APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

1894. *June* 20.

BASA'VA' AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* LINGANGAUDA' (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Adoption—Adoption of an only son—Validity of such adoption among Lingáyets—Custom of Lingáyets—Gift by adoptive father at the time of adoption—Gift binding on adopted son—Conditional adoption—Custom—Evidence of custom.

According to the custom of Lingáyets in the districts of Dhárwár and Bijápur the adoption of an only son is valid.

Where a Hindu at the time of taking a son in adoption made a gift of a portion of his ancestral property to his daughters, and the deed of gift as well as the adoption deed were executed on the same day, and they mutually referred to each other,

Held that the plaintiff's natural father having been a party to the deed of adoption which referred to the deed of gift executed along with it, the case fell under the category of conditional adoptions which are allowed by law.

Held, also, that the deed of gift in favour of defendants Nos. 2 and 3 was valid and binding on plaintiff.

Quœre—whether the *dwyamushyayana* form of adoption has become obsolete in the southern districts of the Presidency of Bombay.

APPEAL from the decision of Ráo Báhádur Bábáji Lakshman, First Class Subordinate Judge of Dhárwár, in Suit No. 69 of 1888.

The main question raised in this appeal was whether the adoption of an only son was valid according to the custom of Lingáyets in the Dhárwár and Bijápur districts.

The plaintiff sued for a declaration that he was the adopted son of one Shivangauda, deceased, and to recover possession of the moveable and immoveable property belonging to his adoptive father. He alleged that he was adopted by Shivangauda on 31st March, 1887; that an adoption deed was executed in his favour by Shivangauda at the time of the adoption; that Shivangauda died on 13th April, 1887; that after his death he (the plaintiff) lived with his adoptive mother till October, 1887, when disputes

* Appeal No. 18 of 1890.

and differences arose, in consequence of which she denied his adoption and turned him out of his house.

Defendant No. 1 (the widow of Shivangauda) pleaded (*inter alia*) that the plaintiff's adoption was invalid under the Hindu law, as he was the only son of his natural father.

Defendants Nos. 2 and 3 (the daughters of Shivangauda), besides disputing the validity of the plaintiff's adoption, contended that part of the property in dispute had been given to them by their father under a deed of gift dated 31st March, 1887.

Defendant No. 4 did not contest the plaintiff's claim.

Defendant No. 5 (the husband of defendant No. 2) raised the same defences as defendants Nos. 2 and 3.

The parties to this suit belonged to the Lingáyet community of Dhárwár and Bijápur. The plaintiff alleged that according to the custom of this caste the adoption of an only son was valid.

The Subordinate Judge held that the custom set up by the plaintiff was proved; that this custom was a valid custom; that the defendants were estopped from questioning the validity of the plaintiff's adoption; and that the plaintiff was entitled to all the moveable and immoveable property in dispute, except the portion given by the deed of gift to the defendants Nos. 2 and 3 by the deceased Shivangauda. Subject to this exception, the plaintiff's claim was decreed with costs.

Against this decree the defendants appealed to the High Court.

The Advocate General and *Scott* (*B. A. Bhagvat* with them) for the appellants:—In this Presidency it is settled law that the adoption of an only son is invalid—*Wáman Raghupati* v. *Krishnáji*[1]. The plaintiff relies on a special custom of the Lingáyets in the Southern Marátha Country, according to which he alleges that the adoption of an only son is valid. Such a custom he has failed to prove. Out of fifty-one instances adduced by him, eleven are cases of adoption in the *dwyamushyayana* form. In this group we include cases of adoption not only of a brother's son, but also of a brother's grandson, for the same reason and on the same principle that the Hindu law forbids an adoption so long

(1) I. L. R., 14 Bom., 249.

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as a son or a grandson exists—West and Bühler (3rd Ed.), 917 and 944. These cases must be excluded, because they are valid without any special custom. We must also exclude eight other cases which are sought to be proved by hearsay evidence. So, too, we have to exclude four cases which are only supported by affidavits. Then there are about fourteen cases of adoption which took place in castes other than *Lingáyets*. Excluding all these cases there remain not more than ten or fifteen cases of adoption of an only son among the Lingáyets of Dhárwár. These cases are of a comparatively recent date, and cannot establish an ancient and uniform custom such as can be recognized by a Court of Justice. The present case resembles the case of *Gopál Nathar Safray* v. *Hanmant Ganesh Safray*(1), where it is held that occasional breaches of general rules of caste or law do occur, but a few modern breaches of such a rule do not constitute an ancient and invariable custom. That such a custom does not exist among Lingáyets, appears clearly from the Full Bench case of 1879 referred to in *Wáman Raghupati* v. *Krishnaji*(2). Disputes occur when such adoptions take place among Lingáyets, as is shown in plaintiff's case, and in about thirty other cases cited by the defendants; so plaintiff goes to other castes and to Native States like Miraj and Sángli. The wider the circle, the more breaches of religious law will be found. The cases adduced by the plaintiff do not, therefore, establish a valid custom.

Ganashám Nilkanth (with *Jardine*) for respondent:—The present case comes from a district which lies on the borders of the Madras Presidency, where adoptions of an only son are held valid—*Chinna Gaundan* v. *Kumara Gaundan*(3); *Náráyansami* v. *Kuppasami*(4). In *Gawri* v. *Shivarám*(5) this Court has held that the adoption of a daughter's son, though invalid according to the strict Hindu law, is permissible according to the custom of Saraswat Bráhmins in the neighbouring district of Kánara. The custom set up by the plaintiff has been satisfactorily proved. The instances cited are mostly from the Southern Marátha Country—from Dhárwár and Bijápur districts. Most of the cases

(1) I. L. R., 6 Bom., 107.
(2) I. L. R., 14 Bom., 249, at p. 257.
(3) 1 M. H. C. R., 54.
(4) I. L. R., 11 Mad., 43.
(5) P. J. for 1891, p. 30.

are from watandár families. If such adoptions had not been sanctioned by custom, they would have been contested. Yet there has been no dispute or litigation in civil Courts. Such of the adoptions as came under the cognizance of the district authorities, of Government, or of the Native States were confirmed by them. The instances given range from the commencement of the British rule up to the present time; and they are sufficiently numerous to establish a valid custom, and not occasional breaches of the law—*Chain Sukh Rám* v. *Parbati*[1]; *Vayidinada* v. *Appu*[2]; *Viraragava* v. *Rámalinga*[3]. The existence of such a custom among the Lingáyets of the Southern Marátha Country is probable, because the law on this subject, though now authoritatively settled by the recent Full Bench decision of this Court in *Wáman Raghupati* v. *Krishnáji*[4], was differently interpreted by the other High Courts and even by this Court—*Hanuman Tiwari* v. *Chirai*[5]; *Beni Prasad* v. *Hardai Bibi*[6]; *Nárayanasami* v. *Kuppusami*[7]; Mandlik's Hindu Law, pp. 496—514; Strange's Hindu Law, Vol. I, p. 87. The prohibition against the adoption of an only son has reference to the performance of funeral rites, and *shradhas*, &c., which are not observed among Lingáyets. Like the Jains, the Lingáyets adopt for temporal purposes only. The religious grounds which prohibit the adoption of an only son do not, therefore, apply to the Lingayets.

As to the cases of *dwyamushyayana* adoption, which the appellant's counsel seeks to exclude, some of them are cases of adoptions of a brother's grandson, to which the *dwyamushyayana* theory does not apply. It is restricted to the case of a brother's son and cannot be extended further. The remaining cases are cases of brother's sons, in which the brothers were separated in interest at the date of the adoptions. But the *dwyamushyayana* adoption takes place only in the case of united brothers—*Wooma Dace* v. *Gokoolánand Dass*[8]. It requires a special agreement to the effect that the son adopted shall be son to both the adoptive and natural father—Vyavahár Mayuk, ch. IV,

(1) I. L. R., 14 All., 53.
(2) I. L. R., 9 Mad., 44.
(3) *Ibid.* 148.
(4) I. L. R., 14 Bom., 249.
(5) I. L. R., 2 All., 164.
(6) I. L. R., 14 All., 67.
(7) I. L. R., 11 Mad., 43.
(8) I. L. R., 3 Calc., 587 at p. 598.

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s. 5, pl. 31, 32; Stokes Hindu Law, pp, 65, 69; Sarkár's Tágore Law Lectures, pp. 23, 301; Mandlik's Mayuk, 58; West and Bühler (3rd Ed.), 1134, 1208, 898 and 1045. In the case of united brothers, the existence of such an agreement may be presumed. But where the brothers are separated, such a presumption would work injustice to the heirs of the natural father, such as the widow, the daughter, &c.

RÁNADE, J.:—In this case, the appellant No. 1 is the widow, appellants Nos. 2, 3 are the daughters, and appellant No. 4 is the son-in-law, of the deceased Shivangauda, and the respondent, (original plaintiff), claims to be the adopted son of Shivangauda. Shivangauda, it was alleged, had adopted the respondent according to the custom of the caste and the Hindu Shastrás on 31st March, 1887, and after executing a deed of adoption in respondent's favour, Shivangauda died on the 13th April, 1887. Respondent alleged that he first lived with his adoptive father, and since his death with the appellants till October, 1887, when differences arose, and appellants refused to recognize his adoption, and turned him out of the house. Thereupon he brought his suit to establish his alleged adoption by Shivangauda, and to recover possession of the moveable and immoveable property of the deceased Shivangauda.

The chief contentions of defendants Nos. 1, 2, 3, 5, were (1) that the deceased Shivangauda did not adopt the respondent, plaintiff, as his son according to the Hindu law, as plaintiff's natural mother was Shivangauda's daughter-in-law, and the plaintiff could not be validly adopted. (2) It was also urged that as plaintiff was the only son of his natural father, he could not be given or received in adoption according to Hindu law.

The defendant No. 1 also urged that all the moveable and immoveable property and cash in dispute belonged to defendant No. 1, excepting such property as was given by a deed of gift to defendants Nos. 2, 3, 5 by Shivangauda, and that no part of the property belonged to plaintiff. Defendant No. 4, the third daughter of Shivangauda, did not appear to defend the suit. Defendants Nos. 2, 3, 5 claimed to be owners of most of the moveable and some immoveable property in their own right, and

they also claimed a house and certain lands under a deed of gift. Defendant No. 5 (appellant No. 4) was the husband of defendant No. 2.

The lower Court held (1) that plaintiff was the only son of his natural father; (2) that he was adopted by Shivangauda; (3) that the adoption was not valid according to Hindu law; (4) but that it was valid by the custom of the Lingáyets in the southern districts of this Presidency, which permitted such adoptions; (5) that this custom was a valid custom; (6) that defendants were estopped from questioning the validity of plaintiff's adoption by reason of their conduct prior and subsequent to the date of adoption; (7) that the plaintiff was the owner of all the moveable and immoveable property, save that which was given by the deed of gift (Exhibit 113) to the defendants Nos. 2, 3 by the deceased Shivangauda. Plaintiff's claim was accordingly awarded, subject to the exception noticed above.

Defendants Nos. 1, 2, 3, 5, appealed from this decree, chiefly on the grounds (1), that the alleged custom of Lingáyets in the southern districts of this Presidency was not proved; (2) that the custom was not valid, and could not be enforced. (3) It was also urged that the decision of the lower Court was based on insufficient and inadmissible evidence, and was against the weight of that evidence. As regards the details of the property, it was contended (4), that some of the moveable property had been set apart by Shivangauda for defendant No. 1's maintenance, and some property was her *stridhan*, and plaintiff had no right to the same. (5) The same objection was urged in respect of the rest of the moveable property as belonging to defendants Nos. 2, 3, 5, in their own right. Respondent preferred cross-objections in respect of the portion of the claim disallowed by the lower Court, and he urged that the deed of gift was invalid and inoperative, as Shivangauda had no power to execute such a deed of gift of ancestral property in favour of defendants Nos. 2 and 3 to the prejudice of his adopted son.

This case came on before this Division Bench (Jardine and Telang, JJ.) on the 30th March, 1892, when the case was sent back under section 568 for receiving the evidence of the parties.

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in respect of certain genealogies filed on plaintiff's behalf, which had been accepted by the lower Court, without being formally proved, on the strength of a presumed admission of the same by the parties. This additional evidence has been since recorded, and the whole of the arguments have been heard afresh, and the case has been pending for judgment since March last.

As the evidence filed in the case was of a very voluminous character, both the parties have, with the permission of the Court, filed printed statements (A and B) carefully prepared on the basis of the documentary and oral evidence bearing on the main point in controversy, namely, the evidence regarding the alleged custom of the Lingáyets in the southern or Canarese districts of the Presidency of adopting an only son. The statements summarize the evidence affirming or negativing such custom. This was indeed the principal point argued before us by the learned counsel on either side. The Advocate General in his first argument admitted that this was the main point in controversy in regard to the adoption. The dispute was not in regard to the *factum* of adoption, but in regard to the legality of the alleged adoption of the plaintiff by Shivangauda. About the alleged custom, the Advocate General, and after him Mr. Scott, contended that no such custom, even if proved, would be valid, as it was opposed to Hindu law, that the custom set up in this case was sought to be proved by instances which had no bearing on the alleged practice of Lingáyets in the southern districts of the Presidency, and that the so-called instances were made up largely of exceptional cases of *dwyamushyayana* sons. It was admitted that the Hindu law allowed the adoption of an only son as a *dwyamushyayana*, but it was contended that the present case did not fall under this category. It may be of use to reproduce here a brief summary of the arguments urged on either side before examining the evidence in detail. On behalf of the appellants it was urged (1) that very few witnesses came from the immediate neighbourhood, and many instances occurred in Native States where the law was not settled; (2) that many of the instances were based on erroneous views of the Shástras, which were upheld in the earlier decisions; (3) that many instances were cases of *dwyamushyayana*,

being sons of uncles first removed, and not of second cousins' sons, as in this case; (4) that many of the witnesses were women, who adopted after their husbands' death; (5) that many of the instances were of very recent date, some having taken place after the suit, and others only a few years before the suit; (6) that the evidence in the case of many of them did not make it quite clear whether the adoption was of an only son; (7) that some instances were evidently based on vague hearsay evidence, and the facts were not personally known to the witnesses; (8) that many instances did not belong to the members of the Lingáyet caste, but belonged to Reddis, Hatgars, Dhangars, Bráhmins, and other castes. In other words, no ancient, invariable, and general custom was proved. (9) Moreover, evidence was given on defendants' behalf to prove that the adoption of an only son was looked upon as illegal by Pandits and others, and the High Courts' decisions were against such a custom. (10) It was also urged that there was no estoppel in this case, as the dispute was raised within six months after the alleged adoption.

On behalf of the plaintiff, it was urged (1) that the defendants were estopped by their conduct from raising the question of the validity of plaintiff's adoption; (2) that the deeds of gift and adoption were parts of the same transaction, and the defendants could not claim under the deed of gift, and repudiate the adoption. (3) As regards the evidence of custom, it was alleged, that there were very few cases of contemporaneous or subsequent adoptions; (4) that out of 51 cases in all, in nine or ten cases only was the adoption made of a nephew, and such adoptions of nephews cannot be held to be *dwyamushyayana* in all cases, in the absence of special agreement to inherit from both families; (5) that in none of the previous decisions where Lingáyet adoption disputes came up before the High Court, was there any plea of custom set up; (6) that most of the witnesses were from the neighbourhood; (7) that even if women adopted in some cases, they did so in the presence of many persons, and the estates affected were watan properties, where litigation might have been expected, if the validity of the custom was not generally recognized; (8) that those who gave hearsay evidence had also given evidence of similar adoptions within their own knowledge, and many cases

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were presumably very old cases; (9) that even in cases where the adoptions were previously disputed, the dispute was raised on other grounds, and not on the ground alleged by defendants in this case; (10) that the Bráhmin instances were given to show that, if custom prevailed over the Shástras in the Bráhmin caste, with its devotion to ceremonials and *shraddha* offerings, it should *ipso facto* be less open to question among the Lingáyets, who, like the Jains, are heretics, and observed no ceremonies, and performed no *shraddhas*; (11) that defendants' witnesses were either unreliable, or gave vague and hearsay opinion evidence; and (12) that no instances were cited by defendants' witnesses where the adoption of an only son had been disallowed.

This epitomé of the arguments on either side brings out clearly the several bye-issues which have to be considered in properly appreciating the evidence of custom adduced in this case. These bye-issues resolve themselves into:—(1) Whether the evidence adduced comes from the part of the country under consideration, or from outside those limits. (2) Whether the instances noted are of recent or ancient date? (3) Whether the evidence relates to the Lingáyet caste, or to other castes, whose practice in such matters can have no bearing on the point in dispute? (4) Whether the evidence is of a vague and hearsay character given by incompetent witnesses, or whether it is the result chiefly of personal knowledge? (5) Whether many of the cases cited were really instances of the alleged custom of the adoptions of an only son, or were adoptions in the *dwyamushyayana* form? Defendants' contention is that if proper exceptions be made under all these heads, out of the fifty-one instances adduced on plaintiff's behalf to prove the alleged custom, fifteen instances would go out as belonging to other than Lingáyet castes (Bráhmins, Maráthás, Kostis, Reddis, Dhangars, Hatgars, &c.). The castes in five more are unknown. Ten cases fell under the category of the adoption of brothers' sons, permitted by Hindu law. Three more related to adoptions subsequent in date to the one in dispute. Eighteen were objected to on the ground of being supported by hearsay evidence only. Several instances came from Native States, where the law of adoption might be different, and from Poona and Sátára districts, where the general law

obtains, and has been so applied by the High Court. In three or four instances it was not proved that the adopted child was the only son of his natural father. These deductions leave very few, if any, instances, which at all support the alleged custom. Plaintiff, on the other hand, contended that these objections did not apply, at least in a vast majority of the instances deposed to on his behalf.

In regard to the first bye-issue noted above, a glance at the printed statements filed by the parties shows clearly that most of the instances came from Dhárwár and Bijápur districts. Ten instances came from Bijápur (one from Bágevádi, three from Bágalkot, and six from Bádámi tálukas in that district), and thirty-two instances came from the Dhárwár District, being spread over all the tálukas; one from Nargund; eleven from Navalgund; six from Bankápur; three from Kalghatgi; four from Hubli; three from Dhárwár; and one each from Gadag, Hangal, Karajgi, and Ron. There are three instances from Lakshmeshwar, and one from Shirhatti, which are tálukas of the Patwardhan Chiefs of Miraj and Sángli, surrounded on all sides by the Dhárwár Districts. To prove the alleged custom, these last instances appear to us, for reasons given below, to be perfectly legitimate. There are only five instances from Poona and Sátára districts and the Kolhápur State, which must be excluded from the category of the southern districts of the Presidency.

As regards the second bye-issue as to the period of time covered by these instances, it may be noted that the period covered is nearly seventy-five years, from 1814 to 1889. One instance is of 1814-16, another of 1825, a third of 1829, one each of 1837, 1847, 1849, 1857, 1859 and 1861. The rest, about thirty-eight, occurred between 1867 and 1889, and only four are contemporaneous, or of subsequent years. It could not be reasonably expected that, either in respect of time or place, plaintiff should have produced all very old instances, or instances from his own particular táluka Ron of Dhárwár District. The range of instances is both in respect of time and place wide, and evenly distributed.

As regards the castes, there are 29 cases of Lingáyets, 4 Reddis, 7 Bráhmins, 4 Shepherds or Dhangars, 1 Hatgar, 1 Kunbiwani,

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1 Marátha, and 4 of unknown castes. The instances of Bráhmins, and of the Marátha, Kunbiwani and unknown castes, may at once be excluded from consideration, as proof of any custom among them cannot be of much use in the present case. This exclusion affects thirteen instances, Nos. 28, 30 to 34, 36, 43, and 47 to 51. The last five cases are excluded also on account of the locality they come from, being outside the local sphere of the custom now pleaded. Four of these cases are further open to objection on the ground that they are based on affidavits filed in another case in 1879, which affidavits were not then accepted, and are certainly inadmissible in this case. This exclusion leaves about thirty-eight instances, which we must now consider in detail. We do not think that the few instances of recent adoptions should be excluded from consideration solely on that account, as it cannot be assumed that parties to them resorted to such a practice with a view to favour or disfavour the litigants in this case. These instances, being uncontested, are useful as expressions of the general legal conscience of the country on this point. The exclusion or inclusion of adoptions by Reddis, Dhangars and Hatgars, (instances 1, 2, 8, 11, 18, 25, 41, 42, 44), cannot be summarily made. It is a question of fact which will have to be considered later on on the evidence given, since the Reddis described themselves, and are described in the Gazetteers, as Lingáyets by religion, and the Shepherds are in a similar condition, being alleged to be either half Lingáyets, or affiliated Lingáyets in that part of the country. We shall, however, for the present confine our attention to purely Lingáyet cases, and proceed to a detailed consideration of the evidence to see how far they are satisfactorily proved or disproved. These are 29 in number (3, 4, 5, 6, 7, 9, 10, 12, 13, 14, 15, 16, 17, 19, 20—24, 26, 27, 29, 35, 37—40, 45, 46).

Instance No. 3.—The adoption in this case is alleged to have taken place in Bágalkot in Bijápur District in 1884. Plaintiff's witnesses, (Exhibits 75, 159,) were present at the adoption. The only objection urged on defendants' behalf to this evidence was that one of the witnesses was a woman living in Bágevádi, while the adoption took place in Bágalkot, and that the parties to the adoption were not themselves examined. We do not think that

these are valid objections. The defendants might have examined the parties themselves, if they suspected the truthfulness of plaintiff's witnesses. As regards the objection that witness, Exhibit 75, is a woman, she is over fifty-five years old and personally witnessed the adoption. This instance may, therefore, be held to be sufficiently proved. It is not alleged by defendants that this is a case of the adoption of a brother's son.

Instance No. 4 is not entitled to similar credit. It is only supported by the evidence of witness, (Exhibit 159,) who mentioned four instances in all, but whose knowledge in this case appears to be based on very vague hearsay. He cannot identify the parties to the adoption, and cannot say if the person adopted was an only son. We, therefore, hold that the evidence in this case is not of a very satisfactory character.

Instance No. 5 comes from Navalgund, Dhárwár District. It is proved by the evidence of witnesses, Exhibits 160, 232, who were present at the time, and by the far more valuable evidence of the natural mother, a woman seventy years old, and by the documentary evidence, Exhibits 324, 325, the first being a letter of assent passed by the bháubands, and the last an order of the Nargund State. The adoption occurred in 1857 before Nargund was annexed. Defendants' only objection to the oral evidence is that witness, Exhibit 160, was too young at the time to remember the event. No such objection applies to the other witness, Exhibit 232, and to the natural mother of the person adopted. As regards the documents, it is urged that they do not mention the fact that the adoptee was an only son. There was no occasion to make any such mention in 1857, and any mention of the fact would have been suspicious. The positive evidence of the natural mother removes all doubts. It is urged that this instance came from Nargund when it was a Native State, and the law there might have been different. This objection is not sustainable, because till the High Court first raised the point in 1868, the general understanding everywhere was that, though blameable, the adoption of an only son, once effected, was valid. The Advocate General himself admitted in his argument that the older decisions were to this effect. In such matters, true customary law is likely to be better preserved in Native States than in British territory. This

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instance, supported as it is by oral and documentary evidence, is certainly entitled to great credit as evidence of custom. This is also not a case of the adoption of a brother's son.

Instance No. 6 comes from Navalgund in the Dhárwar District, and the adoption is alleged to have taken place in 1829. It is proved by the evidence of witness, Exhibit 160, who is the son of the alleged adoptee, and by the evidence of witness, Exhibit 74, who saw the adoption. This instance, however, does not appear to be an illustration of the adoption of an only son, as the document, Exhibit 328, produced on plaintiff's behalf, shows that Maregauda had other sons at the time. Witness, Exhibit 74, is not sufficiently old herself to speak from personal knowledge about events that took place sixty years ago. We must, therefore, exclude this instance as being of a doubtful character.

Instance No. 7 comes from Navalgund, Dhárwár District, and the adoption took place in 1877-79. It is proved by the evidence of witnesses, Exhibits 160 and 74, who were present, and witness, Exhibit 170, who is himself the adopted son. The defendants did not raise any doubts about the truthfulness of this evidence, except by saying that it is a case of the adoption of a brother's son. It is not quite clear from the evidence whether the brothers, Yelláppa and Goundáppa, were separate or united. It was for the defendants to prove that the adopted son succeeded to the property of both his natural and adoptive fathers. Such evidence ought to have been given to warrant the exclusion of this case from consideration of the evidence about custom. As it is, we must admit this instance provisionally, as an instance of the adoption of a brother's son by his uncle.

Instance No. 9 comes from Navalgund, Dhárwár District, and the adoption took place in 1885. It is proved by the evidence of witness, Exhibit 166, who is the adoptive father, and Exhibit 245, who is the natural father of the adopted son. Witness, Exhibit 161, was also present at the adoption. The adoption in this case was that of a brother's son, but after, and not before separation, as is erroneously stated in the printed statement filed on defendants' behalf. No other objection is urged by defendants, save the one stated above to the inclusion of this instance.

Instance No. 10 comes from Badámi Táluká, Bijápur District, and the adoption took place in 1867. It is proved by the evidence of witnesses 161, 73, who were present at the time of the adoption, and witness 232, who is the natural father, and witness, Exhibit 168. Defendants take exception to the evidence of witness, Exhibit 73, because she lives in Bágalkot Táluka, while the adoption took place in Badámi, and to the evidence of witness 161, because it is hearsay. Leaving aside these witnesses, there is nothing to shake the credit of witnesses 168 and 232, confirmed as it is by the official extract, Exhibit 352, relating to the mutation of names. This is not a case of the adoption of a brother's son, as the adoptive mother was paternal aunt of the natural father.

Instance No. 12 comes from Bankápur, Dhárwár District, and the adoption took place in 1886. It is proved by the evidence of the natural father, Exhibit 165, and witness 169, who saw the adoption. The adoptive mother was the aunt of the father of the boy given in adoption. This was, therefore, not a case of the adoption of a brother's son. Defendants urged no objection to this evidence, except that witness, Exhibit 169, said that his knowledge was of a hearsay kind, and witness, Exhibit 165, stated that the watan in the adoptive family was in dispute. These circumstances do not detract much from the value of the evidence of witness, Exhibit 165. It may, therefore, be accepted as a good instance of the alleged custom.

Instance No. 13 comes from Lakshmeshwar, Miraj territory, and the adoption took place in 1874. It is proved by the evidence of witnesses 165, 239, who stated that some 400 persons were present at the time. The only objection taken by defendants to this instance was that it took place in the territory of a Native State, which objection has not much force for reasons stated above. This is also not a case of the adoption of a brother's son, as the adoptive father is a distant bhauband of the natural father. The defendants were quite free to examine the parties to the adoption if they thought the evidence of witnesses, Exhibits 165, 239, defective or unreliable. This case must, therefore, be accepted as a very clear instance of the alleged custom.

Instance No. 14 also comes from Lakshmeshwar, and the adoption took place in 1884. It is proved by the oral evidence of the

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adopting widow, Exhibit 70, and of two witnesses, Exhibits 165 and 239. The adopting widow produced the deed of adoption, which shows that the adoption was not that of a brother's son. The defendants' objections to this instance are, that it comes from a Native State, that the natural father was not examined, and, lastly, that the deed makes no mention of the fact that the adopted child was an only son. None of these objections appear to us to be at all valid. The omission in the deed to notice the fact, that the boy adopted was an only son, is itself suggestive that no doubts were felt on that point, and the defect is supplied by the oral evidence of witness, Exhibit 70.

Instance No. 15 comes from Badámi in the Bijápur District, and the adoption took place in 1877—79. It is proved by the evidence of witness 167. Defendants' only objection to this instance is that the names of the parties given by the witness are not indicative of their being Lingáyets. The witness, however, swore positively that the adoptive mother was an adherent of the Virkalmath of Badámi, and he was not cross-examined. It was certainly open to the defendants to show by positive evidence that the parties were not Lingáyets, and they could have adduced rebutting evidence if they desired to discredit the witness, Exhibit 167.

Instance No. 16 also comes from Badámi, and the adoption took place in 1885. It was proved by the evidence of witness No. 168, who, however, stated that his knowledge about the adopted child being the only son of his natural father, was derived from what the adopted son told him. This instance cannot, therefore, be accepted as satisfactorily proved for the purposes of this suit, and the defendants' objection is well sustained so far as this case is concerned.

Instance No. 17 comes from Bankápur, Dhárwár District, and the adoption took place in 1867. It is proved by the evidence of witness No. 168, who was himself the adopted son. He stated that he had learnt the fact of his being an only son from his adoptive mother. Defendants object that the natural mother ought to have been examined in this case. As a matter of pedigree, the hearsay evidence in this case is not, in my opinion, open to the same objection as in instance No. 16.

Instance No. 19 comes from Bankápur, Dhárwár District, and the adoption took place in 1873. It is proved by the evidence of the natural father of the adopted son, Exhibit 230, as also by the deed of adoption. This is not a case of the adoption of a brother's son, as the adoptive father was father-in-law of the natural father of the boy given in adoption. Defendants' only objection to this instance is that it was a family arrangement. That circumstance, however, does not detract from its value as evidence in support of the alleged custom. As an instance of the adoption of a daughter's son, it rather strengthens plaintiff's contention that the Lingáyet caste in these parts does not observe the strict Bráhminical doctrine which prohibits the adoption of daughters' sons. This liberty in regard to daughters' sons has been recognized in respect of this caste by judicial decisions, which have treated Lingáyets as being Shudras, who might adopt daughters' and sisters' sons.

Instance No. 20 comes from Kalghatgi, Dhárwár District, and the adoption took place in 1880. It is proved by the evidence of the person adopted, who also produced the deed of adoption, Exhibit 238. Like the last case, this is also not an instance of the adoption of a brother's son, but of a daughter's son. Defendants' only objection to this instance is that this was also a family arrangement, which circumstance, however, does not detract from the value of the precedent. Defendants further contend that Exhibit 238 shows that the son given in adoption was not an only son. A careful perusal of the deed, however, satisfies us that this contention is not correct. The deed only recites that the husband of the adoptive mother had directed her that she should adopt one of her daughter's sons. It does not necessarily follow from this that the daughter had more than one son at the time when the adoption took place. Witness, Exhibit 233, states positively that this was a case of an only son. This is an instance of adoption in a watandár family; and is, therefore, of more than ordinary importance.

Instance No. 21 comes from Hubli, Dhárwár District, and the adoption took place in 1881. It was sought to be proved by the evidence of witness, Exhibit 233, who was present at the time. His information about the adopted child being an only son was,

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however, admittedly derived from the adoptive father, and it may, therefore, be regarded as hearsay evidence of no great probative value.

Instance No. 22 comes from Kalghatgi, Dhárwár District, and the adoption took place in 1875. It is very satisfactorily proved by the evidence of the adopted son, Exhibit 244, and the adoption deed produced by him, Exhibit 331, as also by the evidence of witnesses, Exhibits 233 and 70, who were present at the time. This is again not a case of the adoption of a brother's son, and the property is watan property of considerable value. Defendants' only objection is that this was an instance of the succession of a foster child, which theory is rebutted by the deed itself, and the oral evidence of the witnesses.

Instance No. 23 comes from Dhárwár itself, and belongs to the respectable family of Chanbasápa, late Deputy Educational Inspector, Dhárwár. The evidence of the only witness examined is, however, admittedly hearsay, and the defendant very properly objected to this instance being accepted as evidence of the alleged custom. This instance must, therefore, be excluded from consideration.

Instance No. 24 comes also from Dhárwár, and the adoption took place so far back as 1837. It is very satisfactorily proved, both by documentary and oral evidence. There is, first, the will of the natural father, Exhibit 242, and a petition of the adoptive mother, Exhibit 329. Then there is a statement of the son of the adopted person made in Exhibit 243, and finally an order of the Assistant Collector, Exhibit 330, confirming the adoption. The son of the adopted person was examined as witness, Exhibit 241. The property is watan and inám property of considerable value, and nazrána or succession duty had to be paid to Government. It is further stated in the printed statement filed on plaintiff's behalf, and apparently not controverted by the defendants, that the matter came before the High Court so far back as 1876, and the adoption was confirmed, no contention having been then raised on the point of the adopted person being an only son, though the fact was patent on the face of the will itself. Defendants' objection that the evidence of witness, Exhibit 241,

is hearsay, is not entitled to consideration. Defendants stated further that the will and other documents did not recite the fact that the adopted child was an only son. This is certainly incorrect in so far as the will is concerned. This instance is perhaps the strongest case in support of plaintiff's allegation about the custom in dispute. The adoption in this case was not that of a brother's son, but of a sister's son, which, though disallowed among Bráhmins, is permissible in the case of the Shudras and Lingáyets.

Instance No. 26 comes from Navalgund, Dhárwár District, and the adoption took place in 1859. It is proved by the evidence of the adopted person himself, Exhibit 246. This is an instance of the daughter's son being made an heir by adoption. Defendants' only objection to it is that there is no documentary evidence, which objection by itself is not of much moment.

Instance No. 27 comes from Navalgund, Dharwár District, and the adoption took place in 1887. It is proved by the evidence of witness, Exhibit 246, who was present at the time. Defendants' only objection to it is that the parties to the adoption were not examined. This objection is not entitled to any weight, as it was open to the defendants to examine the parties, if there was reason to suspect the truth of the statement made by the witness. This adoption appears to be that of a separated brother's son.

Instance No. 28 comes from Gadag, Dhárwár District, and the adoption took place in 1880. It was sought to be proved by the evidence of witness, Exhibit 70, and by the Assistant Collector's order, Exhibit 351. Defendants' objection that witness, Exhibit 70, is only thirty-four years old, does not disqualify her from being present at the ceremony of adoption, which took place in 1880. It is mentioned in defendants' statement that this witness is a cook. She is not a cook by profession. In answer to the question as to what her profession was, she stated that she performed household duties, cooking, &c., which means that she had no profession. We do not think that either of these objections are valid so as to discredit the evidence of this witness, confirmed as it is by Exhibit 351. This is also not a case of the adoption of a brother's son.

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Instance No. 29 comes from Shirhatti, Sángli territory, and the adoption took place in 1887. It is proved by the evidence of the adopting widow, Exhibit 71. The adoptive and natural fathers were separated in interest, and their relationship was described in Cánarese by the word "*bháva.*" Plaintiff contends that this word means both full brother or cousin, or sister's husband, while defendants contend that it means only full brother. Accepting defendants' contention, this is a case of the adoption of a separated brother's son. But defendants failed to prove that the adopted son inherited the property of both families.

Instance No. 35 comes from Bankápur, Dharwár District, and the adoption took place in 1880. There is a conflict of evidence on the point of this adoption. Plaintiff gave evidence to show that the natural father had no other son at the time he gave his only son in adoption, while defendants' witnesses seek to make out that the natural father had other sons at the time. Plaintiff's witnesses are Exhibits 451, 452, 453, 454, and the genealogy, Exhibit 340, was filed on plaintiff's behalf. Plaintiff's witnesses prove the genealogy, but the witnesses on defendants' behalf appear to be more entitled to weight, seeing that one of them is the natural father of the boy given in adoption, Exhibit 484, and the other is the adopted son himself, while plaintiff's witnesses are comparative strangers, though distantly related to the person adopted. Defendants' witnesses are, moreover, borne out by the extracts, Exhibits 492 and 512. We must, therefore, exclude this instance from consideration.

Instance No. 37 comes from Hangal, Dhárwár District, and the adoption took place in 1868. This is also, like instance No. 35, the subject of conflicting testimony. Plaintiff's oral and written evidence is intended to show that the person adopted was the only son of Iráppa, who was cousin of the adoptive father; while defendants' evidence goes to show that he was one of the sons of Gangáppa, brother of the adoptive father. The genealogy, Exhibit 342, filed on plaintiff's behalf is contradicted by the genealogy, (Exhibit 472,) filed on defendants' behalf. Plaintiff's genealogy is supported by the evidence of the pátil, Exhibits 472, 477, while defendants' genealogy is supported by the kulkarni, (Exhibit 482,) who, however, admits that he prepared Exhibit 342,

but pleads that the statement about Iráppa's son was made by mistake. The other kulkarni, witness, Exhibit 483, appeared to have prepared the genealogy, Exhibit 472, but the occasion for preparing it, as mentioned by him, seems not to be supported by the genealogy itself. The official extracts 475, 484, 533, 534, however, appear to support defendants' contention. On the whole, as the burden of proof lies on plaintiff, and his evidence does not remove all doubts on the point at issue, we must exclude this instance also from consideration.

Instance No. 38 comes from Karajgi, Dhárwár District, and the adoption took place before British rule commenced in those parts. This is also, like Nos. 35, 37, a case of conflicting genealogies. Plaintiff's genealogy is Exhibit 343, and was first filed in 1878. Defendants' genealogy is a copy of a copy filed in 1866. Neither genealogy is properly proved, and both appear to be made up from some instructions given by an old lady. This instance must, therefore, also be excluded.

Instance No. 39 cannot also be included. It is a case of disputed genealogies and conflicting evidence, and as the adoption is said to have taken place sixty years ago, the oral evidence of the witnesses is not of much value either way.

Instance No. 40 comes from Hubli, in Dhárwár District, and the adoption is alleged to have taken place about 1866, according to plaintiff, and about 1844—1852, according to the defendants. It is also a case of disputed genealogies, like the three preceding instances. Plaintiff's genealogy is Exhibit 345, and was sought to be proved by witnesses, Exhibits 446, 447, and the official extract, 539. Defendants' genealogy, (Exhibit 504,) was produced by witness, Exhibit 496, and proved by the evidence of witnesses, Exhibits 497, 498. These last witnesses push back the date of the alleged adoption, and they urge also that the adopted son had a brother living at the time. Extracts 504 and 525 support defendants' story. On the whole, the evidence is not free from doubt, and as the burden of proof is on plaintiff, and defendants' witnesses appear to be relatives of the adopting family, we must exclude this case also from consideration.

Instance No. 45 comes from Navalgund, Dhárwár District,

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and the adoption is alleged to have taken place before 1875, about 1864. It is also a case in regard to which both parties have given evidence, but plaintiff's genealogy, Exhibit 350, is proved by the evidence of witness, Exhibit 435, who professes to have seen the adoption, and witness, Exhibit 436, who has attested the pedigree, and who shares the estate. Plaintiff's evidence is confirmed by the order of the District Deputy Collector, Exhibit 537, and the deposition, Exhibit 437, of witness, Exhibit 436, given so far back as 1876. Against this evidence, defendant examined only one witness, Exhibit 576, who is not a member of the family, and whose evidence to the effect that the adopted son had a brother at the time is too vague and uncorroborated to be entitled to credit. Plaintiff's evidence is more reliable, and this case must be regarded as affording good evidence in support of the alleged custom.

Instance No. 46 comes from Ron, Dhárwár District, and the adoption is alleged to have taken place about 1834. It is also a case of conflicting evidence. Plaintiff's witnesses 428, 478 are both sons of the person given in adoption, and prove the genealogy, Exhibit 377. Witness, Exhibit 434, is pátil, and supports their testimony. On defendants' behalf, a third son was examined, Exhibit 501, who denied the adoption, but was unable to explain the statement made in the genealogy. Defendants' witness, Exhibit 502, is a stranger, and gave hearsay evidence, and the extracts 493, 523, 524, are not decisive either way. The balance of evidence in this case is decidedly in plaintiff's favour. This is a case of the adoption of a nephew by a separated uncle.

This completes the analysis of the twenty-nine Lingáyet instances. As the result of such analysis, nineteen instances appear to us to be satisfactorily proved, while ten instances have to be rejected, chiefly on the ground of doubtful or conflicting evidence or the hearsay character of the testimony. Of these nineteen instances in three cases the adoption was of daughters' and sisters' sons, and in five of separated brothers' sons. Out of the ten rejected cases, in only two instances the evidence suggests any doubt as to whether the adoption was that of an only son. These nineteen cases are those numbered in plaintiff's statement

as Nos. 3, 5, 7, 9, 10, 12, 13, 14, 15, 17, 19, 20, 22, 24, 26, 27, 29, 45, 46, and the excluded cases are 4, 6, 16, 21, 23, 35, 37, 38, 39, 40. In most of these latter cases, as stated above, the failure of the plaintiff was due to the rejection of secondary or hearsay evidence. It is not easy for a private party to hunt up cases of adoption all over the country, and to secure the attendance of the most competent witnesses when the events took place many years ago, and the parties thereto were in many cases dead. It may be also noted that in the cases of disputed genealogies, some witnesses, summoned at first on plaintiff's behalf, apparently went over to defendants' side. Witnesses Nos. 501, 514, 408, 457, 459, 485, 482 fall under this category. Bearing in mind that adoptions are not very common, and the adoptions of only sons are still rarer, it is by no means a small task to establish by satisfactory evidence nineteen Lingáyet adoptions of only sons, some of them in watandár and inámdar families, with Government sanction. The cases, moreover, are spread over a large extent of country including Bágalkot, Navalgund, Badámi, Bankápur, Lakshmeshwar, Kalghatgi, Dhárwár, Gadag, Shirhatti, and Ron tálukas, and cover a long period of seventy years and more. Plaintiff appears to us to have thus fully discharged the *onus* of proof thrown on him. His failure to establish his allegation by equally satisfactory evidence in the remaining ten Lingáyet cases is not a fact which detracts from the general credibility of plaintiff's evidence about the prevalence of the alleged custom among Lingáyets in these districts as shown in the nineteen proved instances.

Turning next to the Reddis, they described themselves (Exhibits 479, 159, 161, 73, 78,) to be Lingáyets by religion. The Dhárwár Gazetteer also states that most Reddis wear *ling*, and are reckoned as Lingáyets. They call Jangams as priests, though a few call Bráhmins to officiate on marriage occasions (page 141). In Bijápur out of six divisions of Reddis, five profess the Lingáyet faith, and are married by Jangam priests (page 145). There are only four Reddi instances in plaintiff's statement which require consideration.

Instance No. 1 comes from Bágevádi in Bijápur District, and

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the adoption took place in 1887. It is satisfactorily proved by the evidence of the natural father and adoptive mother, Exhibits 159, 75, witness, Exhibit 73, and the Collector's sanction, Exhibit 326. Defendants object to the evidence of witness, Exhibit 73, on the ground that it is hearsay, but this circumstance cannot detract from the value of the evidence of witness 150. The omission in Exhibit 326 of all mention of the fact of the adopted boy being an only son, is of no great consequence, and it rather strengthens plaintiff's case. Defendants' reference to Exhibit 388 is not in point, for that order was passed in the case of a Marátha family, and it is not at all likely that, if the Collector had thought the same objection would apply to Lingáyets, he would have given his sanction in this case. This does not appear to have been a case of the adoption of a brother's son.

Instance No. 2 comes from Nargund, when it was a Native State, and the adoption took place in 1814—1816. It is proved by the evidence of witness Exhibit 159, and the order of the Nargund Darbár, Exhibit 375, as also by the genealogies, Exhibits 369, 376. The defendants' objection that this instance comes from a Native State has been more than once noticed before. Witness, Exhibit 159, is not an entire stranger, but bases his information on the papers produced by him. This is also not a case of the adoption of a nephew by an uncle. The order, Exhibit 375, speaks of *purvaja*, which word would not have been used if the relationship was very close.

Instance No. 8 comes from Bágalkot, Bijápur District, and the adoption took place in 1888. It is proved by the evidence of the adoptive mother and natural father, Exhibits 161, 73, as also by the evidence of witness, Exhibit 160, and the document, Exhibit 327. The only objection urged by defendants to this instance rests on the ground that it is a brother's son's adoption, which it no doubt is, though the brothers appear to be separated.

The last Reddi instance is No. 25, which comes from Navalgund, Dhárwár District, and the adoption took place about 1873. This case is not satisfactorily proved, as witness, Exhibit 245, only speaks from hearsay.

There are only four cases of Shepherds or Dhangars. The District Gazetteers (Dhárwár, 180-181), (Bijápur 122-123), do not throw any clear light on the religious condition of Dhangars. Some sub-divisions among the shepherds are plainly Lingáyets by religion, and all are more under Lingáyet than Bráhminical influence. Kurubar or Dhangar witnesses, Exhibits 510, 438, stated that Kurubars, Shepherds or Dhangars followed the tenets of the Lingáyet faith. The Kurubar gurus are admittedly Lingáyets in religion. The Kurubars bury their dead like Lingáyets. The test of flesh-eating does not apply strictly to half Lingáyets or affiliated Lingáyets. The tests of burying the dead by Lingáyet rites, and inviting Jangam Gurus on marriage occasions, are more decisive in such matters. On the whole, I am inclined to admit these Kurubar or Dhangar instances.

Instance No. 18 comes from Lakshmeshwar, Miraj State, and the adoption took place so far back as 1849. The adoption is proved by the evidence of the adopted son, Exhibit 171. Defendants object that as he was only eight years old at the time, his evidence is of no great value. As, however, defendants did not give any counter evidence to discredit him, I see no reason to disbelieve his positive statement, based as it is on a knowledge of his own family. This is a case of a brother's son adopted by the uncle.

Instance No. 41 comes from Hángal, Dhárwár District, and the adoption took place in 1863-64. There is in this case conflicting evidence. On plaintiff's side there is a genealogy, No. 446, proved by witness 510, and on the other hand the adoptee and his uncle, Exhibits 513, 514, stated that there were two other sons. We must believe these last witnesses, and exclude this case from consideration.

Instance No. 42 comes from Navalgund, Dhárwár District, and the adoption took place in 1876. This is also a case of disputed genealogies. The genealogy filed on plaintiff's behalf, Exhibit 347, is supported by the evidence of the adopted person himself, Exhibit 442, and his previous deposition, Exhibit 443, given in 1878, and by the evidence of the pátil witness, Exhibit 444, and the Collector's order, 536. The evidence, on the other hand, of

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defendants' witness, Exhibit 537, is hearsay, and the silence maintained on this point in the reports 531, 532, 533 is not very significant, when defendants' own witness, Exhibit 517, admits that the person alleged to be adopted was entrusted to the care of the alleged adoptive father. We feel satisfied that this instance is properly proved, and that it is an instance of the adoption of a brother's son, who had inherited both his natural and adoptive father's property.

Instance No. 44 comes from Navalgund, Dhárwár District, and the adoption took place in 1853-54. It is also a case of conflicting evidence. The adopted son, Exhibit 438, and witness, Exhibit 440, proved the genealogy, Exhibit 349, and the deposition, Exhibit 439, given so far back as 1878, and the kulkarni's deposition, Exhibit 441, and the Collector's order, Exhibit 538, passed in 1878, prove the fact of adoption. Against this evidence, defendants examined witness, Exhibit 515, and filed kulkarni's statements 527, 528 given in 1871, which either ignore the adoption, or speak of it as that of a foster child. The later orders of 1878 are, however, decisive on the point, and prove the adoption, which is of a nephew by his uncle.

The Hatgar witnesses, Exhibits 162, 167, do not claim to be Lingáyets, and state that only some among them wear *ling*. The Gazetteers of Bijápur and Dhárwár also confirm this statement. Hatgars have no affinity towards Lingáyets, and their instance No. 11 must, therefore, be excluded from consideration like that of the Bráhmins and Maráthas.

We have thus passed in review the whole of the evidence in regard to the twenty-nine Lingáyet cases, four Reddi Lingáyet and four Shepherd (Dhangar) cases, in all thirty-seven instances, and excluded from consideration fourteen cases in all [1] the seven Bráhmin cases, one Hatgar, one unknown caste, and the five instances coming from parts of the country other than the southern districts of the Presidency, to which alone these inquiries have been confined. As the result of these inquiries we find that the custom of giving an only son in adoption has been satisfactorily proved in nineteen Lingáyet instances [2], three

[1] 11, 28, 30—34, 36, 43, 47—51.

[2] 3, 5, 7, 9, 10, 12—15, 17, 19, 20, 22, 24, 26, 27, 29, 45, 46.

Reddi[1], and three Dhangar cases[2], making in all twenty-five instances in favour of the alleged custom, while it has not been satisfactorily established in ten Lingáyet, one Reddi, and one Shepherd case, making in all twelve cases[3]. Plaintiff's failure to prove his allegation in these twelve cases is not a matter of much surprise, for that failure is chiefly due to the length of time that has elapsed since many of these adoptions occurred, and to the general difficulty of proving any positive allegation under the conditions imposed by law about the admission of relevant evidence, and the exclusion of secondary evidence. In only two or three out of these twelve cases, the failure was due to the fact that the evidence negatived the allegation of an only son. This sort of suspicion does not rest on the other cases, in which the failure was due to the length of time that had elapsed, and the absence of direct evidence. This disposes of the bye-issue about the hearsay and the doubtful character of the evidence in support of the alleged custom of the adoption of an only son. This objection applies only to twelve out of thirty-seven cases in all.

The next point to be considered relates to the inquiry how far these twenty-five cases of the proved adoption of an only son can be explained on the ground that the adoption was by an uncle of his nephew in the *dwyamushyayana* form, which is permitted by the Shástras, and which cases, therefore, cannot be held to prove the alleged custom. Defendants' counsel himself suggested in all only eleven cases of this kind out of the entire list, *viz.*, Nos. 6, 9, 25, 35, 46 being admitted by plaintiff's vakil to be adoptions of nephews by uncles, and 2, 7, 10, 27, 37, 38 being named by defendants' counsel, but not admitted by plaintiff's pleader. Out of the eleven cases named by defendants' counsel, we have found it necessary to exclude instances Nos. 6, 25, 35, 37 as being cases where the adoption was not satisfactorily proved. This deduction leaves only seven cases, 2, 7, 9, 10, 27, 38, 46, as the cases that we have still to consider in this connection. Out of these seven cases, in only one case, No. 46, has plaintiff's pleader admitted that the adopted son has inherited, or has a right to inherit, both his natural father's and adoptive father's property. Of the

(1) 1, 2, 8. (2) 18, 44, 42.

(3) 4, 6, 16, 21, 23, 25, 35, 37, 38, 39, 40, 41.

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other six cases, Nos. 2, 10, 38 are clearly not cases of nephews adopted by uncles. Nos. 7, 9, 29, as also Nos. 27, 8, 18, 42, 43, as shown above, are cases of adoption by uncles, but these adoptions were obviously made by separated uncles. It was open to the defendants to prove that the son had inherited in both families in these cases. In the absence of such evidence, it is not strictly necessary to discuss the question raised by defendants' counsel, as it does not affect seventeen out of the twenty-five cases we have held as being satisfactorily proved.

We may, however, observe, in passing, that the defendants' counsel sought to give an unwarranted enlargement to the doctrine of *dwyamushyayana* when he urged that it covered not only the cases of brothers' sons, but brothers' grandsons also. This enlargement was sought to be justified by the analogy of the rule of Hindu law by which the existence of a son, grandson or great grandson bars the way to adoption. This analogy, however, is too far-fetched to be readily accepted. The original *dwyamushyayana* son was a relic of the Niyoga form and as such this order of son is prohibited in Kaliyuga (West and Bühler (3rd Ed.), page 879). *Dwyamushyayana* of the second and more modern form is still permitted, but Ráo Sáheb Mandlik has statedin his work that he had notcome acrossuch adoptions in this Presidency (page 506). Steele also (page 183) has stated that such adoptions seldom take place. The Madras Sadar Diváni Adálat came to a similar conclusion in 1859. On the other hand, the learned authors of the Digest state that this form obtains in the southern districts of this Presidency (West and Bühler (3rd Ed.), page 898), and Steele also refers to certain castes where it is still in vogue (page 385). The Judicial Committee of the Privy Council has recognized the existence of this form in the North-West Provinces: and there are also some Bengal cases to the same effect—*Wooma Dáee* v. *Gokoolanund Dáss*(1). The presumption in the case of an adoption by a united brother would certainly be in favour of the son adopted being the son of two fathers. No such presumption can be made in the case of separated brothers, for the *dwyamushyayana* is not equally effective as the Dattaka son to secure the spiritual salvation of the person adopting—*Srimati Uma Deyi* v. *Gokoolanund*

(1) I. L. R., 3 Calc., p. 587.

Dáss[1]—as also of his natural father (West and Bühler (3rd Ed.), page 899). It is, thus, not difficult to understand why this form of adoption should have become generally, if not altogether, obsolete in this Presidency. Even if it still exists, the best test of it is either the proof of a special agreement, or evidence to the effect that the son inherited, or has a right to inherit, in both families. There is no such proof of agreement in the cases relied upon, and only one or two instances were cited where the son appears to have succeeded to the estates of both his father and uncle, who apparently were united. On this bye-issue accordingly, we find that the large bulk of the instances adduced on plaintiff's behalf are not touched by this ground of exclusion, and that for the purposes of this suit we may safely leave it out of consideration, except in regard to, at the most, two out of the twenty-five cases in which the custom of the adoption of an only son has been satisfactorily proved.

We have next to consider how far the twenty-five instances of the adoption of an only son satisfactorily proved to have occurred as facts among Lingáyets over a large part of the two districts of Bijápur and Dhárwár, during a period of seventy-five years or more, can be held sufficient to prove the validity of the alleged custom as one which the Courts are bound to give effect to. In this respect several considerations have to be borne in mind. (*a*) The prohibition of the adoption of an only son, is not a generally recognized part of Hindu law. Neither the Sanskrit text writers, nor their English translators, are unanimous on the point, Shrináth Jagannáth, Vijnyáneshwar and Mayukha range as authorities on one side, and Nandapandit and Kuber on the other. Similarly, Strange, Ellis and W. Macnaghten are on one side, and Colebrooke and F. Macnaghten on the other. (*b*) The Madras and Allahabad High Courts have interpreted the texts of Caunaka and Vasishta, on which the prohibition is mainly based, as commendatory only, and not directory, and held that the act of giving an only son is injurious to the giver, but does not affect the validity of the gift—*Chinna Gaundan* v. *Kumara Gaundan*[2], *Hanuman Tiwari* v. *Chirai*[3]. The Bombay and

(1) L. R., 5 I A., p. 51. (2) 1 Mad. H. C. Rep., 54.

(3) I. L. R., 2 All., 164.

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Calcutta High Courts have interpreted the texts more strictly. (*c*) But even in Bombay and Bengal, the current of authorities down to very recent times was in the opposite direction—*Huebut* v. *Govindráo*[1]; *Vishrám* v. *Náráinráv*[2]; *Lakshmibái* v. *Ganpat Moroba*[3]; *Mhalsábái* v. *Vithoba* by Sausse, C. J., and Hebbert and Forbes, JJ.[4]; and *Sreemutty Joymony* v. *Sreemutty Sibosundry*[5]. The first Calcutta decision to the contrary is reported in *Raja Upendra Lal* v. *Srimati Ráni*[6], and was followed up later on in *Wooma Daee* v. *Gokoolanund Dass*[7].

On the Bombay side, the first case "questioning the correctness of the previous decisions" was decided on the Original Side of the High Court, and was reported in *Bháskar* v. *Mahádev*[8]. The doubt therein expressed was confirmed in *Lakshmáppa* v. *Ramáva*[9], but the Court did not pronounce its final judgment on the point even in that case. Next came the Full Bench, but unreported Lingáyet, case of 1879 in certificate proceedings, and finally the Full Bench decision in *Wáman Raghupati* v. *Krishnáji*[10]. See also *Dáda* v. *Appa*[11]; *Hanamagowda* v. *Hanamagowda*[12]. The Chief Justice Sir C. Sargent admitted in *Wáman Raghupati* v. *Krishnáji* that until 1875, with the exception of *Bháskar* v. *Mahádev*[8], the current of decisions, both of the Sadar Diváni Adálat and of the High Court, was in favour of not setting aside such an adoption. These Full Bench decisions of 1879 and 1890 must of course be held to have settled the general law in this Presidency, but the fact, that the law was regarded to be otherwise for nearly sixty years (1820—79), cannot be lost sight of in judging of the weight and character of the evidence required to prove an alleged custom, contrary to the law as now declared, but in conformity with the law as previously enforced. (*d*) The Lingáyet community may well be supposed to have first received notice in 1879 of the

(1) 2 Borr., p. 83.
(2) 1 Morley, p. 24; 4 S. D. A. R., 1857, p. 26.
(3) 4 Bom. H. C. Rep., O. C. J., p. 161.
(4) 7 Bom. H. C. Rep., Appx., 26.
(5) 1 Fulton's Reports, p. 75.
(6) 1 Beng. L. R., p. 221.
(7) I. L. R., 3 Calc., p. 587.
(8) 6 Bom. H. C. Rep., O. C. J., 4, p. 1.
(9) 12 Bom. H. C. Rep., p. 364 (1875).
(10) I. L. R., 14 Bom., p. 250.
(11) P. J., 1885, p. 111.
(12) Cross S. A. No. 1007 of 1889 and No. 37.

change of views in the interpretation of the texts and it appears from plaintiff's printed statement in this case that, so late as 1876, the High Court affirmed on other grounds a Lingáyet adoption of an only son, and no objection was raised in the course of that dispute on this ground. The presumptions, therefore, are all in favour of, and not against, such a custom or usage having been recognized by all parties as obligatory, more especially when it is borne in mind that in the neighbouring Madras districts, the law, even after 1868 and 1879, was declared to be in favour of such an adoption, not only among Shudras—*Vasudevan* v. *The Secretary of State for India*[1], but even in the case of Bráhmins. (*e*) The Bombay High Court itself has recognized a custom about the adoption of daughters' sons in the neighbouring Bráhmin communities such as the Saraswats —*Gowri* v. *Shivarám*[2]—and Haviks of Kánara—*Devarshanbhog* v. *Devápp*a[3] (Appeal No. 36 of 1881 decided on 3rd May, 1882)—at the same time that it laid down the law to be otherwise for Bráhmins generally elsewhere. This High Court has thus recognized an essential difference between the customary law of Maháráshtra and Carnatic.

(*f*) The binding force of custom as law was discussed in *Tara Chand* v. *Reeb Rám*[4], and it was there held that it is not the act or omission of the parties, but the recognition by the Courts which makes customs valid and obligatory. In conferring or withholding this recognition, the reason of the Shástra prohibition must never be lost sight of by the Courts, when applying and interpreting Shástra texts. The Lingáyets are admittedly a heretical sect, and are not subject to Bráhmin religious laws, and repudiate the Shástras in the matter of the obligatory character of funeral rites and *shraddhas* on which Bráhmins lay so much stress. The exceptional character of the Lingáyets in this respect has been recognized both by the Madras and Bombay High Courts—*Koduthi* v. *Madu*[5]; *Virasangápa* v. *Rudrápa*[6]; *Gopál Narhar* v. *Hanmant Ganesh*[7]. The liberty of widow re-marriage, and even of wife re-marriage, has

(1) I. L. R., 11 Mad., p. 165.
(2) P. J., 1894, p. 30.
(3) 3 Mad. H. C. Rep., p. 50.
(4) I. L. R., 7 Mad., p. 321.
(5) I. L. R., 8 Mad., p. 440.
(6) I. L. R., 3 Bom., p. 273.
(7) I. L. R., 3 Bom., p. 275.

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been allowed to this Lingáyet community, and so has the adoption of daughter's and sister's son been sanctioned among Lingáyets on account of their status as Shudras—*Mhálsábái* v. *Vithobá*[1]; *Gópál* v. *Hanmant*. Bearing all these considerations in mind we feel satisfied that the evidence of the alleged custom among Lingáyets furnished on plaintiff's behalf, unrebutted as that evidence is by any attempt of the defendants to adduce a single case to the contrary, their evidence being mostly of the nature of opinion evidence, is sufficient both in quality and quantity to justify us in finding the custom to be a valid custom.

(*g*) Some of the decisions in regard to the proof of custom may be briefly referred to here. In *Vayidinada* v. *Appu*[2] the custom among Bráhmins of adopting daughter's and sister's sons was affirmed precisely on the same sort of evidence as we have reviewed here. More evidence is rigorously exacted when it is sought to prove an alleged family custom—*Suriya Ran* v. *The Rája of Pittapur*[3]. In *Virasangáppa* v. *Rudráppa*[4], a custom of wife re-marriage among Lingáyets was affirmed. In *Mirábivi* v. *Vellayanna*[5] the difference between custom and practice is thus set forth: "Practice may be more or less common, but it does not become a custom unless it is consciously accepted as having the force of law." In the present case, the numerous acts of official recognition, and the absence of disputes, and the conduct of defendants themselves (Exhibit 82), show clearly that the custom set up in this case is not a mere practice, but was recognized to be an obligatory custom by the people concerned, and by the authorities. A Bohra Bráhmin custom of adopting a sister's son was similarly affirmed by the Allahabad High Court in *Chain Sukh Rám* v. *Párbati*[6]. The Lingáyet custom to the same effect was affirmed in *Gopál Narhar* v. *Hanmant Ganesh*[7]. In order to prove a custom of Khoja inheritance according to rules of Hindu law, it was laid down by the High Court that "the mere opinion evidence of elderly persons in its favour was not sufficient. Specific instances must be proved where it has been observed and followed"—*Rahimatbái* v. *Hir-*

(1) 7 Bom. H. C. Rep., Appx., 26.
(2) I. L. R., 9 Mad., 44.
(3) I. L. R., 9 Mad., 499.
(4) I. L. R., 8 Mad., p. 440.
(5) *Ibid.*, p. 464.
(6) I. L. R., 14 All., 53.
(7) I. L. R., 3 Bom., 273.

bái[1]. The peculiar succession of dancing girls by force of custom was affirmed in *Tára Náikin* v. *Nána Lakshman*[2]. The custom of Jains to adopt a daughter's son in opposition to the rules of Hindu law, which generally applied to them, was upheld by the Privy Council in *Sheo Singh* v. *Mussamat Dakho*[3]. The reasons given in that judgment for departing from the general law apply with equal, if not with still greater, force to the Lingáyets. It was stated in this judgment, quoting from the judgment in another case of Sir E. Perry, "that if a custom is proved to exist for a time whereof the memory of man runneth not to the contrary, if it is not injurious to the public interests, and if it does not conflict with the express law of the ruling power, such custom is entitled to have the sanction of the Courts" (Perry's Oriental Cases, page 110, judgment in *Khojas and Memons* case; as also *Abraham's* case[4].) The judgment of the Privy Council went on to state "that the general rules of Bráhminical law cannot be justly made to override well-established local and caste custom, especially when (as in the case of Jains and Lingáyets) the *ratio decidendi* is inoperative." Lingáyets like the Jains do not revere the Shástras, and their views of religious efficacy differ widely from those of the Bráhmins.

On the whole, therefore, we feel satisfied that the evidence of the twenty-five proved instances in this case is sufficient to show that the custom of the adoption of an only son is an immemorial, invariable and recognized custom among the Lingáyets in the southern districts of this Presidency, and that it has been so affirmed both by Native and English rulers, and that in the present case it cannot be justly urged that the instances adduced are only breaches of a generally received law, and that they are not sufficient to justify this Court in affirming its validity. Not a single case was shown on defendants' behalf where an adoption of an only son by the Lingáyets of these parts was disowned or repudiated by the people, or by their rulers, Native and British. In the Poona, Sátára and Sholápur cases referred to above, the custom was neither alleged nor disproved. Those instances, therefore, cannot be allowed much weight in this case as disproving

(1) I. L. R., 3 Bom., 34.
(2) I. L. R., 14 Bom., 90.
(3) L. R., 5 I. A., 87.
(4) 9 M. I. A., 239.

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the alleged custom. Of course it has never been contended that every person adopting a child was bound to adopt an only son. Cases of adoptions of one out of many sons will naturally be more numerous, but this preponderance by itself will not invalidate the adoptions of only sons, when the custom was properly proved.

The question of estoppel was not much pressed in argument on either side, and in the view we have taken of the merits, it is not necessary to go into that inquiry. On the whole, we are satisfied that the instances adduced cover a long range of time and place, and are proved by satisfactory evidence, and that they justify this Court in deciding in plaintiff's favour on the principal point in issue between the parties.

The finding recorded above on the point of adoption disposes of the first six contentions raised in the memorandum of appeal by the defendants. The next four contentions in defendants' appeal, and all the cross-objections urged by the plaintiff, relate to the question of property. Plaintiff claims the whole of the moveable and immoveable property as belonging to the estate of his adoptive father, the deceased Shivangauda; and this claim was allowed by the lower Court, except in respect of the immoveable property included in the deed of gift, Exhibit 113, executed by Shivangauda in favour of his daughters, defendants Nos. 2 and 3. Defendant No. 1 contended that she was the owner of a portion of the moveable property (four ornaments worth Rs. 281-8, Exhibit 35) as being her *stridhan*, and that another portion (a cash sum of Rs. 1,128) was hers because it was given to her by the deceased Shivangauda for her maintenance, and that generally she was the heir of Shivangauda in respect of the moveable and immoveable property not owned by defendants Nos. 2, 3, 5, or not bestowed on them in gift by Shivangauda. Defendants Nos. 2, 3, 5 confined their contention chiefly to the moveable property not claimed by defendant No. 1, and this property amounted to Rs. 7,863-2-6 in cash, and 115½ tolás in weight of gold ornaments, and 121 tolás of silver ornaments, besides pots, furniture, grain and cattle, Exhibit 36. Plaintiff on the other hand contended that the deed of gift, Exhibit 113, was invalid, and not binding on him. Such being the respective contentions

of the parties, the sub-issues involved in this part of the inquiry involve the following questions:—

(1) Whether the deed of gift, Exhibit 113, was valid and binding on the plaintiff?

(2) Whether a portion of the moveable property, the four ornaments claimed, belonged to defendant No. 1 as her *stridhan?*

(3) Whether the cash sum of Rs. 1,128 belonged to defendant No. 1 as having been given to her for her maintenance?

(4) Whether the rest of the moveable property, cash, ornaments, &c., belonged to defendants Nos. 2, 3, 5?

As regards the first bye-issue, we see no reason to differ from the lower Court in the view it has taken of the same. Reading together the two deeds, the adoption deed (Exhibit 112) and the deed of gift (Exhibit 113), it is obvious that as they mutually refer to each other, and both were executed on the same day, they were really parts of one and the same transaction. The adoption deed states that plaintiff was to have the whole of Shivangauda's estate, except the property which he assigned in gift to his daughters in the deed, Exhibit 113. The deed of gift similarly refers to the adoption of plaintiff, and Shivangauda gave thereby the house occupied by himself and 7 jiráit lands with trees to his daughters. Both deeds were written and attested by the same writer and witnesses (Exhibits 102, 103, 104, 109, 110, 255, 277, 278), and were executed on the day and regsitered together, Exhibits 82, 83, 84. It was admitted on respondent plaintiff's behalf that, if the gift had been made prior to the adoption, no valid objection could have been urged, but that even half an hour's difference would have made it invalid as against the plaintiff if executed after the adoption. The Registrar's evidence, Exhibit 84, however, shows that both the deeds were registered together, and the other evidence, both of plaintiff's and defendants' witness Nos. 102, 103, 104, 110, 255, 277, 278, shows that they were simultaneously executed, and formed in fact parts of one and the same transaction. Respondent's objection must, therefore, fail. There is nothing to show that, like some other property expressly stated to be ancestral, the house and lands mentioned in the deed of gift

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had been inherited as ancestral property, and were not acquired by Shivangauda. As between the parties to the suit, he must, therefore, be held to have a full right to dispose of these his acquisitions. The consideration was a good one, seeing that the donees were his daughters, and would have been his ultimate heirs, if he had not adopted plaintiff. The property given in gift was, moreover, only a small portion of the entire estate. Plaintiff's natural father did not indeed expressly assent to the deed of gift, but as he was a party to the deed of adoption which referred to the deed of gift executed along with it, the case falls under the category of conditional adoptions which are allowed by law. We must, therefore, overrule respondent's contentions on this point, and hold that the deed of gift in favour of defendants Nos. 2 and 3 was valid, and binding on plaintiff.

As regards the next two sub-issues, it is to be noted that defendant No. 1 claimed a gold *sargi*, gold bracelets, silver *tolbandis*, and silver *gundgudigi*, as her *stridhan*, and she claimed Rs. 1,128 out of the cash as having been given to her by Shivangauda for her maintenance, Exhibit 35. She also claimed to be the owner by right of heirship of the remaining property, so far as it did not belong, or was not given, to defendants Nos. 2 and 3. This latter claim of heirship must be disallowed, as plaintiff, and not the defendant No. 1, is the heir of Shivangauda.

About the ornaments claimed as *stridhan*, and about the cash sum, it is to be noted that in her deposition, Exhibit 227, defendant No. 1 claimed to have received the ornaments and Rs. 1,000 in cash (in place of Rs. 1,128 mentioned in the written statement), and she claimed to have received this double gift one month before her husband's death. She did not rest her claim upon any reservation made by Shivangauda for her maintenance at the time of plaintiff's adoption. It is true that the deed of gift contains a statement that the moveable property was retained by Shivangauda for his own and his wife's maintenance. There is, however, no specification of the value of the property so retained, and there is no similar reservation in the contemporaneous deed of adoption, which makes plaintiff his heir in respect of all the property not included in the deed of gift. The oral gift

alleged to have been made one month before his death by Shivangauda is not referred to in either deed, though these last were executed within fifteen days before Shivangauda's death. Defendant No. 5, moreover, contradicted defendant No. 1 openly, for he stated that the gift of Rs. 1,000 was made by Shivangauda twenty or thirty years ago, Exhibit 202. It is admitted by defendant No. 1 herself that there were no witnesses present at the time of the gift. The oral evidence on this point on defendant's behalf is thus entitled to no weight.

It is plain that the alleged oral gift is not proved, and defendant No. 1 has no right as against plaintiff either to the cash sum of Rs. 1,000, or to the four ornaments, claimed as *stridhan* by her. The *yádis*, Exhibits 10, 16, show that, in this case, attachment before judgment was made at the instance of the plaintiff, and Rs. 8,991-6-9 in cash, about Rs. 3,550 worth of gold ornaments, about Rs. 154-8-0 worth of silver ornaments, and about Rs. 320 worth of other property, including utensils, grain and cattle, &c., in all property worth about Rs. 13,000, was attached on two occasions. The bailiff's report shows that defendants made away with some other property. The attached property was, moreover, subsequently returned back to the defendants after taking security from them for an equivalent amount, and defendants will have to account to the plaintiff for the value of the same. Defendant No. 1 has no doubt a right to be suitably maintained by the plaintiff out of her husband's estate; but till defendants have rendered a proper account to the plaintiff of the property in their possession, it will not be fair to decide upon defendant No. 1's claim for maintenance, and require plaintiff to settle any definite amount on her. She set up a specific defence about an alleged oral gift, and failed to prove the same. Both her objections, therefore, about the *stridhan* property and the cash gift must be overruled.

As regards the fourth sub-issue, which relates to defendants Nos. 2, 3 and 5, it may be noted that they claim in their written statement to be the owners of nearly the whole of the moveable property in dispute, excepting the portions to which defendant No. 1 laid claim. Voluminous evidence was given on defendants'

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behalf to prove this portion of the claim. It is to be noted, however, that nearly all the witnesses who gave evidence in defendants' favour on this point gave evidence also against the alleged custom of adoption. These witnesses come mostly from Naregal, where the parties reside. Defendants' witnesses on this point were Nos. 255, 256, 258, 263, 264, 267, 270, 272, 276, 278, 279, 280, 281, 282, 283, 285, 286, 289, 290, 292, 296, 298, 301, 303, 304, 308; and bonds, Exhibits 265, 271, 273, 275, 279, were produced as having been passed in defendants' name. Plaintiff also gave both oral and written evidence to prove that all the property in dispute belonged to Shivangauda, and not to his daughters. Plaintiff's witnesses are Exhibits 100, 102, 103, 104, 109, 110, 111, 178, 181, 183, 184, 185, 186, 190, 193, 195, 198, 199, 200, 202, 203, 206, 207 and 302, and the written documents in his favour are 332, 338, 353, 366, 179, 180, 194, 196, 197, 201, 204, 205.

After a careful consideration of the whole of the oral and written evidence on both sides, we see no reason to disturb the finding of the lower Court on this point: (1) If defendants Nos. 2, 3 and 5 were so well off as they claim to be, it was not likely that Shivangauda would have made any gift of lands and house to them. (2) At least some mention would have been made of this fact in the deed of gift. (3) Defendant No. 3 has been a widowed daughter of Shivangauda for many years, and she and defendant No. 2 and her husband have been to all appearance dependent members of Shivangauda's family. (4) Defendant No. 5's deposition, Exhibit 202, leaves little room for doubt that neither he nor his wife nor her sister were ever in possession of cash and ornaments of their own, as stated on their behalf by their witnesses. (5) A few of these witnesses themselves, Exhibits 255, 262, 292, 293, admitted that the actual management was with Shivangauda, who, according to them, took bonds, and received payments, on behalf of his daughters. (6) The bonds in defendant No. 3's name, Exhibits 265, 271, 273, 275, 279, are few in number, and for small amounts. One of the bonds produced was in the name of defendant No. 3's deceased husband Appánna, but he was described in it as having been a party on behalf of Shivangauda. (7) Defendant No. 1 is sister of this

Appánna, and she is mother of defendants Nos. 2, 3, 4, and this relationship accounts for her partiality in favour of defendants Nos. 2 to 5, and her assumed ignorance about her husband's means. (8) Defendant No. 5 admitted that he only tilled the lands, and that he had no money of his own with him. (9) The census papers, Exhibits 338 and 353—364, show that the houses were all entered in Shivangauda's name. (10) The bonds, 177, 180, 192, 196, 197, 201, 204, 205, are also in Shivangauda's name. Bearing all these circumstances in mind, we feel satisfied that plaintiff's witnesses on this point are obviously more entitled to credit than those of the defendants. The defendants Nos. 2 and 3 are of course entitled to the property given to them by the deed of gift. The rest of the property belongs to the estate of Shivangauda, and the plaintiff as his heir succeeds to the same, subject to the charge of maintaining defendant No. 1, his mother.

Defendants contended that certain properties did not belong either to them or to the estate of Shivangauda. The evidence of plaintiff's witnesses relates to the property generally. If strangers have a claim to any of these properties, they will in due course assert the same. It is not necessary to inquire into this point further here.

JARDINE, J.:—I concur in all the findings on the issues and in most of the reasons just given.

The parties are Kudava Kaligars by caste and Lingáyets by religion, and dwell at Naregal in the Ron Táluka of the Dhárwár District, not far from the Nizám's territory.

It is now the settled doctrine of this Court, that the adoption of an only son is, by the general Hindu law, invalid—*Wáman Raghupati* v. *Krishnáji*[1]. The report of that case shows that in Appeal No. 1 of 1879 under Act XXVII of 1860 this rule of law was applied to Lingáyets by a Full Bench; and that an attempt to prove validity by custom in that appeal from the District Judge of Belgaum failed. In the report of *Gopál* v. *Ganesh*[2], which determines that the Lingáyets are Shudras,—*cf.* *Virasangápa* v. *Rudrápa*[3],—some account is given of the case of *Káshibái* v.

(1) I. L. R., 14 Bom., 249. (2) I. L. R., 3 Bom., 273.

(3) I. L. R., 8 Mad., at p. 450.

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Nagápa decided in 1828 between Lingáyets of the Sholápur District, in which the Zilla Court at Poona held the adoption of an only son invalid.

In arguing on the instances relied on as proof of custom in the present case the counsel for the appellants asks the Court to exclude several on the ground of irrelevancy, they being valid at Hindu law as adoptions of *dwyamushyayanas* or sons of two fathers: Mayne's Hindu Law, 5th Ed., para. 132. The respondent meets this contention with the following arguments: 1st, that it is not shown by any cited case or otherwise that this form of adoption is still in vogue in the Presidency of Bombay; 2nd, that if not obsolete, it extends only to the son of a brother, and not to any other relations; and 3rd, that where the brothers are separate in interest, and there is no proof of an express agreement that the adopted son's relationship to his natural family shall continue, he is not a *dwyamushyayana*, and so the adoption stands on custom, not on law. The appellants reply to this third point that in all cases where the only son of a brother, divided or undivided, has been adopted, the law raises a presumption that the son is a *dwyamushyayana*.

The respondent, who denies that this status exists, relies on the Ráo Sáheb Mandlik's opinion *arguendo* at p. 506 of his work on Hindu law that this form of adoption is not recognized in this age and a Madras decision of 1859, *Annamala* v. *Mungalam*[1], against which, however, there is in Mr. Mayne's opinion overwhelming authority—Mayne's Hindu Law, para. 160. But in para. 132 of Mayne's Hindu Law it is said: "It seems to be admitted everywhere that there is no objection to the adoption of an only son, when he is taken as *dwyamushyayana*, or the son of two fathers." For this text, books and decisions are cited. The form is said to be common in the North-West Provinces—Jolly's Tágore Law Lectures, 166. It is argued that there is no case in the Bombay Reports. But several are mentioned by West and Bühler, 898, 1044, 1045, 1208. The learned writers say that from personal inquiries it appears that the *dwyamushyayana* son is not at all unusual in the southern districts of Bombay—898, 1045.

(1) Mad. S. D. A. Rep., 1859, p. 81.

See also Steele's Law and Custom, 47, 384, 45, 183. The form is common in Malabár, though obsolete on the Coromandel Coast—*Vásudevan* v. *Secretary of State*[1]. In *Nilmadhub* v. *Bishumber*[2], a Bengal case, the Judicial Committee of the Privy Council treat the *dwyamushyayana* son as recognized. Also in another Bengal case, *Srimati Uma Deyi* v. *Gokoolanund*[3]. On consideration of these authorities, I am not inclined to hold that the *dwyamushyayana* son is obsolete in this age in the southern parts of the Bombay Presidency.

The second question is, whether the adoption of an only son, being the son of the son of the brother of the adopter, can, where there has been no special condition, be upheld as the adoption of a *dwyamushyayana* son, so that the instance must be imputed to Hindu law and withdrawn from the evidence of custom. No text has been shown by Mr. Scott to support this argument, nor any decision: it is merely based on the supposed analogy between a son and a grandson, drawn from the fact that the existence of either makes adoption impossible—West and Bühler, 917, 944. This basis appears far too slender for us to extend the meaning of *dwyamushyayana* in the absence of any reason for supposing that the brother's grandson would stand in the same spiritual relation to the adopter as a natural grandson does according to the Dattaka Mimansa, sec. 1, pl. 13. But it appears from the decisions that a stranger may become a *dwyamushyayana*. As is said in 1 Strange Hindu Law, 96, "the same double relation may be the result of agreement, at the time of adoption, between the adopter and him who is willing to give his son for the purpose." For the formula of giving we may refer to West and Bühler, 1134, quoting the Vyavahára Mayukha.

The third point is, whether, when the two brothers are separated in interest, and one of them adopts the only son of the other, and there is no evidence of a special condition, the son is a *dwyamushyayana* son at Hindu law, or whether, as the respondent contends, the adoption and the inheriting in both families must be imputed to the custom.

(1) I. L. R., 11 Mad., at p. 167.
(2) 13 M. I. A., 101.
(3) L. R., 5 I. A., 40; S. C. I. L. R., 3 Calc., 587.

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The distinction between united and separated brothers is not taken by Mayne, who in para. 132 says in general terms that when one brother takes in adoption the only son of the other, the double relationship of *dwyamushyayana* appears to be established without any special contract. Nor can I find the distinction in West and Bühler *ubi supra*. A general presumption may possibly be drawn from some of the decisions, *viz.*, that where a *dwyamushyayana* can be given at all, as, *e. g.* between two brothers, the presumption is that he has been given as such—West and Bühler, 1045, note h. The respondent relies on the remarks of the Judicial Committee in *Srimati Uma Deyi's* case[1] as authority for making the distinction between divided and united brethren. The remarks appear to me applicable on the question of evidence, and shew that the consent of the divided brother is more improbable. No text of Hindu law has been cited as authority for the distinction: I find none in the history of the *dwyamushyayana* son given by Dr. Jolly in his Tágore Law Lectures, 1883, 165, where it is traced to the obsolete custom of Niyoga (see Mitákshara, ch. I, s. x.), nor in the rules about *dwyamushyayana* at p. 318, nor in Colebrooke's Digest. But I think that the remarks in *Srimati Uma's* case do require the Court to consider in dealing with the present evidence of adoption between separated brothers such facts as the absence of any special agreement, and whether the adopted only son succeeded to property in his natural father's family. (For the Bombay rules on this point see West and Bühler, 898, 1209.) But the significance of the presumptions, especially those drawn from the ordinary motives of religious Hindus, is weakened much when we are dealing with Lingáyets, who, as remarked by the Court below, attach no religious value to adoption and its ceremonies. Mr. Jardine compares this purely civil act of theirs to the adoptions of the Jains; it also resembles the Kritrima form of Mithila—Mayne's Hindu Law, para. 95.

It is admitted by both sides that the instances numbered 6, 9, 25, 35 and 46, are adoptions of brothers' sons. The *factum* and in most cases the only sonship are not disputed. The respondent

(1) L. R., 5 I. A., at p. 50.

has admitted that in cases 25 and 46 the adopted sons inherited in both their natural and adoptive families, but denies this as regards the cases 6, 9 and 35. But in case 6 we concur that the only sonship is not proved. Case 25 must be excluded as not being one among Lingáyets. I find on examining Exhibits 74, 160 and 328 that in case 6 there is no evidence on this point, nor can it be inferred whether at the time of the adoption the brothers were separated in interest. I also do not find this adoption proved. In case 9, to which Exhibits 161, 166 and 245 belong, the brothers had separated; and as the natural father, Exhibit 245, speaks of his elder brother (probably the adoptive father) as his heir, it would seem that the adopted son loses his rights as such in his natural family. The agreement, Exhibit 332, shows that when the adoptive father married again, there was a dispute between the brothers, which was settled by the adoptive father agreeing that the adopted son and each natural son should have equal shares. In case 35 the brothers were separate, and the natural father still lives. But we concur in excluding this case, as both the natural father and the son, Exhibits 494 and 495, say there was a second natural son at the time of the adoption, although Exhibits 451 to 453 swear the contrary. We do not think it proved that the adoptee was an only son.

In case 46, though evidence to contradict was given, we are satisfied on the testimony of two of Irangauda's sons, Exhibits 428 and 478, confirmed by the pátil, Exhibit 434, and the genealogy, Exhibit 377, that plaintiff has proved this case and that the two brothers were separate in interest when Irangauda was adopted.

Thus, after excluding cases 6, 25 and 35 as irrelevant to the custom, we concur in finding that in cases 9 and 46 the brothers were separate in interest.

The appellants-defendants have declined to admit that the cases 2, 7, 10, 29, 37 and 38 are not cases of brothers' sons as the plaintiff avers. We concur in holding the only sonship in cases 37 and 38 to be not proved: and that in cases 2 and 10 the adoption was not between brothers.

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The contest then is as to whether the other proved adoptions, cases 7 and 29, can be presumed to be of the *dwyamushyayana* form without proof of special condition. I will now examine the facts of all these cases.

Case 2 occurred about eighty years ago in what was then the Nargund State. The *factum* is proved, and the family is Lingáyet. The son of the adoptee, Parvatgauda, though living has not been called. In Exhibits 376 and 369 the fathers of the two fathers bear different names, which fact indicates that they were not brothers. The word of relationship used in Exhibit 375 is "*purvaj*", which includes elder brother, but has also a wider meaning. The witness, Exhibit 159, is not more specific. We are agreed that this is not an adoption between brothers.

The *factum* of case 7 is not disputed, and is deposed to by the adoptee, Exhibit 170, who says the fathers were uterine brothers. But the adopting father is not called. Exhibit 74 gives different names to the fathers' fathers, and Exhibit 160 knows nothing. I think we must hold them to be brothers, as the plaintiff has not disproved the assertion of the witness without whom the case is not proved. There is no evidence as to whether the fathers were joint or separated.

We agree that case 10 is certainly not a case of two brothers, although Exhibit 161 says it is. It is clear from Exhibits 73 and 232 that the woman who adopted was a relation of the natural father; but neither he, nor the son, Exhibit 168, suggests the brotherhood of the fathers.

In case 29 the only evidence is the adoptive mother, Exhibit 71, who says the giver was her "*bháva*", which in Cánarese means, according to the dictionary, "husband's elder brother, wife's brother, maternal uncle's son if older than one's self." On studying her deposition I incline to hold that Mudibasápa, the father of the adopted son, was her husband's separated brother, as the appellants' counsel argues. The act occurred in the Sángli territory of Shirhati about the year 1887. The adoption deed and other documents have not been produced: and there is no official recognition of the act alleged. The facts that a dispute occurred with the natural father, and that some other son was also adopted,

and that at a private settlement both have been treated as adopted sons, somewhat discredit this instance. At the same time it is to be remarked that the dispute is not said to have been raised on the question of only sonship: and I would, therefore, admit this case as one relevant to the custom.

As we concur in finding that in cases 37 and 38 the fact of the only sonship is not proved, it is unnecessary to deal with them here.

The result is that we concur in holding cases 2 and 10 to be proved and relevant evidence of the custom and not cases of *dwyamushyayana:* and in holding case 29 to be like, cases 9 and 46, an adoption of a separated brother's only son. Case 7 is an adoption of a brother's only son. My learned colleague thinks the evidence shows separation: while I am unable to form an opinion. The discussion of the *dwyamushyayana* form thus only touches four cases, *viz.*, 7, 9, 29 and 46 out of the twenty-two cases we find proved and relevant: in three out of the above four the brothers were separate, and perhaps in the fourth also; all but case 46 are recent.

It appears then that the only point regarding the *dwyamushyayana* form of adoption which we can be asked to decide is whether without proof of a special agreement such an adoption between separated brothers can be held proved. But I am of opinion that it is not necessary for us to decide the point; firstly, because, even if we exclude cases 7, 9, 29 and 46 there is material in the other eighteen proved cases on which we can adjudge the question of custom; secondly, because the religious motives of ordinary Hindus have little influence on the minds of Lingáyets, who look on the destiny of their dead ancestors from a different religious standpoint.

The learned Judge below finds that among Lingáyets no funeral ceremonies are performed; and he logically infers that, therefore, the salvation of the father who gives his only son is not imperilled: and he holds on the statements of the witnesses that he incurs no sin. These findings have not been seriously disputed. In discarding the *shraddha* ceremonies, they resemble the Jains from whom many of them are believed to be descended. We can, therefore, apply to the Lingáyets Sir M. R. Westropp's remarks

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on the Jains in *Bhagvandás* v. *Rajmal*[1]. "This circumstance is fatal to the existence, amongst that sect, of the principal reason which renders adoption almost indispensible to the more orthodox Hindus when they are sonless, "the future beatitude of" such "a Hindu depending, according to the prevalent belief, upon the performance of his obsequies, and payment of his debts by a son as a means of redeeming him from an instant state of suffering." The motive for which a Lingáyet adopts is the perpetuation of the name and family, recognized by Westropp, C. J., in *Bhála* v. *Parbhu*[2]. Now, it appears that the views of the Court below are confirmed by the interesting accounts of the tenets and practices of the Lingáyets found in the volumes about Bijápur and Dhárwár in Mr. James Campbell's Gazetteer. These were respectively supplied by Mr. Cumine of the Civil Service and Ráo Bahádur Tirmalráo Venkatesh whom we remember as an experienced Judge, well informed about the locality. The latter reports: "As regards the future state, Lingáyets believe that the wearers of the *ling* are not liable to transmigration. According to his conduct, a Lingáyet after death is sent either to heaven or to hell, and where he is sent there he stays. The Lingáyet belief that none of the house spirits can come back, frees them from one great section of the Bráhmin ritual. They have no offering to the dead of sesamum, sacred grass, burnt sacrifices, new moon and full moon rites, and pourings of water. In their disregard of after-death rites the Lingáyets agree with the Jains"[3]. Mr. Cumine contrasts the tenets with the practices in his philosophic discussion and comes to the same opinion: "that the dead Lingáyet goes to Shiv's heaven seems to be a practical belief which has greatly reduced the rites to the dead and probably the fear of spirits"[4].

I am of opinion, therefore, that these four cases may more reasonably be imputed to the influence of the alleged custom than to motives of religious law: and on considering the evidence I would impute them to the custom.

I see no reason to exclude the cases where adoptions occurred since the present suit began. Nor for excluding the cases arising

(1) 10 Bom. H. C. Rep., at p. 262.
(2) I. L. R., 2 Bom., 67.
(3) Vol. 22, Bom. Gaztr., 106.
(4) Vol. 23, Bom. Gaztr., 227, 229, 236.

in Native States, in the absence of any reason to suppose that the Hindu law in force in those States differs from that of the neighbouring British Indian districts. *Cf. Shivji* v. *Datu*[1].

Before examining the evidence it may be remarked that the burden of proving the custom, by clear and unambiguous evidence, to be ancient and invariable lies on the plaintiff under the rulings of the Privy Council—*Bhagvandás* v. *Rajmal*[2]. There must be "satisfactory proof of usage, so long and invariably acted upon in practice, as to show that it has by common consent been submitted to as the established governing rule of the particular family, class or district of country, and the course of practice upon which the custom rests must not be left in doubt, but be proved with certainty"—*Sivanananja* v. *Muttu Rámalinga*[3]; *Shidhojiráo* v. *Náikojiráo*[4]. It is to specified instances that the Court pays most attention—*Bhagvandás* v. *Rajmal*[5], and it is unsafe to act on mere opinions of witnesses—*Rahimatbái* v. *Hirbái*[6]; *Cásumbhoy* v. *Ahmedbhoy*[7]. The Court below has applied these rules and found the custom proved by specified instances. It says: "On the whole, it appears that the defendants' witnesses are not very serious in asserting that there exists no custom of adopting an only son. They cannot cite instances of such adoptions having become null and void amongst the community."

It now becomes the duty of this Court to determine whether the specified instances outweigh the opinions of witnesses adverse to the custom, as the Subordinate Judge has held. We must examine each instance before giving our decision. We are of opinion that the defendants' witnesses have not proved any instance of an adoption of an only son being disallowed or even seriously disputed. Most of them come from Naregal, to disprove the *factum* or some other point alleged by the plaintiff. The Judge below is right in disbelieving their denial of the custom. As I have already noticed, they cannot seriously suppose that the desire of salvation from hell moves Lingáyets at all, or that the dogma about the hell named *Put* is any part of their creed. One

(1) 12 Bom. H. C. Rep., 281.
(2) 10 Bom. H. C. Rep., at p. 260.
(3) 3 Mad. H. C. Rep., 75 S.C. 14 M. I. A, 570.
(4) 10 Bom. H. C. Rep., at p. 234.
(5) 10 Bom. H. C. Rep., at p. 263.
(6) I. L. R., 3 Bom., 34.
(7) I. L. R., 12 Bom., at p. 302.

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witness, Exhibit 296, tries to make out that one such adoption was disallowed in the Madras Presidency. But he must be ignorant of the decision of the Madras High Court in *Náráyanasami* v. *Kuppusami*[1] which recognizes the adoptions of only sons as valid. It is admitted that the instances numbered 30 to 34, 36 and 43 relate to Bráhmins. We exclude them as not relevant to the custom of so different a people as the Lingáyets; and until the right of the Bráhmins in the Dhárwár and Bijapur districts to adopt only sons is established as a custom, it is as likely as not that these seven instances are infractions of the Hindu law as interpreted by this Court.

The two instances of Hatgars or weavers numbered 11 and 15 must next be considered. The Court has been referred to Vol. 22 and 23 of Campbell's Gazetteer, the volumes about Dhárwár and Bijápur, pp. 165 and 267, respectively. People of this caste have in their habits and worship resemblances to both the Bráhmin and Lingáyet forms of Hindusim: and it is said that "though they have an hereditary feud with the true Lingáyetism, half of them have gone over to Lingáyetism and the other half have begun to feel its influence"—Vol. 22, 268. In case 11, witness 162, the adopted son, says plainly that he is not a Lingáyet; and the adopting father, witness 167, does not contradict him. It is, therefore, clear to us that case 11 is not relevant. Case 15, about which witness 167 gives vague evidence, appears to us relevant.

Case 28 is objected to by the appellants as irrelevant, because there is no proof nor indication that the parties were Lingáyets. But the questions put to the one witness examined, Exhibit 70, confine her assertions to Lingáyet cases. The order, Exhibit 351, gives no indication of the caste. If, as appears, the adopters were Deshpándes, it would have been easy for the appellants to produce evidence about their religion, or to have asked witness 70 if they had any doubt. We, therefore, admit case 28.

The four instances, Nos. 18, 41, 42 and 44, occurring among the shepherds (called Dhangars in Maráthi and Kurubas in Cánarese) are disputed on similar grounds.

(1) I. L. R., 11 Mad., 43.

In case 18 no question was put about religion to the only witness, Exhibit 171. We have been referred to the Gazetteer volumes, Dhárwár, 180, Bijápur 121. The Dhárwár writer does not treat the Kurubas, who number 87,800 in that district, as Lingáyets at all, as appears from the table at p. 103, though he styles the Kuruba Gurus as half Lingáyets. These Gurus seem to be what are known as Vaders in the Bijápur District. The Bijápur writer says at p. 123 that the Kurubas are Bráhminical Hindus. Neither does he include this great caste numbering 94,786 in Bijápur District in his tables of True, Affiliated and Half Lingáyets. In the full notice of the Kurubas in the Telugu country written by Dr. Buchanan in the early part of this century (Journey into Mysore and Canara, Vol. I, p. 395) there is nothing distinctive to show that they are Lingáyets; and another reference made by Mr. Ghanashám for the respondent (8 Bombay Royal Asiatic Society's Journal, 74) only shows a story in the Basava Purána, one of the Lingáyet sacred books, in which a shepherd appears as an adorer of the *linga*.

In case 41 the only evidence that the parties were Lingáyets is a statement of a collateral, Exhibit 510, that although he is a Kuruba he follows Lingáyet tenets. In case 42 there is nothing whatever in the evidence, Exhibits 442 to 445, 347, 517 and 536 to show that the parties were Lingáyets. In case 44 from the Navalgund Táluka of the Dhárwár District the evidence is Exhibits 349, 438 to 441, 515, 526 to 529 and 538. In Exhibit 438 the son of the adopted son says that the Kurubas of his neighbourhood follow the religious tenets of the Lingáyets. But the kulkarni of his village, Exhibit 440, a Bráhmin called by the plaintiff, throws doubt on the statement by pointing out that the Kurubas eat flesh, which he says is contrary to Lingáyetism: and witness 438 says himself that Lingáyets do not dine or intermarry with them. The Kurubas in Dhárwár District eat the flesh of sheep, fowls, hare and deer, but not of kine or swine (Gazetteer, Dhárwár, 181). There is a class of shepherds called Hande-Vazirs or Hande-Kurubas separately described in Gazetteer, Bijápur, 244, and mentioned in the accounts of the Kurubas. These are real Lingáyets, and it is stated that they have left off meat and liquor. The Vaders or Kuruba Gurus, who are the ecclesias-

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tics of the non-Lingáyet Kurubas, appear to recognize a Lingayet superior. But the writers of the Gazetteer class these ecclesiastics as half Lingáyets; and it appears that unlike the laity of either division, these Vaders eat no flesh and wear the *linga*.—Gazetteer, Bijâpur, 123. But these differences, though striking to the casual observer, are not a test enabling us to say whether or not a Cánarese tribe has gone over to Lingáyetism—Gazetteer, Dhárwár, 102, 106; Bijápur, 219. "In the northern districts, in Poona, Satárá, Kolhápur and Belgaum, the Lingáyet faith is declining, and many Lingáyets are adopting Bráhminical ways of worship, ceremonies and gods. On the other hand, in Bijápur, in Dhárwár and in parts of southern India, Lingáyetism appears to be gaining ground" and getting converts from Bráhminical Hinduism as it originally did from among the Jains, whose religion it in many respects resembles. On the whole I think case 44 must be excluded as not shown to be relevant, the *onus* being on the plaintiff.

I am of opinion, on the evidence, that cases 18, 41, 42 and 44 are not relevant to the issue of custom, it not appearing that the parties were Lingáyets; and the presumption being in the present state of the Kuruba community that the Kurubas have not gone over to Lingáyetism.

The cases 1, 2, 8 and 25 occurred among the people called Raddis or Radders (Gazetteer, Bijápur, 145; Dhárwár, 141). The Gazetteer shows that, excepting the division called Namad, these people are Lingáyets. In the cases 1, 2 and 8 the witnesses make it clear that the parties were Lingáyets. The only witness in case 25, Exhibit 245, says that it occurred in his own village when one elder and divided brother adopted the only son of his brother, and that the adopted son has inherited in both families. This witness is explicit on every point and must be believed when he says that the son is not a Lingáyet. Case 25 must, therefore, be excluded.

Cases 47 to 50 must be excluded for more reasons than one. The only evidence of them consists of affidavits, Exhibits 384 to 387, made in Appeal No. 1 of 1879, in which the High Court decided that the rule of Hindu law prohibiting the adoption of an only son applies to Lingáyets. The present defendants filed

these affidavits in order to show that they had not convinced the High Court. They cannot be used to prove the plaintiff's case, as there has been no opportunity in this suit of cross-questioning the deponents. Moreover, cases 48, 49 and 50 are irrelevant, as there is nothing whatever to show that the parties were Lingáyet, and the names suggest Bráhmin and Marátha lineage. Case 47 is irrelevant, as the issue in the present case only relates to the Carnatic and not to the country where Poona stands amid a population not Cánarese and Dravidian, but Marátha and Aryan.

Case 51 is based on Exhibits 368, 371 and 374. Exhibit 368 is P. J., 1882, p. 294, following which the District Judge of Satárá held further inquiry, and in his judgment found on the evidence that the adoption of an only son was valid by custom in the country round Tásgaon in the Satárá District. The parties were Lingáyets. We exclude the case as coming from a different part of the country, hardly within the Carnatic. The final judgment of the High Court, P. J., 1885, 111, was based on other grounds.

It may here be mentioned that the Advocate General drew attention to the fact that in a case where the Assistant Judge of Bijápur held the adoption of an only son of a Lingáyet invalid, no plea that it was valid by custom was raised. See Cross Appeals 1007 of 1889 and 37 of 1890. It appears from the original judgment, in Cánarese, of the Bágalkot Court that the Judge found that when the son was given he was not an only son, and the postponement of the ceremony which occurred after all his brothers had died did not invalidate it. That Judge held the case to be an exception, outside of the prohibitory rule. The Assistant Judge thought otherwise and acted on the *obiter dicta* in the cases *Lakshmáppa* v. *Rámává*[1] and *Káshibái* v. *Tátia*[2]. It is not safe under the circumstances to speculate why the plea of custom was not raised.

After careful examination of the evidence in the light of the arguments, we concur in holding the following twenty-two instances to be both proved and relevant:—

Cases 1, 2, 3, 5, 7, 8, 9, 10, 12, 13, 14, 15, 19, 20, 22, 24, 26, 27, 28, 29, 45, 46.

(1) 12 Bom. H. C. Rep., 364. (2) I. L. R, 7 Bom., 221.

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And the following ten not proved:—

Cases 4, 6, 16, 21, 23, 35, 37, 38, 39, 40.

And the following fourteen irrelevant to the custom of Lingáyets:—

Cases 11, 25, 30 to 34, 36, 43, 47 to 51.

And though our reasons differ, we agree to exclude case 41.

We differ on the following instances:—

Case 17 which I think not proved.

Cases 18, 42, and 44, among Kurubas, not in my opinion proved to be Lingáyets.

Case 1 occurring in 1887 in the Bijápur District in a family of Lingáyet Reddis is clearly proved by the natural father and adopting mother, witnesses 159 and 75. The boy is the only son of a divided brother. Exhibit 326 F shows that an inquiry was made into the propriety of the act by the Revenue authorities, as the right to share in pátelki watan was involved, and that the Collector solemnly confirmed the adoption.

Case 2 occurred about 1815, in a district then belonging to the Chief of Nargund. Exhibit 375 is the chief's sanction to the adoption of Parvatgauda in order that he might succeed to the pátil's watan at Sirol. Parvat's son, father of witness 159, is the present pátil. I do not doubt that Parvat was an only son—see the genealogies, Exhibits 369 and 376—which the witness got from the kacheri when he was considering whether to give his own son in case 1 in adoption. It cannot be inferred that Parvat was son to his adopting father's brother.

Case 3 occurring about 1884 in the Bijápur District is spoken to by witnesses 159 and 75, who were personally present. Witness 159's wife belongs to the village of Bilgi. These persons are not rightly objected to as hearsay witnesses. I hold the case proved.

Case 4 depends solely on witness 159, who admits that he does not know whether the boy was an only son. The proof, therefore, fails.

Case 5 arose in 1857 in Navalgund, in what was then the State of Nargund. A faint objection was made that witness 160

speaks from hearsay: and it was urged that the case is one of *dwyamushyayana*, being of a brother's grandson. The *factum* is clearly proved by the natural mother, witness 70, an eye-witness, Exhibit 232, the Chief's sanction, Exhibit 325, and the settlement, Exhibit 324.

Case 6 I hold not to be proved to be one of an only son, for the reasons given by my learned colleague.

Case 7 already discussed[1] as one of a brother's son occurred about 1878. The *factum* is not disputed.

Case 8 is from the Bijápur District and dated 1888. The *factum* is not seriously disputed, and the whole transaction is proved by the natural father and adopting mother, witnesses 161 and 73, by two persons present, witnesses 160 and 166, and by a registered deed, Exhibit 327. All this evidence shows clearly that the parties believed the act was sanctioned by their law. The natural father says the adopting family was that of his cousin. It illustrates the pertinacity with which this case has been fought, to notice that the appellants object that they may have been brothers. This unfounded contention is based upon the ambiguous expression "*annatammandaru*", literally "elder and younger brethren" used by witness 73. The Cánarese word is as ambiguous as our word "brethren", and does not exclude cousins. They were separate in interest.

Case 9 is clearly proved by the two fathers, witnesses 245 and 166 and the document, Exhibit 332 B. It occurred in 1885, in the Navalgund Táluka between two separated brothers. The parties have had a dispute, but they have up till now treated the adoption as legal and binding.

Case 10 occurring about 1867 near Badámi we have found not to be a case of two brothers. The son and natural father, witnesses 168 and 232, prove that the former is an only son. The adoption has been distinctly recognized by Government in Exhibit 352.

Case 11 we exclude, as the parties are not Lingáyets. In case 12 the *factum* is admitted. It is a proved instance of 1886 from the Bankápur Táluka. In case 13 the instance is, in our opinion, proved by the eye-witnesses, 165 and 239, as

(1) *Ante*, p. 470.

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occurring in 1874 in presence of hundreds of people near Lakshmeshwar in the principality of the Chief of Miraj. The fact in both cases 13 and 14 was admitted by Mr. Scott. Case 14 also comes from the Lakshmeshwar region. We agree that the evidence, witnesses 70, 165 and 239, prove it. The date is 1884. The registered document, Exhibit 323 of 1885, which recites the transaction and its reasons, corroborates the adopting woman's statement that the adoption was believed to be legal and proper.

Cases 15 and 16 come from Badámi, and are dated about 1878 and 1885. The evidence is slight. But I concur with Mr. Justice Ránade in his reasons for holding case 15 proved and rejecting case 16. As to case 17, dated 1867, from Bankápur I do not think it proved, as the only evidence, witness 169, says it occurred in his third or fifth year: and he does not allege his own direct knowledge of his only sonship. Case 18 of 1849 from Lakshmeshwar I have already excluded, there being no testimony that the Kurubas, parties thereto, were Lingáyets. The only witness, No. 171, styles himself Hindu. Moreover, I think his statements do not prove the *factum*.

In case 19 dated 1873 from Bankápur the *factum* is fully proved by witnesses 230 and 231, the natural father and son. The latter was a daughter's only son. It is quite clear from the depositions and the solemn document of adoption, Exhibit 327, that the parties acted, unconscious of any want of validity.

Case 20 occurred in the Kalghatgi Taluka under Dhárwár in 1880 and is clearly proved to be the solemn adoption of a daughter's only son. The *factum* is not disputed. The adopted son, witnes 233, says there was no dispute: and as a pátil's watan was involved, there would have been objection taken, if any remote relation had thought the act improper. This witness and the adoption deed, Exhibit 238, show clearly that the parties were conscious of nothing improper, but acted as if the adoption were in every respect properly performed. The document is fully attested by four witnesses and was registered. It shows that the widow acted under her husband's direction, and it bases the act on religion and cust om, the two great forces

which dominate the rural society with its love of tradition. Other similar documents filed in this case show the same things.

We agree in holding that case 21 is not proved by witness 233's somewhat vague statements.

Case 22, dated 1875, comes from the same táluka as case 20, and the same remarks apply. Here the property, especially the inám fields, is considerable. See witness 244, the adopted son, and the deed, Exhibit 331, drawn up ten years after. No serious objection to this case is raised by appellant. The adopted son inherited in both families.

Case 23 we reject, witness 240 speaking from hearsay. Case 24 from the Dhárwár Táluka in 1837 is clearly proved by witness 241 and the documents, Exhibits 242, 243, 329 K and 330 to be the adoption of an only son of the sister of the adopting mother. There seems to have been no dispute; and the revenue authorities have recognized it.

Case 25 we have excluded, the Raddi family not being Lingáyet.

Cases 26 and 27 come from Navalgund and belong to the years 1859 and 1887. The one is an adoption of a daughter's son: the other of a separated brother's grandson. Both are proved by the testimony of witness 246, the adopted son in case 26, and related to the family in case 27.

I concur with Mr. Justice Ránade in holding case 28 from the Gadag Táluka to be proved by witness 70 and the revenue order, Exhibit 351. It is of the year 1880 and is important as occurring in a family holding a Deshpánde right.

We have both given reasons for admitting case 29 which occurred in the Sángli territory in 1887. We have excluded cases 30 to 34, which relate to Bráhmin families as irrelevant.

In case 35 and some others we have no finding by the Court below. I concur in Mr. Justice Ránade's reasons for holding that this instance of only sonship is not proved.

Case 36 we exclude as relating to Bráhmins. In cases 37 and 38 the testimony and documents being full of conflictions we hold only sonship not proved. Also in case 39, where the son

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of the adopted person says the latter had brothers at the time. For similar reasons I concur in rejecting case 40.

Case 41 I would exclude on the ground that the Kuruba family in which the case is alleged is not shown to be Lingáyet. My colleague excludes it for failure of proof of only sonship.

On case 42 I have already given opinion that the Kuruba family is not Lingáyet. I entirely agree with Ránade, J., in holding the *factum* and the only sonship proved. The opposite contention of the appellants is vain and unfounded. The adoption, which was about 1878, in the Navalgund Taluka involved a right to police service and to a share in the police inám lands. Exhibit 443 shows that Bhima, the adopted son, said distinctly to the revenue officers that he was the only son of his natural father Basáppa. A careful inquiry was made before Bhima was accepted to fill his adopting father's place. The other heirs must have known of these public proceedings, but there was no dispute. This is a clear instance of a brother's only son being adopted. The evidence does not show whether the brothers were joint or not.

We have excluded case 43 as one of Bráhmins. I have given my reasons for excluding the Kuruba case 44 from Navalgund as not one of Lingáyets. My learned colleague admits it as proved.

I agree with him in holding case 45 of 1864 from Navalgund to be clearly proved. The adopted son has not inherited in his natural family. The two fathers were cousins. As temple inám lands were involved, and the relations appeared at the inquiry, the recognition by the Collector of this adoption, of which the legality was not disputed in the family, makes this case important evidence of the custom.

Case 46 is alleged to have occurred in a pátelki family in the Ron Táluka about 1834. Concurring in my colleague's remarks I hold this case proved. It is that of a nephew adopted by a separated uncle. The nephew was often described as son of the natural father. This fact is partly explained by his inheriting in both families.

We have already given our reasons for excluding cases 47 to 51 as irrelevant.

The result of our consideration of the above cases is that we concur in finding that the existence of the alleged custom is clearly proved by the evidence. The instances range from 1814 till the present time, and belong to the Bijápur and Dhárwár Districts, between the Bágevádi and the Hangal tálukas. If the adoptions were considered invalid, it is incredible that no disputes should have been raised, either in the British districts or the Native States, especially where the right to service or watan or inám was in question. Many of the cases were publicly conducted, in the kacheri as well as the home: there is documentary evidence of them in registered deeds and public records. There is no sign of secresy or indication that the transactions were improper or unusual. Like the adoption in the present suit, they must have been matter of great notoriety. If we turn to the remarks of the Judge below on the present adoption, the abundant evidence shows that it was treated as right and proper; the defendants concurred in it, and some of the witnesses who depose against the custom are found to have witnessed the deeds, and nobody protested against the adoption. I think it may, therefore, be inferred that the objection to validity is an afterthought; and I find that the parties acted at the time with a consciousness that the act was valid by custom. Following the decisions already noted, we must give it our judicial recognition. "Thus by frequent iteration and multiplication of the act, a custom constituted, and being used for a time obtains the force of law"—*Case of Tanistry*[1].

Turning now to other questions on which we must give judgment, I concur with the Judge below and with my learned colleague, for the reasons he gives, in upholding the gift of house and lands by the deceased Shivangauda to his two daughters, the defendants Nos. 2 and 3, by Exhibit 113. I do not think we can affirm, on the evidence, that either the deed of adoption, Exhibit 112, was executed, or that the ceremony of adoption took place prior to the gift: and, therefore, I think we must treat the gift and adoption as substantially one transaction.

(1) Sir J. Davy's Report, p. 32.

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We concur, for the reasons given by Ránade, J., with the Subordinate Judge in refusing to the widow, the defendant No. 1, the four ornaments and the sum of Rs. 1,128.

With regard to the claim of defendants Nos. 2, 3 and 5 to the residue of the moveable property and the endeavour to make out that the defendant Gangava did a large money-lending business of her own quite independently of her deceased father Shivangauda, I am of opinion, after careful examination of the evidence, that the Subordinate Judge, who examined the witnesses, is right in believing them to be false, and in his conclusions rejecting the defendants' claim. My reasons are substantially those of the lower Court, and I concur entirely in the reasons given by Ránade, J., on this part of the case. Both Courts are enabled to apply several tests to the conflicting evidence. It is to be noticed prominently that many of the defendants' witnesses on this claim are persons who professed complete ignorance of the practice of adopting only sons, although some of them were present at this particular adoption, which was performed with great publicity and without dispute. Moreover, these same people try to convince the Court that such adoptions never have occurred among Lingáyets, by swearing to a religious reason, the Bráhmin dogma about the delivery of the soul from hell by the begetting of a son.

Witness 282 even goes so far as to represent some unknown deceased Lingáyet religious doctors preaching at Naregal some twenty years ago this dogma as a reason for objecting to these adoptions. This is as unlikely as a story would be that ministers of the Protestant churches were insisting on marriage being treated as a sacrament. This story about these abbots or pandits, if there is any truth in it, points to the fact that the Naregal people were aware years ago of the custom of adopting only sons, and possibly people of the other religious community may have expounded the Bráhmanical view. There is no statement that the three pandits, who, according to witness 293, met above thirty years ago in the Nizám's territory and declared that the custom was invalid, were Lingáyets: and the authorities they are said to have quoted, Smriti and Sruti, indicate that they may have been Bráhmins interpreting mere texts of Hindu law, possibly those

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very texts on which the great dispute has turned, *i. e.*, whether at Hindu law the adoption of an only son is valid. No living priest of importance nor learned man has been called to prove these adoptions to be wrong or contrary to religion or practice: there is no evidence of any such adoption being followed by caste meeting or penance or ecclesiastical censure. The family guru, witness 255, says he does not know the Shástras: and although his tongue declares these adoptions to be wrong, his acts speak differently, as he took a part without remonstrance in the adoption under our consideration in this case.

The Court now confirms the decree of the Subordinate Judge of the First Class in all particulars: but adds to it a declaration that the plaintiff-respondent takes the property awarded to him subject to the obligation to provide a sufficient maintenance for the first defendant Basáva: the costs of the cross-objections to be paid by the respondent: and all the other costs of the appeal by the appellants.

Decree confirmed.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Farran.

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December 10, 11.

H. A. ACWORTH, MUNICIPAL COMMISSIONER OF BOMBAY (ORIGINAL DEFENDANT), APPELLANT, *v.* SHA'VAKSHA DHUNJIBHA'I (ORIGINAL PLAINTIFF), RESPONDENT.*

Malicious prosecution—Procuring wrongful execution of a warrant of arrest—Reasonable and probable cause.

The plaintiff sued the Municipal Commissioner of Bombay for damages, alleging that the Commissioner had maliciously and without reasonable and probable cause procured a warrant to be issued against him on 24th March, 1892, and subsequently procured that warrant to be executed at a time when its force was spent, and under circumstances when it ought not to have been executed. From the evidence it appeared that on the 21st December, 1891, a notice was served on the plaintiff under section 232 of the City of Bombay Municipal Act (III of 1888) requiring him to do certain drainage work upon premises belonging to him. The work not having been done, a summons was issued against him on the 11th February, 1892, requiring him to appear before the

* Suit No. 614 of 1892.