family, yet it had become divided in status prior to the suit. On principle it is difficult to see how any distinction can be drawn between joint tenants and tenants-in-common, for the right to partition belongs equally to each of them. In the present case, when the suit of the plaintiff's assignor was dismissed in 1917 she was relegated to her right of possession as joint owner and consequently to her right to partition, a right which accrues from time to time, for this right had not been taken away by the prior litigation. It is not contended for the appellant that the question is *res judicata* and consequently, the present suit, which is based on the plaintiff's assignor's right of partition, is not barred by Order IX, rule 9.

The appeal is dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Madhavan Nayar.

SUNDARAMMA (FIRST DEFENDANT), APPELLANT,

1926, March 12.

v.

VENKATASUBBA AYYAR AND THREE OTHERS (PLAINTIFF AND DEFENDANTS NOS. 2, 3 AND 4), RESPONDENTS.*

Hindu Law—Adoption—Adoption by a person after the death of his only wife—Right of adopted son to inherit to the relations of the deceased wife—whether adopted son can claim as son of the wife, though she did not take part in ceremony of adoption—Pratigrahiyamatha, meaning of—Dattaka Mimamsa—Opinion of Sarkar Sastri, disapproval of.

The adopted son of a Hindu whose only wife had died before the adoption becomes the son of that wife so as to inherit as such to the relations in her father's family.

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* Letters Patent Appeal No. 129 of 1925.

SUNDARAMMA v. VENKATA-SUBBA AYYAR.

There is no authority for the view that to be an adoptive mother, she should have actively participated in the adoption by actually receiving the boy in adoption.

Dattaka Mimamsa, section I, verse 22, and section VI, verse 50, referred to ; Opinion of Sarkar Sastri, disapproved.

APPEAL under clause 15 of the Letters Patent against the judgment of DEVADOSS, J., in Second Appeal No. 318 of 1922, preferred against the decree of E. H. WALLACE, District Judge of Salem in A.S. No. 207 of 1920, preferred against the decree of C. GOMAJI RAO, District Munsif of Krishnagiri, in O.S. No. 122 of 1919.

The plaintiff is the son of a step-sister of one Narasimha Ayyar, and claimed to be reversioner to his estate along with the third and fourth defendants, who were sons of another step-sister of the same person. The plaintiff sued for a declaration that the alienations made by the first defendant, who was the widow of Narasimha Ayyar, to the second defendant was not valid and binding on the plaintiff and others as the reversioners to the estate. The first and second defendants pleaded that the plaintiff and third and fourth defendants were not the nearest reversioners, but that one Subbu Narayana Ayyar, the adopted son of the husband of one Venkachi Ammal, the uterine sister of Narasimha Ayyar, was the nearest reversioner to him and that consequently the plaintiff was not competent to maintain the suit. It appeared that Venkachi Ammal had died prior to the adoption made by her husband. It was contended for the plaintiff that as the woman had died before the adoption and did not consequently take part in the ceremony of adoption and receive the boy in adoption in association with her husband, the adopted son was not her son and could not inherit to her paternal relations. The lower Courts overruled the plaintiff's contention and dismissed the suit. The plaintiff

preferred a second appeal, which came on for disposal before DEVADOSS, J., who held that the adopted son did not become the son of the woman who had predeceased the adoption by her husband. His Lordship reversed the decrees of the lower Courts, and remanded the appeal for disposal on all the issues in the case. Against this judgment, the first defendant preferred this Letters Patent appeal.

C. V. Anantakrishna Ayyar for appellant.

A. Krishnaswami Ayyar for respondents.

JUDGMENT.

PHILLIPS, J. PHILLIPS, J.—The question in this appeal is whether the adopted son of a man whose only wife had died before the adoption becomes the son of that wife so as to be her legal heir. This question does not seem to have been directly decided in any case and therefore it will be necessary to see how far the authorities support the proposition. In the first place it is necessary to consider the principles which govern adoption under the Hindu Law. In *Uma Sunker Moitro* v. *Kali Komul Mozumdar*(1), ROMESH CHANDER MITTER, J., observes :

> "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."

This theory has been upheld by the Privy Council in *Nagindas Bhagwandas* v. *Bachoo Hurkissondas*(2). The theory then appears to be that the adopted boy by a legal fiction becomes the natural son of the adoptive father and presumably also of his wife. The question here is not complicated by the existence of two or more

(1) (1881) I.L.R., 6 Calc., 256 (F.B.).
(2) (1916) I.L.R., 40 Bom., 270 at 288 (P.C.).

SUNDARAMMA v. VENKATA-SUBBA AYYAR.

PHILLIPS, J.

wives. In *Narasimha* v. *Parthasarathy*(1) their Lordships of the Judicial Committee observe

"Only one wife can receive the child in adoption so as to step into the position of being its adoptive mother"

and again

"to hold that a child could bear such a relationship to more than one mother would be entirely contrary to settled law."

This conclusion appears to be based on the theory of adoption, namely, that the adopted son becomes the natural son of the father, and the only way in which he can be deemed to be the natural and legitimate son of his father is by a fiction that he is the son of that father's wife also. A Hindu son has to offer oblations not only to his father's ancestors but also to his mother's ancestors. When therefore, he is adopted into a new family, he becomes the son of that family and presumably he would offer oblations not only to his adoptive father's ancestors but to his father's wife's ancestors as well. It would be straining the legal fiction of adoption too far to hold that the boy need have no mother at all although this may possibly be necessary in the case of an adoption by a bachelor, but that is an exceptional case with which we are not concerned now. In a family in which there were two wives it was held that the wife who joined with the father in making the adoption, although the junior wife, was the mother of the boy in preference to her senior co-wife *Annapurni Nachiar* v. *Collector of Tinnevelly*(2). This was upheld by the Privy Council in *Annapurni Nachiar* v. *Forbes*(3). Wherever possible, therefore, a mother should be found for the boy and the fact that such a mother died before the adoption can be no obstacle in view of the fictitious character of the whole principle of adoption.

(1) (1914) I.L.R., 37 Mad., 199 at 220 (P.C.).
(2) (1895) I.L.R., 18 Mad., 277. (3) (1900) I.L.R., 23 Mad., 1.

It is contended for the respondent that even when the adoptive father's wife is alive she does not become the adoptive mother unless she actively participates in the adoption by receiving the adopted boy. This contention is apparently based on the literal meaning of the word "Prathigrahiya" which is ordinarily translated as adoptive. Its literal meaning is "receiving" and it is contended that unless the boy is actually received by the woman she does not become his adoptive mother. It is well settled that a man can adopt without the consent of his wife and even against her consent and in either case the adoption is valid. If the adoption is valid and the principle is recognized that the adopted boy ought in theory to have a mother it is difficult to accept the proposition that he is not to have any mother at all unless she actually receives him in adoption. The argument that the wife becomes the adoptive mother is based on the text of Nanda Pandita in Dattaka Mimamsa, part I, verse 22

> "In consequence of the superiority of the husband by his mere act of adoption, the affiliation of the adopted, as son of the wife, is complete in the same manner as her property in any other thing accepted by the husband".

In this text there is no qualification of the words "son of the wife" such as is sought to be put upon it by the respondent. He contends that it only means son in a tertiary sense, as laid down by Sarkar Sastri in his commentary on adoption (p. 227). When pressed for an interpretation of this tertiary sense, the learned vakil had to adopt the conclusion in Sarkar Sastri's book, namely, that he was not really a son for any purpose. This seems to be a quite unnecessary deduction, for it destroys the apparent meaning of the text. If he is not really the son of the wife in any sense, why should the text declare that his affiliation as

SUNDARAMMA v. VENKATA-SUBBA AYYAR.

PHILLIPS, J.

such is complete. No doubt Sarkar Sastri in his commentary supports the proposition put forward for the respondent, but there are very many contradictory statements to be found in his commentary. For instance, his observations at page 200 are altogether contradicted by those at page 419 E. Apart therefore from this commentary, there appears to be no authority for the proposition that the wife does not become the adoptive mother unless she actually received the boy. It may also be observed that it is only in very rare cases that the wife receives the boy as well as the father and consequently in most cases, if this contention were to be upheld the result would be that an adopted son who was adopted by the father would have no mother at all, for admittedly he is no longer considered to be the son of his natural mother and consequently he would be in the anomalous position of a man who has no mother at all. If this anomalous position of a man without a mother can be avoided, I think it should be as being opposed to law of nature to which the theory of adoption is assimilated. The text of Dattaka Mimamsa is undoubtedly an authority to the contrary. I may observe that the late Sir BHASHYAM AYYANGAR, J., accepted this proposition in an article in 9 Madras Law Journal, 231, and there appears to be no reason why it should not be adopted. If, therefore, the wife becomes the adoptive mother whether she takes part in the ceremony or not, then there can be little difficulty in pressing the fiction a little further so as to include the deceased wife of the adoptive father. The whole theory being a fiction, the impossibility of a woman becoming the mother after her death must be explained away by the fictitious nature of adoption. As her consent is not necessary, the fact that the consent cannot be obtained after her death is immaterial. I would, therefore, hold

that the deceased wife of the adoptive father can become the adoptive mother and the adopted son becomes her heir.

PHILLIPS, J.

The learned Judge from whose decision this appeal is preferred has adopted the arguments of Sarkar Sastri in favour of his view, but as I have observed above, these arguments seem to be based on incorrect principles and an incorrect reading of the text. The appeal must, therefore, be allowed and the plaintiff's (respondent's) suit dismissed with costs throughout.

MADHAVAN NAYAR, J.

MADHAVAN NAYAR, J.—The question for decision is whether an adopted son can inherit to the relations of the wife of his adoptive father when that wife was dead at the time of his adoption. DEVADOSS, J., answered the question in the negative basing his judgment on the ground that "adoption being after the death (of his wife) it cannot be said by any fiction that she took part in the adoption." According to this view an adopted son can be heir only to the wife of the adoptive father who joins in the ceremony of adoption and who is termed "the receiving mother." The correctness of this view is challenged in this Letters Patent Appeal.

There is no direct authority on the point, but two texts in Dattaka Mimamsa have a bearing on the question. These are Dattaka Mimamsa, section 1, verse 22, and section 6, verse 50, and are thus translated by Stokes.

"In consequence of the superiority of the husband, by his mere act of adoption, the affiliation of the adopted, as son of the wife, is complete in the same manner as her property in any other thing accepted by the husband.

"The forefathers of the adoptive mother only are also the maternal grandsires of sons given, and the rest for the rule regarding the paternal, is equally applicable to the maternal grandsires (of adoptive sons)."

SUNDARAMMA v. VENKATA-SUBBA AYYAR.

MADHAVAN NAYAR, J.

Respondent relies strongly on the latter of the above-mentioned texts in support of his contention. This text shows that the relations of the adoptive mother only are the maternal relations of the adopted son. It is pointed out that the Sanskrit word "Prathigrahiyamatha" corresponding to the term "adoptive mother" means "mother who accepts in adoption" and, therefore, only the relations of a "receiving mother" are the maternal relations of the adopted son. It is difficult to accede to the argument that effect should be given to the literal meaning of the word "Prathigrahiyamatha" and that it should be understood in the sense of physical acceptance by the mother; for it is well known that the wife of the adopter is regarded as the adoptive mother even if she is not present at the adoption. The wife becomes the adoptive mother, not because she receives the boy in adoption, but because she is the wife of the adopter—her husband—who takes the boy in adoption. The context in which the passage occurs does not seem to require that the word should receive its primary meaning. The author mentions that the ancestors of the adoptive father are the paternal ancestors of the adopted son and then points out in the same way that the "forefathers of the adoptive mother only are also the maternal grandsires of the sons given" as distinguished from the ancestors of the natural mother. To illustrate this position there is no need to emphasise "acceptance" by the adoptive mother as a necessary feature in the ceremony of adoption. Sarkar Sastri in his "Tagore Law Lectures on adoption" interprets the term "Prathigrahiyamatha" literally. He says at page 419 E

> "But it should be observed that although the husband's son is deemed by courtesy to be the wife's son, yet acceptance by the wife is absolutely necessary to constitute the husband's adoptee her legal son."

See also page 237. These passages support the contention of the respondent. But the same learned author at page 200, paragraph 4, of the same volume expresses the following contrary view relied on by the appellant:—

"When the adopter is a widower, it might be said that his deceased wife's ancestors will be the maternal ancestors of the adopted son."

The opinion of Sarkar Sastri is, therefore, not very helpful in deciding this question.

In support of the theory that there should be a "receiving mother" to enable the husband to make a valid adoption, the learned Judge refers to *Annapurni Nachiar* v. *Collector of Tinnevelly*(1), but that was a case where a conflict arose between the two married wives of the holder of an impartible zamindari as regards the right to succeed to the impartible estate, the property of the infant adoptive son of their late husband. It was held that the junior wife having taken part in the adoption was entitled to preference over her co-wife who was not associated by the husband in the act of adoption. In the course of his judgment Mr. Justice SHEPHARD points out that

"Where, however, there are several wives it is said that the husband is at liberty to designate the one who shall take the place of mother, and that by this means the anomaly of assigning several mothers to the adopted son may be avoided."

As regards the association by the husband of one of the wives in the act of adoption, the Privy Council in affirming the decision of the High Court observed thus—

"It certainly is a reasonable law that the head of a family should be able to take action likely to prevent disputes between his widows relative to adoption and the consequences of it. To unite one wife with himself in adopting is one way; and it is satisfactory to find that besides the one direct judicial decision there is so much reason and opinion in its favour and so little against it".

(1) (1895) I.L.R., 18 Mad., 277.

SUNDARAMMA v. VENKATA-SUBBA AYYAR.

MADHAVAN NAYAR, J.

See *Annapurni Nachiar* v. *Forbes*(1). What has thus been said as regards the "acceptance" by one mother when there are several wives to the adopter does not lead to the conclusion that the "receiving mother" is necessary to validate the adoption by the husband. It is conceded that if the husband had only one wife the act of adoption inasmuch as it concerns him alone may be performed independently of her.

The first of the two texts referred to above does not in any way support the suggestion that the adoptive mother to have the same relation as the natural mother should be one who actually receives the boy in adoption. On the other hand, inference drawn from it strongly supports the appellant. It is undisputed that adoption can be made by the husband without the consent of his wife. It may be made even against her wishes; for association with the husband in the act of adoption is a religious formality which does not show any legal significance. The ceremonial of adoption utterly ignores the wife, who need not be present and to whom no part is assigned if she is present (Mayne's Hindu Law, page 229). When the adoption is made whether with or without her consent the wife becomes the adoptive mother of the child by the mere fact of adoption. Adoption is but a fiction in law. As observed by MAHAMOOD, J., in *Ganga Sahai* v. *Lekhraj Singh*(2).

"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."

According to Hindu Law, an adopted son occupies the same position, and has the same rights and privileges in the family of the adopter as the legitimate son.

The theory of adoption depends upon the principle of a complete severance of the child adopted from the

(1) (1900) I.L.R., 23 Mad., 1 at 9. (2) (1887) I.L.R., 9 All., 253.

family in which he is born, both in respect to the paternal and the maternal line, and his complete substitution into the adopter's family, as if he were born in it. See *Uma Sunker Moitro* v. *Kalikomul Mozumdar*(1), quoted with approval in *Nagin Das Bhagwan Das* v. *Bachoo Hurkisson Das*(2). As his adoption puts the adopted son in the place of legitimate son as regards the rites of inheritance in the family of the adopter, he must be considered to be heir to any rights arising after the adoption from his father's wife's position in his adoptive family, though she was not alive at the time of the adoption. To give full effect to the fiction of adoption and to assimilate the fact to an imitation of nature the adopted boy should have a mother. I do not think it is impossible to conceive the deceased wife as the fictional mother of the adopted child. The theory of a "receiving mother" being discarded, I cannot find any difficulty in holding that the wife of the adoptive father though she was dead at the time of adoption can be considered as the adoptive mother.

It is true that when a bachelor adopts, the adopted boy can have no adoptive mother. Fiction cannot be made to assimilate to nature in that case. But there is no reason why we should extend that analogy to cases like the present when it is possible to give full effect to the fiction by ascribing the deceased wife of the husband as the adoptive mother of the child.

For these reasons, I hold that the Letters Patent Appeal should be allowed and the plaintiff's suit be dismissed with costs throughout.

K.R.

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(1) (1881) I.L.R., 6 Calc., 256 at 259, 260.
(2) (1916) I.L.R., 40 Bom., 270, 288.