be supported. The decision in *Pandaiya Telaver* v. *Puli Telaver*(1) was based by Holloway, J., on the ground that the classes spoken of are the four main castes and not the sub-divisions of these castes; and as the twice-born man is instructed to marry in his own class the fair inference is that on one not twice-born the precept is not binding. All those who are not twice-born are thus treated as Sudras. Neither the first defendant nor her husband belonged to the twice-born castes. The learned Chief Justice in the same case was prepared to go further and hold that the restrictions on marriage between the castes were only directory. In the Calcutta case the wife was the daughter of an outcaste and in the Bombay case the parties were Lingayets, who in theory recognize no caste, as all who wear lingams are equal; and as they are not twice-born were treated as of the same caste for this purpose. It

(1) (1863) I.M. H.C.R., 478.
(2) (1869) 13 M.I.A., p. 141 at 158 and 159.
(3) (1871) 14 M.I.A., p. 346 at 352.
(4) (1888) I.L.R., 15 Calc., 708.
(5) (1898) I.L.R., 22 Bom., 277.
(6) Punjab Record, Vol. 43, p. 326.

is clear therefore that by "Sudras" it was intended to include all Hindus who are not dwijas or twice-born classes. This is strictly in accordance with Manu, Chapter X, clause 4, that a boy taken in adoption need not belong to any caste, also supports this view. *Shamsing* v. *Santabai*(1) and *Kusum Kumari Roy* v. *Satya Ranjan Das*(2). Further in *Mayna Bai* v. *Uttaram*(3) the children of a Brahman woman by a European father were treated as Sudras. It is clear therefore that the first defendant must be treated as a Sudra under these decisions and the marriage is therefore valid under Hindu law.

It was further contended by Mr. Ramachandra Aiyar that a marriage accepted as valid and binding by the community, sect or caste to which the parties belong cannot be held to be invalid on the ground that it is opposed to the ordinary Hindu law and the marriage in question is therefore valid even if it is opposed to the Dharmasastras. A caste for this purpose may be taken to be a combination of a number of persons governed by a body of usages which differentiate them from others. These usages may refer to social or religious observances, to drink, food, ceremonial pollution, occupation and marriage. Some of these usages may be common to others also. The caste is, so far as I know, invariably known by a distinctive name for identification, it has its own rules for internal management and has also got power of expulsion. The plaintiff and the deceased are *Kaikolars* and they undoubtedly form a separate caste—the Tinnevelly *Kaikolars* form a sub division of that caste and for our present purpose may be treated as a distinct caste by itself.

Though it is a rule of law that a person cannot alter the law of succession applicable to himself, it is now settled in India that he may change it by conversion to another religion, when *primâ facie* he will be governed by the laws of inheritance prescribed by that religion: a Hindu convert to Muhammadanism will *primâ facie* be governed by the Muhammadan laws of inheritance (*Jowala Buksh* v. *Dharumsingh*(4)). A Hindu convert to Christianity could before the Indian Succession Act retain his Hindu law or accept the law of the Christain community to which he has attached himself. *Charlotte Abraham* v. *Francis Abraham*(5).

(1) (1901) I.L.R., 25 Bom., 551.
(2) (1903) I.L.R., 30 Cal., 999.
(3) (1864) 2 M.H.C.R., 196.
(4) (1866) 10 M.I.A., 511.
(5) (1863) 9 M.I.A., 199.

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This was so decided on the ground that though it is not competent to parties to create as to property any new law to regulate the succession to it *ab intestato*, yet when there are different laws as to property applying to different classes, parties are to be considered to have adopted the law as to property of the class to which they belong. This reasoning of course applies to a family which has changed its status without changing its religion. Thus in the case of Christians, it was held that though by origin and in his youth a person might have been a Native Christian following the Hindu law and customs as to property it was open to him to attach himself to the East Indian class who were governed by different laws relating to property, *Charlote Abraham* v. *Francis Abraham*(1). *A fortiori*—for these reasons apply to them with greater force—it is open to a Hindu who is governed by one law of inheritance to accept another law of inheritance recognized by Hindu law. Thus it has been held that a Hindu governed by the Mitakshara law may retain it or accept the Dayabhaga law prevalent in the locality to which he had migrated, *Soorendronath Roy* v. *Mussamut Heeramonee Burmoneah*(2), *Chundro Seekhur Roy* v. *Nobin Soondur Roy*(3), *Ram Bromo Pandah* v. *Kaminee Soonduree Dosee*(4) and Mayne's "Hindu law", section 48.

When such is the case with the law of inheritance prescribed or allowed by the State, it may be easily imagined that greater latitude was allowed in cases of marriage. In fact, in the cases from the *Weekly Reporter* above referred to, in deciding whether the family had accepted a different law relating to property, the Courts laid stress on the adoption of different marriage rites. The Hindu lawyers prescribe various ceremonies to constitute a valid marriage—see Mandlik, on "Hindu Law", page 401. But those ceremonies in their entirety are seldom if ever performed. According to them Vivaha Homam and Sapthapathi are essential. But it is notorious that marriages are performed in many castes without them and it is now settled that if by caste usage any other form is considered as constituting a marriage then the adoption of that form under those conditions prescribed by the caste with the intention of thereby completing the marriage union is sufficient.

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(1) (1863) 9 M.I.A., 199.
(2) (1868) 12 M.I.A., 81.
(3) (1865) 2 Suth. W.R., 197.
(4) 1866) 6 Suth. W.R., 295.

No other conclusion is possible if due regard is had to conditions in India. They show that in all questions regarding marriage including restraints upon marriages between persons of different castes, each sect is governed by its own usage, which often vary from the accepted authorities on Hindu law. For instance it was and is an ordinary process for a class or tribe outside the pale of castes to enter the pale and also for the lower castes to claim recognition as belonging to a higher class. If the other communities recognise the claim they are treated as of that class or caste. This process of adoption into the Hindu hierarchy through castes is common both in Northern and Southern India. If their claim is refused then they form a new sect. Sometimes classes belonging to higher castes are denied religious communion by other classes of the same caste and if not sufficiently powerful to enforce their claims become of lower caste. Amongst such classes we often find the several usages of the two castes or classes. Contact with Buddhism, Mahomedanism and Christianity has evolved various sects which have discarded many characteristics of popular orthodox Hinduism and assimilated many ideas and practise rites which are popularly supposed to appertain to the other religious systems. Conversions to and from, orthodox Hinduism, Buddhism, Jainism, and in rare instances to and from Christianity and Mahomedanism, have not always or even generally been accompanied with changes in the laws of marriage and inheritance. These facts make it impossible to apply the rules of present orthodox Hinduism to such sects when any usage inconsistent with such rules is proved or to treat such usages as deviations from the ordinary law requiring for their validity the requisites of antiquity and continuity necessary to uphold a custom in English law. A reference to Mr. Bhattacharya on "Hindu Castes and Sects", the appendix in Mandlik's Hindu Law, relating to marriages (pages 394 to 459) and to Sir H. Risley's "People of India" will illustrate this position. As to some of these sects it may be not easy to affirm that they are governed by Hindu Law. Thus the Hosainis are a class of Brahmins in Western India who are said to have adopted to some extent the Mahomedan faith and its observances. The Kuvachandas in Sind are said to resemble the Mahomedans in their habits (Bhattacharya, page 118). The Jaiswars of Northern India (page 258) and the Kurmies of Behar (page 272)

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are said to worship Mahomedan saints, according to Mahomedan ritual. Of course a Mahomedan priest officiates. The Hindu Law has to be applied to those only who are Hindus by religion and it is very doubtful whether some of these communities can be treated as Hindus or Mahomedans. In the absence of any statutory law they will be governed as to their marriages and inheritance by the rules of justice, equity and good conscience (See *Raj Bahadur* v. *Bishen Dayal*(1)) or in other words as laid down by the Judicial Committee in *Charlotte Abraham* v. *Francis Abraham*(2) according to the usages of the class or community. About the laws applicable to them I entirely agree with Sir James Stephen in his opinion thus recorded: "My own opinion is that if a considerable body of men, bound "together by common opinions and known by a common name "appeared to be in the habit of celebrating marriages according "to forms and on terms unobjectionable in themselves, the Courts "ought to recognise such marriages as valid, though in any "particular case, there might be circumstances which do not "suggest themselves to my mind and which could invalidate the "marriage. The fixity of the sect, the propriety of its forms, "and the propriety of its terms, would all have to be considered "by the Court. I think, in short, that, though it cannot be "affirmed with confidence, on the one hand, that all persons "who are not Hindus, &c., can marry in any way which suffi-"ciently expresses their intentions, and on whatever terms they "think proper, it may also be affirmed that a marriage between "persons so situated would be valid, unless circumstances existed "which led the Courts to treat it as invalid; but if pressed to "say what those circumstances are, I should be unable to answer "the question, unless I had the facts of some particular case "brought fully before me."—Proceedings of the Legislative Council, pages 77, 78, *Gazette of India* Supplement, January 27, 1872.

Between these classes who occupy the border land between Islam and Hinduism and those castes who confirm strictly to the rigorous tenets of extreme Brahminism, lie various classes or castes whose sole common bond or union is that they are all classed as Hindus, and are governed by Hindu Law.

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(1) (1882) I.L.R., 4 All., p. 343. (2) (1863) 9 M.I.A., 199.

Though Hindus they are widely divergent in their religious belief and conduct and their usages are in many respects utterly repugnant to orthodox Brahminism. Sir H. Risley's "People of India" and Mr. Bhattacharya's "Hindu Castes and Sects" may be usefully consulted for information about sects which originated in religious differences. Sir H. Risley's "People of India" shows how sects are formed, based not only on community of religion but also on community of function. Intertribal marriages have been responsible for the formation of many castes. So also migration and changes of custom. I shall refer to some of these cases which have a bearing on the question before us. The sects of Lingayets (Bhattacharya, page 396), Ram Sanehi (page 448), Dadupanthi (page 446), Chaitanya (page 464), Swami Narayan (page 474), Balahari (page 493), Jains (page 550), Kabir (page 496) and Sikhs (page 505) recognise no caste, no Brahman supremacy, and many of them receive converts from all castes. The Khuinhar Brahmans of Behar (page 109) and the Ooriya poojari Brahmans (page 62), are believed to have been of low caste. Certain classes in Assam are supposed to have been made Brahmans by royal edicts with the result that when their ladies marry pure Brahmans they do not interdine with their maternal kindred (page 58). Similar promotions to the Kshatriya and other castes were made within the memory of men still living (Risley, App. cxxxi).

Emigrants often form castes with their status lowered but emigration also enables men of a lower caste to attain a caste promotion. See Risley, page 90. Similarly the offspring of the union between Brahmans and lower castes are in some places treated as Kshatriyas—Risley, page cxxxi and page 83. For other instances see page 81. Clans who were Jats a few years ago are now Rajputs on account of changes in their customs and the converse practice also is said to be no less common, page cxxxi.

There are classes of Jats who claim to be Kshatriyas though they wear no holy thread (Bhattacharya, page 145). Among the Agarwals the wearing of the sacred thread depends upon their occupation (page 206). A Kolita in Assam wears a sacred thread when he becomes "a big man" (p. 196). Instances of Brahmins ceasing to belong to that caste when they take to

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agriculture are given by Sir D. Ibbetson, p. cxxx, Risley. So also it is noted that a Kshatriya in that locality becomes a Kayastha when he becomes a clerk. This divergence from the Shastras is observable in a greater degree in Southern India. This is only natural, for as rightly pointed out in the census report of 1901, Madras, Volume 15, part 1, the essential difference between the castes of this Presidency and those of Upper India is that the ideas of the Aryans and the rules of Manu have affected the people of this Presidency less deeply than those north of the Vindhyas, page 128. See the very instructive observations of Mr. Mayne on this point, section 47, page 53, 6th edition.

In Southern India many castes numbering over a million deny the superiority or the sacerdotal authority of the Brahmins. See Madras Census Report, page 139. Many others, over five millions, follow practices which according to the Shastras place them beyond the pale of Hinduism (Groups 9 and 10, page 139). We also find that many castes claim a position far higher than that which the Hindu Society in general is inclined to accord to them. A few caste claim to be classed as Brahmins. The Pallis or Vanniyas, the Shanars and some of the Balijas claim to be Kshatriyas; the Komaties, the Muttans and some of few Vellalas state they are Vaisyas (page 130), Madras Census report, 1901. Sometimes, as in the case of Jatapus entirely new castes are formed, page 131. As in Northern India a change in the occupation sometimes creates a new caste. A common occupation sometimes combines members of different castes into a distinct body which becomes a new caste. Migration to another place makes sometimes a new caste. For instances, see page 132. This tendency to divide into sects or divisions, to form new sects with their own religious and social observances is a characteristic feature of "Hinduism" and in my opinion it is not for the Courts to interfere with it. If a community have consciously accepted different religious ideas and rites, it is not for the Court to insist upon their adherence to their abandoned ideas and practices.

Most of these sects arose within a recent date, some of them only within the last century. The Brahmo Samaj became a definite sect only about 1830. The Balahari sect "the most important of whose cult was the hatred that he taught his followers to entertain towards Brahmins" [page 493 (Bhattacharya)],

became a recognised sect only later and the Arya Samaj only within the last few years. The process is still going on. Sir H. Risley says (page 75) that "it is a matter of observation at the present day . . . . . that the adoption of new occupations or of changes in the original occupation may give rise to sub-divisions of the caste which ultimately develop into entirely distinct castes."

The offspring of the sexual unions between members of higher and lower castes becoming members of a different caste is also said to be going on at the present time (pages 82, 84, also page 81). Sir D. Ibbetson states that in the Himalayas any one can observe caste growing before his eyes, the priest into a Brahmin, the peasant into a Jat and so on and he also says that the process was also more or less in course at a period not very remote from the present day in Kangra where the proudest and most ancient Rajput blood in the Punjab is to be found, Risley (Appendix page cxxxi). He also states that this process of forming separate castes "is going on daily around us, and it is certain that what is now taking place is only what has always taken place during the long ages of Indian History." I entirely agree. It is impossible to hold that marriages performed amongst such communities are invalid on account of non-conformity with the accepted tenets of orthodox Hinduism laid down by the Courts.

To these communities it is impossible to apply a marriage law which is based on the immutability of castes, and on ordinances which proscribe many of their most cherished practices. The castes referred to are only a few selected for illustration and their usages cannot be treated as exceptions to any general rule. It appears to me, therefore, that the Hindu Law to be administered by the Courts consists of the Shastras which claim divine sanction and are followed by the Brahmins generally and also of the usages or approved habitual practices, of these communities, whose caste status depends upon the degree of conformity of their usages to the Shastras and if according to the usage of the community a marriage is valid or the community recognize a marriage as valid then, in the absence of any statutory prohibition, I fail to see why it should not be recognized as valid, even without the requisites of a valid custom in derogation of what may be styled the ordinary Hindu Law unless it offends against rules which would render any other marriage invalid.

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It is, of course, open to a community to admit any person and any marriage performed between him and any member would in my opinion, be valid, if it complied with their usage though it may be opposed to the Dharma Shastras.

Sir James Stephen's opinion on this question certainly seems reasonable. He said that, if it were not for English Courts and English Law, no difficulty would have risen. "New sects which might have arisen would have adopted their own usages and would have lived or died according to the degree of vitality which they might contain. Their marriage and other customs would, if they lasted, have taken their place amongst the other customs of the country and would have been treated as equally valid with those which are in more general use. Why should we interfere with this state of things? Why should we determine at all what is, or is not, orthodox, according to Hindu notions? Why should we interfere with the natural course of events? There can, I imagine, be but one answer to these questions, namely, that no course can be more unwise, more opposed to our settled policy, more unpopular with the natives, or more unjust. All that can be said for it is, that it is more or less favoured by certain analogies which may be drawn from a part of English Law which has less in common with India than almost any other part of it. It is upon these grounds that I think it impossible to lay down, beforehand, with any approach to completeness, all the essentials to the formation of a new and valid custom as to marriage. It is possible to affirm, in general, that the mere fact that a Hindu sect is of recent origin, and the fact that it has adopted forms of celebrating marriage differing from those commonly in use, are not sufficient to prevent such marriages from being held valid by Hindu Law as interpreted and administered by our Courts." (*Gazette of India*, January 27, 1872, Supplement, page 81.)

This is in strict conformity with the spirit of Hindu Law. The legal rules put forward by the sacred writers are primarily intended only for those who accept in theory, the religious belief, the religious, social and moral obligations which form the foundation of that system. On the others, it is binding only by adoption and, though it will be presumed that as Hindus they are governed by that system of law, circumstances may exist to throw the burden of proof on the party asserting that they have adopted any specific rule of Hindu Law (See *Fanindra Deb Raikat* v. *Rajeswar Dass*

alias Jagindra Deb Raikat(1)), where the Judicial Committee held that where a family were shown to have become Hindus in part only recently, there is no presumption that they have adopted the law of adoption. Where, therefore, the religious and legal consciousness of a community recognizes the validity of a certain marriage, it follows that it cannot be discarded on account of its repugnance to that system of law.

Whether the marriage is valid or not, according to the caste rules, it is for the caste itself to decide. So far as ancient history and modern usages go, marriage questions have always been settled by the caste itself and the validity of a marriage between the members of a caste who recognize it as binding has not been questioned by outsiders though the caste itself may be lowered in their estimation when such marriages are repugnant to their notions of morality.

Where, therefore, a caste accept a marriage as valid and treat the parties as members of the caste it would be, it appears to me, an unjustifiable interference for the Courts to declare those marriages null and void.

It does not follow that a marriage opposed to the usages of the communities and not recognized by them would be invalid. A marriage whatever else it is, *i.e.*, a sacrament, an institution, is undoubtedly a contract entered into for consideration with correlative rights and duties. The Civil Courts Act only requires that so far as Hindus are concerned its validity must rest upon Hindu Law, *i.e.*, as explained above the law of the Dharma Shastras as distinguished from caste rules or the caste law. If it is not recognized by the caste or caste rules, the parties may cease to belong to the castes whose usages they have violated and who would, therefore, expel them. There is nothing to prevent a man from giving up his caste or community. He is bound by the caste rules only on account of his voluntary submission and therefore, if the marriage is valid under the ordinary Hindu Law, they will be legally married even if such marriage is opposed to the rules of the caste or community to which they belong.

In fact in the case before us there are sub-divisions of the Kaikolar community intermarriages between whom are not allowed: but it is not contended that such marriages would be

(1) (1884) 12 I.A., 72.

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invalid in a Court of Law though they may entail expulsion from those sub-divisions.

I am, therefore, of opinion that this marriage is valid (1) on the ground of custom, (2) because it is in conformity with Hindu Law which does not prohibit marriages between any persons who are not dwijas or twice-born persons, (3) because when the caste of which the parties are accepted members, recognize a marriage as valid, then it is legal marriage under Hindu Law.

I would, therefore, reverse the decree of the Sub-Judge and dismiss the suit for possession and restore that of the Munsif.

As, however, the alienation has been found to be not binding on the reversioners, there must be a declaration to that effect. It was contended that on the death of the original plaintiff the suit abated so far as the declaration is concerned. But as the suit for declaration was brought by the plaintiff not on his behalf only but also on behalf of the reversioners, the right to sue survives and the suit does not abate. Each party will bear his own costs throughout.

ABDUR RAHIM, J.—I agree.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Krishnaswami Ayyar.

1909. December 6, 7.

CHIDAMBARAM PILLAI (PLAINTIFF), APPELLANT,

v.

MUTHU PILLAI (DEFENDANT), RESPONDENT.*

Variance between pleading and proof—Where plaintiff sues in ejectment on the ground of exclusive title, he cannot be given a decree for partition when the claim set up is found to be barred.

Where a plaintiff sues the defendant in ejectment on the ground that he and defendant were separately enjoying properties, he cannot, when such claim is found to be barred by limitation, rely on a tenancy in common not alleged in the plaint and claim a decree for partition.

SECOND APPEAL against the decree of F. D. P. Oldfield, District Judge of Tanjore, in Appeal Suit No. 118 of 1907 presented

* Second Appeal No. 388 of 1908.