1873. April 28. R. C. No. 23 of 1872.

The Act so far as the plaintiff was concerned imposes a new tax The sections under which it is to be imposed and levied make it an annual tax payable in two instalments, but they manifestly provide for no case but that of the imposition of that annual tax at the commencement of the official year.

Here there was no legal authority whatever for its imposition at the commencement of the year. The sections as to notice enforce the construction that there is only one legal period of imposition of the tax, and at that period there was no tax legally in existence. We answer, therefore, that the levy from the plaintiff was illegal.

Appellate Jurisdiction.(a)

Regular Appeal No. 33 *of* 1869.

GO'PA'LA'YYAN.....*Appellant.*

RA'GHUPATIA'YYAN *alias* A'YYAVA'YYAN.*Respondent.*

Suit to set aside the adoption of the 1st defendant, the alleged adopted son of plaintiff's undivided brother; to declare plaintiff's title to certain lands, and for possession. 1st defendant pleaded that the question of his adoption was res judicata and the Civil Judge so decided. Upon appeal, the High Court reversed the decision and remanded the case for decision on the merits. After trial the Civil Judge found that the fact of the adoption was satisfactorily proved and that 1st defendant had done acts as adopted son since 1833, at least. It was also argued, on plaintiff's part, that the adoption was illegal, being that of a sister's son, and the judgment of Holloway, J. in *Special Appeal No.* 139 *of* 1863 was cited. The Civil Judge decided that this applied only to the Andhra country, and that as the custom was common in the Dravida country the adoption was legal, or, if not legal, that it was too late to dispute it. The plaintiff appealed and the case was referred to a full Court. The Court decided that on the general principles of Hindu Law, as expounded by the writers of all schools, a Brahmin could not legally adopt his sister's son, but as the existence of a custom, derogating from the general law, was asserted, they directed an enquiry into the existence of the supposed custom.

The Civil Judge found that a rule of customary law did exist affirming the legality of the adoption of a sister's son by a Brahmin. Upon the question coming before the High Court the finding of the Civil Judge as to the existence of the custom was reversed and the following issue sent for determination.—"Has the conduct of the plaintiff and that of the members of his family been such as to render it inequitable for him to set up as against the present defendant the rule of law upon which he now insists?" The Judge found to the effect that there had been a long course of acquiescence by all the members of the family, the plaintiff

(a) Present: Holloway, Ag. C. J. and Innes, J.

included, in the validity of the sonship asserted. *Held*, that this would be hardly enough, if, through the influence of that course of representation by conduct the defendant had not altered his situation so that it would be impossible to restore him to that original situation. That he had done so, and that, although the adoption was invalid and inadequate of itself to create communion, that communion had been created by the course of conduct of the plaintiff and his family, coupled with the defendant's changed situation which had resulted.

1873. *April* 4. *R. A. No.* 33 *of* 1869.

THIS was a Regular Appeal against the decision of F. S. Child, the Civil Judge of Tinnevelly, in Original Suit No. 8 of 1866.

The suit was brought to set aside the adoption of the first defendant, the alleged adopted son of plaintiff's undivided brother: to declare plaintiff's title to certain lands, and for possession. First defendant pleaded that the question of his adoption was res judicata in a former suit and the Civil Judge decided in conformity with this plea.

The High Court held (on appeal) that the question was not res judicata and remanded the suit for trial upon the merits (See III, M. H. C. R., 217). The Civil Judge having tried the case upon the merits delivered the following judgment:—

"This suit was by decree in Regular Appeal No. 62 of 1866 returned for decision on the merits.

In this case the question is whether the first defendant as the adopted son of one Appuváyyar, a member of the Teruvai branch of a wealthy Brahmin family, is entitled to retain a share of the family property.

The first defendant alleging the adoption, the burden of proof lay upon him, and 16 witnesses were examined on his side and 5 on the part of the plaintiff.

I am not going into any particulars regarding the abstract of their lengthened examination, which went on for days—it suffices to say that the fact of the adoption is as satisfactorily proved by the evidence before me as it was in that given before the Principal Sadr Amin in No. 33 of 1862, confirmed on appeal and Special Appeal, where the same question was tried, the son being the plaintiff in that suit and the father in the present, the said father and the

1873. April 4. R. A. No. 33 of 1869.

said son, as is proved, being all along living and acting together.

In fact the evidence now given is even stronger than what was given before, more pains having been given to the examination of the witnesses.

As for the plaintiff's witnesses they are utterly useless for his side. They are unable to contradict the fact that the first defendant has been always acknowledged by the family and his name registered, and that acts have been done by him as the adopted son of Appuváyyar since Andu 1019 (A. D. 1833) at all events.

To get over this, the plaintiff's vakil asserts that the adoption was illegal from the beginning, being that of a sister's son; and great stress is laid on Mr. Justice Holloway's words in *Special Appeal No.* 139 *of* 1863.

In fact this suit is clearly brought to have another trial at the property, grounding the claim on the above-mentioned Special Appeal, notwithstanding that this question of legality of the adoption was brought forward in *Special Appeal No.* 294 *of* 1864, and in *Review Petition No.* 11 *of* 1865, which were those suits in which this question was first mooted by the son of the present plaintiff and his claim thrown out.

The decision, however, in *Special Appeal No.* 139 *of* 1863 applies only to the Andhra or Telugu country and not to the Dravida or Tamil country. That is the clear inference of the words of the judgment; and so, clearly, the Reporter understood it—See the heading of the Report.

That any other supposition would lead to the greatest injustice is shown by the fact that in this one family alone several instances have occurred in which the principle "that the adopted must be one with the mothers of whom the adopter could legally have intermarried" was never once thought of, and I have no hesitation in saying that such a principle was never heard of in modern times in the southernmost parts of India.

1873.
April 4.
R. A. No. 33 *of* 1869.

9th witness for the defendant, one of the family, in his cross-examination deposed that he had given his son by a second wife in adoption to one who had married his daughter by his first wife. 3rd witness on cross-examination by plaintiff, also one of the family, deposes that 4th witness, a member of another branch of this family, was adopted by his mother's brother like the 1st defendant in the present case. So also Annavayya, another of the family. This is confirmed by the 4th witness—in fact the plaintiff does not and cannot attempt to deny this; and further, these adoptions of sister's sons have been recognised by a decision of the Highest Court in the country in suits connected with property belonging to different branches of this very family. (Vide *Special Appeal No.* 59 *of* 1859.)

If it were now attempted to be declared that such adoptions were illegal in Southern India there would be only one course to pursue, viz., a similar one to that some years ago acted on in England in the matter of marriage with deceased wife's sisters, that is to pass an Act declaring all such adoptions already made to be legal, but to prohibit them in future. Otherwise the most frightful confusion would be imported into very many families in this district alone.

I lay such stress on this as it is the only ground really relied on by the plaintiff in the present case, for that the 1st defendant was adopted some 40 years back is proved beyond a shadow of a doubt.

Therefore being of opinion that the adoption is legal and that *Special Appeal No.* 139 *of* 1863 does not apply to this case, and that even if not legal it is now too late to dispute it, I have no hesitation in dismissing the plaint with costs."

Against this decree of the Civil Judge the plaintiff appealed on the ground that the Court was wrong in law and in fact in holding—

1. That the adoption of the 1st defendant is proved.
2. That such adoption is legal, he being a sister's son.
3. That if illegal it is now too late to question it.

1873. *April* 4. *R. A. No.* 33 *of* 1869.

This appeal was referred to a Full Court, with *Special Appeal No.* 233 *of* 1869, in which the same question arose, and came on for hearing on the 18th February 1870, when the Court (SCOTLAND, C. J., BITTLESTON, HOLLOWAY and COLLETT, JJ.) delivered the following judgment—

"The substantial question in these cases is—whether the adoption by a Brahmin of his sister's son is valid?

On the general principles of Hindu Law as expounded by the writers of all schools, the arguments have shewn us that this question must be answered in the negative.

Several dicta and one decision of the late Supreme Court have, however, been quoted to show the existence of a custom derogating from that general law, and in one of these cases the Civil Judge of Tinnevelly, whose great experience causes us to attach great weight to his opinion, has expressed himself very strongly in favor of the existence of such a customary law. We have, therefore, resolved to direct an enquiry as to the existence of the supposed law.

At present we will only observe that

1. The evidence should be such as to prove the uniformity and continuity of the usage and the conviction of those *following it that they were acting in accordance with law,* and this conviction must be inferred from the evidence.

2. Evidence of acts of the kind, acquiescence in those acts, their publicity, decisions of Courts, or even of panchayats upholding such acts, the statements of experienced and competent persons of their belief that such acts were legal and valid will all be admissible, but it is obvious that, although admissible, evidence of this latter kind will be of little weight if unsupported by actual examples of the usage asserted.

With these observations, intended to point out the direction which the enquiry should take, we refer the issue.—

Whether there exists in the districts from which these suits come, 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 Brahmin?

1873. *April* 4. *R. A. No.* 33 *of* 1869.

In return to this issue the Civil Judge (E. F. Webster) found (on a consideration of oral evidence alone) "that the custom has been shown to be uniform because uninterrupted. That the existence of the custom goes back as far as 134 years, and that the publicity of the Acts, the general acquiescence of the people in those Acts and the opinions of those among the people who are acquainted with the Shastras that such adoptions are valid, all go distinctly to show a conviction among the people that they were acting in accordance with law. And I therefore find the issue sent down in the affirmative."

After receipt of this finding the case was again argued and, on the 16th December 1872, the Court (HOLLOWAY and INNES, JJ.) delivered the following

JUDGMENT:—This case was originally heard before our late colleagues Bittleston and Collett and the late Chief Justice as well as before one of ourselves. On the return to the issue it was again argued and all the Judges then present were of opinion that the customary law asserted was not made out. That there were many instances of property passing through transactions supposed to be valid adoptions there could be no doubt, but we were all of opinion that there was no evidence justifying the setting up of a rule of law opposed to all authorities, and specifically to the one declared by almost the only skilled witness examined in favor of the custom to be binding in the very district in which it was sought to enforce it. These allegations of special customs have arisen from mixing the practices of people not subject to the Hindu Law at all with the system of law binding those who are subject to the Hindu Law. In the case of adoptions this has been the more conspicuous from the assumption, originally based upon no solid foundation whatever, that the "son given" is the only son known to the present age. In the case of Brahmins 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. These authorities themselves are as much the record of customary law as of the written texts of

1873. *April* 4. *R. A. No.* 33 *of* 1869.

the Shastras, and we are quite satisfied that no such rule of customary law exists. Our opinion is confirmed by a case from Tranquebar, also a Southern District, in which, after an elaborate inquiry, the Civil Judge came to the conclusion that there was no such rule of law. This being so, the decree of the Civil Judge cannot be confirmed upon the grounds upon which he put it. Here, however, it is alleged that the conduct of this family has debarred them, in consequence of their acting as if such rule existed and the changed situation induced, from now taking the benefit of the ordinary rule of law and we therefore remit the case for the determination of the issue—

"Has the conduct of the plaintiff and that of the mem-"bers of his family been such as to render it now inequitable "for him to set up as against the present defendant the rule "of law upon which he now insists ?"

The return of the Judge to this issue was in the affirmative, and at the final hearing, *R. Bálάji Rau* appearing for the appellant and *Miller* and *Sanjiva Rau* for the respondent, the Court (Holloway, Acting C. J. and Innes, J.) delivered the following

JUDGMENT:—We decided with great reluctance that when once it was conceded that adoption is now the only mode of affiliation, the defendant was not a son of the person who purported to have affiliated him. We, however, saw reason to doubt whether a long course of conduct of the members of this family had not rendered it inequitable for the plaintiff now to insist on the invalidity. The Civil Judge's finding is merely to the effect that there has been a long course of acquiescence by all the members of the family, the plaintiff included, in the validity of the sonship asserted. Undoubtedly it is the strongest case possible of that kind. It would hardly, however, be enough, if through the influence of that course of representation by conduct, the defendant had not altered his situation so that it would be impossible to restore him to that original situation.

Here, however, the attention of the parties was pointedly called to the evidence which showed that he had aban-

doned his rights to the property in his natural family and had long rendered his services in that of his quasi adoptive father. There are many other points in the case, and although we cannot disguise from ourselves that the present is an extreme application of the doctrine of changed situation, we think that it would now be manifestly inequitable to permit the plaintiff to undo partially to his own advantage what cannot be undone so far as it has prejudiced the defendant.

1873. *April* 4. *R. A. No.* 33 *of* 1869.

The situation is the result of the conduct of the whole family of plaintiff continued through a long course of years, and we think that we cannot properly decree for the plaintiff upon the footing that the defendant is wholly unentitled to any part of the family property. On the contrary we are of opinion that although the adoption was invalid and inadequate of itself to create communion, that communion has been created by the course of conduct of the plaintiff and his family, coupled with the defendant's changed situation which has resulted. We would willingly, if possible, have made a decree putting an end to this long and discreditable litigation, but the mode in which this case has been conducted would, perhaps, on the present allegations make a partition more unfavorable to the plaintiff than it ought to be. We shall, therefore, simply dismiss the appeal, but without costs.

Appellate Jurisdiction.(a)

Regular Appeal No. 55 *of* 1873.

SANTAIYA.....*Appellant.*

RA'MARA'YA.....*Respondent.*

Plaintiff sued for confirmation of an award delivered by arbitrators appointed by agreement of parties to decide upon his claim to a share of ancestral property. Defendant objected that the award was illegal, principally upon the ground that he had cancelled his submission some time before the award was passed. The District Judge ordered the award to be filed, on the authority of *Pestonjee* v. *Maneckjee* (III, M.H. C. R., 183, affirmed 12, Moo., 112.) The defendant appealed. *Held* that no appeal lay.

1873. *July* 16. *R. A. No* 55 *of* 1873.

THIS was a Regular Appeal against the decision of A. C. Burnell, the Acting District Judge of Mangalore, in Original Suit No. 2 of 1872.

(a) Present: Holloway, Ag. C. J. and Kindersley, J.