Tagore Law Lectures, 1908.

CUSTOMS RARE AND CUSTOMARY LAW IN BRITISH INDIA.

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PREFACE.

The contents of the following pages have been the subject of a series of Lectures delivered by me, as Tagore Law Professor for the year 1908, at the University of Calcutta during the latter end of January and the first week of February 1909.

Though under the revised rules the manuscripts of the entire lecture were submitted by me to the Syndicate and approved of by a Committee as "complete and ready for the Press" before it was actually delivered, there has been an unfortunate lack of expedition in its publication. For this regrettable delay, though it was beyond my control, I beg to tender my apologies to the Profession.

In preparing these lectures I experienced considerable difficulties in my search for old reports and references. The decisions of the Sudder Dewany Adawluts are pre-eminently important on questions of customs and usages, but some of these reports are of such rarity that I was unable to consult them. Consequently I have not succeeded in making these lectures as comprehensive as I desired. Further, the time-limit, within which an elected Tagore Law Professor has under the new rules to write out his lectures, has in no inconsiderable degree hampered me in doing justice to the subject, which, I need hardly say, is not merely vast but also original. In this book I have only succeeded in embodying most of the decisions bearing upon various customs

and usages which came up before Courts of Law for their decision. But outside these, there exist innumerable customs and usages in all parts of the country, among civilized and uncivilized people, which have not yet come to Courts of Law. Into these I have not been able to extend my investigation for want of time and means. Moreover in order to carry on an investigation into these customs and usages, it would be necessary to have the collaboration of other workers without which so stupendous a task would be impossible of accomplishment. Should such voluntary co-operation and means be ever forthcoming in the future, I should feel it an honour to be allowed to contribute my humble quota of labour towards the completion of that *magnum opus*.

The numerous difficulties that have attended me in preparing these lectures will, I hope, induce the generous Profession to look with a favourable eye upon its many imperfections of which no one is more conscious than myself. I will consider my humble labours well-recompensed if I can think that I have facilitated the future labours of others in this line.

I beg to express my indebtedness to Sir Wm. Rattigan from whose excellent work I have taken the subject-matter of my lecture on the Punjab Customs.

CALCUTTA. | S. R.
24th December, 1910. |

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CUSTOMS AND CUSTOMARY LAW

IN

BRITISH INDIA

INTRODUCTORY.

Priority of Custom to Law.

It requires no special reasoning to satisfy oneself that of the two—Custom and Law—Custom is of far earlier origin than Law. Law which is the product of a rather complicated machinery of Social and Political organization was unknown, at any rate, in its present sense, in the primitive ages when society was not, "as at present, a collection of individuals but an aggregation of families." There was then no king or sovereign to frame rules or set 'law' for these families. One family was independent of another and followed its own head, whose will or pleasure was 'law' unto its own members. As families expanded into a community and the community into a tribe, rules and principles were established for the guidance of its members, and for the regulation of its internal economy. They continued for ages, and existed long before any attempt to legislate was made by a Sovereign authority, and, having been handed down from generation to generation, came to be regarded as sacred traditions and customs governing the tribe.

Law was built upon custom.

It is not merely that 'law' is of very recent origin but that, in most cases, it has been based upon custom and

usage.[1] In tracing the gradual development of 'law,' one thus sees how custom has been the very corner-stone of the legal superstructure. It has been so not in ancient Greece, Rome or India alone, but in every country, ancient or modern. The Common Law of England, most of which is now embodied in Acts of Parliament or judicial decisions, at one time consisted of a collection of unwritten customs which had subsisted immemorially in the Kingdom.[2] The Roman law, which theoretically rests on the twelve Decemviral Tables and, therefore, on a basis of written laws, was, to use the words of Sir Henry Maine, "merely an enunciation in words of the existing customs of the Roman people."[3] Savigny remarked that the oldest law in Rome, as among all nations, was founded on the common understanding and consent of the people without any other apparent basis, and this we are accustomed to call *consuetudinary* law.[4] And as regards Hindu law, it is not merely based on immemorial customs, but customs form a very important *branch* of that law.[5]

Various uses of the term 'Law.'

Before we proceed further, let us have a clear understanding of the term 'law.' As we all know the term 'law' has been applied rather loosely to various matters which are not the proper subject of jurisprudence. For instance, we speak of 'laws of God,' 'laws of Nature,' 'laws of Gravity,' 'laws of fashion' or 'laws of honour,' 'physical laws,' 'moral laws, and so forth. In these, no doubt, the term 'law' is applied either as a metaphor or by way of analogy. But the term, in a more strict

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[1] Prof. Newman observed 'Law is everywhere built upon custom.'—Misc. Lec. ii, p. 166.

Herbert Spencer speaks of the "gradual establishment of law by the consolidation of custom."—Study of Sociology, p. 108.

Plato recognises ; customs as existing before law.—Repub. ii, Grote's Plato, Vol. III, p. 47.

[2] *Vide* Stephen's Commentaries, Vol. I, pp. 2, 19, *et seq.*

[3] Ancient Law, p. 18.

[4] History of the Roman Law during the Middle Ages, by Cathcart, p. 2.

[5] Strange's H. L., Vol. I, p. 256. Mayne's H. L., p. 4.

sense, is generally associated in people's minds with a command or commands of some definite *human* authority, the disobedience to which will be followed by some penalty. This sense, broadly speaking, accords with the meaning generally attached to the term by the jurists, principally, of the school of Austin.

Its definition by Austin.

Law, rather, *positive law*, according to Austin, is a rule "set by political superiors to political inferiors."[1] It is "a creature of the Sovereign or State; having been established *immediately* by the *monarch* or *supreme body*, as exercising legislative or judicial functions; or having been established immediately by a *subject* individual or body, as exercising rights or powers of direct or judicial legislation which the monarch or supreme body had expressly or tacitly conferred."[2] Practically what Austin means is that law is the express enactments by a Sovereign or a State and certain judicial decisions. Now, this definition of law excludes a large body of rules and customs, collectively termed *unwritten laws*, which existed and regulated the life and conduct of human societies long before any regular political or civil Government came into existence. Austin, holding that until a custom is recognised by a judicial court it cannot become a positive law, has placed these rules and customs under the term *positive morality*. As we shall see later on, Sir Henry Maine does not, and rightly too, agree with this view of Austin.

Holland, who practically adopts Austin's definition of law,[3] differs from him in regard to his (Austin's) opinion that a custom becomes a law only when it receives judicial

[1] Austin's Juris. Vol. I, p. 1; see also Maine's Village Communities, p. 67—'A law, they say, is a command of a particular kind. It is addressed by political superiors or sovereigns to political inferiors or subjects; it imposes on those subjects an obligation or *duty*, and threatens a penalty (or *sanction*) in the event of disobedience.'

[2] Austin's Juris. Vol. II, p. 221.

[3] "A general rule of external human action enforced by a sovereign political authority."—Holland's Juris., p. 37.

recognition. Holland says: "The State, through its delegates, the judges, undoubtedly grants recognition as law to such customs as come up to a certain standard of general reception and usefulness. To these the courts give operation, not merely prospectively from the date of such recognition, but also retrospectively; so far implying that the custom *was law* before it received the stamp of judicial authentication."[1] In giving the recognition a court "merely decides *as a fact* that there exists a legal custom about which there might, up to that moment, have been some question, as there might about the interpretation of an Act of Parliament."[2]

Holland, though he has proceeded a step further than Austin, in that, custom *was law* before it received judicial recognition, and that, all that the court does is to decide *as a fact* that such custom exists, has not given such a broad definition of law as to include customs. Both customs, that have attained all the force of law, and laws, *i.e.*, statutes, are principles or rules which govern and regulate the life and conduct of human societies. The former have their foundation in the collective will or common consent of the people, just as much as the latter have, on the will or pleasure of a Sovereign or a State. The objects and the functions of both are alike, though the procedure is different. To say, therefore, that customs and usages, which have all the force of law, nay, sometimes even greater force than statutory laws, are not to be called *law*, is a mere verbal contest and nothing else. To give therefore a comprehensive definition of law, so that both customs of the above description and statutes may be included under the term law is not very easy, but yet the following brief description may be considered as adequate. Law is a body of rules of human conduct, either prescribed by long established usages and customs or laid down by a paramount political power.

Comprehensive definition of Law.

[1] Holland's Jurls. p. 53. [2] Ibid, p. 55.

Definition of custom.

Now let us consider the term custom, a correct definition of which may be stated with less difficulty. "At its origin," says Austin, "a custom *is a rule of conduct* which the governed observe spontaneously, or not in pursuance of a law set by a political superior."[1] A rule of conduct, by uniform series of acts in pursuance of it, turns into a *custom*, which the people observe and follow without any coercion from any body. The rule or rules come into existence without any apparent author. Their birth and growth is the natural consequence of the progress of human society; since no association of persons can exist permanently without adopting, consciously or unconsciously, some definite rules governing reciprocal rights and obligations. These rules of conduct may have been based on utility, or may have arisen from social or communal necessity, but they have always the express or tacit sanction of the collective will or common consent of the people among whom they prevail.[2] Custom, therefore, may be defined to be a rule of conduct uniformly governing a community from time immemorial.

A custom cannot be created by *agreement* among certain persons to adopt a particular rule so that it may be binding on others.[3] A mere *arrangement* by mutual consent for

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[1] Austin's Juris., Vol. I., p. 23. Vide *Hurpurshad* v. *Sheo Dyal*, 3 I. A 259 (1876); s.c. 26 W. R. 55, wherein the Judicial Committee defined custom as "a rule which in a particular family or in a particular district has from long usage obtained the force of law."

[2] See Thibaut, *System des Pendekten Rechte*, p. 15.—"Where a class of persons by common consent have followed a rule intentionally, either by positive or negative acts, a law arises out of the common consent for each person belonging to that class, provided that the custom is not unreasonable and applies to matters which the written law has left undetermined. A custom, therefore, to hold good in law requires besides the above negative conditions, the following positive conditions, *viz.*, that the majority at least of any given class of persons look upon the rule as binding and it must be established by a series of well-known, concordant, and, on the whole, continuous instances."

[3] *Myna] Boyee* v. *Ootaram*, 8 Moore's I. A. 400 at p. 420 (1861);

peace and convenience, or an arrangement which is determinable at the will of any member of the family cannot be regarded as custom of the family.[1]

Prescription is not a custom. It, being personal, attaches to a man and his ancestors or to those whose estate he has. Whereas, a custom is, properly speaking, a long-standing local usage.[2]

Difference between Custom and Usage.

"Custom" and "usage" are not synonymous. In fact, there is a great difference between them. *Custom* carries with it an idea of great antiquity. One of the essential points of a *valid* custom is that it must uniformly exist from time immemorial. No such antiquity is necessary to prove a *usage*. A usage may be of far recent growth, and yet may be proved to be valid. The essential condition regarding its validity is that it must have "fructuated into maturity" and that it must not be *growing*.[3] A usage may grow up within a very short period but a custom must have a halo of ages and centuries' uniformity and consistency attached to it in order to be recognised as such. Usage may be defined to be a uniform practice among a people or class with respect to certain matters or things.

Customs and Usages growing up *pari passu* with written laws.

Even in these days of codes and statutes, there is still growing up *pari passu* a body of unwritten laws, or, customs and usages, in every sphere of human activity, which commands all the reverence and obedience of a king-made law. Just look at the English constitution. A series of political changes have been made without any

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Abraham v. *Abraham*, 9 Moore's I. A. 195 at p. 242, (1863); *Bhaoni* v. *Maharaj Singh*, 3 All. 738. (1881).

[1] *Bhau Nanaji Utpat* v. *Sundrabai*, 11 Bom. H. C. R. 249. (1874); *Ramrao T. Despande* v. *Y. M. Despande*, 10 Bom. 327. (1885).

[2] Stephen's Commentaries, Vol. I., p. 421.

[3] Vide *Edward Dalgleish* v. *Gozaffar Hassein*, 3 C. W. N. 21 (1898): s. c. 23 Cal. 427 (1896) in remand; *Sariatullah Sarkar* v. *Pran Nath Nandi*, 26 Cal. 184 (1898); *Jagan Prasad* v. *Posun Sahoo*, 8 C. W. N. 172 (1903).

legislative enactment whatever. A whole code of political maxims has grown up without any aid of the legislature. "We have now," says Freeman, "a whole system of political morality, a whole code of precepts for the guidance of public men which will not be found in any page, either of the statute or the Common Law, but which are in practice held hardly less sacred than any principle embodied in the Great Charter or in the Petition of Right. In short, by the side of our written law there has grown up an unwritten or conventional constitution."[1]

Mr. Freeman, in his admirable little work we have just quoted, has given a number of instances illustrating and elucidating his proposition, and we take one or two of them. *First:* the passing of a resolution declaring want of confidence in the Ministers of the Crown. We all know that now this means that the Ministers must resign. But there is no statutory enactment to that effect. The fact that, under such circumstance, the Ministers must resign, rests solely on traditional principles and not on written law. *Second:* the relations of the two Houses of Parliament to one another, the theory of the Cabinet and of the Prime Minister and the practical working of the government—all belong to the unwritten constitution, and not to the written law. *Third:* the British Sovereign has, under the written law, power to select, appoint, and remove from office all his ministers and agents, great and small. But the unwritten constitution makes it practically impossible for a Sovereign, either to keep a Minister in office of whom the House of Commons does not approve or to remove from office a Minister of whom the House of Commons does approve.[2] Many more instances of the same kind may be given.

As in the region of politics, so in social and domestic,

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[1] Freeman's Growth of the English Constitution, Chap. III. pp. 112-114.

[2] Ibid, pp. 118-119.

private and public relations, between man and man, it may be observed that, side by side with written law, there has grown up and is still growing up, silently and without any acknowledged author, a number of customs and usages, precedents and conventions.

Origin and growth of custom.

It is impossible to ascertain the precise beginning or to discover the rudimentary growth of an ancient and long established custom. It is of such high antiquity that neither human memory nor historical research can retrace it. Indeed, on its antiquity and immemorial practice depends the goodness of a custom. But though we are unable to trace the origin of a custom which is enshrouded in the mist of ages, yet we can ascertain the process by which a certain rule of conduct is gradually established into a custom.

Let us picture to ourselves for a moment the primitive aga of the archaic family when it was ruled by the paterfamilias. The head of the family, the father, governs his wife, children and slaves and directs their conduct according to his wishes. The commands or rules in which his wishes are expressed are obeyed by the different members of his family. Whenever the same circumstances arise, the same conduct, as first directed by the rule, is followed. The repetitions of conduct in the various matters of domestic life come at last to be regarded in the family as a rule of conduct or custom. And as years go by, the same rule or custom continues to be observed and with the lapse of years the rule becomes more and more binding, and any attempted departure from it by any member is resented by the rest. In the course of long years, the origin of the custom is lost, how the rule came to be made becomes unknown and unknowable: the members observe it because their ancestors followed it. These rules and principles, few in number, on account of the simple mechanism of an ancient community or tribe, would, though being uniformly followed and acted upon, gradually become inviolable and obligatory. The original tacit

consent of the people on which they were based would gradually crystallize into a collective *will* of the people. And by this *collective will* of the community or tribe those rules and principles would gradually become firmly established as customs.

Nature of custom.

Custom differs from law in its flexible and plastic nature. This is the inevitable consequence of their respective origin. Law, rather, positive law, originates from the will or command of the Sovereign power, whereas custom has no direct author: it grows and fashions itself as the exigencies of a community arise and need. A law or statute once enacted cannot be altered or repealed by any other power than that of a Sovereign. A custom, on the contrary, may change or modify itself or may be abandoned by a community or a class without the intervention of any authority whatever.

Lord Beaconsfield in his famous speech on the Irish Land Bill observed: "The value of a custom is its flexibility and that it adapts itself to all the circumstances of the moment as of the locality . . . . customs may not be as wise as laws, but they are always more popular. They array upon their side alike the convictions and prejudices of men. They are spontaneous. They grow out of man's necessities and inventions, and as circumstances change and alter and die off, the custom falls into desuetude."[1]

How custom preserved.

"The preservation," says Sir Henry Maine, "during a number of centuries which it would be vain to calculate, of this great body of unwritten custom, differing locally in detail, but connected by common general features, is a phenomenon which the jurists must not pass over."[2] That customs have been handed down to us from the remotest ages and not allowed to pass into oblivion is due to the conservative nature of man and to the reverential regard with which each member of a community or a

[1] Hansard, Vol. 199 p. 1806.

[2] Village Communities, p. 55.

tribe looks upon them. To violate a custom is to him nothing short of a sacrilege. Thus by right observances and constant practices, the traditional rules have been always kept in evidence and transmitted from generation to generation without any way being warped by extraneous influences. Further, the frequent discussions regarding the various customs among the people themselves, as occasions arise, have tended, in no small measure, towards their preservation.

Customary Law.

A divergence of opinion exists amongst jurists as to what is meant by the expression *Customary Law*. This difference is due to the different conception of the term 'law' by the two different schools in which the jurists have arrayed themselves, *viz.*, the Historical and the Analytical. Hale, Blackstone, Maine and other English jurists and many Roman and German writers representing the Historical School, trace back *law* to before the period when Sovereigns or States came into existence ; whereas Hobbes, Bentham, Austin and others representing the Analytical School, trace law from the period when Sovereigns and States first came into being. Both the Schools, however, agree that, before the king-made law, there existed a large body of rules regulating societies. The Historical School call them *unwritten laws* in contra-distinction to the *written* or statutory and judiciary laws. But the School of Austin, as they own the existence of no other law than the king-made one, will not apply the term 'law' to them and prefer to designate them as *unwritten* rules or rules of morality. These unwritten rules or rules of morality, as called by the Analytical School, are collectively called *Customary Law*. It is the *jus non scriptum* of the Romans.

Thus Customary Law,[1] or as it is called, *mores*

[1] Cicero has described Customary Law as "that which without any written law antiquity has sanctioned by the common consent of all men." *De Invent*, 2. 22.

majorum or *consuetudinarium*, is composed of a large body of rules, observed by communities, evidenced by long usages and founded on pre-existing rules sanctioned by the will of the community. It exists independently of a Sovereign authority. It forms the ground-work of every system of legislation.

According to Austin, Customary Law is "positive law fashioned by judicial legislation upon pre-existing customs."[1] Or, in other words, it embraces only those customs which have been recognised by the established tribunals. But the inconsistency of such a definition is quite apparent. In the first place, it excludes a large body of customs which exist with all the force of law, just like those which as a matter of accident having been brought before the court received judicial sanction. In the next place, according to Austin, the moment a custom receives judicial recognition, it becomes part and parcel of the *positive law*, and, therefore, for him to call it again a customary law is simply, if not contradicting, certainly confusing, himself. Lastly, in India, as we shall see presently, a judicial decision or recognition can not confer on custom all the rigidity of a positive law. A custom, though judicially sanctioned, may not be followed at the discretion of courts.

Its binding force.

Now let us see what constitutes the binding force of Customary law. The Romans attributed the binding force of customs to a principle of utility (*consensus utentium*) rather than to a religious or reverential respect for the practice of a long line of mythical ancestral gods. The Greeks attributed a divine origin to the customs and usages which had been handed down from their mythical ancestors. In England the weight and authority of a custom depend upon its having been used since the 'time whereof the memory of man runneth not to the contrary.' In india the binding force of customs lies in their sacred

[1] Austin's Juris., Vol. I, p. 148 ; see also *Ibid*, Vol. II, p. 222.

antiquity and in the reverential obedience to them by the people themselves for generations.

Vangerow says, "just as law is said to derive its force by publication, it is equally correct to say Customary law exists by usage."[1] It will not seem paradoxical to say that the same collective will or common consent of a community that originates a custom, *obliges* every individual member to observe and obey it. Save this there is no other coercive force to enforce obedience. "A custom," says Thibaut, " . . . . is binding in itself, and does not require either the special recognition of the ruling power or its confirmation in Court of Law or the efflux of time, definite or indefinite,—least of all does it require prescription although either of these latter tends very much to prove the existence of the common consent; and from a uniform series of decisions common consent may be inferred."[2]

According to Austin, however, a custom cannot have a binding force until it has become law by some legislative or judicial act of a Sovereign power. Similar view was expressed in one[3] of our early Indian cases, probably on the basis of the view of Austin, but such view is no longer tenable. Holding the view as Austin does, he calls *customs* as nothing more than *rules* of *morality*. Sir Henry Maine has assailed this view in no measured terms. In dealing with the Indian Village Community he writes thus:—"Those most entitled to speak on the subject deny that the natives of India necessarily require divine or political authority as the basis of their usages; their antiquity is by itself assumed to be a sufficient reason for obeying them. Nor, in the sense of the analytical jurists is there *right* or *duty* in any Indian Village Community; a person aggrieved

[1] 'Lehrbuch der Pandekten' t. I, § xiv.

[2] Thibaut, System der Pandekten Rechte, p. 15.

[3] Vide, *Narasammal* v. *Balaramacharlu*, 1 Mad. H.C.R., 420, at p. 424. (1863).

complains not of an individual wrong but of the disturbance of the order of the entire little society. More than all, the customary law is not enforced by a sanction. In the almost inconceivable case of disobedience to the award of the village council, the sole punishment, or the sole certain punishment, would appear to be universal disapprobation. And hence, under the system of Bentham and Austin, the customary law of India would have to be called morality—an inversion of language which scarcely requires to be formally protested against."[1]

Judicial decisions are not indispensable for the establishment of customary law.[2] The Courts by recognizing a custom simply declare that it exists as legal and valid custom. Of course, any judicial decision about a certain custom will govern all future cases of like nature or at any rate supply weighty testimony to its existence or non-existence. But such decision is by no means conclusive or absolute. A Court may, in the exercise of its discretion, refuse to follow the past decisions under certain circumstances: as for instance, if a custom which has once received judicial recognition is considered to have become prejudicial to the public interests at some subsequent time.[3]

Custom as a source of Hindu law.

Now let us examine what place customs and usages occupy in the Hindu law. There can be no question that the Hindu law, like most other laws, is based on customs and usages. The Code of Manu was by far the earliest attempt at a compilation of the then prevalent customs and usages, though it contained but a very small body of such customs and usages. They have been long since recognized as a branch of Hindu law by the British Courts here as well as by the Judicial Committee. Writers on Hindu law have, one and all, declared that the law is based on immemorial customs. These customs, wherever they

[1] Village Communities, p. 68.

[2] Vide, *Tara Chand* v. *Reeb Ram*, 3 Mad H. C. R. 50 (1866).

[3] *Mathura Naikin* v. *Esu Naikin*, 4 Bom. 545 (1880).

prevail, "supersede the general maxims."[1] Manu says, "the whole Veda is the first source of the scared law, next the traditions and the virtuous conduct of those who know the (Veda further), also the *customs* of holy men, and (finally) self-satisfaction."[2] This injunction helped in a considerable measure in rendering the customs and usages prevalent in India so stable and firm.

Code of Manu.

The Code, or Laws, or Ordinances, or Institutes, of Manu, as they are variously called, are, as we have said, the earliest attempts among the Hindus to fix ancient customs and traditions in a systematic form. The Code is, at best, only a large collection of "the usages of a peculiar tribe of the country" and a compendium of "moral and religious duties and precepts to pious Hindus." This compilation or Code of Manu dates back, according to various authorities,[3] from the thirteenth to the third century before the Christian era. Whatever the age of the *magnum opus* may be, it is now beyond all shadow of a doubt that it is the earliest record we possess of Indian customs and usages existing from time immemorial. Whether or not the present Code of Manu is the original work of the author whose immortal name it bears we need not stop here to discuss. It is sufficient for our purpose to say that the original compilation of Manu must have suffered mutilations and interpolations, modifications and alterations at the hands of the glossators, and under the later school of Brahmanism, as, in accordance with the general principle of progress and advancement, the needs of the growing communities demanded.

"The Hindu Code, called the Laws of Manu," observes Sir Henry Maine, "which is certainly a Brahmin compila-

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[1] Strange's H. L., Vol. I. p 251.

[2] See *Infra*, p. 15.

[3] Sir William Jones places its age at 1200 B. C.; Schlegel, at about 1000 B. C.; Elphinstone, at about 900 B C.; Prof. M. Williams, at about the 5th Century B. C.; Prof. Max Müller, at a date not earlier than 200 B. C.—*Vide* Mayne's H. L., p. 19.

tion, undoubtedly enshrines many genuine observances of the Hindu race, but the opinion of the best contemporary orientalists is, that it does not, as a whole, represent a set of rules ever actually administered in Hindustan. It is, in great part, an ideal picture of that which, in the view of the Brahmins, *ought* to be law."[1] Again: "The Codified law—Manu and his glossators—embraced originally a much smaller body of usage than had been imagined, and, *next*, that the customary rules, reduced to writing, have been very greatly altered by the Brahmanical expositors constantly in spirit, sometimes, in tenor."[2]

That Manu recognised the vast importance of customs and usages will be found from the following passages quoted from Prof. Max Müller's 'Laws of Manu.'[3]

CHAPTER I.—108. The rule of conduct (usage, আচার, শীল) is transcendent law, whether it be taught in the revealed texts or in the sacred tradition; hence a twice-born man who possesses regard for himself should be always careful to (follow) it.

CHAPTER II.—6. The whole Veda is the (first) source of the sacred law, next the traditions and the virtuous conduct of those who know the (Veda further), also the customs of holy men and (finally) self-satisfaction.

" —12. The Veda, the sacred tradition, the customs of virtuous men, and one's own pleasure, they declare to be visibly the four-fold means of defining the sacred law.

" —18. The custom handed down in regular succession (since time immemorial) among the (four chief) castes (Varna) and the mixed (races) of that country, is called the conduct of virtuous men.

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[1] Ancient Law, p. 17.
[2] Village Communities, p. 52.
[3] Sacred Books of the East, Vol. XXV.

CHAPTER II.—20. From a Brahmin, born in that country, let all men on earth learn their several usages.

CHAPTER IV.—155. Let him, untired, follow the conduct of virtuous men, connected with his occupations, which has been fully declared in the revealed texts and in the sacred traditions (Smriti) and is the root of the sacred law.

" —156. Through virtuous conduct he obtains long life, through virtuous conduct desirable offspring, through virtuous conduct imperishable wealth; virtuous conduct destroys (the effect of) inauspicious marks.

" —178. Let him walk in that path of holy men which his fathers and grandfathers followed; while he walks in that he will not suffer harm.

CHAPTER VIII.—41. (A King) who knows the sacred law, must enquire into the laws of castes (gati), of districts, of guilds, and of families, and (thus) settle the peculiar law of each.

" —46. What may have been practised by the virtuous, by such twice-born men as are devoted to the law, that he shall establish as law, if it be not opposed to the (customs of) countries, families, and castes (gati).

Manu went futher and enjoined the Kings, after they have conquered a new country, to uphold the customs of the conquered country. (Vide Manu, Chapter VII, 203).

A few quotations from the later commentators will show that they also laid stress on the authority of customs and usages in their respective works. We do not desire to quote from every one of the leading commentators whose names are familiar to the students of Hindu law, but we need only mention Gautama, Vasistha, Apastamba, Yajnavalkya, Narada, Vrihaspati, and Katyayana. To exemplify, we quote the following texts from some of these authors.

Gautama—CHAPTER X. 19-20. The laws of countries, castes, and families, which are not opposed to the (sacred) records (have) also authority. Cultivators, traders, herdsmen, money-lenders, and artizans, (have authority to lay down rules) for their respective classes.

Vasistha—CHAPTER I. 17. Manu has declared that the (peculiar) laws of the countries, castes and families may be followed in the absence of (rules of) the revealed text.

Yajnavalkya—CHAPTER I. 343. Whatever customs, practices and family usages prevail in a country they should be preserved in tact when it comes under subjection.

Narada—CHAPTER I. 40. In case of conflict of Smritis decision should be based on reason. Custom is powerful and overrules the sacred law.

Vrihaspati—Book II. Ch. iv, V. 17 (cited in the *Vyavahara-tatwa*):—

A decision must not be made solely by having recourse to the letter of written codes; since, if no decision were made according to the reason of the law, or according to immemorial usage (for the words *yucti* admits both senses), there might be a failure of justice. *Raghunandana.*

Vachaspati and Raghunandana cite the following from the *Vamana Purana*:—A man should not neglect the approved customs of districts, the equitable rules of his family or the *particular* laws of his race.

In whatever country, whatever usage has passed through successive generations, let not a man there disregard it; such *usage* is law in that country.[1]

[1] See Colebrooke's Digest of Hindu Law, pp. 137, 162.

Influence of Brahmanism on customs.

It is important to consider the influence of Brahmanism, which is of later development, on the then existing customs. History tells us that the first country in which the Aryans settled was the tract of land drained by the great river Indus and its tributaries. The holy land of *Brahmavarta* was, as described by Manu,[1] situated between the two ancient rivers, Sarasvati and Drisadvati in the Punjab, and this *Brahmavarta*, according to that sage, is the land where "the custom handed down in regular succession (since time immemorial) among the (four chief) castes of that country is called the conduct of the virtuous men."[2] Manu further says "from a Brahmin in that country let all men on earth learn their several usages."[3] It is worth noting that Manu has throughout his treatise enjoined unqualified reverence for, and implicit obedience to, the Brahmans, and placed them, as a class, above all other human beings. The Brahmans, armed with such *shastric* injunctions, assumed for themselves the position of sole interpreters of the Vedas and Shastras, and became the expositors of usages and customs, both secular and religious, and ultimately attained an ascendancy even higher than that of the rulers of the soil. It was through their influence that ancient customs and usages, which had originally been free from any religious significance or superstitious ideas, became clothed with all sorts of religious rites and superstitions.

But whatever may have been the influence of Brahmanism in modifying the customs and usages of the country where it became paramount, there exists a large body of customs and usages, absolutely pure and untouched, amongst the indigenous population of India who were unaffected by Brahmanism. Even in the Punjab, the birth-place and cradle of Brahmanism, the ancient customs and usages did not suffer much change. Because, soon

[1] Laws of Manu, Chap. II, 17.
[2] *Ibid*, Chap. II, 18.
[3] *Ibid*, Chap. II, 20.

after the Aryans began to move further eastward, the hold of Brahmanism slackened to a considerable extent. In Southern India also, the Brahmans never settled in sufficient numbers to produce a lasting effect on the existing customs and usages. Consequently, in Malabar, Canara, and among the Tamil inhabitants of the South of India, and the Nambudri Brahmans on the West Coast of the Madras Presidency, certain peculiar usages and customs are noticed which remained uninfluenced by Brahmanism.

The case of the Nambudri Brahmans is very singular. They belong to the same stock as the Aryans who invaded and conquered India and subsequently settled in it. They, however, separated themselves from the main stock before Brahmanism had been fully developed, and went to settle in Malabar. Naturally, their usages and customs were not affected by Brahmanism. But the singularity lies in the fact that though they have been in Malabar over 1200 or 1500 years, their customs have not been modified or influenced by those of the people among whom they have lived so long. They have retained their old customs and usages unchanged. The customs and usages which prevail among the Nambudri Brahmans of the present day are the same as existed among the Brahmans of Eastern India at the time of their emigration. Their archaic character exactly accords with such a conclusion.[1]

Village Community and Punchayet.

The Village Community and the Punchayet are two institutions which were instrumental in producing and preserving many customs. The former is the older of the two and "is to be found in every part of the world where men have once settled down to an agricultural life." The Indian village system had its foundation in the communal principle, the essential features of which are that, whilst the individual house-holder may be the supreme

[1] Vide, *Vasudevan v. Secy. of State*, 11 Mad. 157 at pp. 180, 181. (1887).

head of his own family, he is still bound, as a member of the community, irrespective of his creed or caste, to strictly conform to the village rules and usages regulating the internal economy or administration of the whole community. In the Punjab and the adjoining districts this village system is still found in its primitive vigour. Similarly this system is also prevalent among the Dravidian races in the South and among the Nairs of Malabar and Canara. These communities have not been affected by the Brahmanic innovations, and, as a result, have handed down their customs and usages unchanged and unmodified. Among the Hindus of the Punjab, for instance, the order of succession is determined by custom and not by religious considerations. The right of pre-emption, another village custom, is to be found in the Punjab, and is now recognised by Statute. The Tamil settlers of Northern Ceylon retain many of their ancient customs, unaltered by Brahmanic influence owing to causes which cannot now be ascertained.

The Punchayet, or the Council of Village Elders, is an institution of comparatively modern times. Elderly men of the village formed its members, managed the affairs of the community, interpreted customs and settled all disputes. The Elders made no new rules but interpreted the meanings thereof. They declared what the rule of custom was, as the judges in England even now declare what the Common law is. The Punchayet possessed no power to alter any peculiar order of succession immemorially observed. It had nothing to do with any matter involving private rights except merely declaring what had been the custom of that particular family or locality in regard to them. Its chief functions lay in settling civil or municipal rights of individuals in relation to neighbours. As the authoritative interpreter of customs and usages, the Punchayet settled and adjusted the various disputes between private individuals. This course of procedure naturally tended to the rigid observance of a

body of customary rules which being traditionally handed down to posterity acquired a force in proportion to the frequency of its recognition and application. But it must not be forgotten that by these very interpretations and declarations the old rules and customs came insensibly to be modified and altered to suit the times, and so the changes and modifications went on from age to age. When, however, records came to be made of such interpretations and declarations, the gradual modifications of the ancient rules and customs naturally ceased.

Origin of customary law in the aristocratic period.

The first stage in the evolution of the human race, after the primitive state, is what is known as the *heroic* or *military* age. At this stage of humanity, the King used to be regarded as a divine agent, and whatever he did or said was looked upon as imbued with direct divine inspiration. Not Kingship alone, but every cardinal institution of the age, in fact, was supposed to have existed under supernatural presidency. The heroic age was succeeded by an *era of aristocracies*. During this age, the kingly rule was supplanted by that of oligarchies. The sacredness of the kingly character having become weakened, the dominion of aristocracies sprang up. It is not only in Europe but also in India that these oligarchies of aristocracy came into existence. Here the aristocracies became religious, whereas in Europe, they were civil or political. These aristocracies were universally the depositories as well as the administrators of law. They claimed to monopolise the knowledge of law, to have the exclusive possession of principles by which disputes were to be settled and civil rights adjusted. This period, according to Sir Henry Maine, is the period of Customary Law. "Customs or observances," he observes, "now exist as a substantive aggregate and are assumed to be precisely known to the aristocratic order or caste."[1]

We remarked while dealing with the influence of

[1] Ancient Law, p. 12.

Brahmanism, that at one time Brahmanism or the sacerdotal order became a paramount power in the land of the Hindus. It was at this period that a body of customary laws grew up in India. The period of the sacerdotal order or Brahmanism in India corresponded with that of aristocracy in Europe. And like the aristocracy of Europe, the hierarchy of priesthood in India became the depository and custodian of customs and principles regulating the whole society. "The epoch of Customary law and of its custody by a privileged order," says Sir Henry Maine, "is a very remarkable one. The condition of jurisprudence which it implies has left traces which may still be detected in legal and popular phraseology. The law, thus known exclusively to a privileged minority, whether a caste, an aristocracy, a priestly tribe, or a sacerdotal college, is true unwritten law. Except this, there is no such thing as unwritten law in the world."[1]

In the history of jurisprudence this period of customary law was succeeded by the Era of Codes or written laws like those of the Twelve Tables of Rome, the Attic Code of Solon, Laws of Dracco, or the Laws of Manu.

Special importance of customary law in India.

In India, as it is generally admitted, Government by legislation, in the modern sense of the expression, is of very recent date. The Hindu rulers and chiefs of various provinces never made any serious attempt to rule their respective states or dominions by legislation. They never framed a code of laws regulating purely private rights. They did not attempt to interfere with the diverse social and domestic rights, duties and interests (like marriage, adoption, succession, &c.) of the people over whom they held their sway. It would seem that all these domestic and social matters were severely left to be shaped and moulded by the people themselves or, rather, by accidents. The people, no doubt, guided themselves in these matters by rigidly following their ancient customs

[1] Ancient Law, p. 13.

and traditions, which the practice of their forefathers consecrated in their eyes. So far, therefore, as India is concerned the importance of customary law is very great indeed.

It is worthy of note that by the Act of the British Parliament, 21 Geo. III, c. 70, s. 17, and by the Indian Regulation IV of 1793,[1] s. 15, the customs and usages of this country were early recognised and all the British courts in India were required, in determining questions of civil rights and status in cases between Indians, to decide according to such customs and usages. Both these Statutes provided that in suits regarding inheritance and succession to lands, rents and goods, marriage, caste and all other matters of contract and dealing between party and party the laws and usages of Hindus, in the case of Hindus, the laws and usages of Mahomedans, in the case of Mahomedans, should be observed by the Judges in coming to a final decision. Shortly after, the Privy Council, in their decisions of cases, solemnly declared that "under the Hindu system of law clear proof of usage will outweigh the written text."[2] The legislatures of the different Indian Provinces have, whenever necessary, always provided a saving clause in the Acts passed by them guarding the observance of the customs and usages of the country whether of a family, of a tribe, or of a district, so that the judicial officers may in deciding cases give effect to the ancient customs and usages of the people.[3]

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[1] *Vide* Act XII of 1887, s. 37 which has been substituted for s. 15 of the Regulation.

[2] Vide *Collector of Madura* v. *Moottoo Ramalinga Sathupathy*, 12 Moo. I. A. 397, at p. 436 (1868); *Bhyah Ram Singh* v. *Bhyah Ugur Singh*, 13 Moo. I. A., 373 at p. 390 (1870); *Matangini Debi* v. *Jaykali Debi*, 5 B. L. R. 466 at p. 469, (1869).

[3] *Vide* Bombay Reg. IV of 1827, s. 26.
Act II of 1864, s. 15.
Burma Act XVII of 1875, s. 5.
Central Provinces Act XX of 1875, s. 5.
Madras Act III of 1873, s. 16.
Oudh Act XVIII of 1876, s. 3.
Punjab Act XII of 1878, s. 1.
Burma Courts Act XI of 1889, s. 4.

Incidents of Customary Law.

Whenever a custom is pleaded and proved to exist, and if it be not repugnant to pubilc interests or abhorrent to public morality, and if it satisfies all the requisites of a good old custom,—such a custom is "entitled to receive the sanction of a court of law." Nay, it will out-weigh the written texts of law and supersede the general law.[1]

Requisites of custom.

We will now consider what are the requisites of a valid custom. In order that a custom may have the force of law, it is necessary that it should be *ancient* and *invariable*, *continuous* and *uniform*, *reasonable* and *not immoral*, *certain* and *definite*, *compulsory* and *consistent*.[2] In *re Sivanananja Perumal* v. *Muttu Ramalinga*[3] the learned Judges made the following observations :—"What the law requires before an alleged custom can receive the recognition of the court and so acquire legal force is satisfactory proof

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Arakan Hills Reg. VIII of 1876, s. 5.

Terai Reg. IV of 1876, s. 5.

Ajmere Reg. VI of 1877, s. 4.

Indian Contract Act IX of 1872, ss. 1 and 110.

Indian Trusts Act II of 1882, s. 1.

Bengal Tenancy Act VIII of 1885, s. 183, *et passim*.

Oudh Land Revenue Act XVII of 1876, s. 31.

N. W. P. Rent Act XII of 1881, s. 29.

&c., &c., &c.

[1] *Vide* Perry's O. C., p. 121. *Sunder* v. *Khuman Sing*, 1 All. 613 (1878); *Mahomed Sidick*, 10 Bom. 1 (1885); *Bhagirthibai*, 11 Bom. 285, (F. B.) (1886); *Desai Ranchhoddas Vithaldas*, 21 Bom. 110. (1895).

[2] *Huro Prasad* v. *Sheo Dyal*, 26 W.R. 55(1876): s.c. 3 I. A. 259; *Rajkishen Singh* v. *Ramjoy Surma Mozoomdar*, I. Cal. 186 (P.C.): s.c. 19 W.R. 8 (1872); *Mathura Naikin* v. *Esu Naikin*, 4 Bom. 545 (1880); *Sivanananja Perumal* v. *Muttu Ramalinga*, 3 Mad. H. C. R. 75 (1866); *Raja Koernarain Roy* v. *Dhorinidhur Roy*, S. D. Decis (1858), p. 1132; *Sumrun Singh* v. *Khedun Singh*, 2 S. D. Sel. Rep. 116 (147) (1814); See also *Joy Kishen Mookerjee* v. *Doorga Narain Nag*, 11 W. R. 348 (1869); *Amrit Nath Chowdhry* v. *Gouri Nath Chowdhry*, 6 B. L. R. 232 (P.C.) at p. 238; (1870); *Ramchurn Mujmooadar* v. *Rajah Bishoonath Singh*, 12 S. D. Decis 399 (1856); *Soorendronath Roy* v. *Heeramonee Burmoniah*, 12 Moo. I.A. 81 (1868); *Patel Vandra Van Jekisan*, 16 Bom. 470 (1891); *Lutchmiput Singh*, 9 Cal 698 (1882); *Bhau Nanaji Utpat*, 11 Bom. H. C. R. 249 at p. 271 (1874); *Tara Chand* v. *Reeb Ram*, 3 Mad. H. C. R. 50 at p. 57. (1866).

[3] 3 Mad. H. C. R. 75, at p. 77. (1866).

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." This case came on appeal before the Privy Council, and their Lordships in affirming the judgment of the Madras High Court made the following remarks:— "Their Lordships are fully sensible of the importance and justice of giving effect to long-established usages existing in particular districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession, that they should be *ancient* and *invariable* : and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of *antiquity* and *certainty* on which alone their legal title to recognition depends."[1] A custom should not only be ancient or immemorial, but it should have been exercised in a *uniform* manner. (*Vetutissima et jugiter observata*). A custom being irrational, absurd, and contrary to equity and good conscience cannot be sustained in a court of justice.[2] A custom set up must be *definite*, so that its application in any given instance may be clear and certain and reasonable.[3] A custom to be valid must be consciously accepted as having the force of law.[4]

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[1] *Ramalakshmi Ammal* v. *Sivananantha Perumal*, I. A. Supp. 1 at p. 3. (1872) : s. c., 17 W. R., 553 (P. C.)

[2] Vide *Indur Chunder Dugar* v. *Luchmi Bibi*, 7 B. L. R. 682 (1871) : s. c. : 15 W. R. 501.

[3] *Lachman Rai* v. *Akbar Khan*, 1 All. 440 (1877) ; *Lala* v. *Hira Singh*, 2 All. 49 (1878); *Hurpurshad* v. *Sheo Dyal*, 3 I. A. 259, at p. 285 [1876] ; *Ramalakshmi Ammal* v. *Sivananantha Perumal* I. A. Supp. 1 (1872) : s. c. 17 W. R. 553 (P. C.) ; *Doorga Pershad Singh* v. *Doorga Kooeree*, 20 W. R. 154 at p. 157 (1873) ; *Bhogawan Das* v. *Balgobind Sing*, 1 B. L. R. (S. N.) IX. (1868).

[4] *Mirabivi* v. *Vellayanna*, Mad. 464 (1885).

Stephen, in his Commentaries,[1] has enumerated certain conditions that are necessary to make a special custom good and these are :—

(i) The custom must have been used *so long, that the memory of man runneth not to the contrary.*

(ii) A custom must have been *continued.* Any interruption would cause a temporary ceasing; revival would give it a new beginning, which would be *within* the time of legal memory, and therefore the custom will be void. But this must be understood with regard to an interruption of the *right*; for a temporary interruption of the *possession* only will not destroy the custom. But if the *right* be any how discontinued, even for a day, the custom is quite at an end.

(iii) A custom must have been enjoyed *peaceably*, and not subject to contention and dispute.

(iv) A custom must be *reasonable*; or, rather, taken negatively, it must not be unreasonable.

(v) A custom ought to be *certain.*

(vi) A custom, though established by consent, must (when established) be *compulsory*; and not left to the option of every man, whether he will use it or no.

(vii) Lastly, customs must also be *consistent* with each other; one custom cannot be set up in opposition to another.

Legal Memory.

Both the Hindu and the Roman jurists required that the usage or custom should be *immemorial.* But neither of them laid down any specific rule for determining precisely either the length of time or the exact number of repetitions necessary to constitute such an *immemorial* custom. In England the rule is that the usage must be so ancient that it must have existed 'from time whereof the memory of man runneth not to the contrary.' This hypothetical period, which is, in jurist's language, known as *legal memory* in contradiction to *living memory*, has been fixed,

[1] Vol. I, pp. 26-29.

arbitrarily no doubt, *anterior* to the first day of the reign of Richard I. (1199 A.D.); the *living memory* being computed from the first day of Richard I.'s reign. The reason why the reign of Richard I. was accepted as the extreme limit of living memory is because from his reign the records of all the legislative enactments have been preserved, and all traces of parliamentary legislation prior to his reign have been lost.

The principle laid down by Grey, C. J., by way of analogy to the English legal memory, is to be found in a reported case of the then Supreme Court of Calcutta and is worth quoting. The judgment was delivered on the 21st November, 1831. His Lordship observed as follows:—

"I have no hesitation in saying, that we are bound to take notice of any special customs which may exist among the Hindoos, or which can be considered as the law of any particular part of the country, but then there must be an averment in the pleadings to show that this custom prevails, and ought to be received as the law of that place, notwithstanding that it varies from the general laws of the Hindoos.....It may be said that from the year 1756 to the year 1765, there was a double Government in this country, and during which period there was no registry of any Regulations. To those who minutely study the history of that period, it must be evident, that many usages were then introduced, that are now recognised as Hindoo customs, and if any of the usages which were introduced at that period are relied upon as Law, we are bound to take notice of them, should it be shown to us, that they have become written Law of the land, but even if they have not become the written Law, and they are specially pleaded, we must still recognise them as a valid subsisting custom, on the presumption, that this custom had its origin in some lawful authority, and there will be no more difficulty in doing this, than there is in recognising the local customs of England. Although in this

country we cannot go back to that period which constitutes legal memory in England, *viz.*, the reign of Richard I., yet still there must be some limitation, without which a custom ought not to be held good. In regard to Calcutta I should say, that the Act of Parliament in 1773, which established this Court, is the period to which we must go back to found the existence of a valid custom, and that after that date, there can be no subsequent custom, nor any change made in the General Laws of the Hindoos, unless it be by some Regulation by the Governor-General in Council, which has been duly registered in this Court. In regard to the Muffasil, we ought to go back to 1793, prior to that, there was no Registry of the Regulations, and the relics of them are extremely loose and uncertain. I admit that a usage for 20 years may raise a presumption, in the absence of direct evidence of a usage, existing beyond the period of legal memory.

"In administering Hindu Law in this Court, there are four distinct authorities which we are bound to recognise.

1*st*. A usage in accordance with the Sastra, contained in the *Smritis* or original Text Books.

2*nd*. A usage in accordance with the *Dharma Sastra* being the works of the Commentators.

3*rd*. English Acts of Parliament.

4*th*. Usages in Calcutta prevailing previous to 1774, and in the Muffasil previous to 1793, as their existence for that length of time presumes, that they were established by Acts of Sovereign Authorities."[1]

Thus in Calcutta 1773 is the period which constitutes legal memory, and in the Muffasil, 1793. These are the periods to which we must go back in order to establish the existence of a valid custom. But a custom for twenty years may raise a rebuttable presumption of the custom existing beyond the period of legal memory.

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[1] *Doe d. Jagomohan Rai* v. *Srimati Nimu Dasi*, Montriou's Cases of Hindu Law, p. 596. Clarke's Rules and Orders of the Supreme Court of Judicature in Fort William, p. 112.

In *re Garurudhwaja Parshad Singh* v. *Saparandhwaja Parshad Singh*[1] it has been held by the Privy Council that the evidence of unbroken custom for eighty years, since the British occupation of that Province, is sufficient. A family custom cannot be binding where the estate to which it is alleged to attach is so modern as to preclude the possibility of any immemorial usage.[2]

It should be noted that this rule of immemorial antiquity is to be restricted to *custom* only and not to usage. As we have already stated a usage may be of quite recent growth yet, if established, will be valid.

From the first few lines of the passage we have quoted from the judgment of Grey, C. J., it is clear that the British Courts are bound to take notice of any special cutsom that may be pleaded. In the concluding lines his lordship has laid down that in administering Hindu law the British Courts are bound to recognise authorities of usage—usage as contained in the *Smritis*, usage as mentioned by the Commentators, and usage existing anterior to legal memory as fixed by his Lordship. The Judicial Committee in the celebrated *Ramnad* case,[3] observed: "The duty of an European Judge, who is under the obligation to administer Hindoo law, is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage." By the Charter Act, the Supreme Courts of Calcutta, Bombay, and Madras were directed to determine cases by the laws and *usages* of Gentoos and Mahomedans.[4] And in numerous decided cases it has been laid down that the function of the Court is to ascertain, to compare, to explain, and to ratify, and not to

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[1] 27 I. A. 328 (1900).

[2] *Umrithnath Chowdhry* v. *Goureenath Chowdhry*, 13 Moo. I. A. 542 (1870).

[3] *Collector of Madura* v. *Mootoo Ramalinga Sathaupathy*, 12 Moo. I. A. 397 at p. 436 (1868).

[4] *Vide* Charter Act, s. 17.

create a custom. A Judge, as a witness and as an expositor, has to give a clear definition of the custom, usage or rule as to which the opinion of the community has arrived at the requisite degree of maturity.[1]

It should be noted that it is as much a Court's duty to abrogate or veto a bad, immoral or illegal custom as to sanction or ratify a good one. No doubt, a Court is bound to give recognition to any custom or usage proved to its satisfaction; still it possesses a very wide discretion in not recognising a custom which is prejudicial to public interests, or repugnant to public morality, or in conflict with the express law of the country.[2]

Custom may be abandoned.

That a custom may be abandoned is now beyond all shadow of a doubt. The Privy Council have, in at least two very important cases,[3] pronounced so. In the last case their Lordships said that they "can not find any principle or authority for holding that, in point of law, a manner of descent of an ordinary estate, depending solely on family usage, may not be discontinued, so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom, which is the *lex loci* binding all persons within the local limits in which it prevails. It is of the essence of family usages that they should be certain, invariable, and continuous, and well-established discontinuance must be held to destroy them. This would be so when the discontinuance has arisen from accidental causes; and the effect cannot be less, when it has been intentionally brought about by the concurrent will of the family. It

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[1] *Mathura Naikin* v. *Esu Naikin*, 4 Bom. 545, p. 559 (1880).

[2] Vide *Mathura Naikin*, 4 Bom. 545 (1880); *Basava* v. *Lingangauda*, 19 Bom. 428, p. 459 [1894]; *Khojah's* cases, Perry's O. C. 110; *Tara Chand* v. *Reeb Ram*, 3 Mad. H. C. R. 50 (1866); *Bhau Nanaji Utpat* v. *Sundrabai*, 11 Bom. H. C. R. 249 (1874); *Advyapa* v. *Rudrava*, 4 Bom. 104 (1879).

[3] *Abraham* v. *Abraham*, 9 Moo. I. A. 195 (1863): s. c. 1 W. R. 1; *Rajkishen Singh* v. *Ramjoy Surmah Mazoomdar*, 1 Cal. 186 at p. 195 (1872): s.c. 19 W. R. 8.

would lead to much confusion, and abundant litigation, if the law attempted to revive and give effect to usages of this kind after they had been clearly abandoned, and the abandonment had been, as in this case, long acted upon."[1]

West, J., in *re Mathura Naikin*,[2] following these Privy Council decisions, has remarked that judgment in accordance with a usage as existing does not imply, of necessity, either that it always has existed, or that it always must exist, so as to limit the operation of the Statute. A change in the popular conviction may, without inconsistency, be followed by a change in the course of the decisions by which the Legislature intended to reflect them.

In *re Abraham* v. *Abraham*, the Privy Council have said that customs and usages dealing with property, unless their continuance is enjoined by law, may, as they are adopted voluntarily, be changed or lost by disuetude. In *Soorendranath Roy* v. *Heeramonee Burmoneah*,[3] their Lordships, following *Abraham* v. *Abraham*, observed "whether the property be ancestral or self-acquired, the custom is capable of attaching and of being destroyed equally, as to both."

Migrating Families.

In a country where the law is fixed, such as in the civilized countries of the world, the law governing the devolutions of land is also settled; so that a person coming to live in such a country and acquiring land will be governed with regard to his immoveable property by the settled law of the land, that is, the *lex loci*. On his death his real estate will be inherited by his relations according to the *lex loci*, and not according to the law of the land from whence he came. But in India there is no *lex loci* governing immoveable property; matters relating to property being governed by the law of one's own personal *status*. Among the Hindus in India there are several distinct schools or systems which operate in different

[1] *Rajkihen Singh* v. *Ramjoy Surmah Mazoomdar*, 1 Cal. 186, p. 195 (1872).

[2] 4 Bom. 545 at p. 561 (1880).

[3] 12 Moo. I. A. 81 at p. 91 (1868): S. C. 10 W. R. 35 (P. C.). See *Venku* v. *Mahalinga*, 11 Mad. 393, p. 400 (1888).

provinces. As for instance, a Hindu of Bengal is governed by the *Dyabhaga*; of Behar, Northern India, Marhatta Country, and Northern Canara, by the *Mitakshara*; of Madras, by the *Smriti Chandrika*; of Poona, Ahmednagar and Khandesh, by the *Mayukha* and so forth. Except in Bengal, the system of *Mitakshara*, however, practically prevails in all other provinces, although the special authorities mentioned as prevailing in them have also a considerable weight. But whether it be the *Dyabhaga* or *Mitakshara* that may prevail in a place, the law is not merely a *local* law but also a *personal* law, and becomes part of the *status* of every family which is governed by either school. Consequently, when any such family migrates to another province, governed by a different school of law, it carries with it its own law.[1] Thus if a family governed by the *Dyabhaga* in Bengal comes and settles in a place where the *Mitakshara* prevails, it will not be governed by the *Mitakshara* but by the *Dyabhaga*. And this rule will apply not merely in respect of succession and inheritance to landed properties but also in matters of personal relationship of the members of the family. This is quite unlike the general rule that obtains in other countries, according to which, *lex loci* governs matters relating to land and the law of domicile governs personal relations.

The above principles are also applicable to families which have acquired any special custom of succession differing from that either of their original or acquired domicile. The same rule applies to a family which has changed its status.[2]

Buddhist Customs.

Beyond some vestiges of the great religion of *Gautama* very little is to be found in India of the Buddhistical customs and usages. When *Buddha* was born, *Brahmanism*

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[1] See *Vasudevan* v. *Secy. of State*, 11 Mad. 157, p. 162 (1884).

[2] Vide *Rutcheputty Dutt Jha* v. *Rajender Narain Rae*, 2 Moo. I. A. 132 (1839); *Soorendranath Roy* v. *Heeramonee Burmoneah*, 12 Moo. I. A. 81 (1868).

was in its ascendancy. But the teachings of *Buddha* soon succeeded in checking the tide of *Brahmanism*. The wide and rapid spread of *Buddhism* once threatened the existence of *Brahmanism*. But luckily for the latter, the great *Sankaracharya* appeared at an opportune time to preach his doctrine of *Vedantism*. His teachings not only retarded the progress of *Buddhism*, but soon resuscitated *Brahmanism*, and eventually expelled *Buddhism* from India. *Buddhism*, thus arrested and expelled from its native soil, found a congenial field in Ceylon, Arakan, Burma, China, and Tibet, where it has since taken root and become the religion of the people of those countries.

It is said that Burma was originally colonized by the Hindus and that the *Buddhist* religion was introduced there in the second century of the Christian era. Like the Hindu Code of Manu, the Burmese *Dhammathats* embody rules and principles, customs and usages, relating to social and religious, public and private rights,—the traditions, as it is said, from the foundation of the world, beginning from King Maha Thamada. The *Dhammathats*, in their origin, are Indian and *Brahmanical* and not Burmese or Buddhistical; they have, however, been greatly modified by the Buddhist religion. The original *Dhammathats* are in Sanskrit or Pali and have been translated into Burmese. Up to 1847 these books existed only in the form of palm leaf manuscripts. In that year Dr. Richardson, Principal Assistant to the Commissioner, Tenasserim Provinces, published at Moulmein an edition in Burmese, with translation into English, of the Menu Kyay *Dhammathat* and from that time it has been the sole book of reference. Mr. Jardine, late Judicial Commissioner of Burma, has, in his "Notes on Buddhist Law," translated some portions of other *Dhammathats* relating to marriage, divorce, and inheritance. According to Mr. Jardine "The Menu Kyay is fuller than most of the *Dhammathats*. But in the present dearth of learning it is as difficult to appraise its authority as to determine its age, or the name of the

author . . . it is probably a compilation made from the *Dhammathats*."

All jurists agree that the marriage laws of a nation depend on the social, moral and religious ideas of the people. As regards the Burmese, it will be observed that round the central ideas of marriage, customs governing real and personal property, and its devolution and partition, range themselves. The *Dhammathats* recognise the custom of polygamy. In Lower Burma it has prevailed so universally and for so long a time that it has acquired the force of law.[1] The Burmese had, like the Indians, their *Punchayet*. It was composed of Elders or *Loogyees* who settled all questions of divorce, inheritance and partition of property, according to the customs and usages laid down by Menu, the recluse.

The Government of India in legislating for the Courts in Burma have recognised the rules and customs of the Burmese as will appear from the Burmese Courts Act XVII of 1875. Sec. 4 is as follows:—[2]

"Where, in any suit or proceeding, it is necessary for any Court under this Act to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Buddhist law in cases where the parties are Buddhists . . . . shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished or is opposed to any custom having the force of law in British Burma.

"In cases not provided for by the former part of this section, or by any other law for the time being in force, the Court shall act according to justice, equity and good conscience."

In 1860 Major Sparkes found a Code of Burmese Law combining the written law as found in the Menu Kyay with the *lex loci* or local custom. Besides Menu Kyay,

[1] *Ma In Thau* v. *Maung Saw Hla*, Civil Refce. No. 1, 1880, decided on July 20, 1881.

[2] See *Mi Nu* v. *Maung Saing*, Civil Appeal, June 24, 1874, *per* Sandford, J.

there are numerous rulings of the special Court and the Judicial Court of the Commissioner of Burma. All these rulings have authoritatively decided many doubtful points in Buddhist Customary Law.

Among the Karens, Chins and other hill tribes, peculiar customs obtain and these customs differ from those of the Burmese.

Mahomedan Customs or *Urfs*.

So far as India is concerned the importance of Customary Law has more reference to the Hindus than the followers of Islam. Yet, it is not a fact, as is generally supposed, that custom has no place in Mahomedan jurisprudence. No doubt the two principal sources of Islamic law are the *Koran*, as containing the words of God, and the *Sunna* or traditions, being the inspired utterances of the Prophet of Arabia and precedents derived from his acts. Next in authority, as is well-known, are *Ijma* or consensus of opinion among the learned and *Qiyas* or analogical deductions from the above three. But the same texts upon which *Ijma* is founded have led to the recognition of custom or *Urf* as an independent source of law. Indeed, the Prophet himself in his life-time recognised the force of customary law, as in many instances he either gave his express sanction to certain pre-Islamic usages prevalent among the Arabs or suffered such usages to continue without any expression of disapprobation. His companions after his decease similarly recognised many customs which were not inconsistent with the teachings of the Islamic faith. With the progress of time when the Mahomedans spread over different countries and included a variety of races the area of customary law became widened. The principle that regulates the validity of custom or usage in Mahomedan jurisprudence is that it must not be opposed to a clear text of the *Koran* or the *Sunna*. Otherwise it is broadly laid down that usage obtaining in a particular country among Mahomedans overrides any rule of law based on analogical deduction. It is further stated that a custom, to have the force of law in Mahomedan jurispru-

dence, need not be general. Again, a custom has force and effect only in the age and the country in which it flourishes.

A Full Bench of the High Court of the North-West Provinces has ruled that where a family has professed the Mahomedan religion for successive generations, the Courts in this country, on the occasion of a claim to succession being met by a plea of social usage, are bound to dispose of the case under the Mahomedan law, and cannot recognise any such plea of usage which is opposed to the Mahomedan law.[1] The Privy Council in a case referred to this question as one which had not till then been settled. And although it was unnecessary to decide it in that case, their lordships used language which clearly indicated, that, in their opinion, it was doubtful whether Mahomedan law did admit of any control by custom.[2] The Chief Court of the Punjab, however, in a case, held that by special family custom the females of a certain family were excluded from inheritance. The Court felt itself bound to give effect to this custom under provisions of Act IV of 1872.[3]

Act IV of 1872 has been amended by Act XII of 1878, which provides that questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family-relations, wills, legacies, gifts, partitions or any religious usage or institution shall be decided according to any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience, and has not been by this or any other enactment altered or abolished, and has not been declared to be void by competent authority.[4] Similar provisions have been made in *Oudh*,

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[1] *Sarmust Khan* v. *Kadir Dad Khan*, Vol I F. B. Rule N. W. P. 38 (1866).

[2] *Jowala Buksh* v. *Dharum Singh*, 10 Moo. I. A. 511 at p. 538 (1866).

[3] *Rastam Ali* v. *Nawab Azmat Ali Khan*, P. R. (1875) 21.

[4] *Vide* amended s. 5.

the *Central Provinces*, and Bombay *Muffasil*, *i.e.*, territories outside the Presidency town of Bombay, where customs take precedence of Mahomedan law.[1]

Conversion.

The case of a Hindu embracing Christianity or Moslemism presents some difficulties as to the law applicable in such cases in regard to succession and inheritance. According to the *Koran*, a convert to Mahomedanism changes his personal law also ; so the general presumption is that a convert from Hinduism to the Islamic faith is governed by the Mahomedan law. In regard to converts from Hinduism to Christianity the case is somewhat different. Upon the conversion of a Hindu to Christianity, the Hindu law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound, as he renounced his old religion, or, if he thinks fit, he may abide by the old law notwithstanding the fact that he has renounced the old religion.[2] "The profession of Christianity releases the convert from the trammels of the Hindu law, but it does not of necessity involve any change of the rights or relations of the converts in matters with which Christianity has no concern, such as his rights and interests in, and his powers over, property."[3]

Before the Indian Succession Act was passed, Christian converts could elect to attach themselves strictly to the old Hindu usages or retain them in a modified form, or wholly abandon them. But now the Indian Succession Act (Act X of 1865), governs Native Christians since the passing of the Act. And their rights and interests as to succession and inheritance of property are entirely regulated by it.

In this connection one matter worth noting is this. In dealing with converts, both Hindu and Mahomedan,

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[1] *Vide* Reg. IV of 1826, ss. 3, 26. *Abraham* v. *Abraham*, 9 Moor. I. A. 195 (1863) ; 8 C. W. R. 1. (P. C.)

[2] *Ibid.* 239.

there may be cases in which the injunctions of religion and law are the same. In such cases no party can take shelter under custom and defend an objectionable practice. For instance, monogamy is an essential part of Christianity. A Mahomedan or a Hindu convert to Christianity could not possibly marry a second wife, after his conversion, during the life of the first ; and if he did so, the issue by such second marriage would certainly not be legitimate, any Hindu or Mahomedan usage to the contrary.[1]

Illegal and Immoral customs.

A custom which is contrary to public policy or prejudicial to public interests or against morality cannot have the force of law, nor will it be recognised by any Court of law. It may be ancient and uniform, certain and continuous ; in fact, it may have all the requisites of a valid custom ; yet because it is repugnant to public morality, or against general interests, it can not receive the same recognition from Courts of law as other customs and usages obtain when proved, though at variance with the general law. Following this sound principle, the custom of Hindu widows burning themselves on the funeral pyre of their husbands, (known as a *suttee*) was discountenanced by British Indian Courts ; and an enactment was passed making the aiding and abetting an act of *suttee* a crime and punishable.[2] Similarly the practice of adopting daughters for prostitution by the Naikins of the Western India was held to be bad and the Bombay Court refused to recognise it.

Such evil customs, even though sanctioned by judicial decisions in the past, are not recognised now-a-days. Like the custom of adoption of a daughter among the Naikins, there are other customs generally known as immoral usages or customs. For instance, the custom of recognizing the

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[1] *Hyde* v. *Hyde*, 1 P. & D. 130 (1866) ; *Skinner* v. *Orde*, 14 Moo. I. A. 309 at p. 324 (1871) : s. c. 10 B. L. R. 125 (P. C.) : s. c. 17 W. R. 77 ; *Sonaluxmi* v. *V. Hariprasad*, 28 Bom. 597 (1903).

[2] *Vide* Reg. XVII of 1829.

right of heirship of illegitimate sons born of adulterous intercourse,[1] of the custom of dancing girls, attached to a Pagoda, going through a sham marriage and practically leading a life of prostitution,[2] or a caste custom authorizing a woman to abandon her husband and marry again without his consent,[3] and so forth.

The custom of demanding and taking *pon* (*hoonda* or *palu*, as it is called in Bombay), as consideration for marriage is against the injunctions of Manu.[4] Garth, C. J., in one case[5] held that such contracts are "so far void as to be incapable of being enforced by the rule of equity and good conscience." The Bombay Court went further, and, in a very recent case,[6] held that a marriage contract for the payment of *pon* is illegal and opposed to morality and public policy.[7]

Classification of customs.

The English jurists divide customs into two classes:—*General* and *Particular* or *Special*. The former are the universal rule of the whole kingdom and form what is usually known as the Common law of England. The latter are exceptions to the Common law and usually designated as customs, *e. g.*, customs of Gavelkind, or customs of a Manor. Under this head are also included the Customs of Merchants, or rules relative to Bills of Exchange, Partnerships, &c.[8] The Indian Evidence Act deals with three classes of customs, *viz.*, Public, General, and Family or Private. (*Vide* ss. 32, 48, and 49, of the Act). The distinction between Public and General cus-

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[1] *Narayan Bharthi* v. *Laving Bharthi*, 2 Bom. 140 (1877).

[2] *Reg.* v. *Jaili Bhavin*, 6 Bom. H. C., C. C. 60 (1869).

[3] *R.* v. *Karsan Goja*, 2 Bom. H. C. R. 124 (1864).

[4] "Let no father, who knows the law, receive a gratuity, however small, for giving his daughter in marriage, since the man who through avarice takes gratuity for this purpose is a seller of his offspring."—Manu, III, s. 51.

[5] *Ram Chand Sen* v. *Audaito Sen*, 10 Cal. 1054 (1884).

[6] *Dholidas Ishvar* v. *Fulchad Chhagan*, 22 Bom. 658. (1897).

[7] See *Baksi Das* v. *Nadu Das*, 9 C. W. N. 90 *n.* (1905).

[8] Stephen's Commentaries, Vol. I, pp. 22-25.

toms, as drawn under the English law, seems to be that the former concern every member of the State or Kingdom, whereas the latter are limited to a lesser though still a considerable portion of the community.[1]

We do not desire to follow the classification of the Indian Evidence Act but will treat the question of customs and usages with reference to the people, the communities, the professions, the guilds, and the trades among which they prevail and are observed. In British India we find three principal communities occupying the country—the Hindu, the Buddhist and the Moslem. Now each of these communities has its own peculiar customs and usages. So again, the people of Malabar and the Punjab. And as to the professions, guilds, and trades they too have their own customs and usages which govern their mutual dealings. We propose to classify and deal with customs and usages prevailing in British India as follows.

Hindu customs.

Hindu customs and usages are usually grouped under the heads of *Kulachar* and *Desachar*. *Kulachar* (or *Rasm wa Rewaj-i-Khandan* as it is called in Upper India), *i.e.*, Family Customs embrace all the various customs which obtain in a particular family. *Desachar i.e.*, Local Customs are those which prevail in any particular District or within a local area. In dealing with Hindu customs we propose first to deal with Family and Local customs in a general way and then under the head of Hindu customs we shall consider separately the customs in respect of Adoption, Impartibility, Religious Endowment, Inheritance, Marriage and Divorce. Under each of these heads the peculiar customs prevailing in different parts of India and among different classes or sects of the people will be fully and exhaustively considered.

Buddhistical customs.

The Buddhistical customs of the people of Burma, Arakan, Shan and other provinces differ materially from those of the Hindus. The consideration of their interesting customs will occupy a place in this work.

[1] See sec. 48, Explanation, Indian Evidence Act.

Mahomedan customs.

The Mahomedans in India form a considerable part of the population and their customs and usages though not numerous will be treated in a separate chapter.

Malabar customs.

Besides these, we have to consider the peculiar customs which prevail in Malabar, Canara and in some places in Southern India, and also among Tamil emigrants of Northern Ceylon. The Nairs, the Kandhs, the Moplas, the Numbudris, the Tamils—all of them have customs and usages which are archaic and primitive in their character. And as the study of these customs is very interesting, they will be treated under the head of Malabar customs.

Punjab customs.

The customs and usages prevailing in the Punjab, both of the Hindus and Mahomedans, are so varied and numerous that they cannot be treated as fully as we should desire, but yet we will deal with them as far as we can in the course of this work, noting the most important ones.

Tenancy customs.

There are certain customs and usages which have force between landlords and tenants and as their respective rights have often to be determined by such customs we must notice them.

Trade and Agency customs.

Further a large body of customs and usages has come into existence among the various guilds and professions and is commonly known as Mercantile or Trade Customs. Again, certain peculiar customs are also found among brokers and agents, and these are known as customs in Agency. Both Trade and Agency Customs are very important in determining commercial matters and we will deal with them separately. Finally, illegal and immoral customs and usages, not recognized by our Courts, deserve a passing notice.

Illegal and Immoral customs.

CHAPTER I.

FAMILY CUSTOMS.

Definition.

A family custom or *kulachar* is defined to be "the usages of a family transmitted successively (from father to son) according to law."[1] It generally relates to matters affecting the members of a family in their relationship to each other and to the family as a unit. Amongst the members of a family it has an obligatory force and distinguishes the family by its rules from other families. These rules chiefly concern adoption, marriage, descent and devolution of property. In its nature it is quite different from *deshachar* or local custom and stands on a different footing. Unlike *deshachar*, which binds all persons within the local limits in which it prevails, a family custom governs the members of a particular family only and beyond that its controlling influence cannot extend. Under Hindu law a family usage or custom, when clearly proved, outweighs the written text of the law.[2]

The reason why a family custom is allowed so important a place in the constitution of Hindu law is obvious, when we remember the intimate connection between the celebration of the family sacrifices and the ownership of the family property which is found subsisting in early times. By many of the Hindu sages this connection was made the basis of the theory of the spiritual origin of the

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[1] *Katyayana* cited in *Viramitrodaya*. See also *Sumrun Singh* v. *Khedun Singh*, 2 S. D. Sel.-Rep. 147 p. 149 (1814):—"To legalize any deviation from the strict letter of the law, it is necessary that the usage should have been prevalent during a long succession of ancestors in the family, when it becomes known by the name of *kulachar*."

[2] *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* 12 Moo. I. A. 397 p. 436 (1868); *Bhau Nanaji Utpat* v. *Sundrabai*, 11 Bom. H. C. R. 249, p. 268 (1874).

proprietary rights.[1] "There is" say their Lordships of the Privy Council, "in the Hindu law so close a connection between their religion and their succession to property, that the preferable right to perform the *shradh* is commonly viewed as governing also the question of the preferable right to succession of property; and as a general rule they would be expected to be found in union."[2]

Not a mere convention.

A family custom, to constitute a law for that family, must be shown to have been uniformly observed or of long continuance. A mere convention or an arrangement by mutual assent for peace or convenience cannot be recognized as a family custom. The testimony must show clearly that it has been submitted to as legally binding and not a mere arrangement or a pact among the members of the family themselves.[3] In *Myna Boyee* v. *Ootaram*,[4] the Judicial Committee observed that "the parties could not by their agreement give new rights of succession to themselves or their heirs unknown to the law."

Requisites of a family custom

As regards what are the requisites of a family custom we must refer our readers to the Introductory Chapter.[5] The necessary and indispensable elements which give custom its obligatory character and binding force of law are mentioned there. Those requirements are never so rigidly enforced as in the establishment of a family custom. Its antiquity and invariableness must be established by clear and positive proof. Where such evidence was not forthcoming the question at issue was decided according to the ordinary rule of Hindu law.[6] Markby J., said that in order to establish a *kulachar* or family custom of descent, there must be shown "either a

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[1] *Vide* 11 Bom. H.C.R. 249 p. 264 (1874).

[2] *Soorendranath Roy* v. *Heeramonee Burmoneah*, 12 Moo. I. A. 81 p. 96 (1868).

[3] 11 Bom. H.C.R. 249 p. 277 (1874).

[4] 8 Moo. I. A. 400 p. 420 (1861).

[5] Vide p. 24 *supra*.

[6] *Ramchurn Mujmooadar Chowdhree* v. *Raja Bishoonath Singh*, 12 S.D. Decis. 399 (1856).

clear, distinct, and positive tradition in the family that the *Kulachar* exists, or a long series of instances of anomalous inheritance from which the *Kulachar* may be inferred."[1]

Effect of Discontinuance of a custom.

The discontinuance of a custom even from accidental causes, renders it inoperative. When it has been intentionally abandoned or discontinued by the concurrent will of the family it will be absurd to expect that any Court will revive or give effect to it. In the great Soosung estate case, the Calcutta High Court said that "one departure from a custom is sufficient of itself to destroy the custom if ever it existed" and the Judicial Committee in the same case observed that "a well-established discontinuance must be held to destroy them (usages)."[2]

In this case the special custom of descent was found to have been designedly discontinued for a long time and, therefore, though the estate was descendible to the eldest son to the exclusion of other sons and was impartible and inalienable, the Judicial Committee held that the succession in this estate should be regulated not by custom, but by the ordinary rule of Hindu Law. In a very recent case[3] the Allahabad High Court following the Soosung case observed that where, however, such a custom has been proved the *onus* is upon the party who alleges the discontinuance thereof to prove that fact. But such a discontinuance was held not to be established by one instance in which a female having no title had usurped possession of the family property and had then gone through the form of making, by way of a compromise, a gift of it to the rightful heir, there being otherwise clear and consistent evidence of the existence of the custom.

But when a family emigrates from one district to

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[1] *Maharanee Heeranath Kooeree* v. *Baboo Burm Narain Singh* 15 W. R. 375 at p. 386 (1871).

[2] *Rajkishenh Sing* v. *Ramjoy Surma Mozoomdar*, 8 Sevestre, Part I, 297 at p. 316 (1865) : s. c. in the Privy Council 1 Cal. 186 at p. 196 (1872).

[3] *Sarabjit Partap Bahadur Sahi* v. *Indrajit Partap Bahadur Sahi*, 27 All. 203 (1904).

another it may retain its religious rites and observances, and yet acquiesce in a devolution of property in the common course of descent amongst persons of the same race in the district in which it has settled.[1]

To be binding, must not be modern.

A family custom cannot be binding, where the family or estate is so modern as to preclude the idea of immemorial usage. So where it was contended that the disputed property was ancestral property and descended to the eldest male heir by reason of its being subject to a custom of primogeniture, the Privy Council found the evidence "insufficient to found a family custom, which the Courts below have held must be proved by something like what we should call, in this country, immemorial usage. It is a thing which cannot be predicated of a simple and single estate, the title to which dates from comparatively a short period of time back."[2]

In a suit for partition a custom was set up according to which the family property was not subject to partition. It was found, however, that the family was indisputably a joint Hindu family. There had been partitions of the family property in former times. But during the last six or seven generations the estate had never been divided. The Privy Council held that this fact alone could not control the operation of the ordinary rule of Hindu Law or deprive the members of a joint and undivided family of the right to demand a partition.[3]

As long-existing family usages supersede the ordinary laws of inheritance in large zemindaris or petty Rajships,[4] we propose to deal with some of the important ones now :—

Tipperah Raj family.

A very curious custom of succession prevails in the Tipperah Raj family, according to which the reigning

[1] *Soorendranath Roy* v. *Heeramonee Burmoneah*, 12 Moo. I. A 81 (1868).

[2] *Umrithnath Chowdhry* v. *Goureenath Chowdhry*, 13 Moo. I.A. 542 at p. 549 (1870).

[3] *Durriao Singh* v *Davi Singh*, 1 I. A. 1 (1873).

[4] *Vide Maharajah Gurunarain Deo* v. *Unund Lal Sing*, 6 S. D., Sel. Rep., 282, (354) (1840).

Rajah in his life-time appoints two persons as his possible successors to the Raj. Of these, one is called the *Jubraj* and the other, the *Burra Thakur*. The *Jubraj* succeeds to the Raj on the death of the Rajah in preference to the next of kin. The *Burra Thakur* is next in rank to the *Jubraj*. On the death of the Rajah and in default of the *Jubraj*, the *Burra Thakur* succeeds to the Raj. The choice of the Rajah in his selection of *Jubraj* and *Burra Thakur* is restricted to the legitimate male members of the Raj family.

The succession to the Tipperah Raj has led to much litigation from time to time. The earliest case reported is *Ramgunga Deo* v. *Doorgamunee Jubraj*.[1] In this case D brought an action against R in the Provincial Court of Dacca, on the 12th August, 1805, to recover from R the Raj. The case of D was that in 1785 on the death of the then Rajah there being no *Jubraj* or *Burra Thakur*, his (deceased Rajah's) second son succeeded to the zemindari with the sanction and authority of the British Government. The newly installed Rajah had appointed D as *Jubraj* and his own son as *Burra Thakur*. R resisted D's claim on the ground that he (R) was the eldest son and legal heir of the late Rajah and denied the custom alleged by the plaintiff. The Sudder Dewany Adawlut found that the custom, specified above, having existed in the family of the parties for many generations, D, on the death of the Rajah, was entitled to succeed as *Jubraj*, and R, as the son, had no title to succession. This case recognized the custom of the *Jubraj* succeeding to the Raj in preference to the next of kin.

The next case is *Urjun Manic Thakoor* v. *Ramgunga Deo*.[2] This suit was instituted after the death of Durgamunee mentioned in the first case. On the 18th April, 1813, Durgamunee died without having nominated anybody to the Jubrajship. His opponent in the former case,

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[1] 1 S. D. Sel. Rep., 270, (361) [1804].

[2] 2 S.D. Sel. Rep., 139, (177) [1815]. See the genealogical table of the Raj family given in this case.

Ramgunga Deo, put forward his claim to the Raj now, on the ground that the deceased Rajah had not appointed any *Jubraj* and as he had been appointed *Burra Thakur* in the life-time of the deceased Rajah, his claim was superior to that of others. The Sudder Dewany Adawlut decided in his favour holding that, by the special usage of the Tipperah Raj family the person appointed *Jubraj* takes the inheritance in preference to the next of kin, and the person appointed *Burra Thakur* is considered next to him in succession and takes the inheritance in his default as well as at his death, provided the *Jubraj*, after becoming Rajah, has not appointed any other person to be his *Jubraj*. From this case it is clear that a *Burra Thakur*, once appointed, continues as such after the death of the Rajah unless he be appointed the *Jubraj* by the new King, and also that, if there be no *Jubraj*, the *Burra Thakur* succeeds to the *gadi*.

The third case[1] decided by the Sudder Dewany Adawlut was one brought by the widow of Durgamunee. She, in a separate suit, asserted that as her husband had died without appointing a *Jubraj*, she, as his widow, was entitled to succeed to the Raj and Zemindari. Both the Provincial and the Sudder Courts decided against her. The latter Court in summarily dismissing her appeal, simply referred to their decisions in the *Urjun Manic's* case before mentioned. This case also upholds the above family customs as against succession under the ordinary Hindu law.

The next case[2] involving the right of succession to the Tipperah Raj is the Privy Council case. In this case the principal issues were (i) whether the last Rajah had

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[1] *Ranee Soomitra* v. *Ramgunga Manik*, 3 S. D., Sel. Rep. 40 (54) [1820].

[2] *Neelkisto Deb Burmono* v. *Beerchunder Thakoor*, 12 Moo., I. A. 523, (1869): s.c., 10 Sevestre, 163, (P.C.) [See the genealogical chart]: s.c., 3, B. L. R. 13: s.c. 12 W. R. 21 (P.C.). The same case in the High Court 1 W. R., 177, (1864) s.c., 10 Sevestre 135.

power of his own free choice to appoint a person *Jubraj* in preference to a senior member of the family and nearest of kin to him, and (*ii*) supposing there was no valid appointment of *Jubraj*, who was entitled to succeed to the Raj?

The suit was brought by the half-brother of the late Rajah against his (the Rajah's) uterine brother to recover the Raj. The plaintiff alleged that the defendant had not been validly appointed *Jubraj* and whereas the former Rajah had promised that the plaintiff should succeed him and whereas the plaintiff was the eldest surviving son of the former Rajah, and as such belonged to a class out of which, according to the family custom, a *Jubraj* could alone be elected, he was entitled to succeed. The Judicial Committee, however, found that the defendant was duly appointed *Jubraj* by the late Rajah, and that the right of succession to the Raj was governed by *Kulachar* and devolved on the defendant, as there was no restriction by the family custom on the reigning Rajah obliging him to appoint the eldest of his kindred *Jubraj*.

In the above Privy Council case, their Lordships, after referring to the three Sudder Dewany cases, observed thus: "These three cases establish that, according to the custom, a reigning Rajah should name a *Jubraj* and *Burra Thakur*, of whom the first succeeds to the throne, and the latter to the office of *Jubraj*. Both parties to this appeal admit the custom so far."[1] From the above passage it would appear that on the *Jubraj* succeeding to the Raj, the *Burra Thakur*, *ipso facto*, became *Jubraj*. But from the facts as reported in the second case, it is clear that the *Jubraj* on succeeding to the Raj has the right and privilege of appointing a *Jubraj* who may or may not be the *Burra Thakur*. For we see when Rajdhur Manic was Rajah, Doorga Munee was *Jubraj* and Ramgunga Deo was *Burra Thakur*. On Doorga Munee succeeding to the Raj, he did not, as a matter of fact, appoint any *Jubraj*. And Ramgunga Deo's claim to

[1] *Vide*, 12 Moo. I. A. p. 538.

succeed on the death of Durga Munee was based on the fact that he was *Burra Thakur* and not *Jubraj*.

The most recent case[1] connected with this Raj was heard by a Special Bench of the Calcutta High Court on appeal from the District Court. The case, however, was disposed of on the point of jurisdiction. There the plaintiff's contention was that according to the custom the appointments of a *Jubraj* and a *Burra Thakur* by the reigning Rajah "fix irrevocably the succession in the parties nominated, and the *Jubraj* so appointed is indefeasibly entitled to succeed on the demise of the reigning Rajah, who appointed him to the Rajship" and "the *Burra Thakur* so appointed is indefeasibly entitled to succeed to such property on the demise of the *Jubraj*." The defendant on the other hand stated *inter alia* that "each reigning Rajah is, after his succession to the throne, empowered of his own absolute and free choice to nominate and appoint a member of the royal family to be his immediate successor under the title and designation of *Jubraj*, who, on such nomination, and appointment, becomes entitled to, and does, if alive on the death of the Rajah by whom he was so appointed, succeed to the Raj."[2]

It is a matter of great regret that the High Court was precluded from settling this much disputed family custom once for all. What their Lordships of the Judicial Committee deduced from the above three Sudder Dewany cases to be the family custom of the Tipperah Raj[3] was merely an *obiter dictum*, the main issue in the case being whether the reigning Rajah was obliged to appoint the eldest of his kindred *Jubraj*. And further more, that deduction, as we have already pointed out, was not borne out by the facts. From all these cases, however, we think that the following

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[1] *Shamarendra Chandra Deb Barman* v. *Birendra Kishore Deb Barman*, 35 Cal. 777 (1908) : s.c. 12 C.W.N. 777 : s.c. 8 Cal. L.J. 1.

[2] *Vide* Ibid pp. 785, 786.

[3] See *supra* p. 49.

customs pertaining to the Tipperah Raj may be considered as established.

Firstly—According to the family custom, the reigning Rajah nominates and appoints a *Jubraj* and *Burra Thakur*. So long as the nominees are alive the appointments of *Jubraj* and *Burra Thakur* are irrevocable.

Secondly—On the death of the King, the *Jubraj* succeeds to the Raj, and is at liberty to appoint a new *Jubraj*, or affirm the previous *Burra Thakur* as *Jubraj* and appoint a new *Burra Thakur*.

Thirdly—The choice of the Rajah in these two appointments is restricted to the legitimate male members of the Raj family.

Fourthly—The *Burra Thakur* has no indefeasible right to succeed to the Jubrajship on the installation of the *Jubraj* to the throne, but it depends entirely on the will of the new Rajah.

Fifthly—When at the demise of the Rajah there happens to be no *Jubraj* but only the *Burra Thakur*, the latter succeeds to the Raj in preference to the next of kin.

Sixthly—It would appear that if at the death of the Rajah it happened that neither *Jubraj* nor *Burra Thakur* were in existence, the succession to the Raj would "devolve on the next of kin, respect being had to primogeniture."[1]

Power of alienation of the reigning Rajah of Tipperah.

The Tipperah estate being indivisible, the reigning Rajah is not competent to make a grant or give what may be termed a lease, the effect of which might be to alienate a portion of the lands comprised in the estate for a period extending beyond his life. "It appears," said the learned Judges, "from the cases of *Ramgunga Deo* v. *Doorgamunee Jubraj*,

[1] *Vide Urjun Manic Thakoor* v. *Ramgunga Deo*, 2 S. D. Sel. Rep. pp. 178, 180 (1815); *Neelkisto Deb Burmono* v *Beerchunder Thakoor*, 2 Moo. I. A., pp. 541-42 (1869).

Urjun Manic Thakoor v. *Ramgunga Deo*, and *Ranee Soomitra* v. *Ramgunga Manick* that by special usage the *Jubraj* or person nominated by the reigning Rajah of Tipperah succeeds on his death to the Raj, and the estate is one of those of the nature contemplated by Regulation X of 1800, and not liable to division. The estate, therefore, being indivisible, it is clear that the late Rajah was not competent to make a grant or give what may be termed a lease, the effect of which might be to alienate a portion of the lands comprised in the estate for a period extending beyond his own life."[1] In a note appended to this decision it was remarked that in another case by the same plaintiff against *Ranee Kotee Lukkea Debee*,[2] the competency of the Rajah of Tipperah was the point directly at issue, and the decision was in favour of the plaintiff on the ground of family usage as in the foregoing case.

But if the lessee was an outsider and not a member of the Raj family, such alienation would be unaffected by the family custom. Thus in a case where the Maharajah sued to recover lands from the defendant, which, the latter alleged, had been leased to him in perpetuity by a former Rajah, the learned Judges distinguished the case of *Maharajah Kishen Kishore Manik* v. *Hurree Mala*[3] as the defendant in that case was a member of the family, and the Court there ruled that it was not competent to the reigning Rajah of Tipperah to alienate the lands of the Zemindari of the Raj to one of *his own family* for a period extending beyond the term of his own life. In the present case the lessee was not a member of the family, and consequently, not the custom of the family, as between its several members, but the ordinary law of landlord and tenant must govern the decision.[4]

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[1] *Maharajah Kishen Kishore Manick* v. *Hurree Mala*, 6 S.D. Sel. Rep. 155 (186) [1837].

[2] *Ibid* 157.

[3] See 6 S. D. Sel. Rep. 155 (186) (1837).

[4] *Maharajah Ishun Chunder Manik Bahadur* v. *Myranee*, S. D. Decis. 1375 (1857).

Alienation to a daughter of the Raj family.

A rather ingenious defence was set up by a married daughter of the Raj family, when the reigning Rajah sought to recover from her certain lands alleged to have been held on a *mokurruree pottah* given by his predecessor. The Rajah based his claim upon the custom of the family, *viz.*, that any grant of this nature was resumable on the death of the grantor. The lady asserted that she, having married into another *gotra* (race), was no longer a member of the family of the Rajah of Tipperah, and therefore she was not affected by the alleged custom. But the Court, on consideration of the two foregoing cases, observed that "all grants of such a nature as was sought to be resumed, when made by the Rajah of Tipperah to a member of his family, were, by recognized custom, voidable by his successor, and that, in fact, the grantee took subject to this condition, and that a daughter of the Rajah, whether married or not, was a member of the family."[1]

Tirhoot Raj Family.

Succession to the Tirhoot Raj is governed by *Kulachar* and the estate devolves entire on the eldest son and is not subject to division. In a suit to recover a moiety of the estate, the plaintiff asserted that succession was to be governed by Hindu law, while the defendant rested his claim on *Kulachar*, alleging that the Raj and domain appertaining thereto had never been separated, but had devolved entire on each holder on the death of his predecessor for fourteen generations, and that such custom was still in force; that this had been maintained for some generations past by virtue of a deed of settlement under which the Raj and estates had, on each occasion, been conveyed to the eldest son, suitable provision being made for younger branches; that in case of there being no son, it would devolve on the next brother and his descendants in right line according to primogeniture. The Court found that the evidence was

[1] *Roop Moonjury Kooree* v. *Beerchunder Joobraj*, 5 Wyman, 170 (1868). See also *Maharajah Beerchunder Manickya* v. *Eshan Chunder Thakoor*, 2 Shome, 94 (1878) which followed this case.

conclusive as to the existence of the immemorial family custom or *Kulachar* regulating succession as contended by the defendant.[1]

Baboo[2] *Ganesh Dutt Singh*, a younger member of the family, brought a suit against the then Maharajah to recover possession of a moiety of the ancestral estate of Tirhoot. The Privy Council dismissed his claim, following the ruling of the foregoing case, and observed: "We apprehend that the principle upon which we are about to proceed in this case admits of no doubt or question whatever. By the general law prevailing in the District, and indeed generally under the Hindu Law, estates are divisible amongst the sons when there are more than one son; they do not descend to the eldest son but are divisible amongst all. With respect to a Raj as a Principality, the general rule is otherwise and must be so. It is a Sovereignty, a Principality, a subordinate Sovereignty and Principality no doubt, but still a limited Sovereignty and Principality, which, in its very nature, excludes the idea of division in the sense in which the term is used in the present case. Again, there is no doubt that the general law with respect to inheritance, as well as with respect to other matters, may, in the case of great families where it is shown that usage has prevailed for a very long series of years, be controlled, unless there be a positive law to the contrary."[3]

In the Tirhoot Raj family a custom prevails to the effect that the Rajah in possession in his own life-time may abdicate and assign by deed the Raj-title and domain to his eldest son or next immediate male heir, provision being

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[1] *Maharaj Kowur Basdeo Singh* v. *Maharaja Roodur Singh Bahadur*, 7 S. D. Sel. Rep. 271 (1846): s.c. 2 S. D. Decis. 52. See *Baboo Ganesh Dutt Singh* v. *Maharaj Kowur Roodur Singh*, 2 S. D. Decis. 79 (1846).

[2] The original founder of the family of the Tirhoot Raj and many of his successors were called *Thakoors*, and not *Rajahs* or *Maharajahs*. The younger sons were called "*Baboos*" or *Maharajah Baboos*. See 6 Moo. I. A. 164, p. 191 (1855).

[3] Vide *Baboo Ganesh Dutt Singh* v. *Moheshur Singh*, 6 Moo. I.A. 164 at p. 187 (1855).

made for the *Babooana* allowance for the younger sons. Such custom has been recognized by the Privy Council.[1]

Bettiah Raj.

The Bettiah Raj now consists of two Pergunnahs—Simrown and Majhowa. But at the date when the East India Company became the rulers of Bengal in 1765, what is now known as the Bettiah Raj was included in a larger property called the Raj Reasut of Sirkar Champaran, which was an ancient impartible Raj comprising in addition to Pergunnahs Simrown and Majhowa, two other Pergunnahs called Maishi and Babra. The Sirkar Champaran was formerly held by Rajah Guj Singh, who died in 1694, leaving Dhalip Singh, his eldest son and successor to the Raj, and two other sons, Pirthi Singh and Satrajit Singh. Rajah Dhalip Singh died in 1715 and was succeeded by Rajah Dhrub Singh who died in 1763 without sons, but leaving a daughter. On the death of Rajah Dhrub Singh, his daughter's son, Rajah Jugal Kishore Singh entered into possession of the Sirkar Champaran and was in possession thereof at the date when the East India Company assumed the Government of the Province.

In 1766, one year after the acquisition of the Dewany by the Government, Rajah Jugal Kishore Singh having joined in opposition to the British Government, and having been defeated by the forces of the East India Company, fled to Bundelkund; whereupon the British Government took possession of his estate and placed the zemindari under the management of their Revenue officers. In the year 1771, he returned upon the invitation of the members of the Patna Council and upon that occasion a portion of his estates, consisting of the Pergunnahs and other particulars, were restored to him. But in consequence of his failing to discharge the revenue assessed upon them, he was, in the following year, again deprived of the management and

[1] Vide 6 Moo. I. A. 164. (1855); also see *Maharaj Kowur Basdeo Singh* v. *Maharaja Roodur Singh Bahadur*, 7 S. D. Sel. Rep. 271 (1846).

possession of these Pergunnahs, and ordered thenceforth to reside at Patna.

At the time of Rajah Jugal Kishore's restoration to a portion of his zemindari, the residue thereof was bestowed by the Government upon Rajah Sri Kishen Singh and Baboo Abdhut Singh, who were first cousins on the paternal side of the deceased Rajah Dhrub Singh.

Bir Kishore Singh was the son of Rajah Jugal Kishore. He was allowed the same allowance as his father and the allowance continued until 1790, when the decennial settlement was established.

Under orders of the Governor-General in Council, certain Pergunnahs of the Sirkar Champaran, *viz.*, Simrown and Majhowa, were settled with Bir Kishore Singh and the remainder *viz.*, Pergunnahs Maihsi and Babra, were settled with Rajah Sri Kishen Singh.

Rajah Sri Kishen died in 1798, and was succeeded by his son Gunga Pershad Singh. In 1808 Gunga Pershad filed a suit against Bir Kishore, to recover Pergunnahs Majhowa and Simrown. The suit was dismissed on the ground that the cause of action was barred by limitation, and the decree was ultimately affirmed on that ground by the Judicial Committee.[1]

Recently another suit was brought by Ram Nundun Singh to recover the Raj of Bettiah, on the death of Maharajah Sir Harendra Kishore Singh without issue, which happened in 1893. The plaintiff contended, that according to the custom of the family the estate descended to male heirs only in a course of lineal primogeniture in exclusion of females. He also contended alternatively, that the Bettiah estate was the joint family property of the predecessors of the deceased Maharajah and himself, between whom there had been no division of estate, and he was therefore entitled to succeed as

[1] Vide *Dundial Singh* v. *Anund Kishwar Singh*, (1837). I Moo. I. A. 482

co-parcener by right of survivorship in exclusion of the widows of the deceased Maharajah, the family being governed by the law of the Mitakshara. The defendants on the other hand contended that the Bettiah estate, consisting of the Pergunnahs of Simrown and Majhowa, became and was the self-acquired property of Rajah Jugal Kishore by grant from Government. The suit ultimately went to the Privy Council, and their Lordships decided the matter against the plaintiff. Their Lordships have held that :— The Bettiah estate is and has always been treated as an Impartible Raj. The Government was at liberty to divide the Sirkar into two portions and to grant one portion away from the heir of the former owner of the estate; and, it (the Government) was equally at liberty to grant the whole away from him though, from reasons of policy, it preferred to extend its favour to him in a certain measure. The grant of Maihsi and Babra to Sri Kishen and Abdhut was a direct exercise of sovereign authority, and proceeded from grace and favour alone; and the reinstatement of Rajah Jugal Kishore's heir to a portion of his father's former estate also bore the same character. The present Bettiah Raj must be taken to be the self-acquired property of Bir Kishore Singh, though with all the incidents of the family tenure of the old estate as an Impartible Raj.[1]

The alleged family custom, excluding females from inheritance, affecting the Bettiah Raj has not been proved. The widows of the last male holder dying without issue and without leaving collateral heirs, may, therefore, succeed to their deceased husband's estate. It is important to note that the Bettiah Raj domain is now under female ownership.

Though succession by the eldest son is a feature peculiar to large Estates or Principalities, yet the question as to whether that right belonged to a son of the *paat* or eldest

Manbhom Estate.

[1] *Ram Nundun Singh* v. *Maharni Janki Koer*, 29 I. A. 178 p. 193 (1902) s. c. 7 C. W. N. 57,

Rani, to the prejudice of an elder son by another wife was once a matter of contention in the Manbhom estate. The deceased Rajah had five Ranis. The eldest son was born of the youngest or fifth Rani. He claimed the Raj by virtue of an immemorial family custom whereby the eldest son succeeded to the Raj and the other sons received only subsistence allowance. The son of the eldest or *paat* Rani, who was a younger son, alleged that it was the family custom for the eldest son of the first or *paat* Rani to succeed. The parties joined issue upon this point of family custom. The Sudder Dewany Adawlut, by a majority of the Judges, found that the prevailing family custom, as established by evidence, was that the eldest son, and not the son of eldest Rani, was to succeed.[1] Barlow, J. (*dissentiente*) observed that the evidence tended rather to show, that in the Jungle Mahal estates, the custom was for the eldest son of the *paat* Rani to succeed to the Raj.

The Jungle Mahals.

A question arose, as to whether the widows of the deceased Rajah in the Jungle Mahals were entitled to succeed in preference to the brother of the deceased. On both documentary and oral evidence it was found that the zemindari in question had always been held by the chief male heir, the remaining heirs receiving only food and raiment. It had never been held by a Rani or other female. Agreeably to the family custom it was decided, that the brother of the deceased childless Rajah should take his estate to the exclusion of his widows.[2]

Tributary Mahals in Cuttack.

In several cases before the Sudder Dewany Adawlut in connection with the succession to the Raj, in the Tributary Mahals in Cuttack, the question was raised as to whether by family custom a son born of a *phoolbibahi* woman was entitled to succeed. By a practice in vogue

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[1] *Rajah Rughonath Singh* v. *Rajah Hurribur Singh*, 7 S. D. Sel. Rep. 126 (186) (1843).

[2] *The widow of Rajah Zorawur Singh* v. *Koonwur Pertee Singh*, 4 S.D. Sel. Rep. 57 (72) (1825).

among the Rajahs in these Mahals, they usually have three kinds of wives known as "Paat," "Phoolbibahi" and "Kaneez."[1] The *Paat Rani* is the first or chief wife of the Rajah and must be of the same caste as himself. The *Phoolbibahi Rani* may be a woman of another caste and is taken into the Rajah's establishments by the ceremony of his putting round her neck a garland of flowers. The *Kaneez* is a slave concubine.

In *Pachees Sawal*[2] the status of a *phoolbibahi* wife has been clearly described by the chiefs in their answers. They said that if a Rajah receives as a wife the daughter of any respectable person not of his own caste, she is called a *phoolbibahi*. In non-regulation Mahals or *Gurhs*, if a Rajah leaves no son born of any of his Ranis but leaves a brother and sons by his *phoolbibahis* and concubines, the brother will succeed; and if he leaves no brother, the succession will go to his brother's sons; in default of a brother's son, though there may be sons by *phoolbibahis*, slave-girls or concubines, one of the brethren of his (the Rajah's) grandfather, who is the nearest kin, will be the rightful claimant to the Raj. In the absence of any such, the son of a Phoolbibahi has the next right. The Gurhjat Rajahs said that the "son of a concubine or of a slave-girl has no right to the succession." There is a remarkable difference between the *Gurhjat* and *Killajat* custom of descent.

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[1] Vide *Rajah Sham Soonder Muhunder* v. *Kishen Chunder Bhowurbur Rai*, 4 S. D. Sel. Rep. 39 (94) (1825).

[2] This is a document which embodied the answers given by the chiefs of the sixteen Tributary Mahals in Cuttack and of certain *Killahs* in the Province of Orissa to questions put by the Superintendent of the Tributary Mahals in 1814. After that statement had been drawn up, Regulation XI of 1816 was enacted which provided that the estates of these sixteen Tributary Mahals should descend entire to the person having the most substantial claim according to local and family usage. See *Nittanand Murdiraj* v. *Sreekurun Juggernath*, 3 W. R. 116 (1865).

The Rajah of Kenderpara in his statement in a case[1] said that *Kaneez-zadas* were not entitled to succeed to the Tributary estates; that a *Phoolbibahi Rani* was esteemed in a little higher light than a *Kaneez* or concubine. He was corroborated by other chiefs.

Such being the position of a *Phoolbibahi Rani*, a claim to the Raj of a deceased Rajah by a son of such Rani has in several instances been rejected, preference being given to a brother of the deceased Rajah when leaving no legitimate issue. In *Rajah Sham Soondur Muhunder* v. *Kishen Chunder Bhowurbur Rai*[2] the plaintiff stated that the *Killah* of Dekenal was the hereditary estate of his family and that the occupant thereof bore the title of Rajah, and according to the custom of the family, the eldest son of the Rajah by his wife (*Paat Rani*), or, on the failure of such, the adopted son of the Rajah would take the estate on his death; that in the event of the Rajah leaving neither legitimate son, nor adopted son, the brother or bother's son of the deceased, supposing him to have been born in wedlock, would take the estate to the perpetual exclusion of illegitimate sons of the Rajah by a *Kaneez* or concubine, who according to the family custom could never become Rajah. The defendant stated, *inter alia*, that according to the custom of the family, the eldest son of the deceased Rajah, whether he was the son of a *Paat Rani* or *Phoolhibahi* or *Mahadye Rani*, would take the estate, and that, in default of sons, it would go to the next of kin. The Superintendent of the Tributary Mahals decided the case in favour of the plaintiff, but it was reversed by the Sudder Dewany Adawlut and the plaintiff's claim was dismissed as being barred by s. 4, Regulation XI of 1816.[3]

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[1] See *Rajah Sham Sundur Muhunder* v. *Kishen Chunder Bhowurbur Rai*, 4 S. D. Sel. Rep. 39 at p. 44 (1825).

[2] 4 S. D. Sel. Rep. 39 (1825).

[3] S. 4 is as follows :—"Superintendent is prohibited from taking cognizance of any suit the cause of action of which shall have arisen antecedent to the 14th day of October, 1803, the date on which the Fort and town of Cuttack were surrendered to British arms." This Section has since been repealed.

In another case arising out of the same estate, the plaintiff who was born of a *Phoolbibahi* Rani claimed the Raj. It was proved in this case that the *Phoolbibahi* women of the Rajah resided in the *Mahal-Serai* or family dwelling, and the mother of the claimant never resided in the *Mahal-Serai*. The mother, therefore, being only a kept mistress, her son could not, conformably to the usage of the family, succeed to the Raj.[1]

Killah Bankee.

The Killah of Bankee is another Tributary Mahal. In an action to obtain possession of the Raj, of the fort of Bankee by the plaintiff who was the issue of a *phoolbibahi* marriage, the defendant stated that he was the collateral relation of the late Rajah who, having no legitimate child of his own, adopted the defendant and placed him in the Raj, and that the plaintiff was the son of the late Rajah by a slave-girl, and according to usage, could not succeed to the *gadi*. It was found that the plaintiff was the son of a slave-girl, and, as such, not entitled to succeed to the Raj.[2]

Attgurh Raj.

In *Nittanund Murdiraj* v. *Sreekurun Juggernath Bewartah Patnaick*,[3] the above three cases were referred to, and it was held that a brother of the Rajah of Attgurh had a preferential title over the Rajah's son by a *Phoolbibahi* wife to succeed to the Raj. This custom was well borne out by the answers of the chiefs of the sixteen Tributary Mahals, to whom the Superintendent of those Mahals addressed a number of questions bearing on the point. All the answers have been recorded in a document which is known as *Pachees Sawal* already alluded to. The High Court, in deciding this case, mentioned it as an authority on the subject.

Koenghur Raj.

Koenghur is another Tributary Mahal, and according

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[1] *Rajah Jenardhun Ummur Singh Mahendur* v. *Obhoy Singh*, 6 S. D. Sel. Rep. 42 (1835).

[2] *Bulbhuddur Bhourbhur* v. *Rajah Juggernath Sree Chundun Mahapatur*, 6 S. D. Sel. Rep. 296 (1840).

[3] 3 W. R. 116 (1865).

to the family custom of the Raj, the sons of a Rajah by wives of a lower class than the Rajah rank after the sons of the same caste as the Rajah. The plaintiff, who was a widowed Rani of the late Rajah, claimed the Raj on behalf of a minor, alleged to have been adopted as his son by her late husband, the Rajah. The defendant, who was said to be the son of the late Rajah by a *Phoolbibahi* marriage, alleged that his right to succeed to his father had been recognized by the Superintendent of the Tributary Mahals and by the Government. In this case, though the sole question was the truth or otherwise of the alleged adoption, arguments were addressed to the Court on behalf of the plaintiff as to whether the defendant was the son of the late Rajah, and, if a son, whether he was born of such a marriage as entitled him to succeed to the Raj on the death of his father. The Court, however, thought that it was not necessary for them to go fully into these matters until the question of adoption was fully established. Their Lordships observed: "The plaintiff's claim must stand or fall upon its own merits, independent of the sufficiency or otherwise of the defendant's title, the more so as it may be admitted, and was indeed admitted by the defendant's Vakils in the course of the argument, that the defendant has not such a son as would have any title to succeed to the Raj, if the late Rajah had left any son by his regular wives, or even if the late Rajah had adopted a son. The defendant is a son by a wife of a lower caste than that of the late Rajah; and the sons of such wives admittedly rank below and after the sons by wives of the same caste as the Rajah."[1]

In certain instances, however, a son by *phoolbibahi* marriage succeeded in the absence of any other son by a superior kind of marriage, and *in preference* to a next of kin. The case of *Durrap Singh Deo* v. *Bazzardhur Roy*[2] was an instance in point, and that was in *Killah* Pooteah

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[1] *Rani Bistooprea Patmohadea* v. *Basoodeb Dul Bawartee Patnaik*, 2 W. R. 332 (1865).

[2] 2 Hay 335 (1863).

in Cuttack. *Prandhur Roy* v. *Ram Chunder Mongraj*[1] was another relevant case, in which it was held that a *phool-bibahi* son could succeed to the Raj in preference to the agnates on failure of male issue by a Paat Rani. Among the Rajahs of Chhedra, illegitimate son by a maid servant, and even of a concubine may, in the absence of certain other male relations, claim the Raj.[2]

Dalbhoom Estate.

The Dalbhoom family is one of a group of families whose ancestors originally came from the north-west of India and established themselves by conquest in the Jungle Mahals in Bengal. The estate is an impartible Raj, descending upon a single heir according to the rule of lineal primogeniture; and the heir, so succeeding, has to make suitable provision for the other members of the family, male and female. In a very recent case, the plaintiff brought a suit to recover possession of the ancestral impartible estate, called Dalbhoom, on the death of the last male proprietor who died childless. The defendant set up a custom of lineal primogeniture prevailing in the family. Both the parties belonged to the Dalbhoom family whose head-quarters are at Ghatsila. The Subordinate Judge of Bankura dismissed the suit finding that lineal primogeniture "in a limited form" was the rule of succession in the family. This finding was upheld by both the High Court and the Privy Council to which the case was taken by special leave.[3]

A somewhat singular custom with regard to the *Khorposh Mouzahs* was alleged to have been prevalent in the family to the effect that they descended from Rani to Rani, the senior widow or wife, as the case might be of the Rajah, being entitled to hold them for life. This custom was not proved and upon evidence the Court found that the Rani held a life-estate in the Mouzahs in question and that

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[1] 17 S. D. Decis, 16, (1861)

[2] *Rungadhur Nurendra Mardraj Mohapatur* v. *Juggurnath Bhromurbar Roy*, 1 Shome 92, (1877).

[3] *Mohesh Chunder Dhal* v. *Satrughan Dhal*, 29 I.A. 62 (1902) : s.c., 29 Cal. 343 : s.c., 6 C.W.N., 459. See also 2 C.L.J. 20. at p. 28.

the reversion expectant on the determination of that estate was in the Rajah. As life-tenant she would be clearly not entitled to open any new mines. She had no power to remove by herself or by her lessees any of the minerals in the Mouzahs granted to her as *Khorposh*. The Rajah as the reversioner had the right to restrain her from so doing, and that right could be lawfully asserted by his tenant to whom he had demised his interest in the mines on the land in question.[1]

Soosung Raj (in Mymensingh).

The estate of Soosung was subject to various litigation and in more instances than one the family custom of succession by primogeniture was set up and sought to be established, but all attempts to prove the same failed; and it was finally held by the Privy Council that the Soosung estate was a military *Jagir* resumable at pleasure, and, not a Raj, succession to which depended solely on the will of the sovereign power of the time. The first reported case[2] was between the eldest son of the late Rajah of Soosung and the widow of his second son. She claimed one-third share of the whole estate alleging that, on the death of the late Rajah, the estate became the joint property of his three sons in equal portions and that she, as the widow of one of the sons, was entitled to it. The defendant pleaded family custom as above. The Sudder Dewany Adawlut found on the evidence that the defendant had established the custom, and said that the estate in question differed in many respects from a common zemindari, and that from several *firmans* filed it was clear that the estate was granted as a *Jagir*. It was further established that in "no one instance has the rule of succession by primogeniture been set aside since the grant; on the contrary, it seemed that Raj Singh, the father of the defendant Bishennath Singh, succeeded his

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[1] *Prince Mahomed Buktyar Shah* v. *Rani Dhojamani*, 2 C. L. J. 20, (1905).

[2] *Rani Hursoondree Dibbeah* v. *Rajah Bishennath Singh*, 3 S. D. Decis. 339 (1847).

elder brother Kishwur Singh, notwithstanding that the brother left a widow, who, under the usual practice of Bengal, would have succeeded, but for the family usage pleaded;" and the Court further observed "I do not think the neglect and supineness of the defendant in the management of his affairs, which has allowed the plaintiff to get her name entered, and to obtain a partial possession, sufficient to set aside the established usage of the family, which has been handed down for thirteen generations." And thus her claim was dismissed.

The next case[1] was brought by the eldest son of the late Rajah to recover, from the alleged adopted son of the widow of his (the plaintiff's) youngest brother, possession of one-third share of the Soosung estate, which was given over to the said minor adopted son by the Sessions Judge in proceedings taken under Act IV of 1840. The plaintiff rested his claim on *Kulachar*, by which the entire estate of the Rajahs of Soosung devolved on the eldest son to the exclusion of all other heirs and by which he also sought to invalidate the adoption. It appeared that the plaintiff with his two other brothers, by a joint petition, applied for registry of all their names as joint proprietors of the estate on the death of their father, and by other acts acknowledged their right of co-heirship along with himself. The learned Judges of the Sudder Dewany Adawlut found that these admissions by the plaintiff were positive and absolute and were not to be regarded as mere supineness or neglect. Under the Regulations they were conclusive against his personal claim, but the benefit of those admissions could not be claimed by any other than a lawful heir of his brothers. Their Lordships therefore remanded the case for investigation as to whether there was any family custom which bars inheri-

[1] *Rajah Bishnath Singh* v. *Ram Churn Mujmodar* [Guardian of the alleged adopted son of *Inder-manee Bibeah*, widow of Juggernath, third son of the late Rajah] 6 S. D. Decis. 20 (1850).

tance by adoption and whether the adoption was otherwise correct according to law. They did not think it necessary to advert to the plea that *Kulachar* as to primogeniture had been established in Hurrosoondree's case.

After remand the case again came up before the Sudder Dewany Adawlut on appeal.[1] The issue arising out of the pleadings was simply this :—Is there a custom in the family of the plaintiff by which the eldest son alone succeeds to the estate of Soosung, and under which custom Rani Indramanee received maintenance and in opposition to which plaintiff has been dispossessed by the defendant under the orders of the Sessions Court, or does the ordinary rule of succession under the Hindu law current in Bengal prevail in the family as pleaded by the defendant ? The question of the validity of the adoption of the defendant did not arise in this case as it was not pleaded by the parties. Their Lordships found, after very carefully going through the evidence, that the respondent (plaintiff) had been unable to afford that clear and positive proof of the ancient and invariable custom set up in his plaint, which the nature of the case required ; moreover the appellant (defendant) had proved by most cogent evidence that since the death of Rajah Raj Singh, who was in possession of the estate of Soosung before, at and after the decennial settlement, the ordinary rule of Hindu inheritance had prevailed in the family. The decision of the lower Court was accordingly reversed.

The third case[2] which ultimately came before the Privy Council was originally brought by Rajah Prankishen Singh against Hurrosoondree Dabee, widow of one of his uncles (Gopeenath Singh, the second son of Rajah Raj Singh),

[1] *Ram Churn Mujmoodar Chowdhree* (Guardian of Rajah Sreekishen Singh minor Defendant) v. *Rajah Bishonath Singh*, after his death, *Rajah Prankishen Singh*, 12 S. D Decis, 399 (1856).

[2] *Ramjoy Muzoomdar* v. *Rajah Prankissen Singh*, 8 Sevestre 297 (1865) : s. c. in the Privy Council *Raj Kissen Singh* v. *Ramjoy Surma Mozoomdar*, 1 Cal. 186 P.C. 1872).

and some purchasers from her, to recover possession, "by family custom," of one-third of the Soosung estate. The plaint stated that according to family custom prevalent in the Raj or estate, the right of the plaintiff as proprietor of the estate accrued after the death of his father Rajah Bishonath Singh. The claim was rested entirely on the ground of family custom, under which, it was alleged, the estate was descendible on the eldest son, to the exclusion of the other sons, and further that it was impartible and inalienable.

It appears that the entire of 16 annas of the Pergunnah were at one time enjoyed by the ancestors of the family but two annas were afterwards alienated, and it appears to have been assumed on both sides that these 2 annas were a long time ago given as dower on the marriage of a daughter of one of the possessors. Rajah Raj Singh, the grand-father of the plaintiff Prankishen, died in 1822, leaving three sons, Bishonath (the father of the plaintiff Prankishen), Gopeenath and Juggernath ; and it is undisputed that on his death the three sons presented a joint petition to the Collector, describing themselves as the heirs of their father, and proprietors of the Pergunnah, and praying to be registered, and that they were so registered for the 14 annas. Gopeenath held the one-third of the estate until his death ; his widow Hurrosoondree succeeded to the possession and when the present suit was commenced against her in 1861, Gopeenath and she, as his widow, had been in possession for nearly forty years, viz., from 1822 to 1861.

The High Court came to the conclusion that the plaintiff had failed to establish by evidence the exceptional family custom on which he relied ; and, further, that if there had been such custom as pleaded, it was certainly waived by the sons of Raj Singh on his death in the year 1822. There was nothing in any one of the documents submitted to the Court, either before or after the British Government, which prohibited alienation while, at the same time,

the Court found that at a period previous to the British rule alienation of two-sixteenths of the property in dispute did take place and was acquiesced in by the successors. It was manifest from plaintiff's statement and evidence that the property was, during the Mahomedan Government, a Military *Jagir* resumable at pleasure, and not a Raj, and that the succession to it went on not by the right of custom but by the will of the Sovereign power of the time. The Privy Council upheld the judgment of the High Court.[1]

Chota Nagpur Raj family.

Family custom of the Maharajah of Chota Nagpur formed the subject-matter of a suit brought by the members of a junior branch of the family. The plaintiff, as representative of his father, sought to recover possession of a fourth share of certain moveable and immoveable properties on the ground of a special custom by virtue of which all the surviving male descendants of the common ancestor, Thakoor Bulbhuddur Sahee, were entitled to obtain equal shares of the properties left by a childless member of the said Thakoor's family without any reference whatever to their position in the family-tree, or to their capability to satisfy the conditions of heirship laid down by the ordinary Hindu Shastras. But he failed to establish the alleged custom. The defendants, on the contrary, alleged a long established custom of the family in conformity with which he, as representative of the eldest branch, was entitled solely and exclusively to the properties in dispute. The Court relying on the evidence, adduced by the defendant, decided that according to the custom in the eldest branch of the Thakoor A. Sahee's family, the property left by a childless member devolved on the eldest or the *gadi Thakoor*, and as defendant's position in B. Sahee's branch

[1] *Ramjoy Muzoomdar* v. *Rajah Prankissen Singh*, 8 Sevestre 297 (1865) s. c. in Privy Council *Raj Kissen Singh* v. *Ramjoy Surma Mozoomdar*, 1 Cal. 186 P. C. (1872).

of the family was similar *i.e.*, that of a *Thakoor*, he had every right to contend that the same custom might be presumed to obtain in both until the contrary was proved.[1]

In another case the Sudder Dewany Adawlut agreeably to the family usage, upheld the succession by primogeniture to an estate in Chota Nagpur against a claim for division of the ancestral estate.[2]

Ramghur Raj.

In *Koonwar Bodh Singh* v. *Seonath Singh*,[3] the action was brought by the plaintiff to recover two-thirds of the estate of Ramghur in Chota Nagpur. In 1772 the estate was confiscated as the then Zemindar had become refractory and it was conferred on another person in recognition of his public services. The estate was held by his son and afterwards by his grandson to the exclusion of all other members of the family. On the suit of two sons of the original grantee to participate with their nephew, the judgment was given against them, the Zemindari being one of those estates not liable to division, recognized as such by Regulation XI of 1793. Provision was made in that Regulation for the future abolition of custom, and it was enacted that after the 1st of June, 1794, such estates should descend according to the Mahomedan and Hindu laws of inheritance. But this provision was not held to be applicable to the present case, the father of the claimants having died in the year 1774.

With regard to the validity of the claim of the plaintiff according to the Hindu law of inheritance the Court observed that this point turned upon the further question whether the estate in dispute was to be considered a common Zemindari divisible by the laws of inheritance, or one of those estates which, by the custom noticed in

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[1] *Thakoor Jeetnath Sahee* v. *Lokenath Sahee Deo*, 19 W. R 239 (1873).

[2] *Thakoorai Chutterdharee Singh* v. *Thakoorai Tilukdharee Singh*, 6 S. D Sel. Rep. 260 (1839).

[3] 2 S. D. Sel. Rep. 116 (92) (1813).

and abolished by Regulation XI of 1793, descended to one heir in exclusion of all other members of the family.

Adverting, however, to the extent and situation of the estate, to the Zemindar possessing the title of Rajah, and to his maintaining a sort of feudal establishment of troops and dependant *Jagirdars*, the Court could entertain little doubt that it was not a common estate divisible by the laws of inheritance.

In another case[1] the subject of investigation was the right of succession to the Raj or Zemindari of Ramghur in Chota Nagpur, vacant by the death of the infant son of the last actual Maharajah. The infant in question was a posthumous child. On the death of the Maharajah without issue the Court of Wards had assumed charge of the estates. The suit was commenced by the plaintiff, as next agnate, against the officer of the Court of Wards, and against the widow of the late Maharajah and mother of the deceased infant. The lady alleged that she was entitled as heir to succeed on the death of her husband and her son. Both sides relied on custom. The plaintiff emphatically relied on *Kulachar*, but the defendant gave her own version of it, so as to show her own right and to exclude the plaintiff.

The real question in this case was whether the custom of the Ramghur Raj favours succession of the male heir or of the widow and mother. It was held on evidence that no custom, either family or local, to exclude females had been established and that the plaintiff had failed to make out his title.

In this case Markby, J., held that where the impartibility of the dignity and estate of a Raj had its origin not in any custom, family or local, but in the peculiar character of the Raj itself and which by its very nature was indivisible, the nature of the Raj would not exclude from

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[1] *Maharani Heera Nath Koeree* W. R. 375 (1871).
v. *Baboo Burm Narain Singh*, 15.

inheritance any persons of either sex if without physical or intellectual informity.[1]

The Pactum Raj in Chota Nagpur is admittedly an impartible Raj and one in which the custom of primogeniture exists. There is also a custom that the younger sons of the Rajah are entitled to maintenance, the second being called *Hakim*, the third, *Konwar*, and the fourth, and subsequent, *Lals*, but the maintenance given according to this custom ceases with the life of the grantor and has to be renewed upon a succession to the Raj. It so happened that a Rajah, during his life time, executed two instruments in favour of his third son. Of these two instruments, one was *pon-haba mokurrari pottah* or permanent lease at a fixed rental granted in consideration of a bonus or fine, and the other a *Khorposh mokurrari pottah*, or permanent maintenance grant. The eldest son, on succeeding to the Raj, brought a suit to set aside these two instruments and for possession of the Mouzas included in them. The lower Courts having found that the instrument relating to maintenance ceased to have effect on the death of the grantor-Rajah, the other instrument was the one issue to be decided upon. With reference to this both the Deputy Commissioner and the Judicial Commissioner concurred in the finding that the plaintiff failed to prove that the granting of the *mokurrari pottah* was contrary to family custom. The general power of alienatian on the part of the late Rajah was established. The High Court pointed out that Pactum Raj.

[1] *Ibid* p. 381. Markby, J., said as follows :—

"I am not aware of any definition of a Raj which will enable me to say precisely whether or not the succession in dispute in this case is properly denominated the succession to a Raj. I imagine that where the term is used, it rather represents a dignity than an estate,—though it may sometimes be used to include an estate where that estate is appurtenant to the dignity. And from the expressions which have been currently used in the family, such as 'ascending the *gadi*' 'affixing the *teeluck*' and so forth, I imagine that there was in this family some hereditary dignity and this dignity has been sometimes called a *Raj*."

it was necessary for the plaintiff, in order to succeed, to show that there was some custom which would prevent the operation of the general law and which would give a power of alienation; and the only custom proved was, that the estate descends to the eldest son to the exclusion of the other sons, and that instead of there being proof of a custom against alienation what evidence there was showed that alienation had been made. The Privy Council expressed the same views in upholding the decision of the High Court.[1]

Zemindari of Pachete.

The recognized custom of the Zemindari of Pachete in Hazaribagh is that the reigning Rajah is succeeded by his eldest son on whom the estate devolves entire. The other sons as well as the minor branches of the family receive merely an allowance for their subsistence. The reigning Rajah has full power of revoking, cancelling, altering, modifying or confirming all grants made by his predecessor. The power of making such grants is restricted, in regard to the period of the grant, to the life-time of the grantor.[2]

As to the persons who can claim *of right* maintenance or grant in lieu of maintenance, it has been held that no one "except a son or daughter" can claim it. Thus it has been decided that a grandson or other more remote descendant is *not* entitled to maintenance.[3]

Tomkohi Raj in Sarun.

The Tomkohi Raj consists of a large number of villages in the districts of Gorakhpur, Gya, and Basti, and is situate in the territory which formerly belonged to the Nawab Wazir of Oudh but was ceded to the British Government in the year 1801. It lies on the west side of the river Gandak, on the opposite bank of which lies the

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[1] *Rajah Udaya Aditya Deb* v. *Jaduh Lal Aditya Deb*, 8 I. A. 248 (1881): s. c in High Court 5 Cal. 113.

[2] *Musst Maharanee* v. *Bene Pershad Rai*, 4 S. D. Sel Rep. 62 (1825); *Beebee Pancham Koomaree* v. *Maharajah Gurunarain Deo*, 6 S. D. Sel. Rep. 140 (1837); *Maharajah Gurunarain Deo* v. *Unund Lal Singh*, Ibid 282 (1840): s. c. in the Privy Council 5 Moo. I. A. 82 (1850).

[3] *Nilmoney Singh Deo* v. *Hingoo Lall Singh Deo*, 5 Cal. 256 (1879); s. c. 4 Shomes, Notes 18.

Raj formerly known as the Hunsapore Raj in the district of Sarun. Both the Tomkohi and the Hunsapore estates belonged to Rajah Fateh Sahi and to his ancestors before him for many generations. After the battle of Buxar in the year 1764, the property in Sarun was confiscated by the British Government and Rajah Fateh Sahi, who refused to acknowledge allegiance to the British, was obliged to leave his estate in that territory and settle on property situate on the west bank of the river Gandak, which was formerly described as Bank Jogni. By family customs the incidents of primogeniture and impartibility were attached to the *raj-riasat*, the younger sons receiving portions of the estate by way of "babuai" allowance. In a very recent suit for partition the plaintiffs claimed to be entitled to a share in the estate along with the defendant by right of inheritance according to the ordinary rules of Hindu law. The defence was that the estate was an impartible Raj devolving upon the death of the Rajah, in accordance with a well-established family custom upon the eldest son, the younger son or sons obtaining maintenance in recognition of his or their rights as a Baboo or Baboos; and that the defendant, as the only son of the late Rajah, was entitled to the Raj and the plaintiffs were only entitled to Babooana or maintenance. It was held that the application of the customs of primogeniture and impartibility to the Goruckpore property was unaffected by the confiscation of the property in Sarun; and, that even if (which, however, was found not to have been the case) the Goruckpore property had been altogether acquired after confiscation of the property in Sarun, these customs, being part of the personal law of the family, would still govern such after-acquired property.[1]

Hunsapore or Hatwa Raj.

The Hunsapore Zemindari in Sarun is now known as the Hatwa Raj. It is an impartible Raj and by

[1] *Surabjit Partap Bahadur Sahi* 27 All. 203 (1904).
v. *Indrajit Partap Bahadur Sahi*,

family custom and usage, descended, for many generations, on the death of each successive Rajah, to his eldest male heir, according to the rule of primogeniture, subject to the burthen of making Babooana allowances to the junior members of the family for maintenance.[1]

Sonepur Raj.

According to the special custom of the family of the Rajah of Sonepur the estate of the *Kowur i. e.* the second son of the Rajah, is never divided between his younger sons. His eldest son, who bears the title of *Thakoor*, succeeds to the entire estate. The younger sons are allowed maintenance only. This custom was in issue in a case brought by the younger son against his father and the sons of his elder brother. The former based his claim on the ordinary Hindu law, the latter (*i. e.* the nephews in particular, as the father was merely a *pro forma* defendant) pleaded special family custom as stated above. The circumstances out of which the cause of action arose were these: Rajah D. gave to Kowur H. certain lands in Purgunnah Sonepur. The latter gave to his two sons each fourteen villages in the same Purgunnah. The plaintiff was the younger son. On the death of the elder son, Kowur H. made over the whole of Sonepur to his (deceased son's) sons. Thereupon the plaintiff brought this suit claiming his share of the property in dispute. In upholding the family customs the Sudder Dewany Adawlut observed that the decision of the case rested entirely upon local usage and the customs of the family of the parties concerned. The evidence in the case conclusively proved that no division was made of the Kowur's estate according to the established custom. Therefore Kowur's eldest son, the Thakoor, was entitled to succeed to the *gadi* and the entire estate.[2]

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[1] *Baboo Beer Pertap Sahee* v. *Maharajah Rajendra Pertap Sahee*, 12 Moo. I. A. 1 (1867). S. C. W. R. (F. B.) 97 (1863). (See *infra*, under Impartibility, the history of the Estate).

[2] *Lala Indernath Sahee Deyoo* v. *Thakoor Casseenath Sahee*, 1 S. D. Decis. 17 (1844). See 6 S. D. Sel. Rep. 260.

Baikantpur Family in Julpaiguri.

In the Baikantpur family, in the district of Julpaiguri, succession by adoption is contrary to the family custom. The family could not properly be called Hindu. It originally belonged to an aboriginal tribe known as *Koch*, now designated *Rajbansis*.[1] These Rajbansis affect to be equal to *chhettries*, although they have retained many usages and habits of their own which are quite irreconcilable with those of Hindus.[2] It may be mentioned that even in a Hindu family there may be a custom barring inheritance by adoption.[3]

Rajput family of Jadan Thakur clan in Agra.

The Jadan Thakurs belong to a family of Rajputs, apparently numerous, the clan being known as Jadan Thakurs. The family is ancient and noble and has been in possession of the taluq or *riasat* of Umargarh and of various villages appertaining thereto for many generations. The family property has never been subject to partition and is subject to the custom of primogeniture. In *Nitr Pal Singh* v. *Jai Pal Singh*[4] the property in dispute was a taluq of zemindari villages in the district of Agra and Etah held for many generations by this joint family of the Jadan Thakurs. The disputants were step-brothers. It was contended by one side that the succession should be governed by the ordinary rules of Hindu law and the other side asserted that the ruling principle was the family custom, according to which the whole *riasat* of the family was *tikait* (meaning thereby, was exceptional as being the property of an individual marked with the *tika*) and was impartible; and the estate descended by a rule of primogeniture. Upon evidence it was found

[1] See Dr. Hunter's Statistical Account of Darjeeling about Kochs, and the Baikantpur family.

[2] *Fanindra Deb Raiket* v. *Rajeswar Dass*, 12 Moo I. A. 72 (1884): s. c. 11 Cal 493.

[3] *Rajah Bishonath Singh* v. *Ram Churn Majmoodar*, S. D. Decis. 20 (1850). See also *Sri Raja Rao Venkata Mahapati Surya Rao* v. *Sri Raja Rao Gangadhara Rana*, 13 I. A. 97 (1884): s. c. 9 Mad. 499.

[4] 23. A. 147 (1896). s. c. 19 All. 1.

that there was a family custom according to which the ancestral property descended as an impartible estate and should be possessed by a single heir at a time who should be the eldest son.

Abhan Thakurs of Oudh.

The Abhan Thakurs are said to have migrated from Gujrat some five hundred years ago and settled down in Sitapur and the borders of the Barabanki districts of Oudh. In Gujrat the Mayukha is recognised as an authority of permanent importance when it differs from the Mitakshara. According to the Mayukha, the sons of a brother who is dead share along with the surviving brothers. The rule, however, as found in the Mayukha, does not go beyond brothers and brothers' children. Although the migration of the Abhan Thakurs took place before the Mayukha was written it may well be that the rule was in force in earlier times and that on this point the Mayukha only embodied and defined a pre-existing custom. In *Chandika Baksh* v. *Muna Kunwar*[1] the right was claimed in favour of more distant descendants than brothers under an alleged family custom, which was contended to be a legitimate and natural extension of the Mayukha doctrine. To prove this alleged custom eighteen instances of succession were adduced, of which only four, of a comparatively modern date, were to the point. The Privy Council in dismissing the appeal remarked: "It is obvious that a family custom in derogation of the ordinary law cannot be supported on so slender a foundation."

Patia Raj in Cuttack.

It is contrary to the custom of the Patia Raj, in Cuttack, for the holder of the Raj to alienate the property of the Raj when he has a brother as his heir.[2]

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[1] 29 I. A. 70 (1901) : s. c. 24 All. 273 : s. c. 6 C. W. N. 425.

[2] *Gopal Prosad Bhakat* v. *Rajah Dibbya Singh Deb*, 9 C. W. N. 330 (P. C.) (1904).

Ilaka of Rawutpore

According to the family usage and custom for eight generations the property, Ilaka of Rawutpore, in the district of Cawnpore, descends entire to the eldest son to the exclusion of other sons. Younger brothers cannot claim partition of the estate which is indivisible and devolves on the eldest son.[1]

Seohur Raj in Tirhoot.

A *kulachar* to the effect that the Seohur Raj in Tirhoot is an impartible estate and the Rajah for the time being appoints one competent member of the family to succeed him on the *gadi* as Rajah and that the entire property passes with the Raj from Rajah to Rajah, the other members of the family being entitled to maintenance only—was not proved. It was held that the *status* of the family had none of the characteristics of a Raj and that the head of it became a Rajah in fact and truth for the first time when the title was conferred by Lord Canning.[2]

Talukdari Estate of Katyari.

The talukdari estate of Katyari is situate in the district of Hurdui, in Oudh. According to the custom of the family, a daughter's son does not succeed to the property of his maternal grand-father.[3]

Reg. XI of 1793 and Reg. X of 1800; their effect on family customs.

Regulation XI of 1793 provides that after the 1st of July, 1794, if any zemindar shall die without a Will, &c, and leave two or more heirs, who by Mahomedan or Hindu law (according as the parties may be of the former or latter persuasion) may be respectively entitled to succeed to a portion, such heirs shall succeed. Regulation X of 1800 enacts that Regulation XI of 1793 will not operate in the Jungle Mahals of Midnapore and other districts where a custom exists by virtue of which the succession to the

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[1] *Rawut Urjun Singh* v. *Rawut Ghunsiam Singh*, 5 Moo. I. A. 169 (1851).

[2] *The Court of Wards* v. *Rajkumar Dio Nandan Singh*, 9 B. L. R. 310 *n.* (1871).

[3] *Kunwar Sanwal Singh* v. *Rani Satrupa Kunwar*, 10 C. W. N. 230, (P. C.) (1905).

landed estates invariably devolved to a single heir without the division of property. It, therefore, only partially repeals Regulation XI of 1793. The custom alluded to was concerned with extensive zemindaris or principalities, not with petty estates.[1] In *Rajah Deedar Hossein* v. *Ranee Zuhoor-oon Nissa*,[2] it was held that the family usage that a zemindari has never been separated but devolved entire on every succession, though proved to have existed for many generations, will not exempt the zemindari from the operation of Regulation XI of 1793, which provides in case of intestacy, for the division of landed estate among the heirs of the deceased according to the Mahomedan or Hindu law. Regulation X of 1800 does not apply to undivided zemindaris, in which a custom prevails, that the inheritance should be indivisible, but only to *Jungle Mahals*, and other entire districts where local customs prevail; and therefore only partially, and to that extent, repeals Regulation XI of 1793.

In *Baboo Gunesh Dutt Singh* v. *Maharaja Moheshur Singh*,[3] their Lordships observed: "Now, it is said in this case, that there is no positive law which excludes the divisibility of this inheritance, unless it be clearly proved to be an ancient *Raj*, which it is denied that it is. But Regulation XI of 1793 really has no bearing upon the case, for the Regulation of 1793 is confined to cases in which there is no deed and no Will executed. Where there is a deed, or where there is a Will, it does not give a validity to that deed or that Will, which the deed or Will would not otherwise possess, but it leaves it precisely where it stood before." As it was alleged that there was a deed in this case, their Lordships were of opinion that Regulation XI of 1793 had no application and far less that of X of 1800.

In *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee*[4], the Privy Council held that Regulation XI of

[1] *Kali Dass Mitter* v. *Harish Chandra Laik*, 2 Sev. 157. (1855).

[2] 2 Moo. I. A. 441 (1841).

[3] 6 Moo. I. A, 164 at p. 187.

[4] 12 Moo. I. A. 1, (1867): s. c., 9 W. R. 15.

1793 did not affect the succession, by special custom, of a single male heir to a *Raj* or subject it to the ordinary Hindu law of succession, nor can it alter the character of the grant made in 1790.

In *Rajkishen Singh* v. *Ramjoy Surma Mazoomdar*[1] the previous three cases were referred to and their Lordships observed as follows :—"Regulation XI of 1793 has been held not to be applicable to the succession of a well-established Raj (and here referred to 12 Moo. I. A., 1 and 6 Moo. I. A., 164). But the respondents contend that, notwithstanding the qualification placed upon it by Regulation X of 1800, it did not govern a case like the present, where the claim rests only on a *continuing family usage*, and not on the peculiar character of the zemindari itself or on a local or district custom; see *Rajah Deedar Hossein* v. *Ranee Zahooroon Nissa*.[2] Their Lordships did not think it necessary to give any opinion on the positive effect of Regulation XI of 1793, for they thought that, in the present case, there was sufficient ground for the presumption that after the settlement and this Regulation, the family were induced to regard the former state of things, and the ancient tenures, whatever they were, as at an end, and to consider and treat the property as an ordinary estate held under the British Government; and their acts show that, in fact, they did so consider and treat it." Whether the Regulation XI of 1793 or Regulation X of 1800 would govern a case where the claim rested only on a *continuing family usage* was left undecided in this case.

In a very recent case[3] the High Court of Calcutta had occasion to consider the existence of the rule of primogeniture in the district of Cuttack and observed : "It is true that by Regulation XI of 1793 the Legislature, after referring to a custom which had grown up in consideration of

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[1] 1 Cal. 186 at p. 192 (1872).
[2] 2 Moo. I. A. 441 (1841).
[3] *Shyamanand Das Mohapatra* v. *Ram Kanta Das Mahapatra* 32 Cal. 6 at p. 11 (1904).

financial convenience, and by which some of the most extensive zemindaris devolved entire to the eldest son, enacted that in future the landed property of all zemindars and independent talukdars should devolve, on their death, according to the ordinary rule of succession prescribed by Mahomedan or Hindu law. In a Regulation, however, passed a few years later, X of 1800, it was observed that 'a custom had been found to prevail in the Jungle Mahals of Midnapore and other districts by which the succession to the landed estates invariably devolves to a single heir without the division of property'; and it was enacted that 'Regulation XI of 1793 shall not be considered to supersede or affect any established usage in the Jungle Mahals of Midnapore and other districts, by which the succession to landed estates, the proprietor of which may die intestate, has hitherto been considered to devolve to a single heir to the exclusion of other heirs of the deceased'." Then their Lordships went on and held that by s. 36 of Regulation XII of 1805, passed two or three years after Orissa had come under British rule, all the Regulations in Bengal, not superseded by the special rules laid down in that Regulation, were extended to, and declared to be in force in, the zillah of Cuttack. Thus in that case it has been held that the rule of primogeniture prevails in the district of Cuttack in which by established usage succession to an entire estate devolves to a single heir *provided* the rule is shown to have been in existence at the time of Regulation XII of 1805, and has not since been departed from.

Regulation XI of 1793 does not affect the estate where the proprietor died before the Regulation came into force.[1]

As to the application of the provisions of Regulation X, of 1800, see *The Widows of Raja Zorawur Singh* v. *Koonwur Pertee Singh*[2].

Koonwar Bodh Singh v. *Seonath Singh*, 2 S. D. Sel. Rep. 116, (1813)

[2] 4 S. D. Sel. Rep. 57 (1825).

Ancestral and acquired property.

Where the property in dispute is partly ancestral and subject to family usage, and partly acquired and subject to the ordinary Hindu Law of Inheritance, it is quite consistent that one rule should be applied to that part of the property which has descended, during some generations, under established custom, to the elder member of the family, and that another should prevail for such other property as has been more recently acquired and to which the necessity of applying the previous custom of the family is not made apparent.[1] But if the owner of an estate, the devolution of which is governed by family custom, acquires separate property but does not in his life-time alienate the property so acquired, or does not dispose of it by his will or leave behind him some indication of a contrary intention, the presumption will be that he intended to incorporate it with the family estate. Under such circumstances the self-acquired property will be governed by the family custom which is part of the personal law of the family.[2]

In *Muhammad Ismail Khan* v. *Fidayat-un-nissa*,[3] Spankie, J., speaking of a family custom says: "It must have had a legal origin and have continuance and *whether property be ancestral or self-acquired, the custom is capable of attaching or being destroyed equally as to both*."

Whether a petty family can set up a custom of descent like that of a Raj.

It is an undisputed fact, and it stands to reason, that a descent of property may be regulated by *Kulachar* existing in a *Raj* as well as in a petty family. It would be absurd to ignore, or not to recognize, such custom in the case of the latter because it happened to be a small property. As long as a custom satisfies all the requisites of a good custom and is not opposed to ordinary reason or public policy, it must be given effect to irrespective of

[1] *Annan Santra* v. *Dusrutta Opadhia*, 11 S. D. Decis. 989 (1858).

[2] *Sarabjit Partap Bahadur Sahi* v. *Indrajit Partap Bahadur Sahi*, 27 All. 203 (1904).

[3] 3 All. 723 at p. 739 (1881).

the consideration that it attaches to a large or small estate, to a Raj or to a petty family. Its immemorial and uninterrupted existence gives it a sanctity which should not be lightly violated by the mere reason of the magnitude of the estate or the *status* of the family. With great deference, therefore, we beg to differ from the observations of the learned Judges in *Basvantrav Kidingappa* v. *Mantappa Kidingappa*,[1] who, referring to the cases of *Rawut Urjun Singh* v. *Rawut Ghunsiam Singh*[2] and *Gunesh Dutt Singh* v. *Moharajah Moheshur Singh*,[3] said:—"In both these cases the subject-matter was a Raj or Principality which descended undivided to the eldest male heir during several generations. And the same law would unhesitatingly be applied to some classes of Thakurs and Chiefs in the Bombay Presidency among whom, by settled custom, the Principality descends indivisible to the eldest son. *But it would be a dangerous doctrine that any petty family*,—and in the case under consideration a third of the family property is valued for the purposes of the suit at little more than five hundred rupees—*is at liberty to make a law for itself and thus to set aside the general law of the country.*" In this case the second of the three sons of one Kidingappa brought a suit to recover from his elder brother a third share of the *inam* lands and other properties. His claim was opposed on the ground of a family custom according to which, it was alleged, the plaintiff was entitled to maintenance only and not to any share in the lands, that partition had not been allowed in the family for several generations the eldest member succeeding to the whole of the property. The High Court found the evidence in support of the alleged custom insufficient and so dismissed the appeal. It would appear that the italicized portions of the remarks of the learned Judges were mere *obiter dicta* as the case was dismissed on a quite

[1] 1 Bom. H. C. R. 42 (1865). [2] 6 Moo. I. A. 164 (1855).
[3] 5 Moo. I. A. 169 (1851).

different ground, *viz.*, the alleged custom not having been proved. These *obiter dicta*, however, were considered in another case.[1] In that case the family was a Desai family and it set up a custom of primogeniture. The Court held that if the custom was clearly proved, it would supersede the general Hindu law. Here the learned Judges distinguished the above Kidingappa case by remarking that there "the family did not belong to any particular class or section of the community and that the custom set up was that of a *single family*." "In the present case," continued the learned Judges, "the family are *Desais* and belong to a class who, at one time, at least, occupied an important position in this (Bombay) Presidency and, further, the alleged custom would appear from Steele's work on the Laws and Customs of Hindu Castes in the Deccan Provinces to be in accordance with a very general usage of that class of hereditary offices." Their Lordships similarly distinguished a Madras case[2] which held that a *single family* could not set up a particular custom in derogation of the general law. It is difficult, however, to reconcile this view with the remarks of the Privy Council in *Soorendranath Roy* v. *Heeramonee Burmoneah*[3] and *Serumah* v. *Palathan*[4] where their Lordships recognized the possibility of a family custom being proved, adding that it should be distinctly proved. Further, in *Mahommad Azmat* v. *Lalli Begum*,[5] the custom of a particular family disallowing widows to inherit was recognized by the Calcutta High Court and approved of by the Privy Council. In a case from Bhagalpore[6] the Privy Council has laid down that a custom of descent according to the law of primogeniture may exist by *Kulachar* or family custom, although the estate

[1] *Shidhojirav* v. *Naikojirav*, 10 Bom. H. C. R. 228 (1873).

[2] *Sri Rajah Yenumula Gavuridevamma Garu* v. *Sri Rajah Yenumula Ramandora Garu*, 6 Mad. H.C.R. 93. (1870).

[3] 12 Moo. I. A. 81 at p. 91 (1868).

[4] 15 W. R. (P. C.) 47 (1871).

[5] 8 Cal. 422 (1881).

[6] *Chowdhry Chintamun Singh* v. *Nowlukho Konwari*, 2 I. A. 263 (1875).

may be neither a Raj nor a polliam. This case was followed in *Shyamanund Das Mahapatra* v. *Ram Kanta Das Mahapatra*.[1]

These last cases, we venture to say, have put the matter beyond all doubt and settled the rule once and for all.

Family arrangement

How far a family *arrangement* can be upheld is a matter worth some consideration. In *Banee Pershad* v. *Maha Bodhi*[2] it was held that in the district of Tirhoot under the *Mitakshara* a widow cannot, as of right, hold as the heir of the deceased brother of her late husband, though *she may, by family arrangement, be permitted to do so*. In the very latest Privy Council decision[3] their Lordships were of opinion that an unbroken usage for a period of 19 years was conclusive evidence of a family arrangement to which the Court was bound to give effect. Here the arrangement in question was in respect of the office of manager of a Hindu temple. The office was hereditary in a family, having no beneficial interest in the property or in the income of the temple. The office of manager was formerly vested in one M., on whose death it devolved on his eight sons (four sons by each wife) by his two wives. Each of these eight male descendants continued to hold the office for one year alternately. After some years, there having arisen disputes as to the order in which the issue of the first wife should manage the temple, they, by a written agreement, settled it amongst themselves. About this time the members of the junior branch relinquished their claim to the office in favour of the senior branch. During the 19 years immediately preceding the institution of this suit, in each cycle of eight years there had been a settled order of succes-

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[1] 32 Cal. 6 (1904).

[2] 3 Wyman 189 (1886).

[3] *Ramanathan Chetti* v. *Marugappa Chetti*, 33 I. A. 139 (1906) : s. c. 10 C.W.N. 825.

sion among the senior members of the branch. The arrangement, their Lordships thought, was "perfectly a proper arrangement conducing to the due and orderly execution of the office. It was one which the Court would no doubt have sanctioned if its authority had been invoked. It was one which the parties interested were competent to make without applying to the Court. If the applicant wishes to set it aside and to have a new scheme settled, he must take proper proceedings. If he has any ground for attacking the management of the temple or administration of the property attached to it the Courts are open. But it is not for him, at his will and pleasure, to disturb an arrangement of which he has on more than one occasion taken the benefit. It is plain that the arrangement was not intended to be merely temporary nor can it be regarded as precarious. It must hold good until altered by the Court or superseded by a new scheme effected with the concurrence of all parties interested."

In *Helan Dasi* v. *Durga Das Mundal*[1] the question came up before the Calcutta High Court and one of the learned Judges observed thus :—"A family arrangement may be upheld, although there were no rights actually in dispute at the time of making it, as the Courts will not be disposed to scan with much nicety the question of the consideration. Lord Chelsford, L. C., observed that it is a mistake to suppose that the doctrine of family arrangements extends no further than arrangements for settlement of doubtful or disputed rights, and proceeded to hold that the principle is applicable not merely to cases in which arrangements are made between members of a family for the preservation of its peace, but also to cases in which arrangements are made between them for the preservation of its property....Nor can any weight be attached to the circumstance that the family arrangement has been in opera-

[1] 4 C.L.J. 323 at p. 331. (1906).

tion for a short period of time only; the validity of arrangement does not depend upon the length of time for which it has been acted upon....If an attempt is made to set aside a family arrangement on the ground of mistake, inequality of position, undue influence, coercion, fraud, or any similar ground the length of time during which it has been allowed to stand unchallenged, may be a material element for consideration."

The principle to be derived from these cases is that a family arrangement may be upheld where it is made for the preservation of peace and property of the family. No court will disturb such arrangement unless it is clearly shown that a better arrangement will be made or that the old arrangement was made under circumstances which were not in consonance with equity and justice. No particular member of the family, at his will and pleasure, can disturb the arrangement to which he has been a party and in the benefit of which he has participated. But such arrangement cannot certainly have the force of a custom which, when clearly proved, supersedes the law. No family has a right to make its own law of succession. But it can make arrangement among the members of the family which is conducive to the general good without violating the ordinary law of the country.

Where it is not a family arrangement but a family custom.

In *Ramrao Trimbak Deshpande* v. *Yeshovantrao Madhavrao Desphande*,[1] which was a suit for partition of the *Deshpande Vatan*, the plaintiff contended that the services and the greater portion of the *Vatan* were entrusted to the defendant's ancestors for the sake of convenience, with the consent of all, maintenance being allotted to the younger branches; but that, now that the services had been abolished, there was no longer any necessity for that arrangement and that the property should be partitioned. The evidence conclusively showed that it had been the practice in the family, extending over a century and more before any

[1] 10 Bom. 327 (1885).

dispute arose between the elder and younger branches, to leave the performance of the services of the *Vatan* and the major part of the property in the hands of the elder branch, and to provide the younger branches with maintenance only, which, by its nature, was not fixed and permanent. As to whether the practice was the result of an established custom as stated by defendants or only an arrangement, (as West, J., says[1], "by mutual assent for peace or convenience," their Lordships thought that, though there was no direct evidence on the subject "this practice which has been undoubtedly in force during a very long period extending over, probably, a century and a half, without interruption, or dispute of any kind, is more probably due in its origin to a custom, such as is alleged by the defendants, than to a mere arrangement determinable at the will of any members of the family, more especially when it is remembered such a custom is of general usage in the Deccan as shown by the passage in Steele's Work on the Laws and Customs of Hindu Castes in the Deccan Provinces, p. 299 referred to in the judgment in *Shidhojirav* v. *Naikjirav*, 10 Bom. H.C.R. at p. 232." Their Lordships accordingly held that the plaintiff could only claim maintenance.

Gopalrav v. *Trimbakrav*[2] was another case where the parties wanted the partition of the ancestral *deshmukhi* and *patelki Vatan*. Of the three brothers, the first defendant was the eldest and resisted the partition on the ground that, by a custom of the family, the eldest son took the *Vatan* and provided the younger members of the family with allotments by way of maintenance. The Court found upon the whole evidence, that the existence of a custom of eldership, as alleged by the first defendant, had been satisfactorily established, that *it was not a mere arrangement for convenient performance of the services of the Vatan.*

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[1] Vide *Bhau Nanaji Utpat* v. *Sundrabai*, 11 Bom. H. C. R. 249 at p. 277 (1874).

[2] 10 Bom. 598 (1886).

Ordinary law prevails if *kulachar* not established.

It is superfluous to say that, when alleged *Kulachar* is not established, the ordinary law takes its course. Thus, where one party claimed a moiety of a zemindari under the ordinary rules of the Hindu law of inheritance, and the opposite party pleaded a family custom to the effect that the landed property invariably descended to the eldest son, or in failure of issue, to the next male heir in exclusion of all other heirs, but failed to establish the existence of the alleged family custom, a decree was given for the plaintiff.[1] Similarly, where the allegation was that succession was regulated not by the Mitakshara, but by a certain *Kulachar* whereby elder brothers enjoyed special advantages as heads of families, and widows were incapacitated from taking possession to the prejudice of male heirs, and the alleged custom was not established, the plaintiff, who sued to succeed to her husband's estate, was declared her husband's heir.[2] Instances can be multiplied.[3]

The ordinary law of descent and disposal applies also to lands where a particular custom concerning them has been abandoned,[4] or where they have passed into a family not subject to the custom.[5] Where service lands (Vatan estate) are freed from obligation of public service and when there is no concurrent family custom operating to keep the estate together, the lands become subject to the ordinary law of descent and disposal.[6]

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[1] *Raja Koernain Roy* v. *Dhornidhar Roy*, S. D. Decis. 1132 (1858).

[2] *Baboo Bhowany Sohye Singh* v. *Ooday Pertap Sing*, 1 Hay 205 (1862).

[3] See the following cases amongst others: *Pertaub Deb* v. *Surrup Deb Raikut*, 2 S. D. Sel. Rep. 249, (321) (1818); *Mantappa Nadgowda* v. *Baswuntarao Nadgowda*, 14 Moo. I. A. 24 (1871); *Somrun Singh* v. *Khedhum Sing*, 2 S. D. Sel. Rep. 147 (1814); *Durriao Singh* v. *Davi Singh*, 1 I. A. 1 (1873).

[4] See West & Bühler H. L. 744.

[5] *Shewlal Dhurmchand* v. *Bhaichand Luckoobai*, 7 Harr. S. D. Sel. Rep. 195; *Abrahom* v. *Abraham*. 9 Moo. I. R., 195 at p. 242 (1863); *Soorendra Nath Ray* v. *Heeramonee Burmoneah*, 12 Moo. I. A. 81 at p. 91 (1868).

[6] *Radhabai* v. *Anantrav*, 9 Bom. 198 (F.B.) (1885).

CHAPTER II.

LOCAL CUSTOMS.

The peculiar law of a country prevailing from time immemorial without conflict with the Vedas is called *Desachar*, or local or territorial custom.[1] It is the *lex loci*, which, unlike a family custom, binds all persons within the local limits in which it prevails.[2]

A local custom being exceptive in its nature must be pleaded with reasonable certainty.[3] To establish a local custom in a certain district, the district must be stated and described geographically, in which the custom is now, and for a long time has been, prevalent, and which includes the property in question. A sufficient number of instances of the particular custom within that locality must then be adduced to prove that it extends to the whole district and therefore governs the question in dispute. Until some connection, geographical or political, is shown to exist between two districts there is no ground for inferring the existence of a custom in one district from its existence in another.[4]

In order to prove a local custom to be invariable it is not necessary to show that the particular custom has been resisted unsuccessfully, or that there has been litigation in regard to it. Litigation is a test of the existence of a custom but not the sole proof of it.[5]

The following are some of the instances of local customs prevalent in various parts of the country :—

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[1] *Katyayana* cited in the *Viramitrodoya*.

[2] *Rajkishen Singh* v. *Ramjoy Surma Mozoomdar*, 1 Cal. 186 p. 195 (P. C.) (1872).

[3] *Storm* v. *Hamfray*, Tay and Bell 331, p. 337, (1850).

[4] See *per* Markby J. in *Maharanee Heeranath Koeree* v. *Baboo Burm Narain Singh*, 15 W. R. 375 (1871).

[5] *Hurromohun Mookerjee* v. *Lallunmony Dassee*, 1 Wyman, Part II, 36 (1886).

Huq Jethansi or Right of Eldership.

Huq Jethansi or *Jestangsha* is the right of the elder or the first born son to get a larger share of the ancestral property than that of his younger brothers.[1] It would seem that this right of primogeniture, which was recognized by the ancient Hindu law, is of no force in the present day, except where family or local custom sanctions it.[2] Consequently we find that where, in a case from Shahabad, the plaintiff sought to obtain possession from his younger brother of 7½ per cent. of the moiety of landed property which devolved on him by inheritance from the father, in right of *Jethansi*, his claim was disallowed on proof that *Jethansi* was not authorized by law.[3] In another case from Patna it was similarly held that, in a division of property among Hindus, priority of birth did not entitle to a larger portion.[4] In *Chowdree Junumjoy Mohapatra* v. *Pursottum Pandah*,[5] the plaintiff sought to recover possession of his share in the family property, real and personal, and some of the defendants pleaded that the estate had been divided by arbitration and that the rest of the property claimed was self-acquired. It was further pleaded that this arbitration was conducted according to a family custom under which the eldest son received, by right of primogeniture, a double share of the property. But as the defendants failed to establish the alleged custom, plaintiff's claim was allowed.

Jesthangsha may not be authorized by Hindu law, but the custom of granting the eldest born an additional share over and above that of his other brothers is prevalent in many parts of India. This is apparently for "his services in managing the family property and in acquiring other property and so increasing the value of the family estate."[6]

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[1] See *Wilson's* Glossary p. 237.

[2] *Vide*, Sir William Jones's Institute of Manu.

[3] *Sheo Buksh Singh* v. *The Heirs of Futteh Singh*, 2 S. D. Sel. Rep. 349 (265) (1818).

[4] *Taliwar Singh* v. *Puhlwan Singh*, 3 S. D. Sel. Rep. 301 (1824).

[5] 14 S. D. Decis. 848 (1858).

[6] *Manick Chand* v. *Hira Lal*, 20 Cal. 45 at p. 47 (1892).

Huq Chaharan is the right of a landlord, based on local custom, to receive one-fourth of the purchase-money when a house in a village is sold. In a Full Bench Case of the N. W. P. High Court it was laid down that where, by custom, the zemindar is entitled to a quarter share of the sale-proceeds of his *huq zemindari*, he is entitled to recover it on the occasion of sales either absolute or originally conditional but subsequently becoming absolute by foreclosure, from the vendor and the purchaser, and the latter cannot be discharged from his liability by proving that he has paid all including zemindar's dues to the former, it being incumbent on him to see that the zemindar is satisfied in respect of his dues.[1] *Huq Chaharan.*

Whether a zemindar's customary due extended to public sales by auction was the point for decision before a Full Bench of the Allahabad High Court. There a house was sold in execution of a decree. The zemindar sued the decree-holder for one-fourth of the sale-proceeds. The Lower Courts dismissed the suit on the ground that, although the plaintiff had proved that the custom set up by him existed in the case of private sales, he had failed to prove that it existed in the case of sales in the execution of decrees. The Full Bench held that the proof of a custom, whereby the zemindar of the village is entitled to one-fourth of the purchase-money when a house in the village is sold privately, is not proof of a similar custom in respect of sales in the execution of decrees.[2]

There is in existence in old reports a large body of rulings in reference to the respective rights of a *purohit* and a *yajamana*. The term *purohit* means a family priest and a *yajamana* is his employer. A *purohit* belongs to the Brahman class and for his services and ministrations to the family of his *yajamana*, in performing religious *Huq Purohiti.*

[1] *Heera Ram* v. *Hon'ble Sir Raja Deo Narain Singh*, Ag. H. C. (Full Bench Rulings) 63 (1867).

[2] *Kalian Das* v. *Bhagirathi*, 6 All. 47 (F.B.) (1883).

ceremonies or religious worship, he receives certain remunerations. Sometimes such relationship continues for generations and becomes quite hereditary. Owing to this peculiar relationship of the two, certain customary rights have sprung up through ages of usages and practices, and those rights were claimed by the one or the other of the parties in litigating with each other for the enforcement of such rights. In many of these disputes between priest and *yajamana*, the Civil Court had to determine whether they were cognizable by the Courts of Law. Generally, as the privileges claimed or denied by the parties involved a mere personal right and not a civil one, the court had to non-suit them.

Yajamana's right to select his own priest.

The *yajamanas* have a right to select their own priests but no suit to enforce the claim will lie in the Civil Courts.[1] But "if the holder of an office was entitled by law to claim dues from the inhabitants of certain places, and a person could establish that he, by right of inheritance, was entitled to fill that office, probably the Civil Courts would defend his right against any disturbance of it."[2] The obligation of the *yajamanas* to employ a particular *purohit* is a mere matter of conscience and not an obligation which a court can enforce.[3] But having selected and employed a priest a *yajamana* cannot discard him in the absence of any disqualifying cause.[4]

No hereditary right to a priest's fees.

Since the *yajamanas* are at liberty to choose their own priests to perform ceremonies no third party who has not performed them can, on proof of hereditary right established by custom, claim the fees either from the *yajamanas* or from the priest who received them.[5]

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[1] *Beharee Lal* v. *Baboo*, 2 Ag. H. C. R. 80 (1867); followed N.-W. P. Decis. 314 (1862).

[2] *Ibid* p. 89.

[3] *Damoodur Misser* v. *Roodurmar Misser*, 1 Hay 365 S.C. 1 Marshal 161 (1862).

[4] *Musst. Chowrasee* v. *Jeewun Chund Mehtoon*, 6 S. D. Sel. Rep. 152 (1837).

[5] *Gourdas Byragee* v. *Annund Mohun Chuckerbutty*, 5 S. D. Decis. 428 (1849); *Hurgobind Surma* v. *Bhowaneepershad Shah*, 6 S. D. Decis. 296 (1850); *Rama Kant Surma* v. *Gobind Chunder Surma*,

Priest's right to fees collected at shrines.

A claim by a priest to the fees bestowed on him by his *yajamana* is not enforcible in a Civil Court, but his claim connected with rights or fees collected at shrines or temples from pilgrims is cognizable by the Civil Courts. Such claim may include his rights connected with religious worship, which are not rights over persons, but referring exclusively to his ministration within a temple or religious building, together with the exclusive receipt of offerings made by any parties who may choose to resort to such temples.[1] In this case a distinction was drawn between "offerings on festive and other occasions" and "offerings at shrines and temples." A series of decisions ruled that, for the former description of cases, a suit in a Civil Court will not lie, while for the latter they will. Thus, in a case where the suit was for a fractional share of offerings presented at a shrine and the suit was dismissed by the Lower Court, the Sudder Court held, following the above decision, that the suit was cognizable in a Civil Court and that the precedent cited by the Lower Court related to "offerings on festive and other occasions" and was not applicable to the present case. The decision of the Lower Appellate Court was reversed and the case was remanded for trial on its merits.[2]

Purohits' exclusive right.

In *Damoodur Misser* v. *Roodurmar Misser*,[3] the suit was brought by a *purohit* against another *purohit* for an interference by the latter with plaintiff in the exercise of his alleged exclusive right of performing certain ceremonies for the people residing at the places named in the plaint, and receiving certain donations or payments in respect of such performance. It was held that the plaintiff had no

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8 S. D. Decis. 398 (1852); *Bog Thakoor*, 4 Sevestre 673 (1857); *Ranee Sadut Koour* v. *Jowlla Pershad*, 4 N. W. P. Decis. 720 (1861). See the cases cited in the last case.

[1] *Ranee Sadut Koour* v. *Jowalla Pershad* 4 N. W. P. Decis. 720 (1861).

[2] *Ussalut-oon-nissa* v. *Ruhim Buksh* 4 N.W.P. Decis. 767 (1861).

[3] 1 Hay 365 (1862): s.c. 1 Marshal 161.

right of suit as no legal right, either of property or person, appeared to have been infringed.

In a case from the Madras Presidency the representatives of the *Arya* Brahmans claimed, in hereditary right, the *Mirassi* and exclusive privilege of administering *Purohitam* (religious rites and ceremonies) to seventeen classes of pilgrims who resort to the shrine of the great *Pagoda* and of the temples in the island of Ramaswaram in Madura. The suit was dismissed as the plaintiffs failed to establish their right either (*i*) by documentary proof of its origin, or (*ii*) by proof of such long and uninterrupted usage as, in the absence of documentary proof, would suffice to establish a prescriptive privilege.[1]

Priest wrongfully receiving fees.

Where a priest wrongfully officiates for another and receives fees, he is bound to account for them to the rightful priest, where such fees are by custom attached to the office. Couch C. J. said: "It is settled law that if a person usurps the office of another, and receives the fees of the office, he is bound to account to the rightful owner for them; where the payments are merely voluntary the case is different, and no suit can be brought....It is contrary to equity to make the *yajamanas* pay twice. The parties who have wrongfully received the fees are properly liable to pay them over to the parties entitled to them."[2]

Sale of a priestly office whether valid.

Whether a sale of the priestly office would be valid was a point for determination in the last instance. But in that case the purchasers were "grandchildren who would eventually have succeeded to the office as heirs." And the grandfather did nothing more than relinquish his right in their favour. Further, there had been previous dealings with this office of a somewhat similar nature, which was some evidence of a usage justifying the alienation. Consequently the sale was upheld. But whether such sale to *strangers*

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[1] *Ramasawmy Aiyan* v. *Venkata Achari*, 9 Moo. I. A. 344 at p. 384 (1863).

[2] *Sitarambhat* v. *Sitaram Ganesh*, 6 Bom. H.C. R. 250 (1868).

would be valid or not remained undecided, as the court did not discuss that point. It would seem, however, that an alienation of a priestly office to strangers would be objectionable on several grounds. Apart from the consideration of public policy such sales would infringe the rights of a *yajamana*, to select his own priests.

Huq Shufa or Pre-emption.

The right of pre-emption is "a right to acquire by compulsory purchase, in certain cases, immoveable property in preference to all other persons."[1] According to the Hindu law there is no right of pre-emption either in the schools of Bengal, Benares or Mithila. It is essentially a Mahomedan doctrine; but being well-suited to the communal life of village communities, it is very widely extended among non-Mahomedans by local usage. It is prevalent not only among the Hindus but also among the Buddhists living in Burma; not only in Bengal, Behar and Orissa, but also in the Punjab, Bombay and Malabar.

When the right of pre-emption has been shown to exist, it is presumed to be founded on, and governed by, the Mahomedan law, unless the contrary be shewn. Where its existence among non-Mahomedans has not been judicially noticed, it must be proved by the person who asserts it. The court may, as between Hindus, modify the law regarding the circumstances under which such right is claimed, and not regarding the preliminary forms.[2]

The right of pre-emption arises from a rule of law by which the owner of the land is bound; and it exists no longer, if there ceases to be an owner who is bound by the law either as a Mahomedan or by custom.[3] It arises by reason of

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Wilson's Anglo-Mahomedan Law p. 394. See also *Gobind Dayal* v. *Inayatullah*, 7 All. 775 (F.B.) at p. 799 [1885] for a definition of *Pre-emption* as given by Mahmood J.

[2] *Fakir Rawot* v. *Sheik Emambaksh*, B.L.R. (Full Bench Rulings) 35 (1863).

[3] *Hurree Churn Surmah* v. *Thomas Ackroyd*, 18 W. R. 444 (1872); *Byjnath Pershad* v. *Kopilmoni Singh*, 24 W. R. 95 (1875).

vicinage or co-parcenership ; where either of these causes does not exist the right does not exist either. In Macnaughton's "Principles and Precedents,"[1] it was laid down that the right of pre-emption can be claimed on the following grounds, in the order enumerated—*a partner in the property sold ; a participator in its appendages*; and *a neighbour*. But no right of pre-emption arises where the sale, being not *a bona fide* one, is but a sham transaction.[2]

The right of pre-emption is not annexed to the land so as to continue to affect it when it has been transferred to a person not bound by the law. The right, also, is not one in the pre-emptor.[3]

Holloway C. J. made the following observations regarding pre-emption, which are worth quoting:—"The so-called pre-emption of Mahomedan law resembles the Retract-recht (*jus retractus*) of German Law. It is an obligation, attached by written or customary law to a particular status which binds the purchaser from one obliged to hand over the object-matter to the other party to the obligation on receiving the price paid with his expenses. The action, in German as in Mahomedan law, is exercisable at the moment at which the property is handed over to the purchaser (Gerber s. 175 *et seq.* Deutsch-Priv-Recht).

"The right *ex jure vicinitatis* was one of six sorts and, like all the rest, was based upon a notion that natural justice required that such preference should be accorded to certain persons having specific relations of person or property to the vendor. It was once, as an enthusiastic Germanist admits, so used as to put the most unreasonable restraints upon the right of alienation. With more enlightened notions of the public weal, nearly every trace of it has disappeared, and it can no longer be considered a principle of the common law of Germany. While it

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[1] p. 47, Edn. Cal. 1825. (Cited in 1 W.R. 234 at p. 235).

[2] *Parsasth Nath Tewari* v. *Dhanai Ojha*, 9 C.W.N. 874 (1905).

[3] *Per* Couch C. J. in *Poorna Singh Moniporee* v. *Hurry Churn Surma*, 10 B. L. R. 117 at p. 121 (1872): s.c. 18 W. R. 440.

existed the antidote to its lawful influences was, as in Mahomedan law, the favouring of subtle devices for its defeat and the attaching of short periods of prescription to its exercise. It cannot be equity and good conscience to introduce propositions which the history of similar laws shows by experience to be most mischievous. If introduced at all, it must apply to all neighbours. The Mahomedan law binds Mahomedans no more than others except in the matters to which it is declared applicable. It is then law because of its reception as one of our law sources in the matter to which it applies. Where, however, not so received, it can only be prevailing law because consistent with equity and good conscience." [1]

Whenever a Mahomedan seeks to enforce his right of pre-emption against a Hindu he must clearly establish a prescriptive usage and local custom. For a Hindu defendant is not bound by the Mahomedan law in a case involving the right of pre-emption, which is a right unknown to the Hindu law.[2]

In the Madras Presidency the right of pre-emption is not recognised even as between Mahomedans except by local custom, as in Malabar.[3] In the Punjab and Oudh, the right of pre-emption is regulated by statutes. There is no distinction between Mahomedans and non-Mahomedans as regards the right of pre-emption.[4] In other parts of India the law of pre-emption is often modified by local customs, defined and confirmed by agreement by the land-holders of the village, or district, and embodied in the settlement record, called Wajib-ul-urz.[5]

[1] *Ibrahim Saib* v. *Muni Mir Udin Saib*, 6 Mad. H. C. R. 26 at p. 31 (1870).

[2] *Sheraj Ali Chowdhry* v. *Rumzan Bibee*, 8 W. R. 204 (1867): s. c. 2 Ind. Jur. N. S. 249.

[3] *Ibrahim Saib* v. *Muni Mir Udin Saib*, 6 Mad. H. C. R. 26, (1870); *Krishna Menon* v. *Kesavan*, 20 Mad. 305 (1897).

[4] See the Punjab Laws Act XII of 1878 and Oudh Laws Act XVIII of 1876.

[5] *Rup Narain* v. *Awad Persad* 7 All. 478. (1885).

The fixed rule of law as laid down by the Calcutta High Court is that, where the custom of the right of pre-emption under Mahomedan law has been adopted by Hindus in any particular district, it shall be there recognized as a legal custom.[1] The existence of the custom of pre-emption has been recognized in Gujrat,[2] Behar,[3] Bhagalpore[4] and perhaps in some places in Cachar.[5]

No local custom enforcing pre-emption prevails in Dacca,[6] Rungpur,[7] Tipperah,[8] Sylhet,[9] Jessore[10] and Chittagong.[11] As regards the last mentioned district, there were many decisions of the lower court in favour of the existence of a local custom of pre-emption, but no decision of the High Court. The matter first came up before the High Court in a second or special appeal. The learned Judges, (Bayley and Macpherson JJ.,) who heard the appeal had before them three decisions of the lower court in favour of, and one against, the prevalence of the custom of pre-emption. Upon such conflicting decisions of the sub-

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[1] *Inder Narain Chowdhry* v. *Mohamed Nazirooddeen*, 1 W. R. 235 (1864).

[2] *Gordhandas Girdharbhai* v. *Prankor*, 6 Bom. H. C. R. 263 (1869); *Narun Nursuee* v. *Premchand Wullubh*, 9 Harrington 591.

[3] *Musst. Joy Koer* v. *Suroop Narain Thakaor*, W.R. 259 (1864); *Fukeer Rawut* v. *Sheikh Emambuksh*, B. L. R. Suppl. Vol. 35 (F.B.) (1863). *Parsasth Nath Tewari* v. *Dhania Ojha*, 9 C. W. N. 874 (1905).

[4] *Fukeer Rawut* v. *Sheikh Emambuksh*, 8 Sevestre 141 (F.B.) (1863): S. C. B. L. R. Suppl. Vol. F. B. 35 (see the cases referred to and discussed in this case. They range from 1792 to 1862 and are both from Bengal and N. W. P.)

[5] *Poorna Singh Monipooree* v. *Hurrychurn Surma*, 10 B. L. R. 117, at p. 120, (1872): S. C. 18 W. R. 440.

[6] *Shiraj Ali Chowdhry* v. *Rumzan Bibee*, 8 W. R. 204 (1867); *Sheikh Kudratulla* v. *Mohini Mohan Shaha*, 4 B.L.R. 134 (F. B.) (1869).

[7] 4 B. L. R. 134 (F.B.) (1869).

[8] *Dewan Munwar Ali* v. *Syud Ashurooddeen Mahomed* 5 W. R. 270 (1866).

[9] *Jameela Khatoon* v. *Pagul Ram*, 1 W. R. 250 (1864).

[10] *Madhub Chunder Nath Biswas* v. *Tamee Bewah*, 5 W. R. 279 (1866).

[11] *Inder Narain Chowdhry* v. *Mahomed Naziruddeen*, 1 W. R. 234 (1864).

ordinate court, their Lordships held that the custom was not established.[1] The matter again came up before them in review.[2] On this occasion some more decisions of the lower court were put in. Bayley J., from "a preponderance of decisions," held that the Hindus in Chittagong had adopted the system of pre-emption prevalent amongst Mahomedans. Macpherson J. admitted that the decisions in favour of the custom were "in a proportion somewhat greater than 3 to 1." Nevertheless, as they were conflicting his Lordship thought, they could not prove the custom. As their Lordships differed, the application for review was rejected. But considering that the majority of the decisions of the lower court were in favour of the existence of the custom of pre-emption in the district of Chittagong, and that one of the learned Judges who heard the review was of the same opinion, we think the existence of the custom of pre-emption may be taken as established in this district.

Pre-emption among Christians or Europeans.

Whether a custom of pre-emption prevailed as among Christians or Europeans was considered in two cases,—one from Bhagalpur and the other from Cachar. In the Bhagalpur case[3] the vendor was a Hindu; the plaintiff claiming the right of pre-emption was a Hindu. The defendant-purchaser was a Christian. The locality of the transaction was Bhagalpur in the Province of Behar. In Behar, as we have already seen, the Mahomedan custom of pre-emption has been adopted by the Hindus and is therefore binding on them. The court thought that the question as to the custom of pre-emption prevailing amongst Christians in Bhagalpur had to be clearly proved on the same principle as that applied to Hindus in Behar. In this case the first court decided that Mr. Christian was a co-parcener in possession; but the

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[1] *Vide* 1 W. R. 234 (1864).

[2] *Nasirooddeen Khan* v. *Indernarain Chowdhry*, 5 W. R. 237 (1866).

[3] *Maheshee Lal* v. *G. Christian* 6 W. R. 250, (1866).

Lower Appellate Court's finding was silent on that point. "If Mr. Christian was a co-parcener," said their Lordships, "no right of pre-emption *as against a co-parcener* could exist. The right could, under Mahomedan law, only be against strangers or third parties, *not* co-parceners." In this view their Lordships remanded the case to be tried on the following issues, *viz.* :—

(i) Whether Mr. Christian is or is not a co-parcener; if so, how can this suit for pre-emption affect *him*?

(ii) Whether custom makes pre-emption binding on a Christian in Bhagalpur?

(iii) Whether the vendor and pre-emptor being Hindus, their right of pre-emption was affected by Christian defendant being the purchaser?

Unfortunately we are not in a position to say what the findings on those issues were, as we do not find any further report of the proceedings.

In the Cachar case[1] a Hindu brought a suit against a Christian vendor and Monipoori purchasers to enforce his right of pre-emption and to obtain possession of certain lands situate in Cachar. The defence was, that although by local custom the law of pre-emption was applied to Hindus in some places, it had nothing to do with Europeans. Couch C. J. observed: "We think it is essential that the vendor should be subject to the rule of law. If it were not so, a Mahomedan might become a partner in an estate owned by Christians or Hindus, which they could not prevent, and then he might prevent their selling their shares to any other person."[2] The court accordingly held that as the vendor in this case was a European, there was no right of pre-emption.

Pre-emption being wholly a question of the law of

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[1] *Poorno Singh Monipooree* v. *Hurryohurn Surmah* 10 B. L. R., 117 : s. c. 18 W. R. 440 (1872).

[2] *Ibid* 121.

sale and contract, the applicability of the Mahomedan system of pre-emption to non-Mahomedans depends on custom. Hindus or Christians, if they adopt the custom of pre-emption, will be bound by it, but the custom must be clearly proved.

"Bhabak Mahals"

"Bhabak Mahals" are tracts of land comprising a certain number of mouzahs of Doobrajpur and the neighbourhood, in the district of Beerbhum. In a claim for an eight annas' share the plaintiff said that "agreeably to the long established custom, the properties of *Vaisnabs* and *Vaisnabis* in the aforesaid mahals dying without heir have been divided among us according to our respective shares." The defendant claimed a similar right, not under a custom but under a grant from the Rajahs of Beerbhum. The first Court gave the plaintiff a decree, not upon the ground that he had proved the alleged custom but upon the ground that he was the *guru* or spiritual preceptor of the deceased person. The Lower Appellate Court reversed the decree and found that the right belonged to the defendant. On second appeal, the High Court observed: "It was admitted by both parties at the outset of the case that there was such a custom in this district, and although, no doubt, the custom is of a peculiar character, yet it appears that it has been always recognized by the courts notwithstanding that it is in contravention of the ordinary Hindu law. If it had been necessary for us to consider the validity of this custom, we should probably have presumed that the custom had a legal origin. But it is sufficient in this case to say that upon the case made by both the parties, there is such a custom in this district and that the court below has found that the right belongs not to the plaintiff but to the defendant."[1]

[1] *Nil Madhub Gossamee* v. *Chunder Mookhee Gossamee*, 22 W. R. 397 (1874).

Vaisnabs of Manickganj in Dacca.

A very curious custom was set up in *Gourdas Byragee* v. *Annund Mohun Chuckerbutty*.[1] There the plaintiffs alleged that one Narotum Thakoor founded a sect of *Vaisnabs* in Bengal some generations ago, and that they belonged to his family. They claimed that on the performance of a certain form of marriage among the disciples of the founder (scattered throughout the provinces of Bengal, Behar and Orissa) they were entitled to some fees. They instituted an action to enforce this demand as, in this instance, one of the sect had paid the fee to his own *guru* or spiritual preceptor. The lower courts gave judgment for the plaintiffs, observing that the right to the claim had been established by former judgments of the Court. On second appeal, it was found by Barlow and Colvin JJ., (Dick J., dissenting) that the plaintiffs were unable to produce any judgment by which the refund of money received as a voluntary gift from a third party was decreed to them against an opponent on the ground of his being a disciple. As no judgment whatever was produced, the question whether former judgments established a custom or usage of legal force, in respect of such a refund, so as to preclude further investigation, was not gone into. Further, as the plaintiffs who sued on the ground of usage and custom failed to substantiate it, the judgments of the lower courts were reversed.

[1] 5 S. D. Decis. 428 (1849).

CHAPTER III.

CASTE CUSTOMS.

Caste : its origin.

"Caste, in the days of the Vedas", says Sir Gooroodass Banerjee, "was an ethnological distinction. There were then two great castes, the *Aryas,* or the fair-complexioned new settlers, and the *Dasyus,* sometimes called the *Sudras,* or the dark-complexioned aborigines. *Varna,* literally colour, was then a strictly appropriate word for caste. Gradually as the *Aryas,* according to their occupations, divided themselves into three classes of priests, warriors, and traders or agriculturists, there arose the four-fold divisions into Brahmans, Kshatriyas, Vaisyas, and Sudras. By intermarriage among these castes, which was then allowable, there arose a number of mixed classes, which have been treated of in the tenth Chapter of Manu ; and further, by a division of Sudras according to their occupations there arose a number of sub-castes, such as the *Karmakars* (Blacksmiths) ; the *Tantis* (Weavers) ; the *Kumaras* (Potters) &c." [1]

Mr. Morley, in his " Digest of cases," under the heading of *Caste* appended the following note : "Originally there were but four castes *viz.*, the Brahman, the Kshatriya, the Vaisya and the Sudra. The Kshatriya and the Vaisya and perhaps even the Sudras are alleged by the Brahmans to be extinct. At the present day these are replaced by a multitude of mixed castes who maintain their divisions with great strictness and abide by certain laws and regulations fixed by themselves. These mixed castes, in many cases, coincide with trades which, in all towns are held together as *Jamaat* or companies, under hereditary chiefs,

[1] See Banerjee's *Tagore Lectures* for 1878. (2' Edn.) p. 68. See also Bhattacharya's *Commentaries on Hindu Law.* (2nd Edn.) p. 643 *et seq.*

who, with a council, or *Punchayet*, settle all disputes among themselves, including those of caste; this, however, appears to apply to trades carried on in a common locality; and it does not follow that a goldsmith of one city would acknowledge common caste with a goldsmith of any other."[1] The term *Jamaat* is not synonymous with caste. It refers to the manufacturing communities or crafts. It is quite possible that all the members of a *Jamaat* might not be exactly of the same caste, though community of caste and community of occupation generally go together. The growth of caste and the origination of different occupations have necessarily caused the growth of a body of rules for the guidance and preservation of the community and these rules have at last crystallized into usages and customs.

Expulsion from caste.

A caste custom binds all the members of a caste residing in a particular area. It varies with localities even among the members of the same caste. But on general matters caste customs agree even among different castes. For instance, the custom of expelling a member from caste for violating a caste rule or committing any offence is to be found among all castes. The *Guru* or the *Punchayet* or a majority of caste-men sit in judgment over a delinquent caste-man, and their verdict is absolute and imperative. The condemned person has no remedy even in Courts of Justice, unless the decision were shown to be not *bonâ fide*. In *Ganapati Bhatta* v. *Bharati Swami*,[2] the head or ecclesiastical chief issued a provisional order of excommunication against the plaintiff for having committed three caste offences; the plaintiff sued to have it declared that the order passed against him was unjust and invalid. The court held (approving *The Queen* v. *Sri Vidya Sankara Narasinha Bharathi Guruswamulu*[3] and *Murari* v. *Suba*)[4] that the *Guru*

[1] See Morley's Digest Vol. I. p. 90.

[2] 17 Mad., 222 (1893).

[3] 6 Mad., 381. (1883).

[4] 6 Bom 725. (1882).

had jurisdiction to deal with such matters according to recognized caste custom and considering the provisional nature of the orders and other circumstances he had exercised his jurisdiction *bonâ fide*, and hence the Civil Court could not interfere in the matter. In *Krishnasami Chetti* v. *Virasami Chetti*[1] it was held that it was open to the Court to determine whether or not the alleged expulsion from caste was valid, that if a person had not in fact violated the rules of the caste, but was expelled under the *bonâ fide* but mistaken belief that he had committed a caste offence, the expulsion was illegal. Kernon J. in the same case held that a custom or usage of a caste to expel a member in his absence without notice given or opportunity of explanation offered was not a valid custom. His Lordship was of opinion that the maxim of *audi alterem partem* could not be superseded by even an immemorial custom.[2]

Without notice.

With regard to notice and opportunity of vindication not being given to a person before he or she was declared an outcaste, we quote the following from the remarks of the learned Judges in *Vallabha* v. *Madusudanan*[3]:—"It was certainly a serious defect in the investigation that the respondent was not heard before he was condemned upon the uncorroborated testimony of the woman....No inquiry can be treated as fair when a person deprived of his *status* in his caste is not heard before he is condemned." Of course when due notice of inquiry was given and the person concerned refused to attend such inquiry, he could not afterwards complain that no inquiry was held.[4]

Caste question and jurisdiction of criminal courts.

As sometimes the violation of caste custom brings the offender within the purview of offences defined by the Indian Penal Code, it is necessary for us to see how far the Criminal Courts have jurisdiction to inquire into such

[1] 10 Mad. 133 (1886).

[2] Vide *William* v. *Lord Bagot*, 3 B and C 772 at 786 (1825).

[3] 12 Mad., 495 (1889).

[4] See *Gunapati Bhutta* v. *Bharati Swami*, 17 Mad., 222 (1893).

matters and how far the plea of custom will prevail. In *The Queen* v. *Sri Vidya Sankara Narasinha Bharathi Guruswamulu*[1] the complainant was one of the persons pronounced out of caste by their *Guru* or spiritual superior for having taken part in the celebration of certain widow re-marriages. It would seem that the *Guru* in response to a petition of the orthodox section sent two documents, one to the signatories of the petition and the other, a post-card, to the complainant, interdicting those who had taken part, or attended the celebration of these marriages and excommunicated some permanently and others provisionally, *i.e.* until they submitted to some penance. The post-card which was directly addressed to the complainant contained the same interdict. After the publication of this interdict the complainant was put to serious inconvenience. The complainant was prevented from performing vows in the temple, lost the society of his relatives and was otherwise injured. Thereafter he charged his *Guru* under ss. 499 and 500, 503 and 506 and 508, I.P.C., (*i.e.* Criminal intimidation, intimidation by attempt to induce a belief that by an act of the offender the person intimidated would become an object of divine displeasure, and defamation). The Joint Magistrate acquitted the accused of all the charges. The High Court, however, on appeal held that the first two charges were unfounded but convicted the defendant of defamation for having communicated the sentence of excommunication by a post-card.

Now, one principal point established in this case was the jurisdiction of a Criminal Court to interfere with the custom of the people. It was fortunate that of the two learned Judges who heard this Criminal appeal one was an Indian Judge, no less a personage than Sir Muttusami Ayyar, and the other was Sir Charles A. Turner, Kt., the Chief Justice of Madras. Both were of opinion that "a Criminal Court has no doubt jurisdiction to enquire into

[1] 6 Mad., 381 (1883).

any case of conventional discipline or spiritual oppression which exceeds its legitimate bounds and comes within the purview of any of the offences defined by the Penal Code." "But," said Sir Muttusami Ayyar, "if it is consistent with the usage of the caste and if it is not expressly forbidden by law, we are not at liberty to treat it as a criminal offence."[1] Pronouncing a man out of caste is a conventional mode of vindicating caste usages. Where a *Guru* exercises his right to excommunicate a disciple in good faith and honesty, he cannot be touched by the Criminal Law. The Court, therefore, exonerated him of all charges of intimidation by excommunication, but found him guilty of defamation for sending such intimidation by a post-card which might be read by others and consequently was illegal.

"This mode of communicating a sentence of excommunication," said Sir Muttusami Ayyar, "is quite new and not sanctioned by custom, and the duty arising from the relation of spiritual superior and disciple does not protect libellous communications to persons who are not disciples and for the protection of whose spiritual interests the power of excommunication is not allowed by the custom of the caste."[2] As between a *Guru* and his disciples, though the language of the post-card was not inconsistent with what the *Guru* might have believed to be his duty as their spiritual superior, and though the defendant did not exceed his privilege in addressing the post-card to the complainant over whose conduct he had authority as spiritual superior, their Lordships were of opinion that "the mode of publication adopted by the defendant violated the privilege and indicated a conscious disregard of the complainant's legal right."

In *Reg* v. *Sambhu Raghu*[3] it was laid down that courts of law would not recognize the authority of a caste

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[1] 6 Mad. p. 388.
[2] Ibid p. 391.
[3] 1 Bom. 347 (1876).

to declare a marriage void, or to give permission to a woman to re marry. A married woman of the *Teli* caste, married again during the life-time of her first husband, who was a leper, with the consent of her caste-people. When she was prosecuted for bigamy she pleaded caste custom which was, however, not established. The High Court in upholding her conviction said the *bonâ fide* belief that the consent of the caste made the second marriage valid might be taken into account as a circumstance in mitigation of punishment but certainly did not constitute a defence to a charge of bigamy.

Jurisdiction of Civil Courts.

Civil Courts have no jurisdiction to deal with caste questions, as the taking cognizance of such matters would be an interference with the autonomy of the caste. Regulation II of 1827, sec. 21, has excluded caste questions from the cognizance of the civil courts. The principle was clearly laid down by the Bombay High Court in a special appeal, No. 39 of 1862. There the question was as to the right of the plaintiff to be recognized as the head of the caste and to be entitled to receive from other members of the caste certain privileges and precedence. The Court held that the question at issue was a caste question and to hold otherwise would be to interfere with the autonomy of the caste. The right to an office of dignity in a caste is a caste question and, as such, no suit will lie against the members of the caste who refuse plaintiff the privileges belonging to that dignity.

This principle was followed in several cases. For instance, in *Murar Daya* v. *Nagria Ganeshia*.[1] Here the plaintiffs sued to recover from another member of the caste fees alleged to be due to them as *Mehtars* or chief men of the caste on the marriage of the defendant's daughter. In *Shankara* v. *Hanma*[2] the plaintiff claimed

[1] 6 Bom. H. C. R. A. C. J. 17 (1869). [2] 2 Bom. 470 (1877).

to be the hereditary holder of the office of *Chalvadi* in the Lingayet caste of Bagalkot to which (it was found by the lower court) no fees as of right were appurtenant, and he sued the defendants for damages for having dispossessed him of the office. In *Murari* v. *Suba*[1] the plaintiff belonging to the Mohar caste sought to establish his right as *Guru* to certain annual fees from his *sishayas* (disciples), and to recover one year's arrears of such fees from them. In this case all the previous cases were referred to and Sargent C. J., at p. 727 said—"Upon these authorities it must be taken as well established that a claim to a caste office and to be entitled to perform the honorary duties of that office or to enjoy privileges and honours at the hands of the members of the caste in virtue of such office is a caste question and not cognizable by a Civil Court; and, indeed, we think the same rule ought to apply when there are fees appurtenant to the office." His Lordship approved of the principle laid down in Appeal No. 39 of 1862 and said "applying that principle, we think, it would be equally so, whether the question turns upon the obligation of the members of the caste to accord to the holder of the office certain privileges and honours or to pay him fees in virtue of his office. In either case it is one which, if a caste is to be considered in any sense a self-governing body as is contemplated by the Regulation of 1827, should, we think, be left to be decided and dealt with by the caste according to its customary mode of procedure." In *Abdul Kadir* v. *Dharma*,[2] which involved a caste question, the High Court held that the suit was not maintainable in a Civil Court.

The Madras High Court following *Murari* v. *Suba*[3] has held that in a matter relating to caste customs over which the ecclesiastical chief has jurisdiction and exercises his jurisdiction with due care and in conformity with the

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[1] 6 Bom. 725 (1882).
[2] 20 Bom. 190 (1895).
[3] 6 Bom. 725 (1882).

usage of the caste the Civil Courts cannot interfere. A *Guru*, as head of a caste, has jurisdiction to deal with all matters relating to the autonomy of the caste according to recognized caste customs.[1] Where the caste heads exercise their jurisdiction not *bonâ fide* or exceed their legitimate powers, an aggrieved person will have his remedy in a Civil Court. Thus in a suit for damages for defamation by a person against those who had declared him an out-caste, the Court, having found that the defendants had not acted *bonâ fide*, held the plaintiff entitled to damages.[2]

According to the usage obtaining among the Numbudri Brahmans on the West Coast, a caste inquiry is held whenever a Numbudri woman is suspected of adultery and if she is found guilty, she and her paramour are put out of caste. The inquiry is made in this way. When a woman is suspected, her kinsmen and their family priest examine her maid servant and ascertain if there is ground for fuller inquiry. This preliminary investigation is termed *dasi vicharam*. On its being ascertained that further inquiry is necessary, a report is made by them to that effect to the Rajah, recognized as the protector of the caste usage, and the woman is meanwhile asked to reside in a detached part of the house called "anjampura." On the Rajah approving of the report, he appoints a Smarthan (a Brahman acquainted with Smriti), four Mimansakars (men versed in sifting evidence) and two others called *Akomkoima* and *Puramkoima* to aid in the investigation. The investigation is conducted at the time and place appointed and, if the woman is found guilty, she and her paramour are pronounced to be outcastes.[3]

In *Venkatachalapati* v. *Subbarayadu*[4] where a *Smarta* Brahman, who was prevented from entering the inner shrine of a temple to present an offering, for his having

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[1] *Ganapati Bhatta* v. *Bharati Swami*, 17 Mad. 222 (1893).

[2] *Vallabha* v. *Madusudanan*, 12 Mad. 495 (1889).

[3] See Ibid p. 497.

[4] 13 Mad. 293 (1889).

married a widow contrary to the Hindu *Shastras*, sued for damages for the above obstruction, the Court held that the right claimed was of a civil nature and within the cognizance of the Court and the question to be determined was not the question of the Plaintiff's legal *status*, since a Brahman widow was at liberty to re-marry under Act XV of 1856, but it was a question of caste *status* in respect of a caste institution. And in order to determine that question the Court ordered inquiry into the usages of the temple regarding admission into the inner shrine and whether according to such usage those who seceded from the caste custom as to remarriage of women were debarred from admission.

The Allahabad High Court, in *Bisheshur* v. *Mata Gholam*,[1] has held that while the Courts have generally accepted the decisions of properly constituted *Punchayets* on questions of caste, they have accepted them subject to the qualification that the decision of the *Punchayet* does not stop the Courts from enquiring into the civil rights of any member of the caste and securing to him the enjoyment of such rights, if he be found not to be precluded from the enjoyment of them by the *Shastras* or the particular usages of his caste.

Loss of caste and forfeiture of civil rights.

Since Act XXI of 1850 has come into operation mere loss of caste does not operate as a disqualification to a person's civil rights. Whatever might have been the effect of such excommunication prior to the passing of the Act, there is now no forfeiture of rights by loss of caste. The Act has abrogated so much of any law or usage which inflicted on any person forfeiture of rights or property, or which might be held in any way to impair or affect any right of inheritance by reason of his or her having been excluded from the communion of any religion or being deprived of caste. Thus, therefore, in *Karuthedatta* v. *M.*

[1] 2 N. W. P. 300 (1870).

P. V. D. Namboodri,[1] it has been laid down that exclusion from caste of a Hindu for an alleged intrigue does not involve deprivation of his civil rights to hold, deal with and inherit property. Again, where a Hindu has been deprived of caste by the members of his brotherhood on account of his intending to give his infant daughter in marriage to a man both old and impotent in consideration of receiving from him some money, he does not, thereby, under Hindu law forfeit his right as guardian of such daughter. Even if the Hindu law, in such cases inflicted a forfeiture of such right, such rule could not, with reference to the provisions of Act XXI of 1850, be enforced. A suit by the nephew for the possession of the minor and for the declaration of his right to give the girl in marriage as her guardian in lieu of the out-caste father, cannot be maintained.[2] Similarly, where a Hindu widow is entitled to a bare or starving maintenance under a decree made in a suit, she cannot be deprived of the benefit of that decree by the fact that she has since its date been leading an incontinent life.[3]

A widow of the Aheer caste, in the district of Moradabad, by her second marriage, does not forfeit her rights to act as guardian to her son by her first marriage. Apart from the well known custom among the Aheer caste according to which the re-marriage of a widow in no way affects her respectability, *status* or rights, Act XIV of 1856, sec. 3 saves the rights and status of widows on their re-marriage.[4]

Where suits will not lie.

Questions involving solely the rights of the castes, and, not involving any civil rights, will not form the subject-matter of any suit and no Civil Court will entertain such

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[1] 1 Ind. Jur. N. S. 236 (1866).

[2] *Kanahi Ram* v. *Biddya Ram*, 1 All. 549 (1878).

[3] *Parvati* v. *Bhiku*, 4 Bom. H. C. R. A. C. J. 25 (1867); followed in *Honamma* v. *Timannabhat*, 1 Bom. 559 (1877). See also *Rajah Pirthee Singh* v. *Rani Raj Kower*, 20 W. R 21 (P. C.) (1873) distinguished.

[4] *Kishun* v. *Erayut Hossein*, 4 N. W. P. Decis. 486 (1861).

a suit. In *Namboory Setapaty* v. *Kanoo-Colanoo Pullia*[1] the dispute was in respect of the respective rights of the Brahmans and the Vaisyas. The Comaties are a tribe of merchants and traders residing at Masulipatam in the Presidency of Madras. The representatives of the tribe brought a suit to establish their right to have performed for them and their tribe certain religious ceremonies, called *Soobha* and *Asoobha*, (auspicious and inauspicious) by Brahmans in the language of the Vedas, in the enjoyment of which they had been disturbed by the Brahmans refusing to perform such ceremonies. The defendants (who were members of the *Mantri-maha-nad* or secret assembly for avenging encroachments on the rights and rules of caste) asserted that the Comaties and the whole merchant class, having for many ages neglected to observe some of the ceremonies prescribed for their caste, and, in their stead, adopted other and spurious ceremonies in conformity with rites prescribed in the *Puranas* and other works, had become degenerate, and had so absolutely forfeited the privilege they once possessed, that no expiation could restore them to their former rights.

Disputes having for a long time existed between the Brahmans and the Comaties, concerning the performance of these ceremonies, and disturbances having constantly taken place on their performance or on the attempt to perform them, the Magistrate of the city of Masulipatam, in order to bring the question at issue before a tribunal competent to determine the right, issued an order prohibiting the Comaties from the performance of one of the ceremonies in question in the language of, or according to, the Vedas, until they had established their right to do so in a Civil Court. In consequence of this order the present suit was instituted. The Zilla Court, taking that part of the defendant's answer which set forth the acts by which the forfeiture of the rights in question was

[1] 3 Moo. I. A. 359 (1845).

occasioned, framed it into a statement for the opinion of the *Pundit* of the Court; and upon his opinion declared the plaintiff's tribe entitled to have the ceremonies performed for them by Brahmans. Upon appeal, the Provincial Court remitted the suit to the Zilla Court to take evidence, and upon such evidence and the opinions of the *Pundit*, which the Provincial Court took upon the same statement as the Zilla, they affirmed the decree. The Sudder Dewany Adawlut, upon the whole case, reversed these decisions. The Judicial Committee of the Privy Council, reversing the decisions of the three Courts, held that the whole proceedings were irregular and contrary to the express provisions of the Madras Regulations XV of 1816, s. X. cls. 3 and 4 which required the Judge to record the points necessary to be established, before the evidence could be taken; the opinions of the *Pundit* being also taken upon an assumed statement of facts, not admitted or recorded. But in consideration of the circumstances, such reversal was without prejudice to bringing a fresh suit. This case, however, left open the question, *viz.*, whether the civil courts in India have any jurisdiction to entertain a suit not involving any civil rights. The decision of the Judicial Committee proceeded on quite a different line and the main question still remained undetermined. But the decisions in the following cases have cleared the point and set the question at rest.

There are several reported cases[1] in which the point was whether a barber could be compelled to render his services to the persons whom he refused to shave. The parties aggrieved sued for damages on account of loss of honour and asked for an order of the Court to compel the recalcitrant barber to do his prescribed work. In all these cases it was held that the Court had no jurisdiction to entertain such suits as no suit would lie. In *Pitamber Rotansi* v. *Jagjivan*

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[1] *Phagoona Noyee* v. *Menye-matha*, (from Rungpur, decided, 22 Novem. 1854), 8 Sevestre, 11 (Footnote) (1865); *Rajkristo Majee*

Honsraj,[1] the suit was by a former Satia, (the spokesman or leader), of the Lovana caste, to recover from a person belonging to the same caste a certain sum agreed to be paid by the latter on his re-admission to the caste. The High Court held that the suit was not maintainable, as the agreement was made with the Satia in his representative, and not in his personal, capacity and the benefit of the agreement accrued not to him but to the caste. Further, as his successor, the present Satia, and other leaders of the caste disapproved of the suit, it could not be maintained.

Re-marriage of widows sanctioned by caste custom.

Many caste customs relate to Marriage and Divorce, and a reference should be made to the chapter dealing with them. Here we will mention a few in passing, *e.g.*, re-marriage of widows. It is well known that the re-marriage of widows is prevalent among many castes of the lower orders in different parts of India. And since such re-marriages are sanctioned by caste custom, they are also regarded as valid marriages by the Courts. The position and *status* of the re-married widows are in no way different to those of spinisters on marriage. Their offspring do not labour under any disqualification in matters of inheritance and succession. For instance, the *Aheer* caste in the district of Moradabad,[2] the *Raoteas*,[3] the *Koirees* and other castes of Behar,[4] the *Hulwaee* caste of Benares,[5] the *Namasoodras* of Midnapur,[6] the Jats of Ajmere.[7] Among the *Koirees* such re-married widows are

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v. *Nobaee Seal* (From Tipperah, decided, 22 Decem. 1864) 8 Sevestre 10 and 11 (Footnote); *Keenker Hajam* v. *Sheikh Sudde*, 8 Sevestre 9 (1865).

[1] 13 Bom. 131 (1884).

[2] *Kishun* v. *Enayat*, 4 N.W.P. Decis, 486 (1861).

[3] *Rudaik Ghaserin* v. *Budaik Pershad Sing*, 1 Marshal 644 (1863).

[4] *Bissuram Koiree*, 3 C.L.R. 410 (1878).

[5] *Kally Charan Shaw* v. *Dukhee Bibee*, 5 Cal. 692 (1879): s. c. 5 C.L.R. 505 : S.C., 3 Shome 81.

[6] *Hurry Charan Dass* v. *Nimai Chand Koyal*, 10 Cal. 138 (1883). S.C. 13 C.L.R. 207.

[7] *Mudda* v. *Sheo Baksh*, 3 All., 485 (1881).

so far the legal wives of their husbands as to justify the punishment of persons committing adultery with them.[1]

Among the Maraver caste

The Maravers, strictly speaking, are not Hindus, but in their customs and observances they are mainly governed by the Hindu law. Among them widows may re-marry and in this respect their customs differ from the Hindu law. In *Murugayi* v. *Viramakali*[2] the question was whether a widow of the Maraver caste, on her re-marriage, lost her claim to the property of her first husband. The Court applying the principle of Hindu law held that she did lose her claim to her first husband's property. The Court observed: "The principle on which a widow takes the life-interest of her deceased husband when there is no male heir is that she is a surviving portion of her husband; (See *Smriti Chandrika* Ch. XI. s. 1 §. 4) : and where the rule as to re-marriage is relaxed and a second marriage permitted, it cannot be supposed that the law which these castes follow would permit of the re-married widow retaining the property in the absence of all basis for the continuance of the fiction upon which the right to enjoyment is founded. From Steele's Hindu Castes, it appears that it is the practice of a wife or widow among the Sudra castes of the Deccan, on re-marriage to give up all property to her former husband's relations, except what had been given her by her own parents; and we have little doubt that the law in this Presidency will not permit the widow who has re-married, and who must be regarded as no longer surviving her husband, to lay claim to the property left by him, and now in the possession of the daughter who, in default of the widow, is the right heir."

Wife's right to re-marry among the Aheers.

In *Musst. Dureeba* v. *Juggernath*[3] the husband claimed the restoration of his first wife, who pleaded that according to the custom of the Aheer caste whenever a husband married

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[1] *Bissuram Koiree*, 3 C L. R. 410 (1878).

[2] 1 Mad. 226 (1877).

[3] 6 N.W.P. Decis. Part I, p. 128 (1855).

a second wife, the first wife was at liberty to take a second husband, and as in this case her first husband *had* taken a second wife, he was not entitled to a decree. On reference to the Hindu law officer no authority was to be found in the *Shastras* to support this contention, and the Court declined to recognize it. It is not clear whether any evidence was adduced in support of this alleged custom. But we venture to think that even if satifactory evidence to prove it was forthcoming, the Court would have refused to give effect to the custom as being immoral.

Among the Lingayets.

The Sect of Lingayets is largely represented in Mysore, and, to a certain extent, in the Wynaad; and also in the ceded Districts in Coimbatore, and South Canara in the Madras Presidency, and in Dharwar, Kolhapore and other places in the Bombay Presidency. They owe their origin to one Basava, who reformed the Lingayet religion, and repudiated Brahmanical observances. He introduced amongst his followers the practice of wearing the *ling*, and held that, as all *ling*-wearers are equal, there should be no caste distinction among them. A Lingayet woman stands in the same footing as a Lingayet man. She does not marry till she comes of age and has a voice in choosing her husband. The customs of the Lingayets vary in different districts. As for instance, at Kolhapore neither eating together nor intermarriage is allowed among different classes of Lingayets. A *Jangam*, *i. e.* a Lingayet priest, may in Dharwar marry the daughter of a pure Lingayet, a Shilvant, or a Banjig.[1] The *status* of Lingayets as Sudras was determined by the judgment in the case of *Gopal Narhar Safray* v. *Hanmant Ganesh Safray*.[2] Mr. Justice Ranade in *Basava* v. *Lingangauda*[3] says:—"The Lingayets are admittedly a heretical sect, and are not subject to Brahmin religious laws." The liberty of widow re-marriage

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[1] *Vide* Steele's Hindu Castes; Campbell's Gazetteer, the Dharwar District. *Fakirgauda* v. *Gangi*, 22 Bom. 227 at 280 (1896).

[2] 3 Bom. 273 (1879).

[3] 19 Bom. 428 at p. 457 (1894).

and even of wife re-marriage has been allowed to the Lingayet community.[1]

Cumbala Tottier caste: Female succession.

Among the Cumbala Tottier caste, females are not precluded by any rule of descent, custom or usage from succeeding to a Polliam. The Collector of Madura instituted a suit for possession of the Polliam of Erasaca Naiknoor in Madras as an escheat for want of male heirs. Evidence as to the custom and usage of females to succeed to the Polliam in question was adduced. Prior to the institution of the suit, the Polliam was in the possession of a female for eighteen years after the alleged escheat for want of male heirs. The Government acquiesced in the right of female succession to the Polliam. Consequently the suit was dismissed.[2]

Potter caste in Tinnevelly: custom of divorce.

Among the members of the potter caste in Tinnevelly there is a caste custom according to which a married woman by repaying the expense of her marriage (which is called *parisam*) to her husband can get the marriage dissolved, and is at liberty to re-marry another person. In *Sankaralingam Chetti* v. *Subban Chetti*,[3] the Court held that divorce in this form is consistent with the original customs of the potters and the custom is sufficiently ancient. "We do not think," said the learned judges, "that it is immoral, since it does not ignore marriage as a legal institution but provides a special mode by which it may be dissolved. The fact that there is a money-payment does not make the custom immoral and among the inferior castes similar customs are known to prevail.

Bogam caste: Succession to property left by mother.

By the custom of the Bogam or dancing girl caste residing in the Godavari district, property left by the mother is divided equally between sons and daughters. In

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[1] *Vide* Chapter on Marriage and Divorce. *Infra.*

[2] *The Collector of Madura* v. *Veeracamoo Ummal*, 9 Moo. I. A. 446 (1863).

[3] 17 Mad. 479 (1894).

Chandrareka v. *Secretary of State for India*[1] the plaintiff claimed a moiety of the property valued at a large sum, in the possession of his sister, as being "ancestral property and property jointly acquired" in which he and his sister had equal rights according to the custom of their caste. The sister denied plaintiff's claim and pleaded that she had acquired all the property as a prostitute. The District Judge passed a decree for plaintiff for a small sum as "representing the moiety of the property left by his mother." The High Court held that on the evidence the custom set up was established.

Reddi caste: whether a father-in-law can disinherit his heir in favour of his son-in-law.

In *Tayumana Reddi* v. *Perumal Reddi*[2] a custom was set up to the effect that among persons of the Reddi Caste a father-in-law could disinherit his heir in favour of his son-in-law. One R. had only a daughter and no male issue. He, having given her in marriage, executed a deed conveying all his property to his son-in-law absolutely. The High Court said that such custom had not the force of law as had been expressly declared by the Special Appeal No. 89 of 1859 of the late Sudder Court at p. 250 of the published decrees of that year.

Sudra Yati: inheritance.

As a Sudra cannot enter the order of *Yati* or *Sannyasi*, the devolution of property left by a Sudra who has become an ascetic and renounced the world, is regulated by the ordinary law of inheritance in the absence of any general or special usage to the contrary.[3]

Queer custom of legitimacy among certain caste or family.

In *Chinnammal* v. *Varadarajulu*[4] a very peculiar custom was set up to the effect that, according to the custom of the caste or family, children born of parents not married at the time of the children's *birth* are treated as their legitimate children by reason of the parents having performed the

[1] 14 Mad., 163 (1890).
[2] 1 Mad. H.C.R. 51 (1862).
[3] *Dharmapuram Pandara Sannadhi* v. *Viropandiyam Pillai*, 22 Mad. 302 (1898).
[4] 15 Mad. 307 at 310 (1891).

ceremony of *pariyam* before their birth. The District Judge found the custom proved but the High Court said it was not, and made the following remarks: "It is not at all clear, however, what is the custom alleged or which the Judge considers proved, whether it is that the *pariyam* or betrothal ceremony is equivalent to marriage, and children born after that ceremony are legitimate, independently of any subsequent marriage, or whether a subsequent marriage is necessary to legitimatize children so born. Nor is it clear whether the custom found by the Judge is a custom of the defendant's caste or only of his particular family, and, if the former, what his caste is. The Judge calls it Paligar or Yanadi. Neither of these terms is generally known as descriptive of a caste." Then commenting upon the evidence adduced in this case their Lordships continued: "This is in our opinion wholly insufficient evidence on which to find a peculiar custom of marriage or legitimacy prevailing in the defendant's caste or family. No judicial decisions recognizing the custom are proved. The only instances in which the custom is alleged to have been followed are in the defendant's own family. The custom is one contrary to the general law of marriage and inheritance prevailing amongst Hindus and requires strong evidence to support it. We notice also that the defendant's mother is said to have been of a different caste. That very loose notions of morality and of the sacredness of the marriage tie prevailed in the family to which the parties belong, is probable enough, for Thanappa Naicker appears to have kept the defendant's mother and another woman in his house from the time they were girls, and had children by them and subsequently to have married them, having in the meantime, married three other women. But something more than a prevailing low tone of morality in a family is required to establish a binding custom of legitimacy differing from the ordinary law. It appears, however, from the evidence that sons born under circumstances somewhat

similar to those of the defendant's birth, have inherited property in the defendant's caste or family, and we think some further inquiry as to the existence of any peculiar custom in the caste or family ought to be made." On the case being remanded the Judge returned the finding that the defendant's mother was not legally married at the time of his birth and that the family was a Sudra family. The High Court accepting this finding held that the defendant was the illegitimate son of a Sudra.

Illegitimate children and their caste.

The Hindu law independently of special usage or custom does not make illegitimacy an absolute disqualification for caste so as to affect in the relations of life not only the bastard but also the legitimate children. The Hindu law, unlike the English Law, recognizes a bastard's relations to his father and family. By birth and without any form of legitimation, bastards of the three twice born classes are now recognized as members of their father's family and have a right to maintenance. So, in the case of Sudras.[1]

In Myna Boyee v. *Ootaram*[2] it was held that the illegitimate children of an Englishman by a Hindu woman of the Ganda Brahman caste, who were brought up as Hindus and lived together as a joint family, were to be regarded as *Sudras* or as a class still lower, but Hindus, and their rights to be determined by the rights of the class of Hindus to which they belonged.

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[1] *Pandaiya Telaver* v *Puli Telaver*, 1 Mad. H.C.R. 478 (1863); *M. J. Y. Naiker* v. *V. Yettia*, 2 Mad. H.C R. 293 (1865); *Murdun Singh* v. *Purhulad Singh*, 7 Moo. I. A. 18 (1857); *V. Udayan* v. *Singoravelu*, 1 Mad. 306 (1877); *Rahi* v. *Govinda*, 1 Bom. 97 (1875); *Roshan Singh* v. *Balwant Singh*, 4 C.W.N. 353 (P.C.) [1899]: s c. 22 All. 191.

[2] 8 Moo. I. A. 400 (1861): s. c. (after leave reserved by the decree of Her Majesty in Council,) 2 Mad, H. C. R. 196 (1864.)

CHAPTER IV.

HINDU CUSTOMS.

Adoption.

"Dattaka Mimansa" and "Dattaka Chandrika" are the two Hindu text books on Adoption. Both the works, as Sir William Macnaghten has said, "are equally respected all over India; and where they differ, the doctrine of the latter is adhered to in Bengal and by the Southern jurists; while the former is held to be the infallible guide in the Province of Mithila and Benares."[1] In the well-known Ramnad case[2] the Judicial Committee expressed a similar view in respect of these two treatises. Mr. Mayne expresses a doubt as to whether they are regarded as authorities in the Bombay Presidency and in Southern India.[3] We are not concerned, however, with what authorities are respected in any particular province. We find from these and other Hindu text-writers that in early ages no less than about twelve sorts of sons, besides the legitimate or *aurasa* son, were recognized by them.

The origin of these subsidiary sons is rather interesting from a juridical point of view. For the practice of having a subsidiary son where legitimate issue had failed was common to the Aryans as well as to the non-Aryans.[4] And we venture to say that the same circumstances, the same

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[1] Macnaghten's Hindu Law, Preface xxiii and p. 74.

Collector of Madura v. *Mootoo Ramalinga Sathupathy*, 12 Moo. I. A. 397 (1868): S.C.: 1 B.L.R. 1 (P.C.): S.C. 10 W. R. 17 (P. C.), and S.C. in the High Court 2 Mad. H.C.R. 206. See *Bhugwan Singh* v. *Bhugwan Singh*, 26 I.A. 153 (1899): S.C. 21 All. 412 (P.C.); S.C. 3 C.W.N. 454.

[3] Mayne's Hindu Law and Usage pp. 28 and 149. (1892).

[4] "There can, I think, be no doubt that if the Aryans brought the habit of adoption, they also found it there already; and the non-Aryan races, at all events, derive it from their own immemorial usage and not from Brahmanical invention."—Mayne's H. L. 9 (1892).

necessity, the same environments operated on the minds of the people, whether they happened to be in ancient India or in ancient Europe, in evolving the practice of having a sort of substitute son. In early ages a sonless father would naturally be anxious to procure a substitute for a son to support him in his old age, assist him in his sickness and maintain his property in his own family. Thus it would seem that this practice or custom of taking into the family a stranger to fulfil the duties of a natural son had its origin in secular rather than religious necessity. The spiritual theory of adopting a son by one who has none "for the sake of the funeral cake, water, and solemn rites, and for the celebrity of his name"[1] was too complicated for the early stage of humanity. In fact its secular origin was not only consonant with the early communal life of the primitive village communities, but is also clear from other facts, such as the absence of any religious ceremonies in connection with adoption amongst various peoples in different parts of India, notably Jats and Siks, (both Hindu and Mahomedan) in the Punjab; Jains in the North-Western Provinces; Tamils in Southern India; some castes in Western India, where their principal object in adopting is to find or appoint an heir. The desire for perpetuating or the celebrity of one's name does not certainly indicate a religious motive. Giving and taking are the operative parts of the whole ceremony of adoption and absolutely necessary.[2] Even among the three superior classes *dattam homam* is not regarded as an essential ceremonial. It is notorious that among Sudras no religious ceremony is at all necessary to validate an adoption; mere giving and taking are sufficient for its purpose.

Of the various forms of subsidiary sons (as enumerated by Manu[3]) most are now obsolete. Practically only one

[1] See Dattaka Chandrika i. § 9; 3 Dig. 297.

[2] *Mahashaya Shosinath Ghose*, v. *Srimati Krishna Soondari Dasi*, 7 I. A. 250 p. 256. (1880).

[3] Institutes of Manu, Chap. IX. §§ 159 and 160.

form *viz. Dattaka* is in force now. *Kritima* form is confined to Mithila and to the Nambudri Brahmans of Malabar only. There is another form prevalent in some parts of India known as *dwyamushyayana*. Of these three species of adoption we will consider the last first.

Dwyamushyayana.

The term *Dwyamushyayana* is a compound word, and its root-meaning is 'son of two persons.'[1] Originally the *dwyamushyayana* was restricted to one description of adoptive son, *viz.*, the *Kshetraja i.e.*, the offspring of a wife by a kinsman or person appointed to procreate issue to the husband or the son of the wife. But the term is diverted from its original meaning and now signifies any adopted son retaining his filial relation to his natural father with his acquired relation to his adoptive parent.[2]

Like the Roman *adoptio minus plena*, a *dwyamushyayana* remains in the family of his natural father but gains a right of succession to his adoptive father.[3] This double relationship may be the result of express agreement at the time of adoption between the adopter and the person willing to give his son for the purpose; or it may be established without any special contract as when a sonless brother adopts the only son of another brother.

Sir William Macnaghten, in his work,[4] describes *dwyamushyayana* as a peculiar species of adoption where the adopted son still continues a member of his own family and partakes of the estate both of his natural and adopting father and so inheriting is liable for the debts of each. To this form of adoption the prohibition as to the gift of an only son does not apply.[5] It may take place either by special agreement that the boy shall continue son of both fathers,

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[1] '*Dvi*' (two) + '*Amushya*' (of a person) + '*ayana*' (an affix signifying son).

[2] Colebrooke's Hindu Law 296; Strange's Hindu Law Vol. I. 100 & Vol. II. 118.

[3] Strange's H.L. Vol. I. pp. 86, 100, 101.

[4] Macnaghten's H. L. Vol. I. 71.

[5] See *Raja Haimun Chull Sing* v. *Kumar Ghunshiam Sing*, 2 Knapp 203 (P.C.) [1834].

when the son adopted is termed *Nitya Dwyamushyayana*, or, otherwise, when the ceremony of tonsure may have been performed in his natural family, when he is designated *Anitya Dwyamushyayana*; and in the latter case the connection between the adopting and the adopted parties endures only during the life-time of the adopted. His children revert to their natural family.[1]

As to the distinction of *nitya* or absolute, and *anitya* or temporary *Dwyamushyayana* Sir Thomas Strange says thus: "According as this double filial connection is consequential, or the result of agreement, the adopted is *nitya* or *anitya*, a complete or incomplete *Dwyamushyayana*, though by some, this distinction is made to depend upon the adoption taking place before or after the performance of tonsure, in the family of the adopted; the effect in the latter case, where the adopted is from a different tribe (*gotra*) being, that the adoption, so far from being permanent from generation to generation, continues during the life-time of the adopted only; his son, if he has one, returning to the natural family of the father."[2]

Mr. Ellis of Madras made the following remarks on the opinion of the Pundit in *Hanumunto Bhutloo* v. *Bhyrapah* (June 9, 1808), where the question was whether *Upanayana* of the son of an adopted son should be in his adoptive or in his natural *gotra*:—"*Nitya datta* is a son adopted from the same *gotra*, before or after the ceremony of tonsure; or a son adopted from a different *gotra*, before the tonsure; *Anitya datta* is a son adopted from a different *gotra*, after he has received the tonsure in his natural *gotra*. The performance of the tonsure is the cause of the temporary nature of the latter species of adoption."[3]

Mr. Colebrooke says: "I am not aware of any authority for holding that the issue of an *Anitya datta* may be

[1] See *Raja Shumshere Mull* v. *Rani Dilraj Konwar*, 2 S. D. Sel. Rep. 169 (216) [1816]; *Joymony Dassee* v. *Sibosoondry*, 1 Fulton 75 (1837).

[2] Strange's H. L. Vol. I. p. 100.

[3] Strange's H.L. Vol. II. p. 123.

initiated in either family. An adoption which renders the party son of wo fathers (*dwyamushyayana*) is not unknown to the law. (See Mitakshara on Inh. ch. i sec. x). But, in such case the issue remains in the same *gotra*, in which the son of two fathers received his *Upanayana* or initiation."[1]

The Allahabad High Court, upon consideration of the above authorities has, in a very recent case, held that an adoption in the *Nitya* or absolute *dwyamushyayana* form depends upon, and has its efficacy in, the stipulation entered into at the time of adoption between the natural father and the adoptive father, and does not depend upon the performance of any initiatory ceremony by the natural father.[2]

Notwithstanding the opinion of the Pundits,[3] the *dwyamushyayana* form of adoption is customary in the present age. The *Anitya* form of it may be said to be obsolete now; but the *Nitya* form in the shape of an adoption by one brother of the son of another brother is still prevalent. What is very strange is that though the Hindu text-writers are very much against the principle of giving in adoption the only or eldest son, an exception is made in the case of a sonless brother adopting the only son of a whole brother. Mr. Sutherland lays down that an only son of a whole brother, if no other nephew exists for selection, *must* be adopted by his uncle requiring male issue, and is the son of two fathers.[4] The Privy Council in *Nilmadhab Doss* v. *Bishumber Doss*[5] recognized the principle of adoption of the eldest or only son of a brother by another brother as a *dwyamushyayana*,

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[1] Strange's H.L. Vol. II. p. 122.

[2] *Behari Lal* v. *Shib Lall*, 26 All. 472 (1904).

[3] Strange's H.L. Vol. II. pp. 82, 118.

[4] Sutherland's Synopsis II.

[5] 13 Moo. I A. 85 (1869): s c. 12 W.R. 29 (P C.): s.c. 10 Sevestre 289 (P.C.). See also *Srimati Uma Deyi* v. *Gocoolanund Das Mahapatra*, 5 I. A. 40 (1878): s. c. 3 Cal. 587 (P. C.): s. c. in the High Court 15 B. L. R. 405: 23 W. R. 340 (1875); *Chinna Gaundon* v. *Kumara Gaundon*, 1 Mad. H. C. R. 54, (1862) *per* Scotland C.J. at p. 57.