lower than the market-rate at that time. The plaintiff claims at the rate of twelve annas per pound. I think ten annas per pound was about the rate of the day; and there will be a decree for damages at that rate.

There will be a decree for Rs. 1,187 8; and the plaintiff is to give up to the defendant the shipping and Custom House documents for the goods on being paid the amount of the decree, including costs on scale No. 2.

Judgment for the plaintiff.

Attorney for the plaintiff: Mr. *Dignam.*

Attorneys for the defendant: Messrs. *Berners, Sanderson,* and *Upton.*

FULL BENCH.

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice L. S. Jackson, Mr. Justice Phear, Mr. Justice Ainslie, and Mr. Justice Morris.

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Feb. 25

BEHARI LAL MULLICK (DEFENDANT) *v.* INDRAMANI CHOWDHRAIN (PLAINTIFF).*

Hindu Law—Sudra Adoption.

A mong Sudras in Bengal, no ceremonies, in addition to the giving and taking of the child, are necessary to constitute a valid adoptino.

THE plaintiff, a Hindu widow, sued as heiress of her deceased husband to recover certain property to which she alleged he became entitled upon the death of his brother, Gobind Lal Mullick without other legal heirs. It was amongst other things set up in defence that Brajasundari, the widow of Gobind Lal's son, had duly adopted one Harankrishna, who thereupon became Gobind Lal's rightful heir, and that a portion of the property sued for was Brajas undari's *stridhan.* The parties wer Sudras; and the chief points in issue in the case were whether Braja-

* Regular Appeal, No. 88 of 1872, against a decree of the Officiating Judge of Zilla Moorshedabad, dated the 30th December 1871, and an order made on application for review, dated the 1st February 1872.

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sundari did or did not, as a matter of fact, "receive Harankrishna as an adopted son from the hands of his father and mother;" and whether "such giving and receiving in the absence of other ceremonies at the time of adoption is sufficient to constitute a valid adoption."

The Judge of Moorshedabad considered that, upon the authorities, and especially with reference to the High Court's ruling in *Bhairabnath Sye* v. *Mahes Chandra Bhadury* (1), something more than mere giving and taking is necessary to constitute a valid adoption, even among persons of the Sudra caste. He found on the evidence that the fact of the adoption was not established, and accordingly gave the plaintiff a decree for all the property claimed, except the portion which formed the *stridhan* of of Brajasundari.

From this decision the defendant appealed to the High Court.

The appeal came on for hearing before Couch, C. J., and Jackson and Phear, JJ., who expressing an opinion that the case of *Bhairabnath Sye* v. *Mahes Chandra Bhadury* (1) ought to be further considered, referred to a Full Bench the following question :—

"Whether, amongst Sudras in Bengal," in addition to the giving and taking of the child in adoption, any, and if any, what ceremonies are necessary to make a valid adoption; and if any ceremonies are necessary, at what time they must be performed?"

Baboo *Mohini Mohun Roy* for the appellant.—Among Sudras the mere gift and acceptance of a child are sufficient to constitute a valid adoption. Menu, Ch. ix, v. 168, p. 267, says, "He, whom his father, or mother with her husband's assent, gives to another as his son, provided that the donee have no issue, if the boy be of the same class and affectionately disposed, is considered as a son given, the gift being confirmed by pouring water." Later writers have enumerated various ceremonies as essential, see the the Dattaka Mimansa, s. 5, and the Dattaka Chandrika, s. 2, in both which works the conclusion is generally stated that the performance of proper ceremonies is necessary—

(1) 4 B. L. R., A. C., 162.

Dattaka Mimansa, s. 5, v. 56, and Dattaka Chandrika, s. 2, v. 13; but it is quite clear from other texts that this is intended only with reference to persons who are capable of performing the ceremonies, and not to women or Sudras; see the Dattaka Mimansa, s. 1, v. 27, and s. 5, vv. 23 to 26; and the Dattaka Chandrika, s. 2, vv. 29 and 32. The learned Judges who decided the case of *Bhairabnath Sye* v. *Mahes Chandra Bhaduri* (1) were misled by a passage translated by Baboo Shama Charan Sirkar from the Dattaka Nirnaya, see the Vyavastha Darpana, p. 876, and which is as follows:—"There is no impropriety in her (*i. e.*, a woman's) performing the *koma* through a Brahmin, just as she does when completing a voluntary religious ceremony, and so forth. A Sudra also should act in like manner." But Baboo Shama Charan omitted to translate the conclusion of the sentence, which is, "and even without the performance of the *koma*, &c., adoption is valid." With the exception of the above case all the reported authorities hold that no ceremonies are necessary; see 1 Strange's H. L., Ch. iv, s. ; 2 Strange's H. L., pp. 87, 126, 130, 155, 218, and 219; 1 Macnaghten's Princ. H. L., p. 69 note; *Raja eNbokissens* case (2), *Veerapurmall Pillay* v. *Narain Pillay* (3), *Sreemutty Joymoney Dosse* v. *Sreemuty Sibosoondry Dossee* (4), *Sreenarain Mitter* v. *Sreemutty Kishen Soondry Dossee* (5), *Sootrugun Sutpruty* v. *Sabitra Dye* (6), *Dyamoye Chowdhrain* v. *Rashbeharee Singh* (7), *Ram Kishore Acharj Chowdhree* v. *Bhoobunmoyee Debea Chowdrain* (8), and *Singamma* v. *Vinjamuri Venkatachar lu* (9).

Baboo *Hem Chunder Bannerjee* for the respondent.—A son is adopted with a view to certain religious benefits, and fixed rules for adoption have been laid down, which must apply equally to all Hindus unless the texts contain any special exemption. There are two forms of adoption, that of Vasishtha and that of Saunakha; both are not necessary, but one or the other must be adhered

(1) 4 B. L. R., A. C., 162.
(2) 1 Morl. Dig., 19.
(3) *Id.*
(4) Fulton's Rep., 75.
(5) 11 B. L. R., 171.
(6) 2 Knapp's Rep., 287.
(7) S. D. A. for 1852, 1001.
(8) S. D. A. for 1859, 229.
(9) 4 Mad. H. C. Rep., 165.

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to in order to produce the filial relation; Dattaka Mimansa, s. 5, vv. 45 to 48, 50; Dattaka Chandrika, s. 2 v. 13. The form prescribed by Vasishtha is very simple and admits of the omission of some of the minor ceremonies, but the burnt offering is common to both forms, and without it no affiliation takes place; Dattaka Mimansa, s. 5, v. 56. The confirmation of the gift by pouring water mentioned by Menu, Ch. ix, v. 168, p. 267, is thus explained by the author of the Dattaka Mimansa, s. 5, v. 47:—"Here the mention of water is illustrative of the whole form necessary for the gift of a son; and hence the form for adoption is also implied." The provision in the Dattaka Mimansa, s. 5, v. 29, that a Sudra also must pay to the extent of his means, shows, that the preceding verses of the section, which state the necessary ceremonies, were intended to apply to Sudras. The Dattaka Nirnaya is an authority only when not opposed to the Dattaka Chandrika; see the opinion of Pundit Iswara Chandra Vidyasagur in *Monemothonauth Dey* v. *Ononthnauth Dey* (1). The case of *Bhairabnath Sye* v. *Mahes Chandra Bhadury* (2). was approved of in *Syamalal Dutt* v. *Saudamini Dasi* (3), and is supported by the decisions in *Bullubakant Chowdree* v. *Kishenprea Dassea Chowdrain* (4), and *Alank Manjari* v. *Fakir Chand Sarkar* (5), though in the last case it does not appear whether the parties were Sudras. Juggernath was of opinion that "the oblation to fire with holy words from the Veda is an unessential part of the ceremony: even though it be defective, the adoption is nevertheless valid, for *no* one admits that the principal object is unattained if an unessential part be defective;" see the Vyavastha Darpana, p. 872; and he states this generally of all classes. But *Thakoor Oomrao Singh* v. *Thakooranee Mehtab Koonwer* (6) shows, in opposition to this opinion, that amongst Khetris the *homa*, or burnt offering, is essential. And as to how far Juggernath can be regarded as an authority, where his opinion differs from the leading writers,

(1) 2 I. J., N. S., 24, at p. 35.
(2) 4 B. L. R., A. C., 162.
(3) 5 B. L. R., 362: but see *Nittianand Ghose* v. *Krishna Dyal Ghose*, 7 B. L. R., 1.
(4) 6 Sel. Rep., 219.
(5) 5 Sel. Rep., 356.
(6) 4 Agra H. C. Rep., 103A.

see *Rungama* v. *Atchama* (1), and *per* Mitter, J., in *Kery Kolitany* v. *Monoram Kolita* (2).

The judgment in *Raja Nobokissen's* case (3) cannot be found, and *Veerapurmall Pillay* v. *Narrain Pillay* (4) and *Sreemuity Joymoney Dossee* v. *Sreemutty Sibosoondry Dossee* (5) were decided on imperfect materials. Those cases therefore cannot be relied upon; and *Sootrugun Sutputty* v. *Sabitra Dye* (6) and *Dyamoye Chowdhrain* v. *Rashbehuree Singh* (7) were as to the necessity of ceremonies other than the *homa*. *Nursapah* v. *Paupummall* (8) was a Madras case.

Baboo *Kristokumal Bhuttacharjee* on the same side.

Cur. adv. vult

The opinion of the Full Bench was delivered by

COUCH, C.J.—The question referred to us for decision is whether, amongst Sudras in Bengal, in addition to the giving and taking of the child in adoption, any, and if any, what ceremonies are necessary to make a valid adoption, and if any ceremonies are necessary, at what time they must be performed? We are not asked to decide whether, according to the received law in Bengal, proof of the performance of the *datta homam* is essential to establish a valid adoption in a Brahmin family. It has been held by the High Court at Madras in *Singamma* v. *Vinjamuri Venkata Charta* (9) not to be essential, but a Division Court of this Court held in the case of *Bhairabnath Sye* v. *Mahes Chandra Bhadury* (10) that it was.

The Madras decision was not noticed either in the argument or the judgment. It not being necessary to decide this question in the appeal in which this reference is made, we do not propose to do so, and shall only consider what is the law of Bengal in the case of Sudras.

(1) 4 Moore's I. A., 1; see p. 97.
(2) *Ante*, p. 50.
(3) 1 Morl. Dig., 19.
(4) *Id.*
(5) 1 Morl. Dig., 21; S. C., Fulton's Rep., 75.
(6) 2 Knapp's Rep., 287.
(7) S. D. A. for 1852, 1001.
(8) 2 Strange's H. L., 126.
(9) 4 Mad. H. C. Rep., 165.
(10) 4 B. L. R., A. C., 162.

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We refer first to the Dattaka Mimansa. In s. 1 the author treats of by whom adoption may be made. Having stated in v. 15 and the following verses when a woman may adopt, he says in v. 24 :—"It must not be argued that since, under a text of Saunakha, the employment of a priest is according to the approved doctrine, the *homa* may be completed by his intervention, for although that were completed, still would the adoption (by the woman) be imperfect, since she is not competent to perform the prayers requisite for the same;" and in v. 25 the prayers are specified. This is an assertion that, notwithstanding the incompetency of a woman to perfoom the requisite prayers, there may be a complete adoption by her, and that this is not by reason of the intervention of a priest. The Sudras being also incompetent to perform the prayers specified, the author notices their case, and in v. 26 says :—"Nor does thus the want of power of Sudras follow ; for their ability (to adopt) is obtained from an indication (of law) conclusive to that effect in this passage,—'Of Sudras from amongst those of the Sudra class.' By this Vachaspati is refuted, who says,—'Sudras are incompetent to affiliate a son, from their incapacity to perform the sacrament of the *homa* and prayers prescribed for adoption.' The text of Saunakha thus referred to is given in s. 2, v. 74. When the author says Vachaspati is refuted, he plainly affirms that the incapacity of Sudras to perform the *homa* and the prescribed prayers does not make them incompetent to adopt. He then in v. 27 states in what manner the competency is produced. It treats of adoption by women and concludes :—'therefore, since by this passage ('of women and Sudras without prayers') a dispensation with respect to prayers is established, the adoption (of the women in question) would be valid without prayers; like their acceptance of any chattel.'"

Thus we have it distinctly laid down that Sudras may adopt, and that an adoption by a Sudra without prayers is valid, because there is a dispensation with respect to prayers. It would be surprising if any passage from this author could be produced which would be an authority for saying that an adoption by a Sudra without the ceremonies is invalid.

In s. 5 the author treats of the mode of adoption. A Sudra is expressly mentioned only in v. 29, where it is said that he ought to bestow as a gratuity on the officiating priest "the whole even of his property, if indigent to the extent of his means." In order to make the author consistent, the rules prescribed in this section must be understood as subject to the qualification that the person adopting is capable of observing them. It is not to be supposed that the author intended to contradict what he had before laid down about women and Sudras, and the concluding v. 56,—"It is therefore established that the filial relation of adopted is occasioned only by the proper ceremonies. Of gift, acceptance, a burnt sacrifice, and so forth; should either be wanting, the filial relation even fails,"—must be understood as only applying where there is a capacity to perform the ceremonies. To give any other meaning to it would make the author absolutely contradictory. In one part of his work he would be saying that a Sudra can adopt, and in another that an adoption by a Sudra is invalid, because ceremonies have not been performed which he was incapable of performing, and which the author had said he was exempted from performing. The doctrine in the Dattaka Chandrika, which is preferred in Bengal, does not differ from this; on the contrary, vv. 29 and 32 of s. 2 support it.

The text of Menu, quoted in s. 5, v. 3, must be understood as applying to those who are capable of observing the ordained rules, and not to Sudras. The decision in *Bhairabnath Sye* v. *Mahes Chandra Bhadury* (1), which made this reference necessary, is based upon a passage in the Vyavastha Darpana, 2nd edition, p. 875, where the author quotes as an authority for what he lays down a passage from the Dattaka Niranya, but it appears that the whole of the sentence is not given. After "a Sudra also should act in like manner" are the words, and "even without the performance of *homa*," &c., the adoption is valid. Thus the authority given by Shama Charan Sirkar for his position proves to be no authority for it, but the contrary.

The decision appears to us to be unsupported by any authority. 2 Strange, p. 89, may be cited as a contrary authority. The

(1) 4 B. L. R., A. C. 162.

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notoriety alluded to at p. 170, if the practice had a modern origin, as is probable, would not be a sufficient foundation for a rule of law. We think we ought to overrule that decision, and answer the question put to us by saying, that amongst Suddras in Bengal, no ceremonies are necessary in addition to the giving and taking of the child in adoption.

PRIVY COUNCIL.

BRINDABUN CHUNDER SIRCAR CHOWDHRY AND ANOTHER (TWO OF THE DEFENDANTS) *v.* BRINDABUN CHUNDER DEY CHOWDHRY AND OTHERS (PLAINTIFFS).

P. C.*
1874
March 4, 5.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Sale for Arrears of Rent —Patni Tenure—Act X of 1859, *s.* 105 *Regulation VIII of* 1819—*Regulation I of* 1820.

The provisions of Regulation VIII of 1819 with respect to the sale of under-tenures for arrears of rent being applicable to sales under decrees for rent made under s. 105, Act X of 1859 :

Held, that where a sale has been effected of a "patni talook" under that section, it must be presumed, in the absence of evidence to the contrary, that the tenure was one tranferable by sale, and upon the creation of which it was stipulated by the terms of the engagements interchanged that, in case of an arrear occurring, the estate might be brought to sale; in other words it must be presumed to be a tenure such as is described in the preamble to Regulation VIII of 1819, and the effect of the sale was to annul all incumbrances created by the patnidar.

APPEAL from a decision of the High Court of Calcutta (Bayley and Phear, JJ.), dated the 7th December 1867, reversing a decision of the Principal Sudder Ameen of Nuddea, dated the 5th March 1866.

One Rutnessur Roy held a patni of Mauza Jeebunnugger from the appellants, who were the zemindars of the talook where in that village was situated, and he was registered as such patnidar. In Jaisti 1227 (August 1820) Rutnessur, as such

Present :—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, SIR R. P. COLLIER, AND SIR L. PEEL.