i. e., son to both to his uncle and natural father ; and they held that such an adoption would not sever the connection of the child with his natural family. A similar view was expressed by the Allahabad High Court in a very recent case, to which we have already referred. Their Lordships said : "It seems to follow from this that if the gift is a qualified gift, as it is in the case of an adoption in the absolute *dwyamushyayana* form, the son who is so adopted does not cease to have filial relation with his natural parents, nor is his relation generally with the family of his natural parent severed."[1] And their Lordships held in this case that the natural mother of a *Nitya dwyamushyayana* did not, on account of such adoption, lose her right of succession to her son in the absence of nearer heirs.

Whether *dwyamushyayana* prevails in Bombay.

Whether *dwyamushyayana* form of adoption prevails in Bombay is a question which in the light of the observations of their Lordships in several reported cases may be answered in the negative. Mr. Steele, no doubt, states that though an only son should not be given in adoption, an exception may be made in the case of such an adoption by his uncle.[2] This certainly means a *dwyamushyayana*. But the decisions of the High Court, barring a few early cases, have been uniform in condemning the adoption of an only son. In 1889 a Full Bench decided that the adoption of an only son was absolutely invalid and the doctrine of *factum valet* could not improve the situation.[3] Ranade J., in *Basava* v. *Lingangauda*,[4] (in which it was held that according to the custom of Lingayets in the districts of Dharwar and Bijapur the adoption of an only son was valid) in meeting the argument of the defence counsel observed thus :—"We may, however, observe in passing that the defendant's counsel sought to give an unwarranted enlargement of the doctrine of *dwya-*

[1] *Bihari Lal* v. *Shib Lal*, 26 All. 472 at p. 478. (1904.)

[2] Steele pp. 45, 183.

[3] *Raghupati* v. *Krishnaji*, 14 Bom. 249 (F.B.) [1889].

[4] 19 Bom. 428 (1894).

mushyayana when he urged that it covered not only the cases of brother's sons, but brother's grandsons also. This enlargement was sought to be justified by the analogy of the rule of Hindu law by which the existence of a son, grandson or great grandson bars the way to adoption. This analogy, however, is too far-fetched to be readily accepted. The original *dwyamushyayana* son was a relic of the Niyoga form and as such this order of son is prohibited in Kaliyuga. (West and Bühler 3rd. Edn. p. 879). *Dwyamushyayana* of the second and more modern form is still permitted, but Rao Saheb Mandlik has stated in his work that he had not come across such adoptions in this Presidency (p. 506). Steele also (p. 183) has stated that such adoption seldom takes place. The Madras Sudder Dewany Adawlut came to a similar conclusion in 1859. On the other hand, the learned authors of the Digest state that this form obtains in the Southern districts of this Presidency (West and Bühler, 3rd Edn. p. 898), and Steele also refers to certain castes where it is still in vogue. (p. 385). The Judicial Committee of the Privy Council has recognized the existence of this form in the North-West Provinces ; and there are also some Bengal cases to the same effect.—*Wooma Daee* v. *Gokulanund Dass*, 3 Cal. 587. The presumption in the case of an adoption by a united brother would certainly be in favour of the son adopted being the son of two fathers. No such presumption can be made in the case of separated brothers, for the *dwyamushyayana* is not equally effective as the Dattaka son to secure the spiritual salvation of the person adopting.—*Srimati Uma Deyi* v. *Gokoolanund Dass*, 5 I. A. 51—as also of his natural father (West and Bühler, 3rd Edn. p. 899). It is, thus, not difficult to understand why this form of adoption should have become generally, if not altogether, obsolete in this Presidency. Even if it still exists, the best test of it is either the proof of a special agreement, or evidence to the effect that the son inherited, or has a right to inherit, in both families. There is no such proof

of agreement in the cases relied upon, and only one or two instances were cited where the son appears to have succeeded to the estates of both his father and uncle, who apparently were united. On this bye-issue accordingly, we find that the large bulk of the instances adduced on plaintiff's behalf are not touched by this ground of exclusion, and that for the purposes of this suit we may safely leave it out of consideration, except in regard to, at the most, two out of the twenty-five cases in which the custom of adoption of an only son has been satisfactorily proved."[1]

Where *dwyamushyayana* prevails.

From the above it would seem that *dwyamushyayana* is not altogether obsolete in Bombay, at all events not in the Southern districts of the Presidency. And from the authorities discussed and cited in the above passage it is also clear that this form of adoption is also recognized in the North-West Provinces and Madras. Dr. Jolly says: "I have been informed by Pundit Dundiraj of Benares, that in the N.W. Provinces also adoptions of the *Dwyamushyayana* type are very common now-a-days, though express stipulations to that effect are as unknown as the term *Dwyamushyayana*."[2] The Sudder Dewany Adawlut held in a case brought in the City Court of Benares that a woman after her husband's death was incompetent to give her only son in adoption as *a dwyamushyayana* without authority previously given by her deceased husband.[3]

Kritima.

It is an universal rule in Bengal and Benares that a woman is not competent to adopt a son or give away her son in adoption, without the permission of her husband previously obtained. But according to the doctrine of *Vachespati*, whose authority is recognized in Mithila, a woman

[1] 19 Bom. p. 454.

[2] Dr. Jolly's Tagore Law Lectures (1883.) p. 166.

[3] *Debee Dial* v. *Hur Hor Singh*, 4, S.D. Sel. Rep. 320 (407) [1828].

cannot, even with the previously obtained sanction of her husband, adopt a son after his death in the *Dattaka* form; and to this prohibitory rule—says Sir William Macnaghten—may be traced the origin of the practice of adopting in the *Kritima* form which is prevalent in Mithila.[1] But this cannot be said to be the reason of the existence of this species of adoption among the Nambudri Brahmans in the West Coast of Malabar. For there a woman is competent to adopt without her husband's consent.[2] Similarly a childless Brahman widow in Mithila may adopt a *Kritima* son without her husband's permission.[3]

The *Kritima* form of adoption has no connection with any religious ideas. No particular ceremonies appear to be necessary to such an adoption.[4] Nor is there any restriction as to the age of the person to be adopted. The performance of *Upanayana* in his natural family is no bar to the acceptance of a boy in *Kritima* form.[5] The adoptee must be of the same class as the adopter and must consent to the adoption.[6] A *Kritima* son when adopted by a widow does not become the adopted son of her husband, even if the adoption had been permitted by him. The *Kritima* son will perform his adoptive mother's obsequies, and will succeed to his adoptive mother's property and has no claim to that of the collaterals. Such son would not, by virtue of such adoption, lose his position in his own family.[7]

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[1] 1 Macnaghten 97.

[2] *Vasudevon* v. *Secretary of State for India*, 11 Mad. 157 at pp. 174, 176. (1887).

[3] 2 Macnaghten 196.

[4] *Kullean Sing* v. *Kirpa Sing*, 1 S.D. Sel. Rep. 9 (11). [1795].

[5] 2 Macnaghten 196.

[6] Ibid.

[7] *Musst Shabo Koeree* v. *Jugan Singh*, 8 Sevestre Part IV 383 (1867) : s. c. 4 Wyman 121 : s. c. 8 W. R. 155 ; *Collector of Tirhoot* v *Hurropershad Mohunt*, 8 Sevestre Part IV 391 (foot note) (1867) : s.c. 7 W. R. 391 ; *Musst. Deepoo* v. *Gowreeshunker*, 3 S. D. Sel. Rep. 307 (410) [1824] ; *Musst. Sabitreea Daee* v. *Sutur Ghun Sutputtee*, 2 S. D. Sel. Rep. 21 (26) [1812] ; Sutherland's Synopsis.

In the *Kritima* form the consent of both parties is the only requisite.[1] So where a Mithila Brahman being on the point of death makes a verbal nomination of an absent person to be his adopted (*kritima*) son, it was held that the adoption was not valid, because the proposal 'be thou my son' and the consent 'I agree to become thy son' which are requisite in ratifying a contract of *Kritima* sonship were not complied with: the nominated son being absent at the time the offer was made by the dying adoptive father. An express consent of the person nominated for the adoption must be obtained during the life-time of the adoptive father. The offer to adopt is but the act of one of the contracting parties and, as being merely a proposal to enter into a contract, is insufficient by itself without the acceptance thereof or consent thereto by the other party.[2]

Consent by both parties essential.

In *Baboo Ranjit Sing* v. *Baboo Obhye Narain Sing*[3] the Sudder Court has held that an elder brother cannot be the *Kurta putra* (*Kritima*) of a younger brother, for it is written in the Dattaka Mimansa, according to the doctrine of *Sounaka*, that an elder brother, an uncle &c. cannot become a son. Sir William Macnaghten, however, says that the authorities cited by the law officers in that case related exclusively to the *Dattaka* form of adoption. On the authority of Keshuba Misra in the Dwaita Purishishta, a man may adopt his own brother, even his own father.[4] A daughter's or a sister's son may also be adopted.[5] A son of a brother, even though he be an only son, may be taken

Who may be adopted in *kritima* form

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[1] *Kullean Sing* v. *Kirpa Sing*, 1 S.D. Sel. Rep. 9 (11) [1795.]

[2] *Musst. Sutputtee* v. *Indranund Jha*, 2 S.D. Sel. Rep. 173 (221) [1816]; *Durgopal Singh* v. *Roopan Singh*, 6 S.D. Sel. Rep. 271 (340) [1839]; *Luchman Lal* v. *Roopun Lal Bhaya Gayal*, 16 W. R. 179 (1871).

[3] 2 S.D. Sel. Rep. 245 (315) [1877].

[4] See Macnaghten Vol. I. p. 76.

[5] *Ooman Dutt* v. *Kunhia Singh* 3 S. D. Sel. Rep 192 (145) [1822]; *Chowdree Purmessar Dutt Jha* v *Hunooman Dutt Roy*, 6 S. D. Sel. Rep. 192 (235) [1837].

as *Kritima* son.[1] But in *Oomun Dutt* v. *Kunhia Singh*[2] it has been laid down that while a brother's son exists, the adoption of any other individual as a son, either in the *Dattaka* or *Kritima* form of adoption, is illegal. It seems the Pundits in this case founded their opinion on the texts of the *Dattaka* form of adoption. As a general practice any person may be adopted, with this restriction, that the adopted person must be equal in class or of the same tribe as the adopter.[3]

Status of a *Kritima son.*

It is not uncommon in Mithila for the husband to adopt one *Kritima* son and the wife another. If they jointly appoint an adopted son, the latter stands in the relation of son to both and is heir to the estate of both. But if the husband adopt one person and the wife another, they stand in the relation of sons to each of them respectively and do not perform the ceremony of offering oblations, nor succeed to the estate of the husband and wife jointly.[4] The relation of *Kritima* son extends to contracting parties only: the son so adopted will not be considered the grandson of the adopting father's father, nor will the son of the adopted be considered the grandson of his adopting father.[5] A *Kritima* son does not lose his rights of inheritance in his natural family but takes both in his own family and in that of his adopting parents.[6]

Kritima form in Jaffna.

Kritima form of adoption prevalent in Jaffna is very similar to that prevailing in Mithila. Mr. Mayne says "there is the same absence of religious ceremonies, the same absence of any assumed new birth and the same right of adoption both by husband and wife, followed by the same result of heirship only to the adopter."[7]

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[1] 2 Macnaghten 197, case xviii (1824).

[2] 3 S.D. Sel. Rep. 192 (145)[1822].

[3] 2 Macnaghten 196; *Musst Shabo Koeree* v *Jugun Singh*, 8 Sevestre, Part IV 383 (1867): s.c. 4 Wyman 121: s.c. 8 W.R. 155.

[4] *Sreenarain Rai* v. *Bhya Jha* 2 S.D. Sel. Rep. 23 (29) at p. 27. (1812).

[5] *Baboo Jaswant Singh* v *Doolee Chund*, 25 W.R. 255 (1876).

[6] *Musst. Dupoo* v. *Gowreesunker* 3 S.D. Sel. Rep. 410 (307) [1824].

[7] Mayne's *Hindu Law and Usage* p. 219. 1892 Edn.; *Thesawalema*

Double adoption.

How far a second adoption, while the first adopted son is existing, is valid or sanctioned by usage formed the subject of decision in several cases. Among the earliest cases, two that came before the Sudder Dewany Adawlut are *Shamchandra* v. *Narayani Debi*[1] and *Gauripershad Rai* v. *Musst. Jymala*.[2] The first case decided that a second adoption was valid when the first adopted son had died without issue. In the second case, a man, having two wives, gave authority to each of them to adopt a son. One of them made the adoption. He himself, together with the other wife, afterwards made an adoption. And it was held that the two sons were entitled equally to inherit from the husband of their adoptive mothers. The first case no doubt has very little bearing on the point of double adoption, but the second case certainly assumes the validity of such adoption. The Judicial Committee considered these cases as well as various authorities, both Hindu and European, in a case which came from the Province of Madras.[3] The facts of the case were these : one V together with his wife adopted a son, J. V took a second wife and together with her adopted R in the life-time of J. The Privy Council held that the adoption of R was invalid. This was followed by other Courts in India and also by the Privy Council in later cases.[4]

It should be noted that in the above Madras case, (the *Rungama* case) though their Lordships of the Privy Council were unwilling to attach any value to the opinions of various Pundits examined in that case, as being more or

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ii. It may be noted that the Tamils of Jaffna adopt boys as well as girls. In this respect their custom resembles that of the Burmans. See Buddhist Customs *infra* : under Adoption.

[1] 1 S. D. Sel. Rep. 209 (1807).

[2] 2 S. D. Sel. Rep. 136 (174) [1814].

[3] *Rangama* v. *Atchama*, 4 Moo. I. A. 1 (1846): s. c. 7 W. R. 57.

[4] See *Joychunder Raie* v. *Bhyrubchunder Raie*, 2 Sevestre 575 s. c : S. D. Decis 461 (1849); *Sudanund Mahapatter* v. *Bonomalee*, 1 Marshal 317 (1863) ; *Gopeelal* v. *Musst. Chundrabalee Buhoojee*. I. A. 131 (1872) s. c. 11 B. L. R. 391 : s. c. 19 W. R. 12.

less influenced by the parties, yet they had to admit that the opinion of the Pundits of the Northern Provincial Court as well as that of the Centre and Southern Division of the Courts, taken before the institution of that case on this question of double adoption was certainly "as free as any opinion can be, from suspicion of undue influence," and in their opinion *the second adoption is good and both sons are equally entitled to inherit.* Though the *Rungama* case is supposed to have settled the point, yet we venture to submit that such adoption is sanctioned by the usage and custom of the people.[1]

As to the plurality of adoption amongst the *Naikins*, see *infra*.

Simultaneous adoption.

Double adoption may be successive or simultaneous, *i.e.*, two sons adopted at the same day and time. This latter form of dual adoption is also held to be invalid.[2] We should note that there is a slight difference between *successive* and *simultaneous* adoptions. In the former, the first adoption is valid and the second invalid : whereas in the latter, both the adoptions are invalid. Phear J., sitting on the Original Side of the Calcutta High Court, decided the cases of *Monemothonath Dey* v. *Onauthnath Dey, and Siddessory Dossee* v. *Durgachurn Sett* and in the first case exhaustively considered all the authorities. But in view of the decision of the Judicial Committee in the *Rungama* case, his Lordship could not accept any other interpretation of the authorities cited before him. So, as there was no express law or authority on the point, his Lordship held that such simultaneous

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[1] See Golapchunder Sastri's Tagore Lectures on Adoption p. 182 *et seq.*

[2] See *Monomathnath Day* v. *Onauthnauth Day*, Bourke 189 O. S. April 20, 1865 : S. C in appeal 2 Ind. Jur. N. S. 24 (1865) ; *Siddesorry Dassee* v. *Doorga Churn Sett*, 2 Ind. Jur. N. S. 22 (1865) : *Gyanendrachunder Lahiri* v. *Kalapahar Hajee*, 9 Cal. 50 (1882) : S. C. in Privy Council *Akhoy Chandra Bagchi* v. *Kalapahar Hajee*, 12 Cal 406 (1885) ; *Doorgasoondari Dassee* v. *Surendra Kisor Rai*, 12 Cal. 686. (1886).

adoption was invalid. Apparently no evidence of custom was given at the trial. For, his Lordship said: "It was stated by the defendants' counsel that the usage and custom of Bengal gives a childless man the right to adopt one son in respect of each of his wives either simultaneously or not; but, as I have already said, no such evidence as the Court considered admissible to establish a custom or usage was tendered during the trial."

Widow's power of second adoption.

Before we leave the subject of double adoption we may consider a widow's power of second adoption. The earliest case on the point is *Gournath Chowdhree* v. *Arnopoorna Chowdrain*.[1] In this case the Bengal Sudder Court held that where a widow was directed to adopt a son she could not adopt a second son if the first adopted son died. But the Privy Council in a very recent case from Madras disapproved the ruling laid down in the above case and held that the widow's authority to adopt was not exhausted by the first adoption and the adoption of a second boy after the death of the first was valid.[2] The main factor for consideration in these cases is the intention of the husband. Any special instruction which he may give for the guidance of his widow must be strictly followed; where no such instructions have been given, but a general intention has been expressed to be represented by a son, effect should, if possible, be given to that intention. In the case under consideration the deceased Brahman placed no specific limitation on the power to adopt, his object being to secure spiritual benefit to himself and to continue his line. And their Lordships of the Privy Council approvingly quoted from the judgment of Mitter J., in *Ram Soondur Singh* v. *Surbanee Dassee*,[3] passages bearing upon spiritual benefit and the performance of religious services necessary on different occasions for the good of the soul of the deceased father.

[1] S. D. Decis 332 (1852).

[2] *Kannepalli Suryanarayana* v. *Pucha Venkata Ramana*, 33 I. A. 145 (1906) : s.c. 10 C W.N. 921.

[3] 22 W.R. 121 (1874).

Jain adoption.

The Jains are seceders from Brahmanical Hinduism and their religious tenets have more affinity to the precepts of Buddhists than to those of the Brahmans. They do not accept the Vedas of the Brahmans and differ from the latter in their conduct towards the dead, omitting all obsequies after the corpse is burnt or buried. They have neither *Tithi*, nor *Shraddha*.[1] They retain, however, many of the customs of orthodox Hindus.[2] In *Sheo Singh Rai* v. *Mussl. Dakko*,[3] the Allahabad High Court considered various authorities bearing upon Jain customs, commencing from 1833, and their Lordships held that it was not to be assumed that the Hindu law applied to the Jains. Though the Jains are termed "*Hindu* dissenters," they have their own usage and custom quite different from the normal Hindu law and usage of the country in which the property is located or the parties are residents. The adoption of tenets of another sect of Hinduism by some Jains will not necessarily affect the laws and customs by which the personal rights and *status* of the family were originally governed. As for instance, the custom which enables a Jain widow to adopt a son without the express or implied authority of her husband will not be affected by the conversion of the family to Vaishnavism.[4]

It is now settled that in the absence of a special custom or usage, the ordinary Hindu law will apply to the Jains. In *Chotay Lall* v. *Chunno Lall*[5] the Privy Council said that "the custom of the Jains, where they are relied upon, must be proved by evidence, as other special customs and usages varying the general law should be proved, and in the absence of proof the ordinary law must prevail."[6]

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[1] *See* Abbé Dubois pp. 562-3, 1817 Edn. Ward's History of the Hindus pp. 229-30, cited by Best J. at, p. 184 in *Peria Ammani* v. *Krishnasami* 16 Mad. 182 (1892).

[2] *Bhagvandas Tejmal* v. *Rajmal*, 10 Bom. H.C R. 241 (1873).

[3] 6 N.W.P. (All.) 382 (1874).

[4] *Manick Chand Golecha* v. *Jagat Settani Pran Kumari Bibi*, 17 Cal. 518 (1889).

[5] 6 I. A. 15 (1878),

[6] See also *Rukhal* v. *Chunnilal Ambushet*, 16 Bom. 347 (1891); *Bachebi* v. *Makhan Lall*, 3 All. 55 (1880).

The Calcutta High Court said: "The authorities are conclusive that unless a custom be proved to the contrary, Jains are governed by the Hindu law of inheritance and ordinarily the Mitakshara School of law would be the system of law applicable to them. In each case there must be clear evidence to prove custom or usage which is invariably followed without question."[1]

Doctrine of adoption prevails amongst the Jains though they do not believe the spiritual necessity or advantage of it. Adoption amongst them is absolutely of a secular character, and is generally governed by the Hindu law except in certain instances where special customs prevail.[2] *Giving* and *taking* of a boy is the essential part of a valid adoption among the Jains and no religious ceremonies are necessary.[3] Where a natural father executed a deed or *ekrarnama* in favour of the adoptive father and by it recited that he (the natural father) had made over his third son to the sonship of the adoptive father, so that the latter might, whenever he would wish, fulfil the rites of adoption in accordance with the *Shastras* and the usage of the country, and from that day the natural father would have no claim or right in respect of the son, the High Court held that this deed did not of itself operate to effect an adoption. It did not even amount to a giving and taking of the boy as it contemplated the subsequent performance of the necessary rites.[4] The age-limit of the adoptee may extend to 32 years.[5] But according to Holloway J., there is no limit of age among the Jains.[6]

There is no restriction to the adoption of a sister's or

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[1] *Mandit Koer* v. *Phool Chand Lal*, 2 C.W.N. 154 p. 158 (1897).

[2] *Sheo Singh Rai* v. *Musst. Dakho*, 5 I. A. 87 (1878) : s.c. 1 All. 688 : s.c. in the High Court 6 N.W.P. 382 (1874).

[3] *Lakhmi Chand* v. *Gatto Bai*, 8 All. 319 (1886).

[4] *Mandit Koer* v. *Phool Chand Lal*, 2 C. W. N. 154 (1897).

[5] *Maharaja Govind Nath Ray* v. *Gulal Chand*, 5 S.D. Sel Rep 276 (322) [1833].

[6] *Rithcurn* v. *Soojan*, 9 Mad. Jur. 21 cited in *Sheo Singh Rai* v. *Musst. Dakho*, 6 N.W.P. 382 p. 402.

daughter's son or mother's sister's son amongst the Jains.[1] A sonless widow has the same power of adoption as her husband would have had if he chose to exercise it. She is competent to adopt without the sanction of her husband, or for that matter, of any other person.[2]

Usage of adoption among *Sarogis* of Alighur.

By the usage of the sect of Sarogis in the Alighur district, who follow the Jain persuasion in contradistinction to the doctrines of the orthodox Hindu community, adoption at the age of nine years is valid, and, on the death of an adopted son without issue during the life-time of the adoptive mother, the further right of adoption vests in the widow and not in the mother.[3] The Privy Council has laid down, upon the evidence given in the case, that, according to the usage prevailing in Delhi and other towns in the North-Western Provinces, among the Sarogi Agarwallas, a sonless widow has a right to adopt without permission from her husband or consent of his kinsmen, and may adopt a daughter's son, who, on the adoption, takes the place of a son begotten.[4]

Among the Oswal Jains.

A widow of the Oswal Jain sect can adopt a son without the express or implied authority of the husband.[5] In *Manick Chand Golecha* v. *Jagat Settani Pran Kumari Bibi*,[6] it was contended that the *Oswals* and the *Sarogis* are not the same and therefore the customs and usages of the one

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[1] *Sheo Singh Rai* v. *Dakho*, 6 N. W. P. 382 (1874); *Lakshmi Chand* v. *Gatto Bai*, 8 All. 319 (1886).

[2] *Maharajah Govind Nath Ray* v. *Gulal Chand*, 5 S.D. Sel.Rep. 276 (322) [1833]; *Sheo Singh Rai* v. *Dakho*, 6 N.W.P. 382 (1874); *Lakmi Chand* v. *Gatto Bai*, 8 All. 319 (1886); *Manick Chand Golecha* v. *Jogat Settani Pran Kumari Bibi*, 17 Cal. 518 (1889).

[3] *Musst. Chimnee Baie* v. *Musst. Guttoo Baie*, 5 N. W. P. Decis. (Sel. case) 465 [1853].

[4] *Sheo Shingh Rai* v. *Musst. Dakho*, 5 I. A. 87 (1878): s.c. 1 All. 688: s. c. in the High Court 6 N. W. P. (All.) 382 (1874).

[5] *Manick Chand Golecha* v. *Jagat Settani Pran Kumari Bibi*, 17 Cal. 518 (1889): *Govind Nath Ray* v. *Gulal Chand*, 5 S. D. Sel. Rep. 276 (1833).

[6] 17 Cal. 518 (1889).

should not be regarded as precedents for the others. But their Lordships were of opinion that the term Sarogi was synonymous with Jains[1] and the decisions in other cases were based on a custom prevalent among the Jains and not *as peculiar to any tribe or caste*. "This appears to be clear," say their Lordships, "from the analysis which is given in the judgment of the High Court, of the evidence upon which they found the custom proved. The parties in the present case admittedly came from the North-Western Provinces, and we think, therefore, that this case, like *Govind Nath Ray* v. *Gulal Chand*,[2] constitutes strong evidence in favour of the custom pleaded by the respondents." And further on their Lordships say: "We think, that the oral evidence taken in this case coupled with the judicial decisions in *Govind Nath Ray* v. *Gulal Chand, and Sheo Singh Rai* v. *Dakho* establishes the existence of a custom among the Jain Oswals, under which a widow may adopt a son to her husband even in cases where he has not conferred upon her an express authority to adopt."[3]

Jains in the Bombay Presidency.

Adoption among Jains in the Bombay Presidency is, by custom, regulated by the ordinary Hindu law, notwithstanding their divergence from Hindus in matter of religion. Hindu law does not allow any one but the widow to act vicariously for the man to whom the son is to be affiliated. The widow is a delegate either with express or implied authority, and cannot extend that authority to another person, so as to enable him to adopt a son to her husband after her decease. Not only a giving

[1] The word *Sarogi* seems to be a corruption of the *Sravakas i.e.* secular Jains; *Yatis* being the term for Jain ascetics. The secular Jains are mostly Vaisyas and includes various sects, such as Oswals, Agarwals, Parwars &c.—See Colebrooke's observations on the sect of Jains, Asiatic Researches Vol. IX p. 287. Dr. Wilson's Works Vol. I. p. 276. Hunter's Statistical Accounts of Bengal Vol. XVI. p. 207. Golapchunder Sastri's Tagore Law Lect. 1888.

[2] 5 S S.D. Sel. Rep. 276 (1833).

[3] 17 Cal. 535.

but an acceptance by the man or his wife or widow, manifested by some overt act, is necessary to constitute an adoption by Hindu law.[1]

Marwadi Jains of Ahmadnagar: alleged custom of adoption where both adoptive parents dead.

In *Bhagvandas Tejmal* v. *Rajmal*[2] it was alleged that there was a custom amongst the Marwadi Jains, both at Ahmadnagar and in Marwar, of adoption where both adoptive parents were dead. One A B died without leaving any natural born issue and without adopting any child. His wife, who survived him, resolved, shortly before her death, on adopting the son of C D (a brother of A B), but did not live to carry her intention into effect. After her death C D and E F (another brother of A B), with the assent of the *Punch* or senior members of their community, went through a ceremony of giving the boy in adoption to the deceased A B and his wife and an instrument of agreement wholly founded upon that adoption was executed by E F to C D, and affected to deal with the property moveable and immoveable of A B. Westropp C. J., after laying down the proposition which should govern a Jain adoption in the Bombay Presidency as stated above, went on considering the evidence adduced in the case in support of the alleged custom and observed: "Some of them (witnesses) speak generally, as to the custom, but as already stated, it is to the specified instances that a Court of Justice pays most attention. And this is particularly so, where, as here, not a single *yati* or *pundit* or priest or other expert in the lore of the Jains or of Brahmans has been called to prove the alleged custom. The witnesses are chiefly shopkeepers, or cloth-sellers or *gomosthas*. There does not appear to be a man of learning amongst them. They *una voce* admit that they cannot point to any authority in the book of the Jain sect which supports the alleged custom, nor do they pretend that it has ever been judicially

[1] *Bhagvandas Tejmal* v. *Rajmal*, 10 Bom. H. C. R. 241 (1873); *Rukhab* v. *Chunial Ambushet*, 16 Bom. 347 (1891); *Amava* v. *Makadaganda*, 22 Bom. 416 (1896).

[2] 10 Bom. H. C. R. 241 (1873).

recognized. There are in the whole body of evidence, to which our attention has been directed, only four specified instances of such adoption and of these the most ancient is one which occurs about 22 years ago, and one of the four breaks down, inasmuch as the widow of the adoptive father was living when the adoption is alleged to have taken place. There are then but three perfect instances established in proof, and of those, the most remote happened less than quarter of a century ago. It is impossible to regard such cases as proof of an ancient, still less of an immemorial custom unsupported as they are, by a single text from any book of authority amongst the Jains themselves or amongst the Hindus at large or by any *pundit*, *yati*, priest or other expert."[1] So the adoption in this case was held invalid and the instrument of agreement fell together with it.

Among Jains of Southern India.

In *Peria Ammani* v. *Krishnasami*[2] the custom of adoption, among Jains of Southern India was fully considered. There the question for consideration was whether a Jain widow can validly adopt without authority of her husband or consent of his kinsmen. Such an adoption according to Hindu law is certainly invalid. The Jains, as we know, are generally governed by ordinary Hindu law except where they set up special custom and clearly establish it. In this case the *onus* lay on the party seeking the declaration that the adoption in question is valid. As there was nothing to show that the parties in the suit are other than natives of Southern India whose ancestors have been converted to Jainism, and who have, in common with the orthodox Hindus, retained many customs and practices of the latter, they were required to prove by unimpeachable testimony that such adoption was sanctioned by custom. The party alleging such custom, however, failed to substantiate it. The learned Judges distinguished the case of *Rithcurn Lallah* v. *Soojun Mull*,[3] in which Holloway J., decided the

[1] Ibid p. 368.
[2] 16 Mad. 182 (1892).
[3] 9 Mad. Ind. Jur. 21 (1873).

question the other way. With reference to this case Best J., said: "It is to be observed that from the names of the parties to that suit, it is clear that they were immigrants from the north, and it may be that their ancestors seceded from the orthodox Hinduism centuries before the text of Vasishta 'Let not a woman give or accept a son unless with the assent of her husband' became a part of the Hindu law. But there is no reason whatever for supposing that the parties to the present suit are other than natives of South of India whose ancestors have been converted to Jainism." [1]

In Bengal.

There are, however, cases in which adoptions by a Jain widow without the authority of her husband or consent of his kinsmen have been upheld on proof of special custom.[2] In a recent case the Calcutta High Court on the basis of the aforesaid cases, held upon the evidence, partly of judicial decisions, and partly of testimony, that a sonless Jain widow was competent to adopt a son to her husband without his permission or the consent of his kinsmen. This case further laid down that in this respect there was no material difference in the custom of the *Agarwal Chorawal*, *Khandwal* and *Oswal* Sects of the Jains; and that there was nothing to differentiate the Jains of Arrah from the Jains elsewhere.[3]

It should be noted that judicial decisions recognizing the existence of a disputed custom amongst the Jains of one place are very relevant as evidence of the existence of the same custom amongst the Jains of another place unless it is shown that the customs are different; and oral evidence of the same kind is equally admissible. There is nothing to

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[1] 16 Mad. p. 192.

[2] *Maharajah Govind Nath Ray* v. *Gulal Chand*, 5 S. D. Sel-Report 276 (1833); *Sheo Singh Rai* v. *Musst. Dakho*, 6 N. W. P. Rep. 382 (1874): s. c. in P. C. 5 I. A. 87 (1378): s. c. I All. 688: s. c. 2 C. L. R. 193; *Lakshmi Chand* v. *Gatto Bai*, 8 All. 319; *Manick Chand Golecha* v. *Jagat Settani Pran Kumari Bibi*, 17 Cal. 518 (1889).

[3] *Harnab Pershad* v. *Mandil Das*, 27 Cal. 379 (1899).

limit the scope of the antiquity to the particular locality in which the persons setting up the custom reside.

Gyawal custom as to adoption.

Gyawals are a sect of Brahmans residing in the district of Gya. There exist, amongst them, peculiar and loose customs in regard to adoption and in particular that, although adoption of a son may be made so as to give him rights of succession to his adopting father, this will not necessarily sever his connection with his own natural father or his family. In the district of Gya there are many places of sanctity connected with ancient Buddhism, and the Gyawal Brahmans have the privilege of acting as guides to the pilgrims who visit these places, and thereby make considerable sums; and by adoption into different families facilities are given for the acquisition of property, without severing the adopted son's connection with his own family.[1] With regard to this loose practice of adoption prevalent amongst the Gyawals we reproduce certain observations made by the Subordinate Judge in the lower Court and quoted by their Lordships of the Privy Council :[2]— "Even a person who gets another's property by gift assumes the surname of his donor and calls himself as his adopted son. This loose practice had its origin in order to induce the pilgrims of his donor to acknowledge the donee. These form the bulk of their (Gyawals') property and the greatest source of income of these Gyawals. In adoption even, they adopt anybody quite contrary to Hindu law. They adopt daughter's and sister's sons, and only son; and widows even adopt without their husband's authority previously given. From what time such practices arose does not appear from the evidence; but apparently from the decline of the Gyawal dynasty. These people are found in Gya alone, and their marriages etc., are confined to this place. The fabulous 1484 families of Gyawals have now dwindled

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[1] *Lachman Lal Chowdhry* v. *Kanhya Lal Mowar*, 22 I.A, 51 at p. 55 (1894).

[2] Ibid pp. 55-56.

to 200 or 300. Hence every one, more for the pilgrims than for their properties, makes such gifts or adoption in favour of those whom he or she loves, and the donees call themselves adopted sons. This practice also does away with escheats."

In *Musst. Luchmi Dai Mohutain* v. *Kissen Lall Pahari Mahaton Gayal*,[1] the plaintiff set up a special practice prevailing amongst the Gyawal community at Gaya, according to which when a Gayal priest dies childless, he is succeeded by his widow. As women cannot have their feet worshipped by pilgrims, she (the widow) takes a son in adoption in order that he may get his feet worshipped by the *clientele* of her family for her own immediate benefit and ultimately for the benefit of the adopted son, who upon her death, takes by inheritance her estate as well as the estate of her husband. The plaintiff further alleged that according to the practice and usage prevalent amongst the Gyawals a son so adopted may be dismissed for misconduct and replaced by another. The son adopted in this case was a married man, twenty-four years of age and already a father. It was held that the so-called adoption was neither a *dattaka* nor a *kritima* form of adoption and further as the special custom supporting such adoption was not proved, their Lordships declared the adoption as invalid. It may be noted, however, that the Subordinate Judge has held that a sonless Gyawal widow can, by custom, adopt a son even though he may have previously been invested with the sacred thread and married, but there was no custom by which an adoption so made could be cancelled in case of disobedience and general misconduct on the part of the adopted son. Upon appeal, however, the District Judge found that the custom of adoption set up by the parties was not established by evidence and the High Court said that they were bound by the finding of the District Judge that the custom alleged had not been established.

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[1] 11 C. W. N. 147 (1906) : s. c. 4 C. L. J. 537.

Adoption by the *Naikins* or Dancing girls.

The *Naikins* or Dancing girls are a class of abandoned women, attached to pagodas or temples in Madras and Western India. They are also called *dasis* or *devadasis*.[1] As a rule they do not marry and are supposed to consecrate their life to the services of the gods or goddesses of their respective temples. But they, as a class, practise prostitution which, it may be noted, is recognized by Hindu law and usage and consequently the existence and continuance of such a class of temple-dancers have been condoned by the public. These *Naikins* in order to perpetuate their class and also with a view to secure heiresses for their estates are in the habit of taking minor girls as *adopted* daughters who, as they grow up, follow the profession of their adoptive mothers. But Hindu law does not sanction the adoption of girls, as that would be opposed to the very purpose and theory of adoption.

Adoption of girls among the Naikins is purely of secular origin and has not the remotest connection with spiritual motive. It requires no particular ceremonies to be performed on the occasion; recognition alone being sufficient.[2] As to how girls are made Naikins, we take the following from Steele's *Law and Custom of Hindu Castes*:—"In the caste or profession of dancing girls, girls of beauty and accomplishments are made Naikins by the ceremony of applying *misee* (a powder made of vitriol) to their teeth; cardamums are distributed to the guests; turmeric is put on the girl's person; after which a religious ceremony is performed in honour of the gods or *Peers*. The members of the caste are feasted, the "misee"

[1] "The word '*dasi*' in its ordinary and accepted signification means a dancing girl in a pagoda. The Tamil expression means 'the slave of *devas*' (gods). The dancing girls are admitted as *dasis* after a certain ceremony in the temple called the tying of *bottu* or *thali*. This has been put a stop to since the passing of the Indian Penal Code."—Vide *Muttukannu* v. *Parmasami*, 12 Mad. 214 p. 216 (1888).

[2] *Venkatachellum* v. *Venkatasawamy*, Mad. Decis. (1856) p. 65; Steele's *Law and Custom of Hindu Castes* p. 186.

is applied by several Naikins, one of whom, of hereditary office and repute in caste, takes the girl on her lap, and presents her with a *Saree*. A girl of another caste may be made a Naikin. In general, expense is incurred by obtaining the sanction of creditable Naikins. The *misee* of a daughter precedes that of a *paluk-kanya* or adopted girl."

As regards the validity of an adoption of a girl by a Hindu we have a distinct decision of the Bombay High Court, where it has been held that the adoption of a daughter by a Brahman is invalid under the Hindu law.[1] Knowing the object and purpose of a Hindu adoption and having in view the dictum of the Shastras "Males only need sons to relieve them from the debt due to ancestors"[2] and in the absence of any authorities[3] in support of such adoption, the Court could not have come to any other conclusion. The question of custom was not raised in the case.

In Bengal.

Though it is well-known that the adoption of daughters among prostitutes and dancing-girls is practised too frequently and sanctioned by immemorial usage of the class or caste, yet the question of the validity of such adoption did not come for decision of a Court of Law until the year 1818, when the Supreme Court of Calcutta had to determine the point incidentally in *Hencower Bye* v. *Hanscower Bye*.[4] There, the Court, on the basis of the opinion of the Court Pundit, who, in answer to question referred to him by the Court, said that there was no such instance of the adoption of a daughter to inherit by

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[1] *Gangabai* v. *Anant*, 13 Bom. 690 (1888).

[2] Colebrook's Digest Bk. V. T. 273 Comm.

[3] Jagannath says that only a male can be adopted and not a female.—*Vyavahara Mayukha* Chap. IV. s. v. Para v.

"Adoption of a daughter is not warranted by any Smriti. It is supported only by some Puranic instances"—See 13 Bom. 690.

Nunda Pandit was in favour of adoption of daughters on the basis of peculiar spiritual benefit derived from the gift of a daughter in marriage and from daughter's son. See Golapchunder Sastri's Tagore Law Lec. (1888) p. 144.

[4] 2 Morley's Digest 133.

Hindu law, rejected the plea of adoption. It should be noted that there was no pleading of special custom in the case and the so-called adoption was found to be without any actual ceremony: the adoptive mother having taken the girl when a mere child in her family and having always treated her as her daughter who also followed her adoptive mother's profession. It was not contended that such adoption was in accordance with the usage and custom prevalent among the prostitutes.

In Madras.

In Madras there is a body of decisions on the subject, extending over a period of more than half a century. The latest decisions on the point declare such adoption by the Naikins as invalid since they are made with criminal intention *viz.*, prostitution of minor girls, and thus transgressing the express legislation, *i.e.*, the provisions of secs. 372 and 373 of the Indian Penal Code. It would seem, however, that the giving and accepting of a minor girl for adoption by a dancing woman is not *per se* an illegal act: but it becomes so if the specific intent which makes the act criminal is established. One of the latest cases on the subject is *Kamalakshi* v. *Ramasami Chetti*,[1] decided by Best and Subramania Ayyar JJ.. The former reviewed all the cases on the point in a well-considered judgment, and came to the following conclusion: "There is thus authority for the following positions (*i*) that the institution of dancing women cannot be ignored by the Courts, (*ii*) that adoption by such women is not necessarily illegal. And (referring to *Q. E.* v. *Ramanna*[2]), this case is also authority for the position that if the adoption was made with the intention of training the child to a life of prostitution, the act would be criminal."[3]

In a later case, where the adoption took place in 1871 (*i.e.* subsequent to the Indian Penal Code, which came into force in 1861), when the girl was six

[1] 19 Mad. 127 (1895).
[2] 12 Mad. 273.
[3] 19 Mad pp. 136-137.

years old, and was made with the intention of bringing her up to practise prostitution even during her minority, it was held that such adoption was invalid.[1] But where adoption took place prior to the coming into force of the Indian Penal Code, it was regarded as valid.[2] We should mention here that the view, *viz.*, the Courts should not recognize an institution such as that of dancing girls, the object of which is prostitution, and the gain to be derived from that source, was expressed in one of the earliest Madras cases.[3] But with reference to this case Best J., says "it is open to question whether *Chinna Ummayyi* v. *Tegarai Chetti* has not been overruled by a subsequent decision reported in the same volume, *Kamalam* v. *Sadagopa Sami*.[4] No doubt the latter case was sought to be distinguished from the former on the ground of its including a claim for honours and income as appurtenant to the hereditary office of dancing girl which plaintiff was seeking to recover; but as observed by Muttusami Ayyar J., in *Venku* v. *Mahalinga*[5] 'it is not clear how, if the custom which is the source of the hereditary right to the office is an immoral custom, the existence of an endowment or emolument makes a difference and removes the legal taint in the source of the right'."[6]

In Bombay.

The view expressed in *Chinna Ummayyi's* case found some support in the dicta of West J., in *Mathura Naikin* v. *Esu Naikin*,[7] who held that adoption by the *Naikins* cannot be recognized by Courts of law and confers no right on the person adopted. His Lordship further observed that an adoption by a woman presupposes a husband to whom she adopts as her representative, and a *Naikin*, while she remains a *Naikin*, can have no husband.

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[1] *Sanjivi* v. *Jalajakshi*, 21 Mad. 229 (1897).

[2] *Venku* v. *Mahalinga*, 11 Mad. 393 (1883); *Muttu Kannu* v. *Paramasami*, 12 Mad. 214 (1889).

[3] *Chinna Ummayyi* v. *Tegarai Chetti*, 1 Mad. 168 (1876).

[4] 1 Mad. 356 (1878)

[5] 11 Mad. 393 (1888).

[6] *Kamalakshi* v. *Ramasami Chetti*, 19 Mad. 127, p. 136 (1895).

[7] 4 Bom. 545 (1880).

So a *Naikin* cannot adopt at all. The latest Bombay case about the Naikins is *Tara Naikin* v. *Nana Lakshman*.[1] There Sargent C. J., referred to the decision in *Mathura Naikin* as having been disapproved of by the Madras High Court in *Venku* v. *Mahalinga*[2] and observsd as follows :— "In *Mathura Naikin* West J., speaking of temple dancers says it is a question 'whether in such circumstances the endowments enjoyed by such guilds of women ought to be recognized and protected by the law without a reform of their essential constitution'. However in *Kamalam* v. *Sadagopa Sami*[3] such endowments were recognized. Now the existence of dancing girls in connection with temples is according to the ancient established usage of the country and this Court would, in our opinion, be taking far too much upon itself to say that it is so opposed to the 'legal consciousness' of the community at the present day as to justify the Court on refusing to recognize existing endowments in connection with such an institution." The lower court in this case rejected the claim of the plaintiff (who, as the adopted daughter of a dancing girl, attached to a temple, sued to redeem and to have her right to manage the *inam* lands assigned as the remuneration for the temple office recognized), on the ground that the adoption could not be recognized by the Civil Court. The High Court reversed the decree and ordered a retrial having regard to the above remarks.

Adoption by a prostitute.

Where a prostitute, not a *Naikin*, adopted a girl of thirteen years of age as her daughter and by a will left all her property to the adopted daughter so that the latter could perform the former's funeral ceremonies and inherit her property, and where there was nothing to show that she contemplated the girl following the profession of a prostitute, the Court held that such adoption was valid, and

[1] 14 Bom. 90 (1889).
[2] 11 Mad. 393 (1888).
[3] 1 Mad. 356 (1888).

that the adopted daughter was entitled to the property under the will.[1]

Plurality of adoption among the *Naikins.*

Double or simultaneous adoption may be contrary to the doctrine of Hindu law, but it has been found that the custom obtaining among dancing girls in Southern India permits plurality of adoption. In *Muttu Kannu* v *Paramasami*[2] a dancing woman adopted first one daughter and subsequently, in the life-time of the latter, adopted another daughter. The question for decision was whether such custom ought to be recognized as having the force of law in the class in which it obtained. Their Lordships referred to *Venku* v *Mahalinga*[3] where a Naikin, in South Canara, affiliated three girls and a boy and all four lived together as a joint family till 1849, when a partition of their joint property was decreed between them in equal shares. It would seem that in this partition suit, at least, such adoption was considered valid. But subsequently when one of the adopted girls (call her T) died in 1880 leaving certain property and one of the surviving sisters (call her V) sued to recover T's estate from T's uterine brother, the Court held that though the adoption of a daughter by a Naikin can be recognized by the Civil Courts, there being no warrant for plurality of adoption in the analogies of Hindu law and *no special custom having been proved,* V could not claim T's estate. In *Muttu Kannu's* case, however, there was the undisputed evidence of custom of the caste or class, and the adoptions in question took place before the Indian Penal Code came into force. So their Lordships held that according to the custom obtaining among dancing women in Southern India plurality of adoption was valid and conferred the rights and *status* of a daughter on the adopted girls. The same question arose in *Sanjivi* v. *Jalajakshi.*[4] There the plaintiff sued to recover a moiety

[1] *Manjamma* v. *Sheshgiri Rao,* 26 Bom. 491 (1902).
[2] 12 Mad. 214 (1888).
[3] 11 Mad. 393 (1888).
[4] 21 Mad. 229 (1897).

of the property left by a deceased dancing woman who had adopted successively the defendant and the plaintiff. But as the adoption of the plaintiff was found to be invalid, on the ground that it was done with the criminal intention of bringing her up to practise prostitution even during her minority, the Court did not go into the second objection to the validity of the adoption, *viz.*, that there was no sufficient proof of local usage sanctioning a second adoption by a dancing girl during the life-time of a daughter previously adopted. So the position is this : plurality of adoption by the Naikins is good if authorized by caste or local custom ; but if such adoption is made with criminal intent, it will be illegal and invalid.

Prohibition of adoption by custom.

We have already noticed that by *Kulachar* of the family an adoption may not be permitted.[1] In *Patel Vandravan Jekisan* v. *Patel Manilal Chunilal*,[2] a custom prohibiting a widow from adopting a son was set up. The Subordinate Judge held that there existed among the Kadwa Kunbi caste of Amedabad such a caste usage forbidding a widow to adopt without the express consent of her husband. He did not record a distinct finding on this point but said that he was inclined to believe in the existence of such a caste usage, on the ground that in Borrodaile's collection of caste rules it was said that Kadwa Kunbis at Surat could not adopt; that the oral evidence on the record showed that a widow of the Kadwa Kunbi caste could not adopt without the express authority of her husband; that the defendant's pleader admitted that with the exception of two cases no other instance had occurred in the Kadwa Kunbi caste ;

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[1] See Family Customs *supra*. *Rajah Bishnath Singh* v. *Ram Churn Mujmoodar*, 6 S. D. Decis. 20 (1850); *Fanindra Deb Raikat* v. *Rajeswar Dass*, 12 I. A. 72 (1884).

[2] 15 Bom. 565 (1890).

lastly, that it was highly probable that there would be such a custom in a caste in which widows freely contract *Natra* marriages and would be able by adopting to frustrate the Hindu Widows' Marriage Act XV of 1856. The Subordinate Judge also admitted in evidence under s. 32 (4) of the Indian Evidence Act a statement signed by several hundred witnesses to the effect that a widow of the Kadwa Kunbi caste could not adopt without the express authority of her husband. As this statement was illegally admitted and was therefore inadmissible to prove the alleged custom, the High Court remanded the case for a clear finding on the following issue :—Whether, according to the custom or caste usage of the Kadwa Kunbi caste of Ahmedabad, the adoption by a widow was forbidden without the express consent of her husband. The finding of the Subordinate Judge on the issue was in the negative. Sargent C.J., said : "Although the spiritual efficacy of adoption is probably not much regarded by the members of the Kunbi castes, a caste custom prohibiting widows from adopting is one which, before the Court can give judicial effect to it, ought to be established by very clear proof that the conscience of the members of the caste had come to regard it as forbidden. That evidence, we think, was not forthcoming in the present case. The statements of two hundred and two witnesses called by the plaintiff doubtless show that it has not been the practice in the caste for widows to adopt; but it also shows there has been no caste resolution forbidding such adoption. At the same time the evidence establishes that there have been, as a matter of fact, two adoptions by widows, so far back as 1881, and 1882, without any caste protest against them ; and that the latter of these adoptions was actually impugned in Court, but nothing was stated at the time as to its being contrary to caste custom—and, lastly, that the adoption in question was attested by sixteen patels of the caste, which could scarcely have taken place had there been a well-established custom forbidding such an adoption. This evidence, as a whole,

leads, we think, to the conclusion that, in the language of Mr. Mayne, 'a uniform and persistent usage had not moulded the life of the caste.' It is also to be observed that this particular caste is not mentioned in Borrodaile's Caste Customs when alluding to other Kunbi castes of Gujarat in connection with such a custom."[1] So the plaintiff's suit was dismissed as the alleged custom was not proved.

Among Chudasama Gamati Garasias of Ahmedabad.

Similarly in another case the Privy Council, in concurrence with the findings of the lower courts, held that a custom alleged to exist in the Hindu caste of Chudasama Gameti Garasias of Ahmedabad in Bombay prohibiting adoption was not proved. Their Lordships observed: "The evidence adduced to show that adoption is forbidden by the custom of the caste consists entirely of what is said by a number of witnesses, who say that if a man dies leaving a widow and no son, the widow cannot adopt a son and that no custom to adopt is recorded. But it appears that there are no written rules as to custom. Some instances to prove the statements made by the witnesses are adduced; but as pointed out by the Subordinate Judge they are all explicable on other grounds than the existence of alleged custom."[2]

Widow's power to adopt in Gujarat and the Marathi country.

In Gujarat and in the Marathi country a Hindu widow may, without the permission of her husband and without the consent of his kindred, adopt a son to him if the act is done by her in the proper and *bonâ fide* performance of a religious duty and neither capriciously nor from a corrupt motive.[3] Parke J., said: "According to the native text-writers, it seems to be clear that the strictness of that law (*viz.*, an adoption by a widow after her husband's death, without any authority from him is invalid) has been in many districts, relaxed or modified by local usage; and the opinion of the Shastris, as published in Mr. Borrodaile's Bombay Reports, is very strong to show

[1] *P. V. Jekisan* v. *P. M. Chunilal*, 16 Bom. 470 p. 476 (1891).

[2] *Verabhai Ajubhai* v. *Bai Hiraba*, 30 I.A. 234 (1903): S.C. 27 Bom. 492 S.C. 7 C.W.N. 716.

[3] *Rakmabai* v. *Radhabai*, 5 Bom. H.C R. A. C. J. 181 (1868).

that in the *Marhatta States, to the West of the Peninsula, the law does not require any such authority to render the act valid.*"[1] But the adoption must not have been expressly forbidden by the husband, and must not have the effect of divesting an estate already vested in a third person.[2] A widow has implied authority from her husband to adopt even though her husband be a minor. Where a widow adopts there is a presumption that she has performed the duty from proper motives and the *onus* lies heavily on him who seeks to set aside the adoption on the ground of corrupt motive.[3] An elder widow has the power to adopt a son to her deceased husband without the consent of a younger widow. Sir Richard Couch said: "It would seem to be unjust to allow the elder widow to defeat the interest of the younger by an adoption against her wish. But on the other hand, if an adoption is regarded as the performance of a religious duty and a meritorious act to which the assent of the husband is to be implied wherever he has not forbidden it, it would seem that the younger widow is bound to give her consent, being entitled to a due provision for her maintenance; and if she refuses, the elder widow may adopt without it."[4]

In the Dravida country.

In the Dravida country a Hindu widow may, without having her husband's express permission, adopt a son to him, but she must be *duly authorized by his kindred* to do so. In the case of an undivided family the requisite authority to adopt must be sought within that family and cannot be given by a single, separated and remote kinsman.[5]

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[1] *Raja Haiman Chull Singh* v. *Koomar Gunsham Singh*, 2 Knapp 203 p. 221 (1834).

[2] *Patel Vandravan Jekisan* v. *Patel Manilal Chunilal*, 15 Bom. 565 (1890).

[3] Ibid.

[4] *Rakmabai* v. *Radhabai*, 5 Bom. H.C.R. 181 p. 192 (1868).

[5] The *Collector of Madura* v. *Mootoo Ramalinga Sethupathy*, 12 Moo I.A. 397; *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Putta Deo*, 1 Mad. 69 (P.C.) [1876].

In *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lukshmibai*[1] it was alleged that according to the custom of the *Daivadnya* caste an adoption by an untonsured widow was invalid. For the purpose of proving such custom the evidence was tendered to the following effect: (i) that there had been many instances of adoption in the caste and in every such case the adopting mother had undergone tonsure and that there had been no instance the other way; (ii) that the caste was divided in opinion as to the validity of the adoption, but that at a meeting of the caste it was declared by a large majority that the adoption was invalid. The Court refused to allow such evidence to be called, holding that "it would merely prove what the court, in the absence of evidence to the contrary, would assume to be the case, *viz.*, that the widows of the caste usually or invariably followed the dictates of the Hindu ceremonial or religious law, which ordains that widows shall shave their heads, and that it would prove nothing more; and with regard to the opinion of the caste, that such opinion, even if expressed by a majority at a caste meeting, as it would not of course be binding upon the Court, ought not to affect its judgment." The Court, however, held the adoption in the case as valid, as the widow, before taking part in the religious ceremonies requisite for adoption, consulted *Shastris* as to whether she, while untonsured could properly do so, and according to the opinion of the latter she, having made certain expiatory gifts, was pronounced competent. Under such circumstances the Court could not hold her to be incompetent. Even if the *Shastris* were of a different opinion, a Civil Court, "could not decide between conflicting opinions upon such a question of ecclesiastical etiquette."

Adoption by untonsured widows among Brahmans of *Daivadnya* caste.

This case has laid down that if an adoption be performed with all the requisite rites, with the assistance of priests, and in accordance with the opinions of the *Shastris*, the

[1] 11 Bom. 381 O.C. (1881).

Court will uphold it, even against the opinions of other *Shastris* expressing or entertaining contrary views.

Datta Homam.

In the last case Farran J., said that he should hesitate long before holding that an adoption is valid among Brahmans, even in Western India, without the performance of the essential religious rites.[1] We have already observed that even *Datta Homam,* or oblation to fire, is not an essential ceremony even in the case of three regenerate classes. Sir Thomas Strange says that the sacrifice to fire is important in a spiritual point of view, but it is so with regard to Brahmans only by whom the *Datta Homam,* with holy texts from the Vedas, can properly be performed. "The other classes, and particularly the Sudra, upon this, and other like occasions, perform an imitation of it, with texts from the Puranas. And even with regard to Brahmans, admitting their conception in favour of its spiritual benefit, it by no means follows that it is essential to the efficacy of the rite, for *civil* purposes; but the contrary is to be inferred; and the conclusion is that its validity, for these, consists generally in the consent of the necessary parties, the adopter having at the time no male issue, and the child to be received being within the legal age, and not being either an only or the eldest son of the giver; *the prescribed ceremonies not being essential.* Not that an unlawful adoption is to be maintained; but that a lawful one, actually made, is not to be set aside, for any informality that may have attended its solemnization."[2]

A full Bench of the Calcutta High Court has decided that amongst Sudras in Bengal no ceremonies in adoption are necessary: the giving and the taking of the child constitute a valid adoption.[3] The Madras High Court following this

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[1] Ibid p. 395.

[2] Strange's *Hindu Law* Vol. I, pp. 96-97; see Dr. Jolly's Tagore Law Lec: (1883) p. 159.

[3] *Behari Lal Mullick* v. *Indromani Chowdhrani,* 25 W. R. 285 (F.B.) [1874]: S.C. 13 B.L.R. 401. This was affirmed in appeal by the Privy Council, see *Indramani Chowdhrani* v. *Behari Lal Mullick,* 7 I. A. 24 (1879): S.C. 5 Cal 770: S.C. 6. C. L. R. 183.

decision held that adoption by a Sudra widow under pollution was not invalid.[1] As the females of the regenerate class labour under the same religious disability as the Sudras, the same Court in another case[2] laid down that in the event of an adoption by a female of the Brahman caste the performance of *Datta Homam* was not essential. Following this ruling it was held that among Kshatriyas in the Madras Presidency an adoption without religious ceremonies was valid.[3] But in a subsequent case a doubt was expressed as to the correctness of the last case and it was held that *Datta Homam* was an essential ceremony in adoption among the Brahmans.[4] A Full Bench, however, has held that the ceremony of *Datta Homam* is not essential to the valid adoption among Brahmans in Southern India, when the adoptive father and son belong to the same *gotra*.[5] In a very recent case where a Brahman after taking a boy in adoption died without performing *Datta Homam* which was solemnized by his widow after his death, it was held that the adoption was valid.[6]

Among Dakhin Brahmans.

A full Bench of the Allahabad High Court has held that in the case of *Dakhani* Brahmans the *Datta Homam* or any other religious ceremony is not recognized to give validity to the adoption of a brother's son; the giving and taking of the child is sufficient for that purpose.[7] The parties were Dakhani Brahmans, whose family came from Poona about a hundred years ago into the Jalaun District. Stuart C. J., said: "It thus appears that the parties in the case are not bound by the law of adoption prevalent in Bengal or any part of Bengal, but being Marhattas, are entitled to have administered in their family relations

[1] *Thangathanni* v. *Ramu Mudali*, 5 Mad. 358 (1881).

[2] *V. Singamma* v. *Vinjamuri Venkatacharlu*, 4 Mad. H.C.R. 165 (1868).

[3] *Chandramala Patti Mahadevi* v. *Muktamala Patti Mahadevi*, 6 Mad. 20 (1882).

[4] *Venkata* v. *Subhadra*, 7 Mad. 548 (1883).

[5] *Govindayyar* v. *Dorasami* 11 Mad. 5 (1884).

[6] *Subbarayar* v. *Subbammal*, 21 Mad. 497 (1898).

[7] *Atmaram* v. *Madho Rao*, All. 276 (F. B.) [1884].

the law of adoption as current and practised in the Marhatta States. So considered it is perfectly clear to me that the *factum* of adoption, as evidenced by the form of giving and taking without any other ceremony, is all that is absolutely essential and that therefore the Judge is right in upholding the adoption in the present case, in which the parties are of the same family or *gotra*. I may add that it appears from the authorities that a like practice of the law of adoption is generally prevalent not only in the Marhatta States but in Western India generally and also in some parts of South India."[1]

Gift of a son in adoption by a Hindu convert

A very curious point was raised in a very recent Bombay case.[2] There the question was whether the adoption of a Rajput was valid, whose natural mother was dead and whose natural father had become a convert to Mahomedanism, and who was given in adoption by his uncle to whom the natural father had given the necessary authority. The Court held that it was valid, as a Hindu father does not lose his capacity to give his son in adoption by reason of his conversion to Mahomedanism. But, does this hold good in the case of Brahmans among whom the *datta homam* ceremony is necessary? With reference to this point the Court observed as follows :—"Adoption may be regarded as a civil transaction as well as a religious ceremonial. If civilly the father is competent to give, he is equally competent to sanction the giving. Were the parties here Brahmans and not Rajputs, and *Datta Homam* essential, then possibly the father after becoming a Mahomedan could not sanction his brother to be present at the giving during the *datta-homa*, but the point does not arise here. The question is really narrowed to this :—If the father is not civilly dead, if

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[1] See 4 Mad. H. C. R. p. 165 and 83 (1821). *Huebut Rao Mankur* v. *Govinda Rao Bulwant Rao Mankur* 2 Borr.

[2] *Sham Sing* v. *Santabai*, 25 Bom. 551 (1901).

he is still the guardian of his son, why should he not be able to exercise his volition and sanction his son being given in adoption according to the Hindu religion? The son is still a Hindu: he is one who may be taken in adoption. We see no reason why the adoption should not be treated as invalid."[1] On the basis of this case it has been held that a Hindu becoming a Brahmo can validly give his son born while a Brahmo in adoption to a Hindu.[2]

Adoption of a son of a Brahmo by a Hindu.

It should be noted that in the case of Sudras many restrictions to adoption are relaxed. As, for instance, the adoption of a Sudra boy, otherwise eligible, is permissible *at any age previous to his marriage* as that of boys of the higher castes is at any age before investiture with the thread (*Upanayana.*)[3] This holds good in Bengal, Benares and Madras. In Western India even a married man with a son may be adopted.[4]

Adoption by Sudras.

The rule of propinquity which forbids a Hindu to adopt a boy whose mother he could not have married—such as mother's sister's son[5] or a daughter's or a sister's son[6]—does not apply to Sudras. Similarly the prohibition against adopting an only son or eldest son has no force

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[1] 25 Bom. p. 555.

[2] *Kusum Kumari Roy* v. *Satyaranjan Das* 30 : Cal., 999 (1903) : s.c., 7 C.W.N. 784.

[3] *Kerutnarain* v. *Musst. Bhobinesree*, 1 S.D., Sel. Rep. 161 (1806) ; *Musst. Dullabh De* v. *Monee Beebe*, 5 S.D. Sel. Rep. 50 (1830) ; *Ranee Nitrodaye* v. *Bholanath Dass*, 9 S.D. Decis 553 (1853).

[4] *Raje V. A. Nimbalkar* v. *Jayavantrav*, 4 Bom. H. C. R., A. C.J. 191 (1867) ; *Mhalsabai* v. *Vithoba Khandappa Gulve* 7 Bom., H. C. R., App., 26 (1862) ; *Nathaji Krishnaji* v. *Hari Jagaji* 8 Bom., H.C.R., A.C.J., 67 (1871).

[5] *Chinna Nagayya* v. *Peda Nagayya*, 1 Mad., 62 (1875). See *Bhagwan Singh* v. *Bhagwan Singh* 26 I.A. 153. (1899) : s.c. 3 C.W.N. 454 : s c. 21 All. 412 s.c.

[6] Expressly permitted by the *Shastras*. Vide Macn. H.L. Vol. I. p. 67. Nareda cited in Dutt Nir ; Strange's H. L. Vol. 1. pp. 83, 84 ; Dutt Mim Sec. ii. 74, 93, 95 *et seq*. *Rajcoomar Lall* v. *Bisseswar Dayal* 10 Cal., 688 (1884) among Kayashas of Bihar ; *Phundo* v. *Jangi Nath* 15 All., 327 (1893) sister's son among *Baqqals* ; *Jiwan Lal* v. *Kullu Mull* 28 All., 170 (1905) among *Purbia Kurmis*,

among them.[1] Nor are any ceremonies, besides giving and taking a child, necessary for the validity of a Sudra adoption.[2]

Adoption by Regenerate classes.

Restrictions regarding age and propinquity of the child to be adopted and the performance of religious ceremonies are rigidly observed among the three regenerate classes. Their non-observance in certain Provinces is justified on the ground of custom or usage. We will now note some of these customs or exceptions to general rules.

Age.

According to Hindu text-writers a child must not be adopted whose age exceeds five years or upon whom the ceremony of tonsure has been performed in his natural family.[3] But the decisions of the Sudder Dewany Adawlut are not uniform on the point. In two cases the Pundits gave the opinion that a boy exceeding five years in age could be adopted if the tonsure had not been performed in the natural family. In two other cases it was broadly laid down that amongst the higher castes adoption is permissible *at any age* before investiture with the thread.[4] In Madras the same rule has been repeatedly laid down.[5]

Vide Macn. Vol. 2 p. 187. note. (adoption of a daughter's son) *Gopal Narhar Safray* v. *Hanmant Ganesh Safray* 3 Bom 273 (1879) among Lingayets (who are members of the Sudra and not of Vaishya class) daughter's or sister's son.

[1] *Mhalsabai* v. *Vithaba Khandappa Gulve* 7 Bom, H. C. R. App. 26 (1862). But see *Mannick Chander Dutt* v. *Bhagabuty Dasee* 3 Cal. 443 (1878) which says that adoption of an only son is invalid in Bengal and the prohibition applies to *Sudras* as well as to the higher classes. *Basava* v. *Lingangauda* 19 Bom. 428 (1894) among Lingayets, adoption of the only son is valid.

[2] *Indramoni Chowdhrani* v. *Beharilal Mullick*, 5 Cal. 770 (P.C.) [1899]: S.C. 4 Shome, Notes p. 43. S.C. in H.C., 13 B.L.R., 401 (F.B.)

[3] Datta Mima iv § 22; Datta Chand ii § 25. But see *Keernt-narain* v. *Musst. Bhobinesree* 1 S. D. Sel. Rep. 161 (1806), *Dullubh De* v. *Manee Bebee* 5 S. D. Sel. Rep. 50 (1830); *Ranee Bullabakant Chowdhuree* v. *Kishenprea Dassee* 6 S. D. Sel. Rep. 270 (219) [1838]; *Ranee Nitrodaye* v. *Bholanath Dass* 9 S. D. Decis. 553 (1853).

[4] *Ramkrishore Acharja Chawdhuri* v. *Bhoobunmoyee Debia Chowdrani*, S. D. Decis. 229 (1859), affirmed on review S. D. Decis. 485 (1860): S.C. in P.C. 10 Moo. I.A. 279 (1865): S C.; 3 W. R. 15 (P.C).

[5] *Mootoo V. R. Satooputty* v.

In *Viraraghava* v *Ramalinga*[1] it has been laid down that according to the custom obtaining amongst Brahmans in Southern India, the adoption of a boy of the same *gotra*, after the *upanayana* ceremony has been performed, is valid. The usage in Pondicherry admits of adoption after the *upanayana*.[2] In *Ramaswami Iyen* v. *Viraragava Iyengar*[3] it has been held that the restrictions against the adoption of one on whom the *upanayana* ceremony has been performed in his natural family is clearly directed to a case where the *gotra* of adoption is different from that of the natural father of the boy adopted. In Western India and Bombay there is practically no restriction of age. It is a settled fact now that in these provinces not only among Sudras, but among Brahmans also, even a married man may be adopted and it is immaterial whether he belongs to a different or to the same *gotra* as the adopter.[4]

Propinquity.

The general rule of prohibited degrees based on incestuous theory is not observed. The rule of prohibited degrees is not observed universally by the three regenerate classes. In Mithila the adoption of a sister's son in the *kritima* form is valid.[5] In Southern India adoptions within the prohibited degrees are quite common even among the Brahmans. In *Vayidinanda* v. *Appu*[6] a Full Bench has

Sevagamy Nachiar, I Mad. Decis. 106; *Vythilingo Muppanar* v. *Vyiathammal*, 6 Mad. 43 (1882); *Pichuvayyan* v. *Subbayyan*, 13 Mad. 128 (1889).

[1] 9 Mad. 148 (1883).

[2] 1 Gibelin 94 cited in Mayne's H.L. p. 151.

[3] 8 Mad. Jur. 58 (1873).

[4] 4 Bom. H.C.R. A.C.J. 191 (1867); 8 Bom. H.C. R. A.C.J. 67 (1871); *Sadashiv Moreshvar Ghate* v Hari *Moreshvar Ghate*, 11 Bom. H.C.R. 190 (1874); *Lakshmappa* v. *Ramava*, 12 Bom. H.C.R. 364 (1875); *Dhurma Dagu* v. *Ramkrishna Chimnaji*, 10 Bom. 10 (1885).

[5] *Chowdree Purmessur Dutt Jha* v *Hunnoman Dutt Roy*, 6 S. D. Sel. Rep 235 (192) [1837]. See *Bhugwan Singh* v. *Bhugwan Singh*, 26 I.A. 153 (1899): s. c. 21 All. 412: s.c. 3 C.W.N. 454, adoption of mother's sister's son is void. *Musst. Lali* v. *Murli Dhur* 10 C.W.N. 730 (P. C.) [1906], adoption of a sister's son among Marwari Brahmans is not warranted by family custom and invalid according to the general Hindu Law. *Baboo Ranjit Singh* v. *Baboo Obhye Naraian Sing*, 2 S.D. Sel. Rep. 245 (315) [1887], a brother cannot be adopted in Mithila.

[6] 9 Mad. 44 (1881).

held that the custom, which exists among Brahmans in Southern India, of adopting a sister's or daughter's son is valid.[1] The Court observed : "Among Sudras the adoption of daughters' and sisters' sons has always obtained, and whether the Brahmans who settled in the south of India never recognized that such adoptions were prohibited in their case or whether they adopted the practice which they found prevalent among the people of the country in which they settled, we are satisfied that the practice of making such adoptions has prevailed among Brahmans in what are now the Southern districts of this Presidency from time immemorial."[2] Similarly by the custom of Malabar the adoption of a sister's son among the Nambudri Brahmans is held to be sanctioned by the customary law of Malabar by a Full Bench of the Madras High Court.[3] In *Minakshi* v. *Ramanada*,[4] which is also a Full Bench case, the Court observed : "Another objection is that, according to this rule, the adoption of a daughter's son, of a sister's son, and of a brother is not permitted, whilst according to usage it is permitted. In the case of the two former, the special usage is referable to the ancient law of *Putrika Putra* ; and in the case of a brother if a special usage is proved, it may be referable to the ancient practice of regarding the eldest brother as a father. On this point, however, we do not consider it necessary to express any opinion in the absence of evidence as to usage. But these special cases do not seem to us to negative the applicability of the rule under consideration as a general rule."

Adoption of a son of the paternal uncle was held valid.[5] Adoption of a nephew was held to be legal if performed

[1] A decision to the contrary by Halloway J., in *Narasammal* v. *Balarama Charlu*, 1 Mad. H.C.R. 420 (1863) was based on a misconception of the force of custom. See *Supra*.

[2] 9 Mad. p. 53.

[3] *Eranjoli Illath Vishnu Nambudri* v. *Eranjoli Illath Krishnan Nambudri*, 7 Mad. 3 (F.B) [1883].

[4] 11 Mad. 49 p. 55. (F.B) [1886].

[5] *Virayya* v. *Hanumanta*, 14 Mad. 459 (1890).

by word of mouth alone.[1] In Kashmere the general principle amongst the Hindus is to adopt their younger brother.[2] The son of a wife's brother may be adopted.[3] Similarly the adoption of the son of a maternal aunt's daughter is not invalid.[4]

Amongst *Bohra* Brahmans in the N.W.P.

Amongst the *Bohra* Brahmans of the Northern districts of the North-Western Provinces there exists a valid and legal custom in virtue of which a person of that caste can adopt his sister's son.[5] Their Lordships referring to the Madras Full Bench cases observed: "The validity of such a custom by which a sister's son may be adopted amongst Nambudri Brahmans in Malabar, and of a similar custom by which a daughter's son may be adopted amongst the Brahmans of Tanjore, Trichinopoly and Tinnevelly have been judicially recognized by Full Benches of the Madras High Court. ... ... The validity of a custom by which amongst certain tribes of Brahmans in the Punjab, a sister's son or a daughter's son may be adopted has been judicially recognized by the Chief Court of the Punjab. (Sarkar's Tagore Law Lec.: 1888 pp. 341-342.) That generally accepted rule of the Hindu law, which prohibits amongst the twice-born classes the adoption of a sister's or daughter's son, has been in many parts of India controlled and varied by custom or possibly never followed, may be gathered from the cases collected in the notes to paragraph 124 pages 137 and 138 Mayne's H.L. 4th Edn."

In Bombay.

In Bombay it is a general rule amongst Brahmans, Kshatriyas and Vaishyas, that they are absolutely prohibited from, and incapable of, adopting a daughter's or sister's son or son of any other woman whom they could not marry

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[1] *Huebut Rao Mankur* v. *Govindrao Bulwant Rao Mankur* 2 Bom. 83 p. 95 (1821).

[2] Vide Golapchandra Sastri's *Tagore Lec.* (1888) p. 318.

[3] *Sriramulu* v. *Ramayya*, 3 Mad. 15 (1881).

[4] *Venkata* v. *Subhadra*, 7 Mad. 548 (1883).

[5] *Chain Sukh Ram* v. *Parbati*, 14 All. 53 p. 57. (1891).

by reason of propinquity. The burden of proving special custom to the contrary amongst any members of these three regenerate classes, prevalent either in their caste or in a particular locality, lies upon him who avers the existence of that custom.[1]

Adoption of an only son or eldest son.

An adoption of an only son is prohibited by the Shastras, and so is the adoption of an eldest son. But both in Madras and Allahabad such adoption is valid.[2] In a Calcutta case it was urged that an adoption of an eldest son was not legal inasmuch as he was an elder son and could not be legally adopted. The Court, however, said that there was no evidence to show that the adoptee was the eldest son of the family at the time of his adoption, and precedents showed that the adoption of an elder son though improper, was nevertheless not illegal.[3] The Bombay High Court held the same view, *i.e.*, the adoption of an only son though improper was not invalid if made.[4] But since 1868 both the Calcutta and Bombay High Courts have held that such adoption is invalid and that even the doctrine of *factum valet* cannot be extended to such cases of adoption.[5] This view has been approved of by the Bombay High Court in several cases[6] and a Full

[1] *Gopal Narhar Safray* v. *Hanmant Gunesh Safray*, 3 Bom. 273 (1879).

[2] *Chinna Gaundan* v. *Kumara Gaundan*, 1 Mad. H.C.R. 54 (1862): s. c. 1 Ind. Jur. 115 ; *Hanuman Tewari* v. *Chirai*, 2 All. 164 (F. B.) [1879] Turner J., dissenting. But See *Tulshi Ram* v. *Behari Lal*, 12 All. 328 (F.B.) [1889].

[3] *Seetram* v. *Dhunnook Dharee Sahye*, 1 Hay 260 (1862). See also *Joymonee, Dassee* v. *Sibo Sundary Dassee*, Fulton 75 (1864).

[4] *Mhalsabai* v. *Vithoba Khandappa*, 7 Bom. H. C. R. App. 26 (1862) ; *Raja Vyankatrav Anandrav Nimbalkar* v. *Jagavartrav*, 4 Bom. H. C. R. A. C. J. 191 (1867).

[5] *Raja Upendra Lall Ray* v. *Rani Prasanna Mayi*, 1 B.L.R. A.C. 221 (1868): s. c. 10 W.R. 347.

[6] *Bhaskar Trimbak Acharya* v. *Mahadev Ramji*, 6 Bom. H. C. R. O. C. J. 1 ; *Lakshmappa* v. *Ramava*, 12 Bom. H.C.R. 364 ; *Rangubai* v. *Bhagirathibai*, 2 Bom. 377 p. 379 ; *Samasekhara* v. *Subhadramaji*, 6 Bom. 524 ; *Kashibai* v. *Tutia*, 7 Bom. 221.

Bench has laid down that the adoption of an only son is absolutely invalid.[1]

As to whether a father having only two sons could properly give them both away in adoption it was held that the adoption would not be invalid though the sin would be not with the person receiving in adoption but with the father in thus giving away both of his sons and leaving himself childless.[2]

Paluk Putra.

In *Cali Chunder Chowdhury* v. *Shib Chunder Bhadoory*[3] it was urged that a *paluk-putra* is a good and valid adoption amongst Sudras according to Hindu law. The Court held that there is but one form of adoption recognized by Hindu law books for the Bengal Provinces and there is *quoad* that no distinction is made between different castes.[4]

Adoption of an orphan.

As there must be a giving as well as receiving to constitute a valid adoption, an orphan cannot be adopted.[5]

"Pro-son-Brahman."

Among Ooriya Rajahs and Zemindars of Ganjam, who are Kshatriyas, the exequial rites are always performed by a Brahman official, who is permanently attached to the family and who is styled a "pro-son-Brahman."[6]

Kritaka son.

Besides *Dattaka*, *Dwyamushyayana*, and *Kritima*, a fourth speceis of subsidiary son, *viz.*, *Kritaka*, may be mentioned. A question arose in 1812 as to the competency of adoption by *purchase*. It was said that that form of adoption was sanctioned by usage in Southern India. But at the trial no sufficient evidence was produced to establish it. The question was not determined as the case was compromised. But the authorities both in Northern and Southern India

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[1] *Waman Raghupati Bova* v. *Krishnaja Krishnaji Bova*, 11 Bom. 219 (F. B.) [1889].

[2] *Huebut Rao Mankur* v. *Govindrao* 2 Borr. 83.

[3] 11 Sevestre 265 (1870).

[4] *Bhimana* v. *Tayappa* Mad. Decis 124 (1861)

[5] *Balvantrav Bhaskar* v. *Bayabai*, 6 Bom. H. C. R. 83 (1869); *Subbalurammal* v. *Ammakutti Ammal*, 2 Mad. H. C. R. 129 (1864).

[6] See Mayne's H. L. p. 107. *Lakshminarayana Dasit*. II Mad. 288 (1887).

seemed to agree that the *Kritaka* form was obsolete in the present age.[1]

Appointment of a daughter (*Putrika putra*).

The custom by which a Hindu father, in default of male issue, might appoint a daughter to be as a son or appoint her to raise a son for him is now obsolete.[2] The question came up before the Judicial Committee in *Thakoor Jeebnath Sing* v. *The Court of Wards*.[3] Their Lordships observed: "This appointment of a daughter may not be strictly an adoption but the text writers evidently refer to this custom, amongst others, as being obsolete. It is not necessary in this case to decide that this is so, although there certainly does not appear to have arisen in modern times any instance in the Courts where this custom has been considered. The custom is referred to in the case of *Nursing Narain* v. *Bhulten Lall*.[4] But supposing it exists, inasmuch as it breaks in upon the general rules of succession, wherever an heir claims to succeed by virtue of that rule he must bring himself very clearly within it." In this case, (according to their Lordships finding) there seems to be no sufficient authority for holding that a father may delegate the power to appoint. The rules as to the manner of appointment given in the old authorities point to the act of appointment proceeding personally from the father and there is nothing said about the father's power to delegate the appointment to his sons. In this instance the appointment was not made by the father.[5]

Rights and Privileges of adopted son.

Since an adopted son becomes for all purposes the son of the adoptive father, his rights and privileges, as to inheritance from his adoptive parents and their relations,

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[1] Strange's *Hindu Law*, Vol. II p. 140 *et seq.*

[2] *Vide* Sir Thomas Strange's *Hindu Law*, vol. I 138. Sir Wm. Macnaghten *Treatise on Hindu Law*, Adoption.

[3] 2 I. A. 163 (1875): s. c. 15 B.L.R. 190: s.c. 25 W.R. 409.

[4] W. R. 194 (1864).

[5] See Malabar Customs *Illatum*.

are precisely the same as that of a legitimate natural born son. He succeeds not only lineally but collaterally to the inheritance of his relations by adoption.[1] In *Teencowree Chatterjee* v. *Denonath Banerjee*[2] the Court has held that a son adopted by one wife becomes the son of all, and succeeds to their *Stridhan*, in the absence of daughters, just as a natural born son will do. A Full Bench of the Calcutta High Court has laid down that an adopted son is entitled to inherit from his adoptive mother's relations in the same way as a son of her body. This ruling has been affirmed by the Judicial Committee on appeal.[3]

An adopted son, (except a *dwyamushyayana* who may inherit in both natural and adoptive families) loses all rights of inheritance in his natural family; but in the adoptive family where by virtue of adoption he is appointed as heir, his right is permanent and absolute. An adoptive father cannot deprive his adopted son of his rights according to his pleasure or caprice by alienating the estate by an act *inter vivos* or by will to the detriment of the adopted son.

In the well-known case in which Rajah Nabkissen gave by will the principal part of his property to his son born after adoption and deprived his adopted son of his legitimate share, the Supreme Court after consulting all the principal Pundits held that Rajah Nabkissen, after having

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[1] See the following cases :— *Sumbhoo Chundra Chowdhry* v. *Narain Dibeh* 3 Knapp 55 (1835); 1 W. R. 25 (P.C.); *Lukhee Nath Ray* v. *Shamasoondree* Beng. S.D. Decis. (1858) p. 1863; *Kishen Nath Ray* v. *Hurree Govind Ray* Beng. S.D. Decis (1859) p. 18; *Gooroo Pershad Bose* v. *Rashbehari Bose* Beng. S. D. Decis. 411 (1860); *Taramohun Bhuttacharjee* v. *Kripa Mayee Dabia* 5 Wyman 251 (1868); *Puddo Kumaree Debee* v. *Juggut Kishore Acharjee* 5 Cal. 615 (1879); *Puddo Kumari Debi Chowdhrani* v. *The Court of Wards*, 8 I. A. 229 (1881.): s.c. 8 Cal. 302.

[2] 3 W.R. 49 (1865).

[3] *Uma Sankar Moitro* v. *Kali Kamal Majumdar*, 6 Cal. 256 (F. B.) (1880): s. c. 7 C. L.R. 145: s. c. in J. C. 10 I.A. 138 (1883): s c. 19 Cal. 232: s.c. 13 C.L.R. 379. See *Sham Kuar* v. *Gaya Din*, 1 All. 255 (1876).

adopted Gopymohan Deb as a son, could not devise away his share of the estate from him, and therefore Gopymohan recovered from the Rajah Rajkissen (son born after adoption) the half of the property. Macnaghten J., observed with reference to this point that an adopted son was considered in the nature of *a purchaser for a valuable consideration* as he thereby lost his inheritance in his own natural family out of whom he was adopted.[1]

In *Sudanund Mahapattur* v. *Bonomalee*[2] which came from Cuttack, and in which the adoptive father took a second son in adoption in the life-time of the first and by a will settled the hereditary property upon the second adopted son and disinherited the first son, the Court held that the father could not so deprive the first son of all his rights.

The rule that an adopted son loses all rights in his natural family holds good only *qua* natural son. No doubt he ceases to be a member of his natural father's family but retains his consanguinal *sapind* relationship to the family of his birth. He cannot therefore after adoption marry any damsel in his natural family whom he could not have married before adoption.[3] Nor can he adopt any one from his natural family, whom he could not have adopted, had he remained in the family.[4]

Adoption in Bareilly.

Two kinds of adoption are prevalent in Bareilly viz., the *Kevola* and the *Dwyamushyayana*. By the first the adopted son becomes the son of the adopted father only and thus becomes unqualified to offer oblations to the manes of his natural parents, or to share in their property; and that if any person bestows his only son under this form of

[1] This case was decided about the year 1800 or 1801 and referred to in *Hencower Bye* v. *Hanscower Bye* 2 Morley's Dig. 133 (1818). See also Macnaghten's *Considerations on Hindu Law*, pp. 228-230.

[2] 1 Marshal 317 (1883).

[3] See Dattaka Mimansa VI § 10. Dattaka Chandrika IV § 8.

[4] *Moottia Moodally* v. *Uppon* Mad. Decis p. 117 (1858).

adoption it would not be recognized by the *Shastras*, but under the *Dwyamushyayana* form the adopted child remained the child of his natural as well as his adopting parents; and that an adoption of an eldest son or only son, in this form, would be permitted by the *Shastras*.[1] In considering the question *viz.*, whether an adoption by a widow after her husband's death without any authority from him is valid in the zillah of Etawa, the Court observed: "According to the native text-writers it seems to be clear that the ancient law of Hindoostan required the authority of the husband; but it is also clear that the strictness of that law has been, in many districts, relaxed or modified by local usage; and the opinion of the *Shastris*, as published in Mr. Borrodaile's Bombay Reports, is very strong to show that in the Marhatta States, to the West of the Peninsula, the law does not require any such authority to render the act valid. But that such relaxation has extended to this particular district is not in their Lordship's judgment established; on the contrary, the weight of authority is in favour of the opposite conclusion; the opinion of the Pundits of the Sudder Court, both in this case and in the case of Shumshere Mull (Appendix 83) and that of the Pundit of the Provincial Court of Appeal of Benares in the latter, appearing to be entitled to more credit than those of the Pundits of the zillah and Provincial Courts of Etawah and Bareilly and of the City Court of Benares."[2]

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[1] *Rajah Haimun Chull Sing* v. *Kumer Gunsheam Sing*, 2 Knapp 203 at p. 206 (1834).

[2] Ibid p. 266.

CHAPTER V.

HINDU CUSTOMS.

Impartibility.

The general rule among Hindus is that an estate is divisible among the heirs of the holder on his death; but an impartible estate is an exception to the rule.[1] It is by nature indivisible and capable of enjoyment by only one member of the family at a time. Either by special law or custom, it always devolves entire to one heir. A Raj, a Principality, a State, or an ancient extensive zemindari may be mentioned as instances of impartible estates.

The reason why such estates are impartible seems to be because of the vastness of their area, the impracticability of their division and sub-division, ultimately tending to the extinction of the whole estate; and partly, also, to the fiscal inconvenience that would arise by the process of sub-division. However, whatever may be the reasons for such estates being impartible, a uniform practice and a settled custom have arisen which make them indivisible and put them beyond the ordinary rule of law. It should be noted that there is no presumption of impartibility because an estate is large. The custom of impartibility should be proved in every case.

Primogeniture is the rule of descent of these impartible estates. The eldest son takes the whole estate, subject only to a charge of maintenance, sometimes called *Babooana*, of the junior members of the family. These junior members are allowed a certain sum of money out of the revenues, and in some cases, lands yielding a certain income, by the

[1] *The Secretary of State in Council of India* v. *Kamachee Boye Sahaba*, 7 Moo. I. A 476 p. 437 (1859); *Baboo Ganesh Dutt Singh* v. *Maharaja Moheshur Singh*, 6 Moo. I. A. 164 p. 187 (1855).

ruler or holder of the estate for the time being. Such allowances correspond to appanages to younger members of powerful European families.

The customary rights to succession to such impartible estates seem to have been the subject of a Regulation in 1793, *viz.*, Regulation XI of 1793, which provided that in the case of intestacy, notwithstanding such custom of primogeniture, these estates would devolve (when there is more than one heir) on all the heirs of the deceased holder, each heir succeeding to his respective share. This Regulation came into operation on the 1st of July, 1794.[1] Then, by a further Regulation, *viz.*, Regulation X of 1800, it was declared that the Regulation XI of 1793 would not operate in the *Jungle Mahals* of Midnapore and other districts and subsequently by Sec. 36 of Regulation XII of 1805, estates or *Mahals* in Cuttack were declared to retain their established usage of devolution to a single heir.

In considering the question of impartibility as prevailing in India, we cannot pass over certain tenures where impartibility equally prevails. They, as a rule, go under the name of Service Tenures. Before the advent of the English, Military tenures were very common. The powerful chiefs, as in Europe so in India, held lands of the paramount power on the condition of attending the sovereign with a number of soldiers or a body of horsemen, whenever called upon to do so. Lands were also given to persons who were to hold certain mountainous passes to prevent the passage of enemies or wild elephants.

[1] Sec. 2, Reg. XI. 1793 runs thus :—"After the 1st of July, 1794, if any *Zemindar*, independent *Talookdar*, or other actual proprietor of land, shall die without a Will, or without having declared by a writing, or verbally, to whom and in what manner his or her landed property is to devolve after his or her demise, and shall leave two or more heirs, who, by the 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 of the landed property of the deceased, such persons shall succeed to the shares to which they may be so entitled."

These tenures are called *Ghatwali*. They exist even to this day. Watchmen got lands instead of money to perform the duties of policemen in villages. Such tenures are known as *Chowkidaris* in Bengal, *Vatans* in Bombay and *Karnams* in Madras. These Chowkidari tenures or Chakran lands are gradually being resumed and the village Chowkidars are paid a salary. Besides these, we may mention *Jagirs* or *Saranjams*, as they are called in Bombay. Jagirs are estates given by the sovereign power to individuals for meritorious services. All such tenures bear the character of impartibility and descend to the person who discharges the services. In Madras there is a class of impartible estates known as *Polliams*. These as well as *Inam* lands and lands dedicated to "Mutts" and Temples are properly included under impartible estates. The mode of descent of this class of lands will be treated in the next chapter under "Religious Endowments".

From old records of decided cases we find that most of the Rajes and Principalities were subjects of frequent and renewed litigation, in some cases litigation lasting over a period of sixty years, and coming up before the Judicial Committee about half a dozen times before final decision. Among others we may mention the following Rajes as of considerable importance:—

Tipperah Raj.[1]
Tirhoot Raj.[2]
Bettiah Raj.[3]
Hunsapore or Hatwa Raj.[4]

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[1] *Ramgunga Deo* v. *Durga Munee Jobraj* 1 S.D. Sel. Rep. 270 (1809); *Neelkisto Deb Burmono* v. *Beerchunder Thakoor* 12 Moo. I. A. 523 (1869) and other cases.

[2] *Maharaj Kowur Basdeo Singh* v. *Maharajah Roodur Singh Bahadoor* 7 S. D. Sel. Rep. 271 (1846); *Baboo Gunesh Dutt Singh* v. *Maharaja Maheshur Singh* 6 Moo. I.A. 164 (1855).

[3] *Ram Nundun Singh* v *Maharani Janaki Koer* 29 Cal. 828 (P. C.) (1902): S. C. 7 C. W. N. 57.

[4] *Baboo Beer Pertab Sahee* v. *Maharaja Rajender Pertaub Sahee* 12 Moo. I.A. 1 (1867).

Manbhoom Estate.[1]
Soosung Estate.[2]
Shivagunga Zemindari.[3]
Pachet Raj.[4]
Pactum Raj (in Chota Nagpur).[5]
Bhara Raj.[6]
Ramghur Raj in Chota Nagpur.[7]
Seohur Raj (in Tirhoot).[8]
Pittapur Raj (in the Godaveri District).[9]
Tanjore Raj.[10]
Totapalli Estate (in Rajamundry).[11]
Devarakota Estate.[12]
Vallur Zemindari.[13]
Tank.[14]

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[1] *Rajah Rughoonath Singh* v. *Rajah Hurrehur Singh* 7 S. D. Sel. Rep. 146. (1843).

[2] *Ranee Hursoondree Dibbea* v. *Rajah Bishennath Singh* 3 S. D. Decis. 339 (1847).

[3] *Katama Natchiar* v. *The Raja of Shivagunga* 9 Moo. I. A. 539 (1863) and several other cases. The latest being *Muttuvadugaanadha Tevar* v. *Periasami* alias *Udayana Tevar* 23 I. A. 128 (1896).

[4] *Anund Lal Singh Deo* v. *Maharaja Dhiraj Gurrood Narayun Deo, Bahadur* 5 Moo. I. A. 82 (1850); *Nilmoney Singh Deo* v. *Hingoo Lall Singh Deo* 5 Cal. 256 (1879).

[5] *Rajah Udaya Aditya Deb* v. *Jaduh Lall Aditya Deb* 8 I. A. 248 (1881): S. C. 8 Cal. 199.

[6] *Raja Rup Singh* v. *Rani Baisni and the Collector of Etawah* 11 I. A. 149 (1884).

[7] *Maharanee Heeranauth Koocree* v. *Baboo Burm Narain Singh* 15 W. R. (1871); *Maharani Hiranath Koer* v. *Baboo Ram Narayan Singh* 9 B. L. R. 274 (1873).

[8] *The Collector of Wards* v. *Rajkumar Deo Nundun Singh* 9 B.L.R. 310*n* (1871).

[9] *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *Court of Wards* 26 I.A. 83 (1899): 22 Mad. 383: 3 C.W.N. 415.

[10] *The East India Co.* v. *Kamachee Boye Sahiba* 7 Moo. I. A. 476 (1859): 4 W.R. (P.C.) 42.

[11] *Sri Rajah Venumulla Gavuridevamma Garu* v. *Sri Rajah Venumula Ramandora Garu* 6 Mad. H.C.R. 93 (1870).

[12] *Srimantu Raja Varlagadda Mallikarjuna* v. *Srimantu Raja Varlagadda Durga* 17 I.A. 134 (1890).

[13] *Venkata Narasimha Naidu* v. *Bhashyakarlu Naidu* 22 Mad. 538 (1899).

[14] *Mahommad Afzal Khan* v. *Ghulam Karim Khan* 30 Cal. 843 (P. C.) [1903].

Zemindari in Bhagulpore.[1]

Patia Raj (in Cuttack).[2]

Normal state of Hindu family is joint.

The normal state of every Hindu family is joint, and where there is no proof of division, the presumption is that the family is joint in food, worship and estate.[3] An impartible estate is, according to Hindu law, a joint family property and not a separate property, unless a custom to the contrary is shown.[4] An ancestral estate, even though impartible, is not the separate or self-acquired estate of the single member upon whom it devolves so long as the family continues joint.[5] The impartibility of property does not *per se* destroy its nature as joint family property or render it the separate estate of the last holder, so as to destroy the right of another member of the joint family to succeed to it upon the death of the former in preference to those who would be his heirs if the property were separate.[6] "The rule upon this subject" observed their Lordships "was stated in the *Shivagunga case*.[7] It is there said: 'The Zemindari is admitted to be in the nature of a principality—impartible and capable of enjoyment by only one member of the family at a time. But whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings), the rule of succession to it is now

[1] *Musst. Maharani* v. *Beni Pershad Rai* 4 S.D Sel. Rep. 62 (79) [1825].

[2] *Gopal Prasad Bhakat* v. *Rajah Debbya Singh Deb* 9 C. W. N. 330 (1904).

[3] *Neelkisto Deb Burmono* v. *Beer Chunder Thakur*, 12 Moo. I.A. 523 (1869).

[4] *Bhawani Ghulam* v. *Deoraj Kuari* 5 All. 542 (1883). See also *Katama Natchier* v. *Rajah Moottoo Vijaya* 9 Moo. I.A. 539 (1863); *Ramalakshmi Ammal* v. *Sivaantha Perumal Sethurayar*, 14 Moo. I.A. 570 (1872); *Doorga Persad Singh* v. *Doorga Konwari* 4 Cal. 190 (1878); *Rajah Yanumula Venkayamah* v. *Rājah Yanumula Boochia Vankondora* 13 Moo. I.A. 333 (1870); *Periasami* v. *Periasami* 5 I.A. 61 (1878).

[5] *Rajah Rup Singh* v. *Rani Baisni and the Collector of Etawah* 11 I. A. 149 (1884): s.c 7 All. 1; *Chowdhry Chintamun Singh* v. *Musst. Nowlukho Konwari* 2 I.A. 263 (1875).

[6] *Doorga Persad Singh* v. *Doorga Konwari* 4 Cal. 190 (P.C.) [1878].

[7] 9 Moo. I.A. 588.

admitted to be that of general Hindu law prevalent in that part of India, with such qualifications only as flow from the impartible character of the subject. Hence, if the Zemindar, at the time of his death, and his nephews, were members of an undivided Hindu family, and the Zemindari, though impartible, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle. If, on the other hand, the Zemindar at the time of his death was separate in estate from his brother's family, the Zemindari ought to have passed to one of his widows and, failing his widows, to a daughter or descendant of a daughter, preferably to nephews; following the course of succession which the law prescribes for separate estate. These propositions are incontestible; but Gouri Vallabha Taver's widows and daughters have advanced a third, which is one of the principal matters in question in this appeal. It is, that even if the last zemindar continued to be generally undivided in estate with his brother's family, this zemindari was his self-acquired and separate property'."[1] The same rule was laid down by their Lordships in the case of *Periasami* v. *Periasami*.[2]

Inalienability of an Impartible estate.

Impartibility of a Raj does not render it inalienable as a matter of law. Its inalienability depends upon family custom which must be proved.[3] Or in other words, inalienability, like impartibility, is a special independent incident which lies outside the ordinary Hindu law and can only attach to an impartible estate by family custom and cannot be deduced from a theory of dormant co-ownership.[4] Alienation by the proprietor of an impartible

[1] *Doorga Persad Singh* v. *Doorga Konwari*, 4 Cal. 201.

[2] 5 I.A. 61 (1878): s.c. 1 Mad. 312.

[3] Vide *Pectum* Raj case; *Rajah Udaya Aditya Deb* v. *Jadab Lal Aditya Deb* 8 I.A. 248 (1881): s.c. 8 Cal. 199 (P. C.): S. C. in Cal. H. C. 5 Cal. 113: 4 Shome Notes 11 (1879). See *Anund Lall Singh* v. *Maharaja Govind Narain Deo* 5 Moo. I.A. 82 (1850).

[4] *Sivasubramania* v. *Krishnammal* 18 Mad. 287 (1894); *Nitrpal Singh* v. *Jai Singh* 23 I. A. 137 (1896); s.c. 19 All. 1.

Raj, which is inalienable by custom is valid if made for legal necessity; and his successor who takes the Raj by right of survivorship is, under the Mitakshara law, liable for the debts proved to have been contracted for legal necessity.[1]

Where, by virtue of a custom, an ancestral immoveable property is not partible among the members of a joint family governed by the Mitakshara, but descends from the father to his eldest son, the father cannot alienate such property without the concurrence of his son, unless such alienation is justified by family necessity.[2]

Rani Sartaj Kuari's case.

In *Rani Sartaj Kuari's* case, the point for determination was whether a gift of certain villages by the Rajah in favour of his younger wife, without the consent of his son, was valid. The villages in question were a part of the ancestral Raj, which was governed by the Mitakshara law in all other respects, except that, by custom, it was impartible, and descendible to a single heir by the rule of primogeniture. The Judicial Committee held that in order to render the Rajah's gift invalid, as made without the consent of his son, it must be shewn that the Rajah's power of alienation was excluded by the custom or by the nature of the tenure. Their Lordships said that "the eldest son, where the Mitakshara law prevails, and there is the custom of primogeniture, *does not become a co-sharer with his father in the estate*; the inalienability of the estate depends upon custom which must be proved, or it may be in some cases upon the nature of the tenure."[3]

In the same case the Judicial Committee made certain observations, with reference to the nature of the evidence

[1] *Gopal Prasad Bhakat* v. *Raghunath Deb* 32 Cal. 158 (P.C.) [1904].

[2] *Rajah Ram Narain Singh* v. *Pertum Singh* 11 B.L.R. 397; S.C. 20 W.R. 189 (1873).

[3] *Per* Sir Richard Couch in *Rani Sartaj Kuari* v. *Rani Deoraj* 15 I. A. 51 p. 65 (1887); S.C. 10 All. 272; see also 13 B. L.R. 445 which was followed in the above case.

necessary to prove a custom of inalienability, which should be noticed. Their Lordships said: "The fact that there is no evidence of a sale of any portion of the estate is in the Plaintiff's favour, but this is not sufficient. The absence of evidence of an alienation without any evidence of facts which would make it probable that an alienation would have been made, cannot be accepted as a proof of a custom of inalienability."[1] Where the custom of inalienability is established, any alienation by the holder of an impartible estate will be regarded as invalid.[2]

The principle laid down in *Rani Sartaj Kuari's* case has been followed in other provinces, and this case has become the leading case on the subject. In pursuance of this ruling the Allahabad High Court in a later case[3] has held that if amongst Hindus, governed by the law of the Mitakshara, a Raj happens to be impartible and governed by the rule of primogeniture, it does not therefore follow that it is inalienable. The condition of inalienability depends upon special custom or, in some cases, upon the special tenure of the Raj, and must be clearly proved.

Sartaj Kuari followed in the Madras Presidency.

Prior to the year 1889, and as far back as 1822, a series of decisions established a custom of inalienability of impartible estates in the Madras Presidency. But a departure from these old decisions was first made in the case of *Beresford* v. *Ramasubba*.[4] In this case the holder of an impartible zemindari, governed by the law of primogeniture, and having a son executed a mining lease of the part of the zemindari for a period of twenty years. The Madras High Court following the *Sartaj Kuari's* case, held that the lease was not invalid as against the grantor's minor son, and the person to whom the Court of Wards granted certain mining rights on the same land. The learned

[1] 15 I. A. 66.

[2] *Sivasubramnia Naicker* v. *Krishnammal* 18 Mad. 287 (1894).

[3] *Rup Singh* v. *Pirbhu Narain Singh* 20 All. 537 (1898).

[4] 13 Mad. 197 (1889).

Judges said they were bound by the decision of the Privy Council and overruled the old decisions, which were based "upon the construction of Regulation XXV of 1802 and, afterwards upon the rights of the members of an undivided family under the Mitakshara law." The Privy Council in a very recent case[1] has finally settled the point, holding that an impartible zemindari is not inalienable by Will or otherwise by virtue only of its impartibility, and in the absence of proof of some special family custom or tenure attaching to the zemindari and having that effect. It was contended before their Lordships that *Sartaj Kuari*'s case was not binding in the Madras Presidency and that a long course of decisions had established a custom of inalienability. The Judicial Committee examined a number of cases and after carefully considering them held that the ruling in *Sartaj Kuari* was applicable to the zemindaris in the Presidency of Madras.

In *Venkata Narsimha Naidu* v. *Bhashyakarlu Naidu*[2] the Madras High Court, following the Judicial Committee's decision in the above case, has laid down that the sons of the present holder of an impartible estate have no *locus standi* to question the acts of their father.

In provinces where the Bengal school prevails, a holder of an ancestral impartible estate with descent by the rule of primogeniture can, without the consent of his sons, sell, give or pledge the estate, and, by Will, prevent, alter or affect their succession to such property.

Rule of succession to an Impartible estate.

Where the impartibility 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 inheritance any persons of either sex, if without physical

[1] *Sri Rajah Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *Court of Wards* 26 I. A. 83 (1899) : s.c. 22 Mad. 383 : s. c. 3 C. W. N. 415.

[2] 22 Mad. 538 (1899).

or intellectual infirmity.[1] But where the right of succession to a Raj depends upon the custom which regulates the devolution of the Raj, the true question as between rival claimants is: Which of them is favoured by the custom as known to the public functionaries of the district, as recognized by the family itself of the late Rajah and as established by precedents?[2]

On the question as to the extent to which property of the nature of an impartible Raj is excepted from the general law by a special rule of succession entitling the eldest of the next of kin to take solely, it has been held that such a usage does not interfere with the general rules of succession further than to vest the possession and the enjoyment of the corpus of the whole estate in a single member of the family, subject to the legal incidents attached to it as the heritage of an undivided family. The unity of the family right to the heritage is not severed any more than by the succession of coparceners to partible property; but the mode of its beneficial enjoyment is different. Instead of several members of the family holding the property in common, one takes it in its entirety, and the common law rights of others who would be coparceners of partible property, are reduced to rights of survivorship to the possession of the whole, dependent upon the same contingency as the rights of survivorship of coparceners *inter se* to the undivided share of each; and to a provision for maintenance in lieu of co-parcenary shares.[3]

The sound rule to lay down with respect to undivided or impartible ancestral property is, that all the members of the family who, in the way pointed out, are entitled to unity of possession and community of interest, according to the law of partition, are co-heirs, irrespectively of their

[1] *Maharance Heeranauth Kooeree* v *Baboo Burm Narain Singh* 15 W. R. 375 (1871) *per* Markby J.

[2] Ibid.

[3] *Sri Rajah Venumula Gavaridevamma Garu* v. *Sri Rajah Venumula Ramandora Garu* 6 Mad. H. C. R. 93 (1870).

degrees of agnate relationship to each other, and that on the death of one of them leaving a widow and no near "Sapindas" in the male line, the family heritage both partible and impartible, passes to the survivors or survivor to the exclusion of the widow. But when her husband was the last sovereign, the widow's position as heir, relatively to his other undivided kinsmen, is similar to her position with respect to his divided or self and separately acquired property.[1]

The question whether an estate is subject to the ordinary Hindu law of succession, or descends according to the rule of primogeniture must be decided in each case according to the evidence given in it.[2] In determining the right of succession to an impartible estate the class of kindred from whom a single heir is to be selected should be first ascertained. Next, it should be seen whether family custom or *Kulachar* discloses a special rule of selection, and, in default of such custom, seniority of age constitutes a title by descent to impartible estate by analogy to general Hindu law.[3] When an impartible property, governed by the Mitakshara, passes by survivorship from one line to another, it devolves not necessarily on the coparcener nearest in blood but on the nearer coparcener of the senior line.[4] When an estate is impartible, it is enjoyed in a different mode from that prescribed by the ordinary Hindu law; but the inheritance is to be traced by the same mode, unless some further family custom exists beyond the custom of impartibility.[5]

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[1] Ibid.

[2] *Srimantu Raja Yarlagadda Mallikarjuna* v. *Srimantu Raja Yarlagadda Durga* 17 I. A. 134 (1890).

[3] *Subramanya Pandya Chokka Talavar* v. *Siva Subramanya Pilla* 17 Mad. 316 (1894).

[4] *Kachi Vura Rangappa Kolokha Thola Udayar* v. *Kachi Kalyana Rangappa Kallaka Thola Udayar* 24 Mad. 562 (1901).

[5] *Mutturadugunadha Tevar* v. *Periasami* 23 I A. 128 p. 137. (1896).

Where, by the usage of the country and family of parties claiming certain prerogatives and property, it was customary that such should vest in the senior male of a particular branch of the family, the court held that a testamentary disposition in favour of any other member of the family was void and of no effect.[1] Where, in consequence of a suit for partition of the entire family property, a portion of the property is divided, but the remaining portion is declared impartible, the family remains undivided in respect to the latter portion.[2]

Primogeniture.

The right of the eldest among the males to inherit real estate or dignity is called *Primogeniture*. This right was not acknowledged by the Romans among whom sons and daughters all shared equally the property of their parents. In continental countries it exists in a modified form only, if at all.[3] Amongst Hindus in India succession in consequence of primogeniture seems to be the rule only in the case of large zemindaris and estates which partake of the nature of principalities.[4] By the ancient custom of the family an impartible zemindari may descend to the eldest son only, other sons getting maintenance for life.[5] An estate may not be a *Raj* nor a *Polliam*, yet a custom of

[1] *Malosherry Kowilagom Rama Wurma Rajah* v. *Moothorakal Kowilagom Rama Wurma Rajah* 1 Mad. Decis 509 (1825).

[2] *Mallikarjuna Prasada Naidu* v. *Durga Prasada Naidu* 17 Mad. 362 (1893).

[3] Eyre and Lloyds' *Rights of Primogeniture and Succession.*

[4] *Garuradhwaja Prasad* v. *Superundhwaja Prasad* 23 All. 37 P.C. (1906); *Bhujangrav* v. *Malojirav* 5 Bom. H. C. R. 161 (1868). *Bhawani Ghulam* v *Deo Raj Kuari* 5 All. 542 (1883): S.C. in P. C. 15 I. A. 51 (1887): S. C. 10 All. 272; *Katma Natchier* v *Rajah Mottoo Vijaya Raganadha Bodha* 9 Moo. I. A. 539 (1883); *Ramalakshmi Ammal* v. *Sivanantha* 14 Moo. I.A. 570 (1872); *Rajah Yanumula Vinkayamah* v. *Rajah Y. B. Vankondora* 13 Moo. I.A. 333 (1870); *Periasami* v. *Periasami* 5 I.A. 61 (1878); *Thakoor Ishri Singh* v. *Baldeo Singh* 11 I. A. 135 p. 145 (1884).

[5] *Lall Munee Koonwaree* v. *Rajah Nemyenarain* 6 S. D. Sel. Rep. 255 (319) [1839]: *Thakoorai Chutturdharee Singh* v. *Thakoorai Telakdharee Singh* 6 S. D. Sel.

descent according to the law of primogeniture may exist by *Kulachar* or family custom.[1] But in the case of petty Hindu family a custom of primogeniture *i.e.* the eldest son alone succeeding to the estate and other sons being entitled to maintenance only, cannot be supported.[2] The question whether an estate is subject to the ordinary Hindu law of succession or descends according to the rule of primogeniture, must be decided in each case according to the evidence given in it.[3]

Lineal primogeniture.

By lineal primogeniture is meant a "continual descent to the eldest member of the eldest branch in exclusion of nearer members of younger branches." Thus, in the event of an eldest son dying before his father, and leaving a son, the latter, surviving his grandfather, shall succeed to the prejudice of the other sons of the Rajah.[4] The only alternative to lineal primogeniture is primogeniture by proximity of degree and among those who are equal in proximity the elder line is to be preferred.[5]

Rep. 260 (325) [1839]; *Rao Golab Singh* v. *Rao Oomrao Singh* N.W.P. Decis. 205 (1859); *Anund Lal Singh Deo* v. *Maharaja Dhiraj Gurrood Narayan Deo Bahadur* 5 Moo. I.A. 82 (1850) : S. C. in the Lower Court 6 S. D. Sel. Rep. 282 (1840); *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* 12 Moo. I. A. 1 (1367); *Baboo Gunesh Dutt Singh* v. *Maharajah Moheshur Singh* 6 Moo. I. A. 164 (1855); *Nitr Pal Singh* v. *Jai Pal Singh* 19 All. 1 (P. C.) [1896].

[1] *Chowdhry Chintamun Singh* v. *Musst. Nowlukho Konwari* 2 I. A. 263 (1875) : S. C. 1 Cal. 153 : 24 W. R. 253 : S. C. in H. C. 20 W. R. 247 ; *Rawut Urjun Singh* v. *Rawut Ghunsiam Singh* 5 Moo. I. A. 169 (1851) ; *Shyamanand Das Mohapatra* v. *Rama Kanta Das Mahapatra.* 32 Cal. 6 (1904) ; *Yarlagadda Malikarjuna* v. *Y. Durga* 17 I. A. 134 (1890): S. C. 13 Mad. 406.

[2] *Basvantrav Kidingappa* v. *Mantappa Kiddingappa* 1 Bom. H.C.R. App. 42 (1865).

[3] *Srimantu Mallikarjun* v. *Srimantu Durga* 17 I. A. 134 (1890). Followed in *Kachi Kaligana R. K. J. Udayar* v. *Kachi Y. R. K. T. Udayar* 28 Mad. 508 (P. C.) [1905] : 10 C.W.N. 95 : S. C. 2 C. L J. 231.

[4] *Lall Munnee Koonwari* v. *Rajah Nemyenarain* 6 S. D. Sel. Rep. 255 (319) [1839] ; *Rawut Urjun Singh* v. *Rawut Ghunsiam Singh* 5 Moo. I. A. 169 (1851). *Mehesh Chunder Dhal* v. *Satrughan Dhal* 29 I. A. 62 (1901) ; S.C. 29 Cal. 343 : S.C. 6 C.W.N. 459.

[5] *Muhammad Imam Ali Khan*

Among others the folowing may be mentioned as the estates where primogeniture prevails :—Purgunnah Palaoon in Chota Nagpore ;[1] Rungpur zemindari ;[2] Purgunnah Raipur in Manbhoom ;[3] Hatwa ;[4] Bettiah ;[5] Zemindari of Koocheysur in Meerut ;[6] Baswan family of Jats in Alighur ;[7] Dhalbhoom Estate ;[8] Chiefship of Tank in Dera Ismail Khan ;[9] in the district of Cuttack in Orissa ;[10] Zemindari of Pachete.[11] And the following, where the rule of primogeniture has not been established :—Talook Sunkra in Bhagulpore ;[12] Talook Majhouli in Bhagulpur ;[13] Jhajpur in Meerut ;[14] Zemindari in Mymensingh.[15]

The term *gadinashini* employed in the N. W. Provinces is used in the same sense as primogeniture in Bengal or other *Gadinashini.*

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v. *Sardar Hussain Khan* 2 C. W. N. 737 s. c. 26 Cal. 90 (P. C. (1898).

[1] *Thakoorai Chutturdharee Singh* v. *Thakoorai Telukdharee Singh* 6 S. D. Sel. Rep. 260 (325) [1839].

[2] *Mookund Deb Raikut* v. *Rance Bissessuree* 9 S. D. Decis 159 (1853).

[3] *Rajah Raghoonath Singh* v. *Rajah Hurrihur Singh* 7 S. D. Sel. Rep. 146 (1843).

[4] Mentioned in 8 Sevestre 291 (1865) re *Rajah Rajkristo Singh* Primogeniture prevails in Hatwa and Bettiah.

[5] *Ram Nundan Singh* v. *Maharani Janki Koer* 29 I. A. 178 (1902) ; P. C. 7 C. W. N. 57.

[6] *Rao Golab Singh* v. *Rao Oomrao Singh* N. W. P. Decis 205 (1859).

[7] *Garurudhwaja Parshad Singh* v. *Saparandhwaja Pershad Singh* 27 I. A. 238 (1900) ; 23 All. 37 ; 5 C.W.N. 33.

[8] *Mohesh Chunder Dhal* v. *Satrughan Dhal* 29 I. A. 62 (1901): 29 Cal. 343 : 6 C.W.N. 459.

[9] *Sardar Muhammad Afzal Khan* v. *Nawab Ghulam Kasim Khan* 30 I. A. 190 (1903) : 30 Cal. 140 : 8.C.W.N. 81.

[10] *Shyamanund Das Mahapatra* v. *Ramakanta Das Mahapatra* 32 Cal. 6 (1904).

[11] *Maharajah Gurunarain Dev* v. *Anund Lal Singh* 6 S. D. Sel. Rep. 282 (1840).

[12] *Musst. Sheo Soondooree* v. *Pirthee Singh* 21 W. R. A. 9 (1872).

[13] *Amrit Nath Chowdhry* v. *Gouri Nath Chowdhry* 6 B. L. R. 232 (P. C.) [1870].

[14] *Muhammad Ismail Khan* v. *Fidayat-un-nissa* 3 All. 723 (1881).

[15] *Re Rajah Rajkristo Singh* 8 Sevestre 291 (1865). *Rajkishen Singh* v. *Ramjoy Burma Mozoomdar* 1 Cal. 136 (P. C.) (1872).

Provinces. Lord Hobhouse said: "The other remark is a suggestion that there is no necessary connection between *gadinashini* and primogeniture. That may be so; but it is impossible to read the evidence without seeing that the witness on both sides treat the two as identical, or the former as proving the latter. Not a single question is put to any witness who has affirmed or denied *gadinashini* for the purpose of disconnecting it from primogeniture. It is clear that the Subordinate Judge had no suspicion that the evidence applying to *gadinashini* could be taken as not applying to primogeniture. The first suggestion of such a distinction comes from the High Court. Their Lordships think that when the witnesses affirm or deny *gadinashini*, they mean to affirm or deny primogeniture; and their constant identification of the two things show how closely they are connected in the minds of the families of that part of the country. The custom of *gadinashini* has clearly an important bearing on that of primogeniture though the connection between them may not be a necessary one."[1]

In another very recent case which made reference to the foregoing case, the Judicial Committee discussed the oral evidence relating to the practice of *gadinashini*. From the statements of witnesses who deposed to the effect that "by *gadinashini* the practice of one person or the eldest son succeeding to the whole estate and the other sons getting maintenance" their Lordships gathered that "expression of this kind shewed the identification in the minds of witnesses of the right of sitting on the *gadi* with succession to the estate."[2]

Allegation of illegitimacy and rule of primogeniture.

In a claim to inheritance by a younger son in a family in which primogeniture is admitted to be the rule, the Court requires convincing proof of the illegitimacy of the

[1] *Nitr Pal Singh* v. *Jai Pal Singh* 23 I. A. 147 (1896) : S. C. 19 All. 1.

[2] *Garuradhwaja Prasad* v. *suparundhwaja Prasad* 23 All. 37 (P. C.) [1900].

elder brother in order to set him aside. In the absence of such proof, the claim of the younger was rejected.[1]

Priority of birth and not that of the marriage of the mother.

The eldest son who succeeds by virtue of the rule of primogeniture is the son who was born first by any of the wives and not the first born son of the senior or *first* married wife.[2] In a Madras case the High Court after carefully considering all the authorities and texts on the point held that "as regards the right of sons by different wives to inherit, whether in coparcenary or as sole heir (except perhaps the son of the first wife) the priority in point of time of their mothers' marriages has never been regarded when the wives were equal in caste and rank, and that the rule of primogeniture was and is the same in the case of sons by several wives of equal caste and rank as in the case of sons by one wife."[3]

In *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar*[4] the Judicial Committee laid down that the son of a wife married subsequently was entitled to an impartible zemindari in preference to the son of a wife married first, as by Hindu law priority of birth was not affected by the prior marriage with the senior wife. If a party rely upon a special custom of a family to take the succession to the zemindari out of the ordinary Hindu law such custom must be proved to be ancient and continuous.

In a later case the Judicial Committee following the above case held that an elder-born son though of the junior wife is entitled to succeed to the father's estate in preference to the younger-born son of the elder wife.[5]

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[1] *Mokund Deb Rackut* v. *Ranee Bissessuree* 9 S. D. Decis. 159 (1853).

[2] *Rajah Raghonath Singh* v. *Rajah Hurcehur Singh* 7 S. D. Sel. Rep. (126) 146 [1843]. *Rawut Urjun Singh* v. *Rawut Ghunsiam Singh* 5 Moo. I. A. 169 (1851); *Bhujangrav bin Davalatrav Ghorpode* v. *Malajirav bin Davalatrav Ghorpode* 5 Bom. H. C. R. 161 (1868).

[3] *Sivanananja Perumal Sethurayar* v. *Muttu Ramalinga Sethurayar* 3 Mad. H. C. R. 75 (1865).

[4] 14 Moo. I. A 570 (1872): s.c. 12 B. L. R. 396: s.c. 17 W.R. 553.

[5] *Pedda Ramappa Nayanivaru* v. *Bangari Seshamma Nayanivaru* 8 I. A. 1 (1880): s. c, 2 Mad. 286.

Sometimes by custom, according to priority of marriage and not of birth.

Sometimes again, according to custom, an impartible estate descends to the sons according to priority in order of marriage of their mothers. In a very recent case[1] the Privy Council, agreeing with the concurrent findings of the lower courts, held that the custom was established to the effect that the defendant was entitled to succeed to an impartible estate (in the Madura district) in preference to his half-brother, the plaintiff, by reason of his mother having been married prior to the plaintiff's mother. The plaintiff in this case was senior in age to the defendant, but born of a wife who was married subsequent to the mother of the defendant. Further the mother of the defendant was a daughter of a zemindar, whereas the mother of the plaintiff was a daughter of an ordinary ryot.

Full brother in preference to half brother.

In the last Tipperah case the Privy Council has observed that the rule of "religious obligation and priority marks the brother of the whole blood as preferably heir in succession to the estate of his brother, over the brother of the half-blood only."[2]

Illegitimate brother's right.

Where a Rajah succeeded to an impartible Raj as the only legitimate son of the last holder and died without leaving any male issue, it was held that his illegitimate brother was entitled to succeed under the Mitakshara by survivorship. This was in the district of Cuttack.[3]

Exclusion of females.

A female cannot inherit an impartible ancestral estate belonging to a joint Hindu family governed by the Mitakshara, where there are any male members of the family who are qualified to succeed as heirs. This is a rule of law and not dependent on custom. A custom

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See *Jagdish Bahadur* v. *Sheo Pertab Singh* 28 I. A. 100 (1901): s. c. 23 All. 369.

[1] *Sundaralingaswami Kamaya Naik* v. *Ramaswami Kamaya Naik* 26 I. A. 55 (1899).

[2] *Neelkisto Deb Burmono* v. *Beer Chunder Thakoor* 12 Moo I. A. 523 p. 541 (1869).

[3] *Rajah Jogendra Bhupati Hurri Chundun Mahapatra* v. *Nityanund Mansingh*, 17 I. A. 128 (1890): s. c. 18 Cal. 151.

modifying the law must be a custom to admit females and not a custom to exclude them.[1] The case in which the above proposition was laid down was approved of by the Judicial Committee in *Chowdhury Chintamun Singh* v. *Musst. Nowlukho Konwari*[2] and their Lordships in *Rajah Rup Singh* v. *Rani Baisni*[3] said of it that "it was correctly decided and is a binding authority."[4]

These cases no doubt establish that a female cannot inherit an impartible *ancestral* estate, but there is no inconsistency between a custom of impartibility and the right of females to inherit an impartible estate. The *Shivagunga* case[5] has laid down that where an impartible estate is a self-acquired and a separate property of the holder and the latter dies without any male issue, leaving a surviving daughter, the latter succeeds him in preference to his collateral heirs. The Privy Council in the latest *Bettiah Raj* case held that there was not sufficient evidence of a custom to exclude females from inheritance affecting the Bettiah Raj. But their Lordships in considering the evidence on the question whether by the custom of this family females are excluded from inheritance observed thus :—"His (counsel's) argument was that when once you admit a custom, as of impartibility, you are outside the common law, and it lies upon those, who maintain any particular right, as of females, to take by inheritance, to prove it. The answer to this argument lies on the surface. 'Where a custom is proved to exist it supersedes the general law, which, however, still regulates all outside the

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[1] *Maharani Hira Nath Koer* v. *Baboo Ram Narayan Singh* 9 B.L. R. 274 (1872) : s. c. 17 W. R. 316.

[2] 2 I. A. 263 p. 270 (1875) : s. c. 24 W. R. 255.

[3] 11 I. A. 149 p. 154. (1884) : s.c. 7 All. 1.

[4] See *Musst. Mahamaya Dibea* v. *Gourikant Chowdry* 1 S. D. Sel. Rep. 236 (316) [1808] ; *The widows of Rajah Zorawur Singh* v. *Koonwar Pertu Singh* 4. S. D. Sel. Rep. 57 (1825) ; *Rance Hursoondree Dibbea* v. *Rajah Bishennath Singh* 3 S. D. Decis. 339 (1847).

[5] See *Infra* p. 189.

custom."[1] There is no inconsistency between a custom of impartibility and the right of females to inherit, as may be illustrated by the well-known *Shivagunga* case and, therefore, the general law must prevail, unless it be proved that the custom extends to the exclusion of females."[2] It may be noted that the Privy Council agreeing with the High Court found that "the present Bettiah Raj must be taken to have been the separate and self-acquired property of Bir Kishore Singh, though with all the incidents of the family tenure of the old estate as an impartible Raj."[3]

Properties purchased by the holder of an impartible estate out of his savings of the estate, would be his self-acquired estates and in the absence of any intention on his part to incorporate them with the ancestral estate, their succession will follow the course of succession prescribed for separate estate.[4]

Babooana allowance.

The term *Babooana* signifies certain allowances granted to the junior members of a family by way of maintenance when the estate or Raj descends to the eldest male heir according to the rule of primogeniture. The grant may be a landed property or some money allowance. Where the grant is a property in lieu of money-maintenance, it is generally subject to the proprietary rights of the grantor and to his ultimate claim as reversioner on the extinction of the grantee's descendants in the male line. The eldest son who succeeds to the *gadi* or Raj assumes the title of Rajah or Maharajah, and the younger male members are called either *Baboos* (as in Behar) or *Thakoors* (as in Tipperah) or *Hakim, Konwar, Lals* (as in Chota Nagpur) and so forth. Hence it is called *Babooana*. According to the family custom these younger members receive from the reigning Rajah grants for their maintenance. They have no power

[1] *Neelkisto Deb Burmono* v. *Beerchunder Thakoor* 12 Moo. I. A. 523, p. 542, (1869).

[2] *Ram Nundun Singh* v. *Janki Koer* 29 Cal. 828 p. 852 (P. C.) [1902] : 8. C. 7 C. W. N. 57.

[3] Ibid 851.

[4] *Srimati Rani Parbati Kumari Debi* v. *Jagadis Chander Bhabal* 29 I. A. 82 p. 98 (1901).

to alienate such grants but to enjoy them as long as they live.[1]

The question of the *Babooana* grant by the Maharajah of Durbhunga came up before the Privy Council in several cases.[2] In *Maharajah Sir Rameshwar Singh Bahadur* v. *Baboo Jibendar Singh* it was decided that "Babooana" lands are alienable, subject to the proprietary right of the grantor and to his ultimate claim as reversioner on the extinction of the grantee's descendants in the main line. In the last case, (*Ramchunder Marwari* v. *Mudeshwar Singh*) it has been further held that a son of the grantee acquires an interest in such a property at his (the grantee's) death.

Money pension by family usage.

In a suit for maintenance, the plaintiff, as one of the widows of the late Rajah of Gurh Kishenpershad in Cuttack sued the defendant successor to her husband in the Raj for maintenance by a money-pension according to the usage of the family. The defendant admitted plaintiff's right to maintenance but pleaded that the family pensions were not paid in money but by allotment of land, and that the plaintiff had long been in possession and enjoyment of the same. But as the defendant failed to prove the allotment of lands, a money-pension was decreed to the plaintiff.[3]

Shivagunga case.

The zemindari of *Shivagunga* is an estate of great value situate in the district of Madura in the Presidency of Madras. The zemindari is said to have been created in the year 1730 by the then Nawab of the Carnatic in favour of one *Shasavarna* on the extinction of whose

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[1] See Tipperah Raj case, Hunsapore Raj case, Tirhoot Raj case, etc. *Supra* under Family Customs.

[2] *Baboo Gonesh Dutt Singh* v. *Maharajah Moheshur Singh* 6 Moo. I.A. 164 at pp. 192, 197; *Maharajah Sir Rameshwar Singh Bahadur* v. *Baboo Jibendar Singh Bahadur* 9 C. W. N. 567 (1905); s. c. 32 Cal. 683; *Ram Chundra Marwari* v. *Mudeshwar Singh* 10 C. W. N. 978 (1906).

[3] *Raja Chundersikhore* v. *Beebee Bishnoomulotee Deye* 12 S. D. Decis 196 (1856).

lineal descendants in 1801, it was treated as an escheat by the East India Company, which had then become possessed of the sovereign rights of the Nawab, and was granted by the Madras Government to a person called (among his many other names) *Gowery Vallabha Taver*. He had an elder brother, by name *Oya Taver*, who predeceased him, dying in 1815. *Gowery Vallabha*, who married seven wives died on the 19th July, 1829, without male issue but leaving three surviving widows, (of whom two were childless and one was *en ciente* at the time of his death, and afterwards gave birth to a daughter); several daughters by his predeceased wives, a daughter's son and three nephews, sons of his elder brother, *Oya Taver*. Litigation began in the year 1832, *i. e.*, shortly after the death of the *Gowery Vallabha*, among the various members of his family, and for a period of more than sixty years the title to the zemindari of Shivagunga was the subject-matter of decisions in various courts.[1] The final decision of the Privy Council in the case was given in the year 1896.

The decision reported in 9 Moo. I. A. 539 (1863) was the earliest case before the Judicial Committee. Therein it was held that the zemindari of Shivagunga was in the nature of a Principality, impartible and capable of enjoyment by only one member of the family at a time and that it was the *self-acquired property* of *Gowery Vallabha Taver, the Istimirari* Zemindar. That it had devolved, at his death without male issue and upon the subsequent death of his widows, upon his only surviving daughter *Katama Natchiar* in preference to collateral heirs.

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[1] *Katama Natchiar* v. *The Raja of Shivagungah* 9 Moo. I. A. 539 (1863), S. C. 10 Sevestre 172 (a): S. C. on appeal from S. D. A. at Madras 7 Sevestre 1121; *Shivagnana Tevar* v. *Periasami* 5 I. A. 61 (1878) S. C. 1 Mad. 312 (P. C.) *Periasami* v. *Periasami* 5 I. A. 61 (1878); [In both these cases and another appeal a consolidated Judgment was delivered by Sir James W. Colvile] Followed 9 Moo I. A. 539. *Muttavadugunadha Tevar* v. *Periasami* alias *Udayani Tevar* 23 I. A. 128 (1895); *Mutta Vulugunadha Tevar* v. *Dorasinga Tevar* 8 I. A. 99 (1881).

On *Katama's* death her son claimed to be entitled in preference to D, the son of *Katama's* sister, the eldest daughter of the Istimirari Zemindar. In the litigation which ended in the year 1881 it was established that though the zemindari was impartible, *Katama* took by inheritance a limited estate in her father's property and, on her death, it devolved not on her heir but on the heir of her father.[1]

On D's death, *Katama's* son preferred a fresh claim to the zemindari. He maintained that the Istimirari zemindar was still the root of title and that he, being a grandson, was entitled to succeed in preference to D's son who was a great grandson. The defendant (D's son) maintained that D acquired full and complete ownership and became a fresh root of title, so that the property descended to his son. Both the Courts below decided that the defendant's contention was right and the Judicial Committee concurred in the same view.

In *Muttuvaduganadha Tever* v. *Periasami*[2] their Lordships have held that an impartible estate, though it is by custom enjoyed in a different mode from that prescribed by the ordinary Hindu law, yet devolves by inheritance according to that law, unless the controlling custom applies specifically to the modes of devolution and not merely to the mode of enjoyment. There is no rule of law applicable to impartible estates that inheritance once obstructed is always obstructed, so that the root of title to an impartible estate is not the last full owner but the last established owner. The reversionary male heir who succeeds at the death of a daughter to the full estate transmits it to his own heir, to the exclusion of those claiming as nearer in succession to the daughter's father.

Where it does not constitute a separate acquired estate.

The principle which the *Shivagunga* case established was, that though, the zemindari was impartible, the daughter took it for the ordinary Hindu woman's estate, and that

[1] See *Mutta Vaduganadha Tevar* (1881). v. *Dorasing Tevar*, 8 I. A. 99 [2] 23 I. A. 128 (1896).

upon her death it devolved not on her heir, but on the heir of her father.[1] This case was observed upon and distinguished in *Rajah Yanumula Venkayamah* v. *Rajah Yanumulu Boochia Vankondora*,[2] in which the subject of litigation was a Mansubdari Taluq held as Mansub, (*i. e.*, on the feudal condition of supplying a certain number of armed peons to the paramount Government,) by a joint Hindu family. By the custom of the family the Taluq was impartible and descendible to a single heir. One of the members of the family took forcible possession of the Taluq and refused to pay the Zemindar's revenue. He was ousted from possession by the Zemindar with the aid of A, another member of the family, whom the Zemindar recognized and put in possession and afterwards entered into an agreement with him to pay the revenue. There was no division of the family. It was held that no forfeiture took place or new title accrued, so as to constitute a separate acquired estate in A.

Hunsapore or Hatwa Raj. Effect of confiscation and restoration. *Vis-major.*

We have already referred to the Hunsapore Raj under *Family Customs*, and stated that it is an Impartible Raj and its descent is subject to certain family custom and usage. As a decision of the Privy Council pertaining to this Raj has laid down a very important principle in regard to impartible estates confiscated and restored by Government to the former proprietor or his issue and heir, it is treated as a leading case on the subject. The history of the case is as follows :— In the year 1767, F, the reigning Rajah of Hunsapore, having rebelled against the British Government, was expelled by force of arms and the Raj was confiscated by Government, who kept possession of the same for upwards of twenty years, and ultimately, in 1790, granted the Raj to C, a younger member of the family of F, on whom some years afterwards the Government conferred the title of Rajah. Now the question was whether the Raj, under the circum-

[1] See *Muttuvaduganadha Tevar* v. *Periasami*, 23 I. A. 128 (1896).

[2] 13 Moo I. A. 333 (1870).

stances had changed its character as an impartible estate. The Judicial Committee held that although the zemindari was to be treated as the self-acquired estate of C, yet, the grant being from the ruling power, it carried, (in the absence of evidence of the intention of the grantors to the contrary) the incidents of the family tenure as a Raj, as the Government's intention must be taken to have been to restore the estate as it existed before its confiscation, with no change other than that which affected F and his descendants. It was not the creation of a new tenure but simply a change of tenant by the exercise of a *Vis Major*. Bengal Regulation XI of 1793 does affect the succession by special custom of a single male heir to a Raj, or subject it to the ordinary Hindu law of succession. The Judicial Committee observed thus:—"...There is no expressed intention to alter the nature of the tenure. The estate, whilst it was in the hands of the company, had never been broken up. The policy of the Decennial settlement was to form a body of land-holders by ascertaining in whom the zemindari interest in the soil actually was, and making with those persons a permanent settlement of the Government revenue so as to give them greater fixity of tenure. ...In the absence of all evidence to the contrary, it must be presumed, that the settlement was made precisely as it would have been made had the estate continued in the line of Rajah F; and, therefore, that the subject conferred on Ch. was the old zemindari with all its incidents, excepting at most, its descendible quality."[1] As to the effect of restoration this case has been followed by the Judicial Committee in the Bettiah Raj case.[2]

[1] *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* 12 Moo. I. A. 1 p. 35 (1867): S. C. in Cal. High Court W. R. (F. B.) 97 (1863).

[2] *Ram Nundun Singh* v. *Janki Koer* 29 I. A. 178. (1902): S. C. 29 Cal. 828. See *Thakur Kapilnauth Sahi Deo* v. *The Government* 22 W. R. 17 (1874) S. C. 13 B. L. R. 445; *Rajah Yanumula Venkayamah* v. *Rajah Yanumula Bovchia Vankondora* 13 Moo. I. A. 333 (1870); *The East India Co.* v. *Kamachee Boye Sahiba* 7 Moo. I. A. 476 (1859): S. C. 4 W. R. (P. C.) 42.

An Impartible estate may become partible.

In the *Nuzvid* case[1] it was held that a zamindari created by *sunnad* in 1803 in accordance with Regulation XXV of 1802 was a partible property. In a recent case[2] it was held that, with regard to a zemindari granted in 1803, the *onus* was on the Zemindar to prove that his zemindari was impartible. Both these cases have distinguished the *Hunsapore* case. As we have noticed in that case the transaction was not so much *the creation of a new tenure, as the change* of the tenant by the exercise of a *Vis major*. In the *Nuzvid* case, the zemindari prior to 1802, formed part of an ancient estate which was indivisible and descendible to a single heir, and which was a military *Jagir* held on the tenure of military service and in the nature of a Raj. The whole estate was resumed by the British Government for arrears of revenue. In 1802 the zemindari was granted to a person by *sunnad* and became a new zemindari, which, upon the true construction of the *sunnad*, was not impartible or descendible otherwise than according to the ordinary rule of Hindu law. In the *Merangi* case, the zemindari was originally held under military tenure and continued to be held on the same tenure after it had been incorporated in another zemindari, and subsequently, by conquest, it again became part of the Vizianagram Zemindari, which was dismembered in 1795. In 1803 a permanent settlement was made with the then Zemindar and a *sunnad* was granted to him as prescribed by Regulation XXV of 1802. In 1827 the zemindari was sold in execution of a decree and bought by Government.

The Government held it for some time and during this time the Dewan of the former Zemindar rendered some important service to the Government in capturing some rebels and, as a reward, the Zemindar's men begged

[1] *Rajah Venkata Narsimha Appa Row Bahadur* v. *Rajah Narayya Appa Row Bahadur* 7 I. A. 38 (1879).

[2] *Zemindar of Merangi* v. *Sri Rajah Satru Charla Ramabhadra Razu*, 18 I. A. 45. (1891): s.c. 14 Mad. 237.

that a new grant might be given to the son of the former Zemindar. The grant was accordingly made in 1835 by a *sunnad*. Under the terms of the *sunnad* there was no intention of the Government to create an impartible estate.

In view of the nature of grants and various dealings with the estate, and in the absence of proof of any usage of impartibility it is clear that the zemindari of Merangi might have been impartible before, but became "partible in a question of succession as it became also subject to the disposition of the Zemindar by deed of transfer on sale or gift of the whole or part of the property."[1]

An impartible zemindari, though forming part of the family property had, by ancient custom, been held and enjoyed by the eldest male member in the direct line. At the death of the last owner he left surviving him four sons and an infant grandson (*i.e.*, the son of the eldest son who predeceased him). During the minority of that grandson, the four surviving sons with the knowledge and consent of their father executed *sunnad* by which they divided the family property equally amongst themselves, the zemindari going to the share of the grandson. It was held that the *sunnad* amounted to an agreement by which the joint family was divided. Consequently upon the death of the grandson without issue his widow succeeded to his estate.

An estate which, according to the family custom of the original proprietor, was descendible entire to the eldest son, may become divisible when passing to another Hindu family in which the practice of division exists. The custom of succession by the eldest son obtained in the family of the former owner is no bar to the division amongst the heirs of the purchaser of the estate, in whose family the ordinary rule of Hindu law prevails.[2]

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[1] *Vadrevu Ranganayakamma* v. *Vandrevu Bulli Ramaiya* 5 C. L. R. 439 (p. c.) [1879]; s. c. 3 Shome 90.

[2] *Gopal Das Sindh, Maun Data, Mohapatra* v. *Nurotum Sindh* 7 S. D. Sel. Rep. 198 (230) [1845]; s. c. 1 S. D. Decis. 72.

Partition of an Impartible estate.

Where it appeared on evidence that the estate had not invariably devolved entire on the chief heir, but had been taken by the most competent and had been occasionally held by several heirs conjointly, the Court considered it to be divisible among the heirs according to the Hindu law of inheritance and decreed partition of the estate in opposition to the claim of one heir to hold the same as an indivisible estate.[1]

Impartible *Taluqs* of Oudh.

Under sec. 8 of Act I of 1869 certain lists were prepared of Taluqdars and grantees in Oudh. Of these lists, list 2 was a list of "the Taluqdars whose estates, according to the custom of the family on and before the 13th February, 1856, ordinarily devolved upon a single heir." The third list was a "list of Taluqdars, not included in the second of such lists, to whom *sunnads* or grants had been or may have been given or made by the British Government up to the date fixed for the closing of such lists, declaring that the succession to the estates comprised in such *sunnads* or grants should thereafter be regulated by the rules of primogeniture." So, in *Achal Ram* v. *Udai Partab Addiya Dat Singh*[2] the estate in question was entered in the second list and consequently it was held that although the estate was to descend to a single heir, it was not to be considered as an estate passing according to the rules of primogeniture. Similarly in the case of *Thakur Ishri Singh* v. *Baldeo Singh*[3] the estate in dispute was an impartible estate, but as the taluqdari had been entered in list 2, and not in list 3, a rule of selection, and not primogeniture, was the governing rule of the family. The

[1] *Girwurdharee Singh* v. *Kulahol Singh* 4 S. D. Sel. Rep. 9 (12) [1825]. This decision was confirmed on appeal by the Judicial Committee. See 2 Moo. I. A. 344 (1840).

See also *Rajah Sooranany Venkatapetty Rao* v. *Rajah Sooranany Ramachandra Rao*, Mad. Decis. 495 (1825). From the decree of the Suddur Adawlut in this case an appeal was preferred to the Judicial Committee, but the appeal terminated in a *Razinamah* being filed by both parties.

[2] 11 I. A. 51 (1883).

[3] 11 I. A. 135 (1884): s. c. 10 Cal. 792.

usage established by prescription in the family was said to be that, out of several sons, an able one had to be selected and nominated as taluqdar without reference to seniority. This is something like tanistry, which prevailed in Ireland and was abolished by James I.

Where an estate is placed in list 2, it descends to a single heir, not necessarily by the rule of lineal primogeniture. It may be that the heir according to lineal primogeniture is more remote in degree from the ancestor than other collaterals or other persons in the line of heirship. If so, degree prevails over the line according to the classification under the Act; though if two collaterals, or persons in the line of heirship, are equal in degree, then, as the property can go to one, recourse must be had to the seniority of line to find out which that one is.[1]

Liability of Impartible property for debt.

An impartible estate taken by a son by heritage from his father, is an asset for the payment of father's debts not contracted for immoral or illegal purposes, and may be attached and sold in execution of a decree for such debts.[2] Where debts are proved to have been contracted for legal necessity the successor to the impartible estate takes it subject to that liability.[3]

In the case of *Nachiappa Chettiar* v. *Chinnayasami Naicker*[4] the contest was whether the *zamin* is an asset for the payment of the debts of the last holder. The question was argued on the analogy of an impartible estate being alienable, and therefore it was contended that the plaintiff's debt on a promissory note could be recovered from the *zamin* as an asset in the hands of the successor of the last holder. In this case there was no issue tried as to whether

[1] *Narindar Bahadur Singh* v. *Achal Ram* 20 I. A. 77 (1893). See also *Muhammad Imam Ali Khan* v. *Husain Khan* 26 Cal. 81 (P. C.) [1898]; s. c. 2 C. W. N. 737.

[2] *Veera Soorappa Nayani* v. *Erappa Naidu* 29 Mad. 481 (1906). See also *Muttayan Chettiar* v. *Sangili Vira Pandina Chinnatambiar* 9 I. A. 128 (1882).

[3] *Gopal Prashad Bhakat* v. *Rajah Dibbya Singh Deb* 9 C. W. N. 330 (1904).

[4] 29 Mad. 453 (1906).

the estate was impartible or not. Both the Judges, however, held that even if the estate should be shown to be impartible, the *zamin* could not be looked on as an asset in the hands of the successor for the payment of the debts of the deceased holder.

Where the right of primogeniture exists in a Mitakshara family, the son who takes the estate by descent by virtue of that right does not become a co-sharer in the estate and does not take by survivorship, and such an estate is not *prima facie* inalienable. The son takes the estate with the burden of the decree obtained against the father and is liable to be proceeded against in execution.[1]

Proof of Impartibility.

A custom of impartibility must be strictly proved in order to control the operation of the Hindu law of succession. The fact that an estate has not been partitioned for six or seven generations does not deprive the members of the family to which it jointly belongs of their right to partition.[2]

Ghatwali Tenures.

Ghatwali tenures are grants of lands situated on the edge of the hilly country, and held on condition of guarding the *ghats* or passes. Generally, a small quit-rent is payable to the Zemindar, in addition to the service rendered, and though the grant is not expressly hereditary, and *ghatwal* removable for misconduct, it is the general usage on the death of a faithful *ghatwal* to appoint his son, if competent, or some other fit person in his family to succeed to the office.[3] *Ghatwali* tenures are in existence in the districts of Bhagulpore, Bishenpore, Burdwan, Bankura, Beerbhoom, Burrakur and other places in Behar, Bengal and Sonthal Pergunnahs.

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[1] *Ramdas Marwari* v. *Tekait Brojo Behari Singh* 6 C. W. N. 879 (1902).

[2] *Thakur Durryas Singh* v. *Thakur Dari Singh* 1 I.A. 1 (1873): S.C. 13 B. L. R. 165 : S. C. 16 W. R. 142.

[3] *Kustoora Kumari v. Monohur Deo*, W. R. 39. *p.* 41 (1864) ; *Munrunjun Singh* v. *Rajah Leelanund Singh* 8 Sevetre 830*a* (1865) : S C. 4 Rev. Judl. Pol. 461 : S. C. 5 W. R. 101.

In some *Zemindaris* and *Putnees* these tenures are of a major, in others of a minor, character. Sometimes the tenure of the great Zemindar himself seems to have been originally of this character. More frequently, large tenures consisting of several whole villages are held under the Zemindar; in other places, as in Bishenpore, the *Sirdar* and superior *Ghatwal* have small and specific portions of land in different villages assigned for their maintenance. These are of a nature analogous to the *Chakeran* assignments of lands to village watchmen in other districts.[1]

Origin of *Ghatwali* tenure.

The exact origin of each *Ghatwali* tenure is generally lost in the confusion and obscurity of the troublous ages which preceded British rule. But there can be no doubt that these tenures have been in existence from a considerable period back and were highly useful in those early days. They were in cases of large tenures in the nature of semi-military colonies, where a chief with his followers were settled down in a part of the country so unsafe that it could not be otherwise occupied. It seems to have sometimes happened that when the country liable to be harried and plundered by freebooters from the hills, was almost entirely reduced to jungle and desolation, one of these semi-military colonies was settled down under a grant to the chief. And, not infrequently, Afghans, Rajpoots, and others came from a distance on these terms, and settling in the jungle lands, defended themselves and their neighbours and brought the lands into cultivation.[2]

Difference between *Ghatwali* and *Chakeran* lands.

The *Ghatwali* tenure differs from the common *Chakeran* lands in two respects, *firstly*, that the land is not liable to resumption at the discretion of the land-holder, nor the assessment to be raised beyond the established rate, and, *secondly*, that although the grant is not expressly hereditary and the *Ghatwal* is removable for misconduct, it is the general usage, on the death of a faithful Ghatwal, to

[1] Harrington's *Analysis*, Vol. III. 510.

[2] *Vide* 4 Rev. Judl. Pol. 463.

appoint his son, if competent, or some other fit person in his family to succeed to the office.[1]

Rule of succession to a *Ghatwali* tenure.

Succession to a *Ghatwali* tenure is regulated by no rule of *Kulachar* or family custom, nor by the Hindu law. By the nature of the tenure, it descends undivided to the eldest son to the exclusion of the others. A female is not incapable of holding a *Ghatwali* tenure.[2]

The word "descendants" in sec. 2, Bengal Regulation XXIX of 1814, is not to be construed in its strictest meaning. It should not be restricted to 'issue of the body only' but should mean the heirs generally. Therefore it may include a widow of the deceased, who may be one of his heirs.[3]

Not a joint family property.

In consequence of the peculiar character of *Ghatwali* tenures as described in Regulation XXIX of 1814, they are intended to be the exclusive property of the *ghatwal* for the time being and not joint family property.[4]

In Bhagulpore and Beerbhoom.

The right of succession to a *Ghatwali* tenure (Taluq Khooria in the district of Bhagulpore) is in the eldest son and his descendants and representatives.[5] In Beerbhoom Ghatwali tenures are held in perpetuity and descendible from generation to generation, subject to certain conditions and obligations. They are not divisible on the death of a *Ghatwal* among his heirs, but should devolve entire on the eldest son or the next *Ghatwal*.[6] A widow of the deceased *Ghatwal*, whose brothers had

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[1] *Ibid.* See also Regln. XXIX of 1814 which defines the *status* of a Ghatwal.

[2] *Musst. Kustoora Koomari* v. *Monohur Deo* W. R. 39 (1864); *Doorga Persad Singh* v. *Doorga Konwari*, 4 Cal. 190 (P. C.) [1878]; *Chhatradhari Singh* v. *Saraswati Kumari* 22 Cal. 156 (1894).

[3] *Chhatradhari Singh* v. *Saraswati Kumari*, 22 Cal. 156 (1894).

[4] *Ibid.*

[5] *Musst. Teetoo Koonwaria* v. *Surwan Singh* 9. D. Decis 765 (1853).

[6] *Hurlall Singh* v. *Jorawun Singh* 6 S. D. Sel. Rep. 169 (204) [1837]. Referred to in *Raja Lilanund Singh Bahadoor* v. The Bengal Govt. 6 Moo. I. A. 101 p. 125 (1855).

separated, succeeded to the *Ghatwali* tenure on the death of her husband.[1]

Ghatwali tenures in Beerbhoom being not the private property of the *Ghatwal*, but land assigned by the State in remuneration for specific public service, are not alienable or attachable for personal debts.[2]

Under tenure.

Under Sec. 2 Regulation XIV of 1819, the *ghatwals* of Beerbhoom cannot alienate their tenures. Their estates cannot be void so long as they perform all the obligations of service and pay rent to Government incident to their tenure. Therefore, a perpetual sub-lease, granted *bona fide* to a party by a *ghatwal* will be good not only during the tenancy of the grantor, but, after his decease, during the tenancy of his heirs.[3]

Resumption of a *Ghatwali* tenure.

Generally, when the performance of the service for which the tenure was created ceases to be necessary, or when the *ghatwal* is dismissed for his neglect of duty, a zemindar in whose estate the *ghatwali* land is included may resume it.[4] But where an obligation of service continues, the Zemindar is not competent to resume the land. Nor is the Government competent to resume it. For, if the services of the *ghatwals* are no longer necessary, the land will lapse to the zemindar.[5] Such resumption is only possible where the tenure is not held under a *Sunnad* conferring an hereditary indefeasible right.[6]

[1] *Chhatradhari Singh* v. *Saraswati Kumari*, 22 Cal. 156 (1894).

[2] *Sartuk Chunder Dey* v. *Bhagut Bharutchunder Singh* 9 S. D. Decis 900 (1853) ; *Pinoderam Sein* v. *Deputy Commissioner* of *Sonthal Pergunnahs* 3 Wyman 124 (1867).

[3] *The Deputy Commissioner* of *Beerbhoom* v. *Rungololl Deo* 1 Hay 200 (1862): S. C. 1 Marshal 117 : S. C. 1 Ind. Jur. 34 ; *Muhurbhanoo Deo* v. *Kostoora Koonwaree* 8 Sevestre 823 (1866).

[4] *Takayet Jagmohun Singh* v. *Rajah Neelanund Singh* 13 S.D. Decis 1812 (1857).

[5] *Raja Anundalal Deo* v. *Government* 14 S. D. Docis Part II. 1669 (1858).

[6] *Rajah Leelanund Singh* v. *Surwan Singh*, 8 Sevestre, Part IV. 311 (1866) : S. C. 5 W. R. 292 ; *Surwan Singh* 2 Ind. Jur. N. S. Vol. II. 149 (1867) appln. for review ; *Rajah Leelanund Singh* v. *Nussab Singh*, 2 Wyman, Part I. 84 (1866) : S. C. 6 W. R. 80 (1866) ;

A full Bench of the Calcutta High Court held that where a *Ghatwali* tenure was granted under a valid *Sunnad* from a person representing the then Government in that behalf, more than 100 years ago, and had been allowed to change hands by descent or purchase, without question, the zemindar was incompetent of his mere motion, without the assent and against the will of the Government, to put an end to the *Ghatwali*, to deprive the *Ghatwals* of the tenure and to treat them as common trespassers.[1]

Where a zemindar compounded with Government for money-payment in lieu of police services which he was bound to render through the *Ghatwals*, and claimed resumption of their tenure held under a *Sunnad* which described the tenure as a *Mukurraree istemraree* (the word *Mukurraree* refers to fixity in respect of *jumma*, and the word *istemraree* refers to perpetuity in point of time,) at a fixed *jumma*, in compensation for services in guarding the mountainous country and passes, the Court held that "the contract between the Plaintiff-zemindar and the Government being without authority of the Legislature, in no way affects the *status* and rights of the *Ghatwals*. The service being required, they are bound to perform it, and by custom they hold the tenure subject to the performance of it. No act of Government and the zemindar can defeat the rights of *Ghatwals*. Their *status* is indicated expressly by *istemraree*, perpetual in the Sunnad."[2]

The Privy Council has decided that the lands constituting the *Ghatwali* tenures in Kharagpore in the district of Bhagulpore are included in the permanent settlement of that estate and covered by the *jumma* assessed upon it,

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Mahaboob Hossein v. *Putasoo Koomaree* 10 W. R. 179 (1868).

[1] *Koolodeep Narain Singh* v. *Mahadeo Singh* B.L.R. Supp. Vol. 559 (1866): S. C. W.R. 199. (F. B.);

S. C. in the Privy Council 14 Moo. I. A. 247 (1871).

[2] *Munrunjan Singh* v. *Rajah Leelanund Singh* 8 Sevestre 830*a* (1865).

and they are not liable to resumption under clause 4, Sec. 8, Regulation I of 1793, as included in allowances made to zemindars for police purposes. In this case the Government had claimed a right to resume or re-assess lands in the zemindari of Kharagpore which were in the possession of various *Ghatwals* who held them under *Ghatwali* tenure from the zemindar.[1] Later on, in another case their Lordships held in respect of these lands that a certain *Ghatwali* tenure, which had been created before the permanent settlement at a fixed rent, could not be determined by a zemindar dispensing with the *Ghatwali* services (which as between him and Government were no longer required) so long as the *Ghatwals* were willing and able to perform those services. Certain other *Ghatwali* tenures which had been created after the permanent settlement could not, under Regulation XLIV of 1793, be cancelled by a purchaser at a sale for arrears of Government revenue. In this case the Government having wrongly resumed certain *Ghatwali* lands were directed to refund mesne profits thereof, which consisted of the rent paid by the *Ghatwals* under a settlement in force with them until the resumption was set aside.[2]

In a very recent case the Calcutta High Court held in respect of a *Ghatwali* tenure in the district of Bankura, existing from before the grant of the Dewany to the East India Company and descending from father to son for many generations upon payment of a quit-rent and the performance of *Ghatwali* services, that the tenure was not merely heritable but also permanent and the holder was bound to perform the services; that a tenure of this description could not be determined or resumed on the ground that the services were no longer necessary or had been dispensed with.[3]

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[1] *Rajah Leelanund Singh* v. *The Bengal Government* 7 Sevestre 1051 (1864).

[2] *Rajah Leelanund Singh Bahadur* v *Ikakoor Munoorunjan Singh* I. A. Sup. Vol. 181 (1878).

[3] *Jogendra Nath Singh* v *Kali Charan Roy* 9 C. W. N. 663 (1905).

An auction-purchaser of a zemindari at a sale for arrears of Government revenue, cannot resume lands held under a *Ghatwali* tenure, at a fixed rent created before the permanent settlement, on the ground that the services have ceased to be performed by the *Ghatwal*, and there was no necessity for such service, if the Government refuse to renounce its claim to the performance of such *Ghatwali* services.[1] The *Ghatwals* are dependant *Talugdars* within the meaning of Regulation VIII of 1793 and are protected from enhancement of rent by cl. 1 of Sec. 51 of that Regulation.[2]

Sale of *Ghatwali* tenure in Kharagpore.

On a question as to whether the sale and transfer of a *Ghatwali* tenure in the Kharagpore Zemindari in the district of Bhagulpore, in execution of a decree against the *Ghatwal*, is invalid by reason of the tenure being in its nature inalienable, the Judicial Committee have held, in regard to a proved custom, that the *Ghatwali* is not inalienable but may be transferred by the *Ghatwal* or sold in execution of a decree against him, if such alienation is assented to by the zemindar. This power of alienation is not limited to the life-interest of the *Ghatwal* for the time being but forms his right and title to the *Ghatwali*.[3] Their Lordships are of opinion that the *Ghatwali* tenures are rendered, by their origin and incidents, distinct in some particulars from other inheritances, and to them the law of Mitakshara, to its full extent, is not applicable. Thus the rules of the Mitakshara yield to a well established custom, though only to the extent of that custom.[4]

In *Rajkishwar Deo* v. *Bunshidhur Marwari*[5] it has been held that after deduction of all necessary out-goings from the total rents due to a *Ghatwal* the residue, being his own absolute property, may be attached in execution

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[1] *Kooldeep Narain Singh* v. *The Government* 14 Moo. I. A. 247 (1871).

[2] See *Leelanund Singh Bahadur* v *Thakoor Munrunjan Singh* 3 Cal. 251 (1877).

[3] *Kali Pershad* v. *Anand Roy* 15 Cal. 471 (P. C.) [1878].

[4] Ibid p. 481.

[5] 23 Cal. 873 (1896).

of a personal decree against him. This case distinguished *Bally Dobey* v. *Gomi Deo*,[1] and approved *Kustoora Kumari* v. *Benoderam Sen*.[2]

A *Ghatwal* is not competent to grant a lease in perpetuity, and his successors are not bound to recognize such an incumbrance.[3] Any presumption that there may be against the right of a *Ghatwal* to grant a *Mokurraree* lease, cannot be held good against such leases when granted in good faith for the clearance of jungle.[4]

Forfeiture of *Ghatwali* lands.

The dismissal of a *Ghatwal* will carry with it the forfeiture of his tenure.[5] Where a *Ghatwal* becomes incapable of personally performing the services and a deputy is appointed to act in his behalf, (conformably with the terms of the *Sunnad* or with the usage), by the Magistrate, the incapacity on the part of the deputy to discharge adequately the duties incidental to the office will not operate as a forfeiture of the appointment of the principal. Where, therefore, during the lifetime of a *Ghatwal*, his son, who was appointed deputy, was dismissed, it was held that the dismissal of the son did not amount to the dismissal of the father. And that after the father's death the son was entitled to succeed although during his father's life-time he had been dismissed while acting as the deputy of his father.[6]

Jagir Chakeran lands.

With reference to *Jagir Chakeran* lands, granted by *Sunnads* rent-free anterior to the Decennial Settlement, for the performance of certain services, which though now obsolete, might again be required to be performed, the Judicial Committee held that the *Sunnads* created a *Chakeran* or service tenure, not affected by Sec. 41 of Bengal

[1] 9 Cal. 388 (1882).

[2] 4 W. R. Misc. Rule 5.

[3] *Grant* v. *Bungshee Deo* 15 W. R. 38 (1871).

[4] *Davies* v. *Debee Mahton* 18 W. R. 376 (1872).

[5] *The Secy. of State* v. *Puran Singh* 5 Cal. 740 (1878). See also *Monorunjun Singh* v. *Rajah Leelanund Singh* 8 Sevestre 830*a per* Kemp J.

[6] *Jogendra Nath Singh* v. *Kali Charan Roy* 9 C. W. N. 663 (1905).

Regulation VIII of 1793, were *pro servilitis impensis et impendiendis*, partly as a reward for past, and partly as an inducement for future, services; and that the grantees, though liable to forfeit the lands, if they wilfully failed in the performance of the duties imposed by the *Sunnads*, were not liable to have such lands resumed, on the ground that there was no longer occasion for the performance of the particular service required. As it was a tenure created before, and subsisting at the time of the Decennial Settlement, and then held rent-free, the presumption was that the lands were treated as *Lakhraj* and the *Jagir* was within the exception of Sec. 26 Act I of 1845. The *onus* was upon the auction-purchaser who sought to dispossess or to rack-rent the grantees under the *Sunnads*, to make out a clear title for resumption.[1]

Chakeran lands.

Chakeran lands are lands set apart and appropriated as a remuneration for services by village watchmen and zemindari "paiks." At the decennial settlement these service-lands were not included in the assessment on which the settlement was based. As before settlement they were appropriated to particular purposes so they remained after the settlement. Burdened with these charges, these service-lands were declared to be the property of the zemindar. Though in the case of zemindari "paiks," the zemindar can, at his pleasure, resume the lands, in that of the village watchmen he cannot. While the public service required them they must remain appropriated to these purposes.[2] In a certain case the plaintiff contended that the lands in question were "*gram sarunjami chakeran*" and upon the cesser of services he was entitled to take possession of them. The Collector asserted that the lands were *Tannahdari* or *Chowkidari Chakeran* and as such were not resumable while the holder of the lands

[1] *Alexander John Forbes* v. *Meer Mahomed Tuquee*, 13 Moo. I. A. 438 (1878).

[2] *Joy Kissen Mookerjee* v. *The Collector of East Burdwan*, 7 Sevestre 1153 (1860).

continued to perform the police service. The Sudder Court, by a majority, affirmed the decree of the Zillah Court, which was in favour of the Collector-defendant. The Privy Council, too, affirmed it on appeal on 5th May, 1864, holding that "the lands in question are to be considered as appropriated to the maintenance of a Chowkidar or village watchman in the *taluq*, and that the right of appointing such officer belongs to the *Taluqdar*, and that such officer is liable to the performance of such services to the *Taluqdar* as, by usage in the zemindari of Burdwan, Chowkidars have been accustomed to render to the Zemindar"[1] Whether or not it is competent to the zemindar on providing an equivalent in money to resume the *Chowkidari Chakeran* lands within his estate was a question not then before the Court, the plaintiff asserting his right to resume without providing any equivalent.

Polliam.

A *Polliam* is explained in William's Glossary to be "a tract of country subject to a petty chieftain." A *Polligar* is described as having been originally a petty chieftain occupying usually tracts of hill or forest, subject to pay tribute and service to the paramount state, but seldom paying either, and more or less independent; but as having, at present, since the subjugation of the country by the East India Company, become a peaceable landholder.

A *Polliam* is in the nature of a Raj; it may belong to an undivided family, but it is not the subject of partition; it can be held by only one member of the family at a time, who is styled the *Polligar*, the other members of the family being entitled to a maintenance or allowance out of the estate.[2]

The decisions in *K. Subba Chetty* v. *Masti Immadi Rani*[3] and *D. Arbuthnott* v. *Oolaguppa Chetty*[4] treated the *polliams*

[1] Ibid.

[2] *Naragunty Lutchmedavamah* v. *Vengama Naidoo* 9 Moo. I. A. 66 at pp. 85, 86 (1861).

[3] 3 Mad. H. C. R. 303 (1867).

[4] 5 Mad. H. C. R. 303 (1870).

only as life estates and the judgment in *Chauki Gounden* v. *Venkataramanier*[1] states that such was then the generally received theory. This was probably true under the Hindu and Mahomedan Governments in the case of those zemindars or *polligars* who were only Revenue or Police Officers before custom rendered their estates hereditary.[2]

An impartible *Polliam* governed by the rule of primogeniture, though possessed exclusively by one of the members of the family, is the joint property of the family and, in the event of death, passes by survivorship. When, on the death of a *Polligar*, the right of exclusive possession passes from one line of descent to another, it devolves, in the absence of proof of special custom of descent, upon the nearest coparcener in the senior line, and not necessarily on the coparcener nearest in blood.[3]

In a suit for partition of a *Polliam* in the Madura district, it appeared that the *Polliam* had been held on military tenure since the sixteenth century and that it had never been partitioned, and that the custom of impartibility obtained in a large number of similar *Polliams* in the same district; on enquiries from the members of the zemindars' family and other persons connected with the zemindari it was elicited that they understood the estate to be impartible and that it descended to a single heir. It was held that the *Polliam* was impartible and the plaintiff was entitled to maintenance.[4]

In this case it was further held that certain "pannai" lands within the limits of the zemindari, which have been

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[1] 5 Mad. H. C. R 208, 211.

[2] *Nachiappa Chettiar* v. *Chinnayasami Naicker*, 29 Mad. 453 p. 455 (1906).

[3] *Narganti Achammagaru* v. *Venkatachalapati Nayanivaru* 4 Mad. 250 (1880); *Kachi Yuva Rangappa Kalakka Thola Udayar* v. *Kachi Kalyona Rangappa Kalaka Thola Udayar* 24 Mad. 562 (1901); *Kachi Kaliyana Rungappa Kalakka Thola Udayar* v. *Kachi Yuva Rangappa Kalakka Thola Udayar* 28 Mad. 508 (P. C.) (1905); S. C. 10 C. W. N. 95 : S. C. 2 C. L. J. 231.

[4] *Lakshmipathi* v. *Kandasami* 16 Mad. 54 (1892).

recognized and dealt with as part and parcel of the zemindari, were impartible.

Dayadi-pattam.

The rule of succession applicable to a *Polliam* is that of *Dayadi-pattam*, according to which the person entitled to succeed on the death of *polligar* is the senior in age of his *dayadis*, descended from one of those who originally formed the joint family and were founders of different lines in the family. The *polligar* for the time being has a proprietary right in the estate and is not a manager merely. Where the holder of the impartible *Polliam* transferred his estate to his wife by a deed of gift and the transferor had at that time living besides his own son numerous *dayadis*, it was held that the custom of inalienability was established and that the gift in question was accordingly invalid as against the *dayadis*.[1]

An impartible *Polliaput* or *Polliam* held by one member of the family descends on a single heir as an ancestral estate the right to which vests, on the last holder's death without issue, in the next collateral male heir of the undivided family in preference to the widow of the deceased.[2]

As to the succession to a *Polliam* according to priority of birth, see *Pedda Ramappa Nayanivaru* v. *Bangari Seshamma Nayainvaru*,[3] or priority of marriage of the mother, see *Sandaralin Gaswami Kamaya Naik* v. *Ramaswami Kamaya Naik*.[4]

A Sunnad under Madras Reg. XXV. 1802 and its effect on hereditary estate.

The acceptance of a *Sunnad* in common form under Madras Regulation XXV of 1802, does not, of itself and apart from other circumstances, avail to alter the succession to an hereditary estate. Thus in the case of "*Udayarpalayam*" it was found that the estate of the Udaipur Polligars was in its origin impartible, and after cession of the

[1] *Sivasubramania Naicker* v. *Krishnammol* 18 Mad. 287 (1894). *Sartaj Koeri* 10 All. 372 distinguished.

[2] *Pareyasami* alias *Kollai Tevar* v. *Salukai Tever* alias *Oyya Tevar* 8 Mad. H. C. R. 157 (1875).

[3] 8 I. A. 1 (1880).

[4] 26 I. A. 55 (1899).

Carnatic to the Company was, for political reasons, circumscribed in extent and was converted into a zemindari which was granted and accepted as equivalent in value to the ancient *Polliam*. It was held that the character of impartibility was not changed and the zemindari must be regarded as impartible and descendible according to the rules of primogeniture.[1]

Jagirs or *Saranjams*.

Jagirs are tenures common under the Mahomedan Government, in which the public revenues of a given tract of land were made over to a servant of the State, together with the powers requisite to enable him to collect and appropriate such revenue, and administer the general government of the district.[2] *Saranjams* are temporary assignments of revenue from villages or lands for the support of troops or for personal service, usually for the life of the grantee ; also grants made to persons appointed to civil offices of the State to enable them to maintain their dignity. They were neither transferable nor hereditary, and were held at the pleasure of the Sovereign.[3]

Colonel Etheridge in the Preface to the List of *Saranjams* published in 1874 speaks of these two terms thus :— "Under the Mahomedan dynasty such holdings were known as *jagir*, under the Mahratta rule as *saranjam*. If any original distinctive feature marked the tenure of *jagir* and *saranjam*, it ceased to exist during the Mahratta Empire ; for, at the period of the introduction of the British Government, there was no practical difference between a *jagirdar* and a *saranjamdar*, either in the Deccan or Southern Mahratta country. The terms *jagir* and

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[1] *Kachia K. R. K. T. Udayar* v. *Kachi Y. R. K. T. Udayar* 28 Mad. 508 (p.c.) (1905) : s. c. 10 C. W. N. 95 : s. c. 2 C L. J. 231.

[2] Prof : Wilson's *Glossary*.

[3] *Ramchandra Mantri* v. *Venkatarao*, 6 Bom. 598 at p. 604 *et seq*. See other authorities cited therein. See also Steele on *Law and Custom* p. 207.

saranjam are convertible terms in these districts. The latter is now almost universally adopted. These holdings, being of a political character, were not transferable, nor necessarily hereditary, but, as a rule, were held at the pleasure of the sovereign. On succession a *nazarana* was levied. When of a personal nature, they were termed *Zat Saranjam*, when for the maintenance of troops *Fouj Saranjam*."[1]

Colonel Etheridge's observation that *jagirs* were not necessarily *hereditary*, was taken exception to by Melvill J., as not being correct.[2] The Judicial Committee in *Gulabdas Jagjivandas* v. *the Collector of Surat*,[3] said that a *jagir* must be taken, *prima facie*, to be an estate only for life, although it may possibly be granted in such terms as to make it hereditary.

In the Fifth Report of the Select Committee on Indian affairs (p. 86, it was said: "With regard to the *jagirs* granted by Mahomedans either as marks of favour or as rewards for public service, they, generally, if not always, reverted to the state on the decease of the grantee, unless continued to his heir under a new *Sunnad*; for, the alienation in perpetuity of the rights of Government in the soil was inconsistent with the established policy of the Mahomedans, from which they deviated only in the case of endowments to the religious establishments and office of public duty, and in some rare instances of grants to holy men and celebrated scholars."[4]

Westropp C. J., in *Krishnarav Ganesh* v. *Rangrav*[6] said "Sanadi grants in Inam, Saranjam, Jagir, Wazifa, Wakf, Devasthan, and Sevasthan, are, generally speaking, more properly described as alienations of the royal share in the produce of land *i. e.*, of land revenue,

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[1] Cited in 6 Bom. p. 603 (1882).
[2] 6 Bom. 603.
[3] 3 Bom. 186 (1878).
[4] Cited in *Ramchandra Mantri* v. *Venkatrao* 6 Bom. 598 p. 604 (1882).
[5] 4 Bom. H. C. R. A. C. J. 1 (1867).

than grants of land although, in popular parlance, they are occasionally so-called." His Lordship repeated almost the same observation in *Ravji Narayan Mandlik* v. *Dadaji Bapuji Desai*.[1] In fact this observation has frequently been quoted and the principle involved in it was approved.[2]

In the case of *Ramchandra Mantri*[3] their Lordships, after very carefully considering various authorities, held that a grant in *jagir* or *saranjam* is very rarely a grant of the soil, and the burden of proving that it is in any particular case a grant of the soil lies very heavily upon the party alleging it.

Regarding the impartibility of a *saranjam*, the rule stated by Colonel Etheridge is in accordance with the orders conveyed in a despatch from the Court of Directors No 27, dated the 12th December, 1855. In para. 20 of that despatch they say 'We agree with you that *saranjams* should not be subdivided but that the holders should be required to make a suitable provision for their youngest brothers.' A *jagir*, to which service is attached, is certainly not divisible, but descends to the eldest son.[4] In *Ramchandra Mantri* v. *Venkatarao* the Court observed that the *Saranjam* was originally given for the maintenance of a body of horse, and was therefore in its inception a *Jagir* held for service. But independently of this, and of any Government rule, the same principle would probably be applied to all *Saranjams* on the ground stated by Mr. Mayne (Hindu Law, s. 393), that an estate which has been allotted by Government to a man of rank, is indivisible, as otherwise the purpose of the grant would be frustrated."[5] It may therefore be said that a *saranjam* is impartible and devolves entire on the eldest son and, on the

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[1] 1 Bom. 523 (1875).

[2] *Yoman Janardan Joshi* v. *the Collector of Thana* 6 Bom. H. C. R. A. C. J. 191 (1869).

[3] 6 Bom. 598 (1882).

[4] *Vide* 6 Bom. p. 613.

[5] 6 Bom. 598 p. 613.

death of the latter, descends to his son in preference to his surviving brother.[1]

It is for the Government to determine how *saranjams* are to be held and inherited and in cases where the civil courts have jurisdiction over claims relating to *saranjams* in consequence of the applicability of the Pension Act XXIII of 1871 or otherwise, they would be bound to determine such claims according to the rules, general or special, laid down by the British Government. In the absence of such rules, the courts would be guided by the law applicable to impartible property.[2]

Saranjams are *prima facie* impartible, the holders thereof being required to make a suitable provision for their younger brothers. Where, however, it appeared that the members of a family had treated *saranjams* as partible over a long period of years and had dealt with them as such in effecting partitions of the entire family estate, which consisted both of incomes and *saranjams*, it was held that the *saranjams* were either originally partible or had become so by family usage.[3] In a suit by a junior member of an undivided Hindu family for division of a *saranjam* and other family property, the eldest member contended that the *saranjam* was impartible and that in any case he was entitled to retain certain sums in his capacity as the eldest representative of the family for the performance of certain offices. The court held that the right of *vadilki* (eldership) had not lost its original character of impartibility and that it was impartible and transmissible to the eldest representative of the family.[4]

As a *saranjam* is ordinarily impartible, if it is resumed by the British Government and in substitution thereof a political pension is granted, the latter also becomes

[1] See 6 Bom. 598, and *Narayan Jagannath Dikshit* v. *Vasudeo Vishnu Dikshit* 15 Bom. 247 (1890).

[2] *Ramchandra Mantri* v. *Venkatarao* Bom. 598 (1882).

[3] *Madhavrav Manohar* v. *Atmaram Keshav*, 15 Bom. 519 (1890).

[4] Ibid.

impartible and is protected from the process of the civil court by Sec. 11 of the Pension Act (XXIII of 1871).[1]

In *Nilmoni Singh Deo* v. *Bakranath Singh*,[2] the Privy Council without deciding whether the *jagir* in question was a *Ghatwali* tenure or not, held that its nature had not been altered by the permanent settlement, after which the services due by the *Jagirdars* remained as before, public services, and continued due to the Government. The *jagir*, though hereditary, was not subject to the ordinary rules of inheritance according to the Hindu or Mahomedan law, but was held upon the condition of approval of the heir by the Government. Therefore either division of the *jagir* upon the death of the holder or alienation during his life was precluded. And consequently the *jagir mahal* was not liable to attachment and sale in execution of a decree against the father and predecessor in state of a *jagirdar* so approved, as assets by descent in the possession of the latter.[3]

Inam lands.

Mr. Steele in his Law and Custom says the following about *inam* grants:—"*Inams* were given under the late Government from personal favour to Chieftains, Mootusuddies, Sastrees, Josees, Physicians, Brahman priests and devotees, Gosains and Mendicants, Sahookars, dancing girls, artisans, sons-in-law, friends, dependants, &c. The subjects of *inam* grants are the Sirkar revenues, or portions of them (as the different Umuls of Mokassa, Babtee &c.) due from villages, and Government land, formerly subject to the discretionary levy of Nuzzurs on alienation, &c. These grants were hereditary, and generally freehold. All the Sovereign princes and great chiefs gave *inams* out of their own territories, and generally obtained the confirmation of

[1] *Ramchandra Sakharam Vagh* v. *Sakharam Gopal Vagh* 2 Bom. 346 (1877).

[2] 19 Cal. 187 (P. C.) (1882).

[3] *Rajah Leelanund Singh* v. *the Govt.* 6 Moo. I. A. 101 which was followed in the above case.

the supreme authority."[1] Whether *inam* lands are subject to partition formed the subject-matter of decision in *Gopal Hari Joshi Rairikar* v. *Ramakant Ranganath Joshi Rairikar*.[2] In this case the plaintiff sued for partition of an ordinary *inam* village and of a cash balance payable by Government out of the revenue of another village. Admittedly the plaintiff was entitled to a one-fifth share. His claim was resisted on the ground that one particular branch was entitled to manage the village and to receive the cash allowance on behalf of all the co-sharers, and distribute the profits and the cash allowance amongst them in proportion of their respective shares, and that the plaintiff was therefore not entitled to partition. It was held that such *inam* land and allowance was liable to partition at the suit of a co-sharer, except when it was held on *saranjam* or other impartible tenure, or where the terms of the original grant impose a condition upon its enjoyment that the management shall rest with a particular branch of the family of the grantee; and possibly a long-continued practice from which a family custom may be inferred, may operate to bring about the same result.

In a suit for partition of *inam* land, the *onus* of proving impartibility lay on the holder of the *inam*. Neither the terms of the grant, nor the subsequent orders of the ruling power, nor any proved custom, as in this case was sufficient to discharge it.[3]

Vatan lands[4] are ordinarily impartible and the holders of them have to perform certain duties. A cessation of the performance of the duties of the office of a *Vatan*, *Vatan* lands.

[1] See Steele's *Law and Custom* p. 206.

[2] 21 Bom 458 (1896).

[3] *Vinayak Waman Joshi Rayarikar* v. *Gopal Hari Joshi Rayarikar* 30 I. A. 77 (1903): S. C. 27 Bom. 353.

[4] *Vatans* have been defined in s. 4., Act III of 1874. Amongst the *Marhattas* it has come to import any hereditary estate, office, privilege, property or means of subsistence, a patrimony—Wilson's Glossary.

even though sanctioned by Government, will not alter the nature of the estate and make it partible.[1]

In the case of *Adrishappa* v. *Gurushidappa*[2] the question was whether a *deshghat vatan* or property attached to the office of a *Desai*[3] was impartible or not. The Privy Council, concurring with the High Court, held that property appertaining to the office of *desai* was not to be assumed *prima facie* to be impartible. The burden of proving impartibility lay upon the *desai*; and on his failing to prove a special tenure, or a family or district or local custom to that effect, the ordinary law of succession applied.

Service *Vatan* Lands.

A Full Bench of the Bombay High Court has laid down that service *vatan* lands become alienable when the services are abolished, except in cases where there is a concurrent family custom operating similarly to keep the *vatan* estate together. Such a custom may continue and may singly bind the hands of the successive holders of the property after the former restriction has failed or been removed. The abolition of the public duty does not alter the nature of the estate. If the family custom forbids alienation beyond the life-time of the alienor, the custom will operate equally after the patrimony has ceased to be a *vatan*, as before. Where, however, such a concurrent custom does not affect an estate, then, when it is freed from its connection with the public office, the reason arising from that connection for the preservation of the

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[1] *Savitriava* v. *Anandrav* 12 Bom. H. C. R. 224 (1875); *Radhabai* v. *Anantrav Bhagvant Deshpande* 9 Bom. 198 (F. B.) [1885]; *Ramrao Trimbak Deshpande* v. *Yeshavantrao Madhabrao Deshpande*, 10 Bom. 327 (1885).

[2] 7 I. A. 162 (1880): S. C. 4 Bom. 494: S. C. 7 C. L. R. 1: S. C. 3 Shome. 206.

[3] The Superintendent or ruler of a Pargana or Province, *the principal revenue officer of a district*, under the native Government. The office was hereditary and frequently recompensed by grants of land, so that the *Desai often became a kind of petty chief in the South of India*—Wilson's Glossary.

estate necessarily fails, and the lands become subject to the ordinary law of descent and disposal.[1]

Majumdari Vatans are a kind of service *vatans*, and the Government has no power to resume them, where it dispenses with the performance of services in respect of them, if the holders of such *vatans* are ready and willing to perform such services. The Law in the Bombay Presidency recognizes the right of females to hold *majumdari vatans*, males being appointed by them to perform the service.[2] *Majumdari Vatans.*

Where in a family of a *deshpande vatandar*, there had been the practice, extending over a century and a half without interruption or dispute of any kind whatever, to leave the performance of the services of the *vatan* and the bulk of the property in the hands of the elder branch, and to provide the younger branches with maintenance only ; it was held that such practice, being more probably due in its origin to a family or local usage than to a mere arrangement determinable at the will of any members of the family, ought to be recognized and acted upon as a legal and valid custom.[3] The holder of an hereditary office, such as a *Deshpande Vatan*, cannot create an hereditary deputy. The appointment of a deputy made by a particular incumbent cannot extend beyond the life of such incumbent.[4] *Deshpande Vatan.*

In *Bhau* v. *Ramchandrarao*[5] the point referred to the Full Bench was whether lands of a service *vatan* become alienable when the services are abolished. It should be remembered that by the Gordon Settlement, services appertaining to a *vatan* had been commuted; but that did not convert *Deshmukhi Vatan.*

[1] *Radhabai* v. *Anantrav Bhagvant Deshpande* 9 Bom. 198 (F. B.) [1885]. But See *Bhau bin Pommanna* v. *Ramchandrarao bin Mahipatrao* 20 Bom. 423 (F. B.) [1895].

[2] *The Government of Bombay* v. *Damodhar Parmananda* 5 Bom. H.C.R. 202 (1868).

[3] *Ramrao Trimbak Deshpande* v. *Yeshvantrao Madhavrao Deshpande* 10 Bom. 327 (1885).

[4] *Ravji Raghunath* v. *Mahader rav Vishvanath* 2 Bom. H. C. R. 250 (1864).

[5] 20 Bom. 423 (F. B.) (1895).

the *vatan* lands into the private property of the *vatandars* with the necessary incident of alienability and left them attached to the hereditary office, which, although freed from the performance of service, remained in tact as shewn by the definition of *hereditary office* in the declaratory Act III of 1874.[1]

Candy J., who referred the point for the consideration of a Full Bench, made the following observations regarding the previous Full Bench case: "As was said in *Radhabai* v. *Anantrav*[2] 'by section 5 of the Act the alienation of *any* vatan or part thereof is forbidden without the sanction of Government to any person not a vatandar of the same vatan, and by section 10 power is given to the Collector to set aside any sale or transfer thereof.' If vatans under the Gordon Settlement are within the terms of section 5, then, there is nothing to exclude them from the provisions of section 10. No doubt after the decision of the Full Bench in *Radhabai* v. *Anantrav*, and dated January, 1885, that vatan lands become alienable when the services are abolished (a decision now admitted to have been founded on the erroneous idea that the settlement of a service vatan could be made under Bombay Act II of 1863) the idea was prevalent in some quarters that section 5 of Bombay Act III of 1874 could not be applicable to vatandars settled under the Gordon Settlement."[3]

The question referred to the Full Bench was whether section 10 of the *Vatandar* Act III of 1874 (Bombay) was applicable to *vatans*, which had been the subject of the Gordon settlement prior to the passing of the Act. The object of section 10 is to supplement the prohibition contained in section 5 against alienation by a *vatandar* to a person not a *vatandar* by enabling the Collector to undo

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[1] For "usual services" of a Deshmukh, see *Rangora Naik* v. *Collector of Ratnagiri* 8 Bom. H.C.R. 107 (1871).

[2] 9 Bom. 198 (F.B.).

[3] 20 Bom. 423 p. 428.

an alienation which may have been effected since the passing of the Act by a decree or order of a Civil Court. The Full Bench has held that section 10 does apply and has retrospective effect.[1]

Deshghat Vatan.

In *Adrishappa* v. *Gurushidappa*,[2] the question raised was whether a *deshgat vatan* was or was not an impartible inheritance. A *deshghat vatan* is a property held as appertaining to the office of *desai*. In this case the younger brothers brought a suit for partition against their eldest brother who asserted that inasmuch as he held the office of *desai* and the property in dispute belonged to his office he was entitled to hold it as impartible, subject to the customary right of his brothers to receive allowance by way of maintenance. The Privy Council held that there was no general presumption in favour of the impartibility of the estates of this kind so as to shift the burden of proof; that it lay upon the *desai*, who sought to show that the estate was impartible, "to give evidence of the special tenure of the *vatan*, or of either family custom or of district or local custom sufficiently strong to rebut the operation of the general law." No such evidence, either of family custom or of district or local custom, had been given to prevent the operation of the ordinary rule of law whereby the property would be partible. Accordingly their Lordships affirmed the decree for partition, accompanied by a declaration that it was to be without prejudice to the right of the *desai* to such emoluments or allowances for the performance of the duties of the desaiship as he might be entitled to under any law in force.

There cannot be two separate *vatans* in connection with one hereditary office. Therefore, when a *vatan* is broken up into shares or *takshims*, those *takshims* do not constitute separate *vatans*.[3]

[1] See also *Gopalrav* v. *Trimbackrav* 10 Bom. 598 (1886).

[2] 4 Bom. 494 (P. C.) [1880].

[3] *Ramangavda* v. *Shivapagavda* 23 Bom. 601 (1896).

Alienation by a *vatandar*.

An alienation by way of mortgage of *vatan* property or any part of it, executed when Regulation XVI of 1827 was yet in force, had no operation beyond the life of the *vatandar* who mortgaged. The mortgage was in its inception void against the heir of the *vatandar* and had not become validated against the heir by reason of the repeal of the sections in Regulation XVI of 1827, relating to this subject, by Bombay Act III of 1874.[1]

[1] *Padapa* v. *Swamirao* 24 Bom. 556 (P. C.) [1900]. See Act V of 1886, which is an Act to amend Bombay Act III of 1874.

CHAPTER VI.

HINDU CUSTOMS.

Religious Endowments.

Endowments for religious and charitable purposes are quite common in India as in other countries. The whole land, it may be said without exaggeration, is covered with numerous institutions of this character. From a very early period, private as well as public munificence poured in for the cause of charity and religion, for establishing religious centres for teaching and disseminating the sublime knowledge stored in the sacred books of the land. And the result has been the creation of numberless *Mutts, Temples, Pagodas, Asthals* and *Adhinams* throughout the country. These are in the nature of permanent institutions for the benefit of the public, and may fairly be called Public Endowments. Besides these, there are other endowments in which the donor holds the property himself in beneficial ownership, subject merely to a trust as to part of the income devoted to the support of the religious endowment. Among Hindus the common practice is to dedicate lands and property in the name of the family idol or some deity and to vest them in a trustee; generally the donor and his heirs are the trustees or *Shebaits*. These we may call Private Endowments. Unlike English law, Hindu law makes no distinction between a private and a public endowment.

Formalities and Incidents of Religious Gifts.

The English law relating to superstitious uses has no application to Hindu religious endowments.[1] Gifts

[1] *Rupa Jagshet* v. *Krishnaji Govind* 9 Bom. 169 (1884); *Kusalchand* v. *Mahadevgiri* 12 Bom. H. C. R. 214 (1875); see also *Das Merces* v. *Cones* 2 Hyde 65 (1864); *Andrews* v. *Joakim* 2 B. L. R. (O. C. J.) 148 [1859]; *Joseph Ezekiel Judah* v. *Aaron Hye* 5 B. L. R. 133 (1870).

for religious purposes are valid without the delivery of possession and are not invalid if they violate the rule of perpetuities.[1] Public endowments are ordinarily inalienable,[2] whereas a private endowment is alienable and partible, but subject to the charge upon it.[3] The property dedicated to religious purposes are generally vested in trustees, and such trust when properly made is irrevocable.[4] When a gift is made, the donor taking all the steps in his power to give effect to it, it is complete and he cannot revoke it by a subsequent Will.[5] Endowed lands are not hereditable property, and the management of them for religious uses can pass by inheritance.[6] The

[1] *Kumara Asimkrishna Deb* v. *Kumara Kumara Krishna Deb*, 2 B. L. R. (O. C. J.) at p. 47 (1868) Per Markby J.—"It being assumed to be a principle of Hindu law that a gift can be made to an idol, which is a *Caput mortuum*, and incapable of alienating, you cannot break in upon that principle by engrafting upon it the English law of perpetuities."

[2] *Maharanee Shibesouree Debya* v. *Mothooranath Acharjo* 13 Moo. I. A. 270 (1869); *Prosunno Kumari Debya* v. *Golabchand Baboo* 2 I. A. 145 (1875); *Narayan* v. *Sadanand Ramchandra*, 5 Bom. 393 (1881); *Collector of Thana* v. *Hari Sitaram* 6 Bom. 546 (1882); *Rupa Jayshet* v. *Krishnaji Govind* 9 Bom. 169 (1884); *Sri Ganesh Dharnidhar Maharajdev* v. *Keshavrav Govind Kulgavkar*, 15 Bom 625 (1890); *Ramchandra Shankarbova Dravid*; *Kashinath Narayan Dravid*, 19 Bom. 271 (1894); *Trimbak Ramkrishna Ranade*, v. *Lakshman Ramkrishna Ranade* 20 Bom. 495 (1895); *Prosunna Kumar Adhikari* v. *Saroda Prosunno Adhikari* 22 Cal. 989 (1895); *Sheo Shankar Gir* v. *Ram Shewak Chowdhri* 24 Cal. 77 (1896).

[3] *Mahatab Chand* v. *Mirdad Ali*, 5 S. D. Sel. Rep. 268 (313) [1833]; approved of by the Privy Council in *Maharanee Brojosoondery Debia* v. *Ranee Luchmee Koonwaree* (1873), see full report in 15 B. L. R. 176*n* (1875); *Futtoo Bibee* v. *Bhurrut Lull Bhukut* 10 W. R. 299 (1868); *Dasoo Dhul* v. *Kishen Chunder Geer*, 13 W. R. 200 (1870); *Sonatun Bysack* v. *Juggut Soondree Dassee* 8 Moo. I. A. 66 (1859); *Shaik Mahomed Ashanulla Chowdhry* v. *Amarchand Kunda*, 17 I. A. 28 (1889): s. c. 17 Cal. 498

[4] *Juggut Mohini Dossee* v. *Sokheemoney Dossee* 14 Moo. I. A. 289 (1871): s. c. 10 B. L. R. 19: s. c. 17 W. R. 41.

[5] *Rajaram* v. *Ganesh* 23 Bom. 131 (1898).

[6] *Elder Widow of Raja Chutter Sen* v. *Younger Widow of Raja Chutter Sen* 1 S. D. Sel. Rep. 180 (239) [1807].

Shebait has not the legal property in the lands dedicated to an idol for religious services, but only the *title* of manager of a religious endowment.[1]

When there has been no direct endowment to support the worship of the family idol, although a moral obligation might be created by Hindu usage and custom, such moral obligation will not be held as having any legal operation.[2]

Origin of *Mutts*.

Of all the religious institutions *Mutts* are the earliest. These institutions were established as centres of theological learning and in order to provide a line of competent teachers to carry on the work of religious propagandism and to spread the particular doctrine of the institution concerned. These are almost invariably presided over by learned and pious ascetics. The word *Mutt* "in its original and narrow sense signifies the residence of an ascetic or *sannyasi* or *paradesi*."[3] In regard to origin, growth and object, *Mutts* in India are very much similar to the ecclesiastical bodies in Europe. The origin and growth of *Mutts* is thus described:—"A preceptor of religious doctrine gathers around him a number of disciples whom he initiates into the particular mysteries of the order, and instructs in its religious tenets. Such of these disciples as intend to become religious teachers, renounce their connection with their family and all claims to the family wealth, and, as it were, affiliate themselves to the spiritual teacher whose school they have entered. Pious persons endow the schools with property which is vested in the preceptor for the time being, and a house for the school is erected and a *mattam* is constituted. The property of the *mattam* does not descend to the disciples or elders in common; the preceptor, the head of the institution, selects among the affiliated disciples him

[1] *Maharanee Shibessouree Debia* v. *Mathooranath Acharjo* 13 Moo. I. A. 270 (1869).

[2] *Shamlall Sein* v. *Hurosoondry Gupta* 1 Ind. Jur. N. S. 36; s. c. 5 W. R. 29 (1866).

[3] *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran*, 10 Mad. 375 p. 380 [1887].

whom he deems the most competent, and in his own lifetime installs the disciple so selected as his successor, not uncommonly with some ceremonies. After the death of the preceptor the disciple so chosen is installed in the *gadi*, and takes by succession the property which has been held by his predecessor. The property is in fact attached to the office and passes by inheritance to no one who does not fill the office. It is in a certain sense trust property; it is devoted to the maintenance of the establishment, but the superior has large dominion over it, and is not accountable for its management nor for the expenditure of the income, provided he does not apply it to any purpose other than what may fairly be regarded as in furtherance of the objects of the institution. Acting for the whole institution he may contract debts for purposes connected with his *mattam*, and debts so contracted might be recovered from the *mattam* property and would devolve as a liability on his successor to the extent of the assets received by him'[1] This description represents the nature of the generality of *Mutts* and the incidents of the property which is devoted to their maintenance. There may, however, be exceptions.

Earliest *Mutts*.

The foundation of *Mutts* in India dates from the time of the great Sankaracharya, who appeared about the 8th century of the Christian era, and was the founder of the *Adwaita* School of philosophy. It was said that before the advent of Sankaracharya, Buddhism flourished and took firm hold in India and the Brahmanical religion was on the point of vanishing from the land. The great Sankaracharya by his superior teachings not only arrested the progress of Buddhism but gradually restored Vedantism in its pristine glory in the land. In his palmy days the great Buddha established monasteries for affording Buddhist monks shelter and abode to learn and meditate, to cultivate

[1] *Sammantha Pandara* v. *Sellappa Chetti*, 2 Mad. 175 p. 179 (1879).

spiritual perfection and attain *Nirvana*. From these Buddhistic monasteries the great teacher of Pantheism or *Adwaitism* took his conception of establishing religious centres of teachings, *i. e.*, *Mutts* where his followers might learn and cultivate, and teach to others, his sublime doctrine of *Adwaitabad*. It was said that he actually founded four *Mutts* for his followers on the basis of the monastic system of Buddhistic *Sangharamas*. After Sankaracharya, founders of other schools of religious philosophy, such as Ramanuj, Madhabacharya, Nanak, Kabir, Chaitanya founded many important *Mutts* for similar purposes.

Endowed *Mutts*.

With regard to the origin of endowed *Mutts* the following passage from the judgment in *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran*[1] may be cited here :—"In former times these institutions exercised considerable influence over the laymen in their neighbourhood; they became the centres of classical and religious learning and materially aided in promoting religious knowledge and in encouraging religious and other charities. The ascetics who presided over them were held, owing to their position as religious preceptors and often also in consequence of their own learning and piety, in great reverence by Hindu Princes and noblemen, who from time to time made large presents to them and endowed the *Mutts* under their control with grants of land. Thus, a class of endowed *Mutts* came into existence in the nature of monastic institutions, presided over by ascetics or *sannyasis* who had renounced the world."

Distinction between an *Adhinam* and a *Mutt*.

The distinction between an *Adhinam* and a *Mutt* as an endowed institution consists in the latter being an isolated institution, whilst the former is the central institution, from which the chief ascetic exercises control and supervision over a group of endowed institutions and religious trusts committed to his manage-

[1] 10 Mad. 375 p. 386 (1887).

ment and subject to his jurisdiction as the responsible trustee.[1]

Sudra *Mutts*.

Mutts may be established by sudra *sanuyasis*. In fact there are several such *mutts* in India. Dharmapuran and Teruvaduthorai are the chief sudra *mutts* in Madras. These are *Shivite mutts*.[2] Regarding *Dwandra*, *i. e.* interdependent *mutts*, see *infra* p. 243.

Dwandra Mutts.

Temples.

Like *Mutts*, Temples are also religious institutions. They are the most numerous in India. They have been founded as places of common resort for the worship of god and for the growth of spiritual knowledge of Hindu community at large. As a rule temples are endowed far more richly than the sister institutions *viz.*, *Mutts*. Each temple has a presiding deity to which the temple is usually consecrated and the worship of this deity is the primary object of the temple. Each *Mutt* has also a deity attached to it, but its worship is the secondary object, the primary object being the teaching and propagating spiritual knowledge. But, whether a *mutt* or a temple, each is presided over by an ascetic. He has to look after the management of the institution in his charge The office of superintendent of these religious establishments which are variously known as *Mutts*, Temples, *Mandirs*, *Pagodas*, *Asthals*. *Devasthanams*, *Adhinams Akharas*, &c.—is called a *Mohantee* or *Mohuntship* and the incumbent of the office is variously designated as *Mohunt Gosavi*, *Geer*, *Acharya*, *Dharmakarta*, *Swami*, *Adhikari*, *Sardar*, *Panda*, &c.

Difference between the position of the manager of a temple and that of head of a *mutt*..

The Madras High Court in a very recent case has drawn a distinction between the position of the manager of a temple and that of a head of a *mutt*. It holds that

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[1] *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran* 10 Mad. 375 at 387 (1887).

[2] *Sammantha Pandara* v. *Sellappa Chetti*, 2 Mad. 175 (1879); *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran*, 10 Mad. 375 (1887).

the custodian or *dharmakarta* of a temple is a mere trustee who is bound to apply the funds at his disposal in carrying out the object of the trust such as the conduct of the daily worship and the performance of ceremonies. The head of a *Mutt* is not a mere trustee but a "corporation sole" having an estate for life in the permanent endowment of the *Mutt* and an absolute property in the income derived from offerings, subject only to the burden of maintaining the institution. His power to alienate or charge the *corpus* of the endowment is limited to purposes necessary for the maintenance of the *Mutt*, and alienations or charges will not be binding on the *Mutt* or on his successors merely because they have been made for general religious and charitable purposes appropriate to the head of a *Mutt*."[1] It would seem that the learned Judges came to the above conclusion by holding that "there is a considerable similarity between these *mutts* and ecclesiastical corporations in Europe, in respect of their origin, growth and object."[2] An endowment to a *mutt* is an endowment to the brotherhood, *i. e.* to the *Mohunt* and his disciples, and an endowment to a temple is a dedication to the presiding deity of the temple. And as idols have all along been treated as perpetual infants, so the provisions of human guardians have been made for the management and preservation of the dedicated property. The Judicial Committee observed :—"It is only in an ideal sense that property can be said to belong to an idol, and the possession and management must in the nature of things be entrusted with some persons as *shebait* or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property at least to as great a degree as the

[1] *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* 27 Mad. 435 (1904).

[2] Ibid p. 453.

manager of an infant heir."[1] His Lordship Mr. Justice Bhashyam Ayyanger has very nicely put the distinction between a *mutt* and a temple in these words: "The two classes of institutions, *viz.*, temples and *mutts*, are thus supplementary in the Hindu ecclesiastical system, both conducing to spiritual welfare, the one by affording opportunities for prayer and worship, the other by facilitating spiritual instruction and the acquisition of religious knowledge—the presiding element being the deity or idol in the one, the learned and pious ascetic in the other. The position of the head of the *mutt* is thus not the same as or analogous to that of managers or *dharmakartas* of *devastanams* and temples, but resembles more that of Bishops and Archbishops in the Christian system of Europe. In the case of temples, the endowments, whether in the shape of landed property or *tasdik* allowances, have to be devoted to the carrying out of the specific purposes connected with the temple, *i. e.*, the daily worship and the periodical ceremonies and festival—purposes defined and settled by usage and custom and generally recorded in what is known as the 'dittam'—and the *dharmakartas* are mere trustees for the carrying out, or executing such trusts In the case of *mutts*, however, such defined and specific purposes immediately connected with the maintenance of the *mutt* as an institution, are, in the nature of things, very limited and a large part of the income derived from the endowments of the *mutt* as well as from the money-offerings of its disciples and followers—which offerings as a rule are very considerable—is at the disposal of the head of the *mutt* for the time being, which he is expected to spend at his will and pleasure, on objects of religious charity

[1] *Prasunno Kumari Debia* v. *Golabchand Baboo* 2 I. A. 145 (1875). See also *Maharance Sibessource Debia* v. *Mothooranath Acharja* 13 Moo. I. A. 270 (1869); *Manohor Ganesh Tambekar* v. *Lakhmiram Govindram* 12 Bom. 247 (1887).

and in the encouragement and promotion of religious learning.'"[1]

Power of a *shebait* or manager.

Lands dedicated to the services of an idol being inalienable, a *shebait* cannot alienate them, though he can create derivative tenures and estates conformable to usage.[2] *Shebaits* who succeed one another from a continuing representation of the *devutter* property, can incur debts for the proper expenses of keeping up the religious worship, repairing the temple, &c. Judgments obtained against a *shebait* in respect of such debts are binding upon succeeding *shebaits*, though the decrees could be executed only against the current rents and profits of the *devutter* property. The Privy Council has laid down a rule relating to the powers of a *shebait* in these terms:—"Notwithstanding that property devoted to religious purposes, is, as a rule, inalienable, it is in their Lordships' opinion competent for the *shebait* of the property dedicated to the worship of an idol, in the capacity as *shebait* and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples and other possessions of the idol, defending hostile litigious attacks and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them."[3] The Bombay Court following this decision of the Privy Council has laid down that religious endowments in this country, whether Hindu or Mahomedan, are not alienable, though the annual revenues of such endowments, as distinguished from the *corpus*, may occasionally be pledged for purposes essential to the Institution endowed.[4]

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[1] 27 Mad. 435 p. 454.

[2] *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo* 13 Moo. I. A. 270 (1869).

[3] *Prosunno Kumari Debia* v. *Golap Chand Baboo* 2 I. A. 145 (1875). See also *Prosonno Kumar Adhikaree* v. *Saroda Prosunno Adhikaree* 22 Cal. 989; *Sheo Shankar* v. *Ram Shewak* 24 Cal. 77 (1896).

[4] *Narayan* v. *Sadanand Ramchandra* 5 Bom. 393 (1881). See also *Rupa Jagshet* v. *Krishnaji Govind* 9 Bom. 169 (1884); *Collector of Thanna* v. *Hari Sitaram* 6

In *Trimbak Ramkrishna Ranade* v. *Lakshman Ramkrishna Ranade*,[1] it was laid down that "as regards public endowments, religious offices are naturally indivisible, though modern custom has sanctioned a departure in respect of allowing parties entitled to share to officiate by turns and of allowing alienation within certain restrictions."

Rights of a *Mohunt* of a *mutt*

As to the rights of the *Mohunts* or *Swamis* in relation to the *mutts* and their endowments, the cardinal principle is that the properties given for the maintenance of charities, religious or otherwise, are ordinarily inalienable.[2] But, "the *Swamis*," says Mr. Justice Subrahmania Ayyar, "were not mere employees or subordinates in the institutions, but heads thereof, whose duty it was to promote learning and further the interests of religion; such heads moreover as ascetics, not prone to be affected by motives incident to worldly life, requiring less restraint in dealing with property than ordinary men. It followed therefore that the law gave them, over what remained of the income after defraying the established charges of the institutions, a full power of disposition, while in respect of the *corpus* it treated the individuals composing the line of succession as in the position of tenants for life."[3] In *Khusalchand* v. *Mahadevgiri*[4] it was laid down that a grant to a *Goswami* and his disciples in perpetual succession, coupled with directions which practically make it an endowment of a *mutt* with a limitation of the enjoyment to a particular line of celebrants of the worship, does not entitle an individual *goswami* to encumber the endowment beyond his own life.

Bom. 546 (1882); *Mancharam* v. *Pranshankar* 6 Bom. 298 (1882); *Shri Ganish* v. *Keshavrav* 15 Bom. 625 (1890); *Ramchunder* v. *Kashinath* 19 Bom. 271 (1894).

[1] 20 Bom. 495 (1895).

[2] *Maharanee Shibessouree Debia* v. *Mothoora Nath Acharjo* 13 Moo. I. A. 270 (1869); *Prasanna Kumari Debia* v. *Golabchand Baboo* 2. I.A. 145 (1875); *Narayan* v. *Chintamon* 5 Bom. 393 (1881); *Collector of Thanna* v. *Hari Sitaram* 6 Bom. 546 (1882).

[3] *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami*, 27 Mad. 435 p. 439. (1904).

[4] 12 Bom. H. C. R. 214 (1875).

A *Mohunt* in charge of an endowment, with only a life interest in the property, cannot create an interest superior to his own, or, except under the most extraordinary pressure and for the distinct benefit of the endowment, bind his successors in office. If a purchaser from such *Mohunt* retained possession after the *Mohunt's* death, the successor to the *gadi* would have a cause of action against him from the date of the election; and no length of possession during the vendor's life-time would give the purchaser a valid title as against the present *Mohunt*.[1] If this were not so, any *Mohunt* who was inclined to commit waste on an endowment and who lived long enough, might ruin the property entrusted to his charge, and leave his successor remedyless if more than 12 years had elapsed since the alienations.

Right of succession to a *mohuntee*.

The right of succession to the property of a deceased *Mohunt* depends upon the custom and practice of the particular institution concerned.[2] The *chelas* cannot claim the property of the deceased *guru* whether hereditary or self-acquired, by right of inheritance, nor can they claim a division of the same among themselves.[3] The custom and usage governing succession of each institution must be

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[1] *Mohunt Burm Suroop Dass* v. *Khashee Jha* 20 W.R. 471 (1873). See also the following cases:—*Narayan* v. *Sadanand Ramchandra* 5 Bom. 393 (1881); *Collector of Thanna* v. *Hari Sitaram*, 6 Bom. 546 (1882); *Dharanidhur Maharajdev* v. *Keskavrav Govind Kulgavkar*, 15 Bom. 625 (1890); *Sitarambhat* v. *Sitaram Ganesh*, 6 Bom. H. C. R 250 (1869); *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo*, 13 Moo. I. A. 270 (1869); *Prosunno Kumari Debya* v. *Golab Chand Baboo*, 2 I. A. 145 (1875); *Konwar Doorganath Ray* v. *Ram Chunder Sen*, 4 I. A. 52 (1876); *Ramalingam Pillai* v. *Vythilingam Pillai*, 20 I. A. 150 (1893) s. c. 16 Mad. 490; *Parsotam Gir* v. *Dat Gir*, 25 All. 296 (1903; *Saminatha* v. *Purushottama*, 16 Mad. 67 (1892); *Kasim Saiba* v. *Sudhindra Thirtha Swami*, 18 Mad. 359 (1895).

[2] *Greedharee Doss* v. *Nandokissore* 11 Moo. I. A. 405 (1867): s c. in Cal. H.C. 2 Hay 633 (1863): s. c. 1 Marshal 573.

[3] *Atmanund* v. *Atma Ram* 1 N.W.P. Decis 309 (1852).

strictly proved.[1] If by usage the office of a *Mohunt* is elective, it must be adhered to in preference to any other mode of succession. Any devise or relinquishment by the incumbent in favour of another person, in opposition to the usage of the institution cannot operate at all.[2]

Rules of succession to a *mutt*.

The rule regarding succession to a *mohuntship* of a *mutt* as laid down in various decided cases, the earliest of which came before the Sudder Dewany Adawlut in 1806, is as follows :—According to the established usage a successor to the office of a *Mohunt* is nominated by the last incumbent, who, in his capacity of *guru* or spiritual teacher, selects one of his *chelas* or pupils to succeed him at his decease. On the demise of the *Mohunt*, the *Mohunts* of other similar institutions in the vicinage convene an assembly of the order for performing the *bundhara* or funeral obsequies of the deceased *Mohunt*, at which they confirm the nomination made by the deceased and initiate the pupil selected as his authorized successor.[3]

Khaschela to succeed where no nomination made.

The foregoing rule for the election of a successor by the *Mohunt* during life and his subsequent installation by an assembly of *Mohunts* at the obsequies of the deceased *Mohunt* appears to be in all cases indisputable and conclusive. But the case of *Ganesh Gir* v. *Amrao Gir*[4] has laid down a precedent that where no successor has been nominated by the last incumbent, the proper successor is his

[1] *Greedharee Doss* v. *Nando Kissore* 11 Moo. I. A. 405 (1867); *Raja Muttu Ramalinga Setupati* v. *Perianayagum*, 1. I. A. 209 (1874); *Rajah Vurmah Valia* v. *Ravi Vurmah Mutha*, 4 I. A. 83 (1876); *Srimati Janoki Debi* v. *Sri Gopal Acharjia* 10 I.A. 32 (1882); *Genda Puri* v. *Chitar Puri* 13 I. A. 100 (1886): s. c. 9 All. 1; *Ramalingam Pillai* v. *Vythilingam Pillai* 20 I.A. 150 (1893): s. c. 16 Mad. 490.

[2] *Narain Das* v. *Brindaban Das* 2 S.D. Sel. Rep. 151 (1815).

[3] *Dhunsing Gir* v. *Mya Gir* 1 S. D. Sel. Rep. 153 (1806); *Ramruttun Das* v. *Bunmalee Das* Ibid 170 (1806); *Gunesh Gir* v. *Amrao Gir* Ibid 218 (291) [1807]; *Gunga Das* v. *Tiluk Das* Ibid 309 (1810); *Narain Das* v. *Brindabun Das* 2 S. D. Sel. Rep. 151 (1815); *Atmanund* v. *Atma Ram* 1 N. W. P. Decis 309 (1852); *Sitapershad* v. *Thakurdass* 5 C. L. R. 73. (1879).

[4] 1 S. D. Sel. Rep. 218 (1807).

Khaschela or principal pupil. A *Mohunt*, being restricted from marriage, can have no legitimate children and must be succeeded in his rights and possession by his *chela* or adopted pupil. Nomination of a successor by the *Mohunt* incumbent may be made either by word of mouth or by will.[1]

Nomination to be confirmed : Installation essential.

It would seem that nomination of a successor by a deceased *Mohunt* must be confirmed by other *Mohunts* of the order and the *Mohunt* elect must be duly installed by them in the *gadi* at the *bundhara* ceremony. In a case where there was no regular election or installation as required by the usage of the sect, the Sudder Dewany Adawlut directed the *Mohunt* in possession to convene an assembly of *Mohunts* to elect and instal him regularly.[2] In the *Ganes Gir's* case[3] the claimant, who was the principal pupil, was duly installed as the successor of the deceased *Mohunt* at his obsequies by an assembly of the *Mohunts*. So the judgment was given in his favour. In another case the Sudder Dewany Adawlut, in rejecting a claim for the superintendence of an endowment, observed as follows :— "But a further objection arises to the plaintiff's claim, *viz.*, that were the deed established and were it shown that it was the *intention* of the donor to transfer to the donee his rights of office as well as personal rights, and also the duties incumbent on the office of *Mohunt, there has been no acknowledgment of the Plaintiff* by the assembly of *Mohunts* and others in due form, as is proved in the record to be customary on the death of one *Mohunt* and the appointment of his successor."[4]

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[1] *Greedharee Dass* v. *Nundakissore Dass* 11 Moo. I. A. 405 (1867); *Trimbakpuri Guru Sital puri* v. *Gangabai*, 11 *Bom.* 514 (1887); *Ramalingam Pillai* v. *Vythilingam Pillai*, 20 I. A. 150 (1893): s. c. 16 Mad. 490; *Genda Puri* v. *Chhatar Puri* 13 I. A. 100 (1886): s. c. 9 All. 1.

[2] *Gunga Das* v. *Tilak Das* 1 S. D. Sel. Rep. 309 (1810).

[3] I. S. D. Sel. Rep. 218 (1807).

[4] *Mohunt Gopal Dass* v. *Mohunt Kirparam Dass* 6 S. D. Decis. 250 (1850).

Bundhara assembly's power.

The *bundhara* assembly has full power either to confirm or to set aside the nomination made by the deceased *Mohunt*. If the assembly see reason for setting aside the nomination or if no successor has been nominated by the deceased, in either of which cases they make an election of their own, selecting from among the pupils of the deceased the one who may appear to be the best qualified to be his successor and then to instal him in the *gadi* with the usual ceremonies.[1]

Usage of each *mohuntee* is its law of succession.

With reference to rules of succession to the *gadi* Sir Barnes Peacock C. J., in *Greedharee Dass* v. *Nund Kishore Dutt* said :—"Numerous cases have been cited to show what was the usage, but the law to be laid down by this court must be as to what is the usage of each *mohuntee*. We apprehend that if a person endows a college or religious institution, the endower has a right to lay down the rule of succession ; but when no such rule has been laid down, it must be proved by evidence what is the usage, in order to carry out the intention of the original endower. Each case must be governed by the usage of the particular *mohuntee*.'[2] The Judicial Committee on the appeal of the same case said, "It is to be observed that the only law as to these *Mohunts* and their office, functions and duties, is to be found in custom and practice, which is to be proved by testimony."[3] The same principle has been laid down in various other cases by different courts in India as well as by the Judicial Committee.[4]

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[1] *Gunga Das* v. *Tiluk Das* 1 S. D. Sel. Rep. 309 (1810) ; *Atmanund* v. *Atmaram* 1 *N. W. P.* Decis 309 (1852).

[2] 1 Marshal 573 p. 581 (1863) : s. c. 2 Hay 633 ;

[3] *Greedharee Dass* v. *Nundokissore Dass* 11 Moo. I. A. 405 (1867). See also similar observations of Garth C. J., in *Sitapurshad Thakurdass* 5. C. L. R. 73 p. 79 (1879).

[4] *Raja Muttu Ramalinga Setupati* v. *Perianayagum Pillai* 1 I. A. 209 (1874) ; *Raja Vurmah Valia* v. *Ravi Vurma Mutha* 4 I. A. 76 (1876) : s. c. 1 Mad. 235 ; *Srimati Janoki Devi* v. *Sri Gopal Acharjia* 10 I. A. 32 (1882) s. c. in the lower court 2 Cal. 365 ; *Genda Puri* v. *Chhatar Puri* 13 I. A. 100 (1886) : s. c. 9 All. 1 ;

Sravuk guru succession.

A suit by the *chela* of a *Sravuk guru* to obtain possession of the temple of his sect at Surat in quality of heir to the last *guru* was dismissed because the *seth* of the sect of Ahmedabed was possessed of the sole power to nominate a *guru* and had already appointed another person.[1]

Escheat.

Land bestowed by a zemindar in perpetuity upon a *Gosain* escheats on the death of the donee without legal heirs, together with any buildings or groves standing thereon, to the ruling power, and does not revert to the donor.[2]

Legal representative of a *mohunt*

According to Hindu law a *chela* is the heir and personal representative of the deceased *Mohunt*.[3] So the *chela* (spiritual son) and not the *gurubhai* (spiritual brother) of the deceased *Mohunt* is entitled to collect the outstanding debts due to his private estates.[4] On an application for Letters of Administration to the estate of a deceased *Bairagee*, it was held that according to the custom prevalent amongst the sect the preceptor of the deceased *Mohunt's* preceptor was entitled to it. This custom supersedes the Hindu law which contemplates the succession only of the preceptor himself.[5] Whether this custom, which ignored the right of the preceptor to inherit the property of the disciple, was unreasonable or not, Banerjee J., said : "But that of itself does not make the custom so unreasonable that we should refuse to recognize it. It may be well (and some of the facts appearing from certain of the documents go to show that is so) that by reason

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Ramalingam Pillai v. *Vythilingam Pillai* 20 I. A. 150 (1890): s. c. 16 Mad. 490 ; *Basdeo* v. *Gharib Das* 13 All. 256 (1890).

[1] *Bhutaruk Rajendra Sajigur Sooryee* v. *Sook Sagur* 1 Borr. 390 (1809).

[2] *Sungram Singh* v. *Debee Dutt* 2 N. W. P. Decis Sel. Rep. 235 (1855).

[3] *Mohunt Sheoprokash Das* v. *Mohunt Joyram Dass* 5 W. R. Misc. 57 (1866) : s. c. 2 Wyman Part I 8.

[4] *Dukharam Bharti* v. *Luchman Bharti* 4 Cal. 954 (1879): s. c. 4 Shom. Notes 5 ; See also *Bhyrub Bharati Mohunt* 21 W. R. 340 (1874).

[5] See Dayabhaga Ch. XI. s. 6. para. 35.

of superior sanctity attaching to the family, to which the applicant belongs, the right to succeed has been conceded to the members of that family in preference to the right of the immediate preceptors of the deceased disciples."[1]

A *chela* alone entitled to succeed.

Primarily no person except a *chela* or disciple is entitled to succeed to a deceased *mohunt*. The *chela* must be an ascetic and follow a life of celibacy.[2] Where there are more *chelas* than one, custom and practice intervene. Sometimes the eldest or *khaschela* succeeds to the *gadi* by right of primogeniture. In some cases the *guru* selects or nominates his successor from amongst his *chelas*. In some *Asthals* the succession depends upon election from amongst the *chelas* by the superiors of other similar *Asthals*. The reigning king has occasionally the right to elect from amongst the *chelas* of the last *Mohunt*.[3] In a very recent Madras case, one of the learned Judges has thus put the law of succession to *mutts* in Southern India :—"It is regulated in the case of *mutts* by the custom or usage of each particular *mutt*, but in most cases, especially in Southern India, the successor is ordained and appointed by the head of the *mutt* during his own life-time and in default of such appointment the nomination may rest with the head of some kindred institution, or the successor may be appointed by election by the disciples and followers of the *mutt*, or, in the last instance, by the Court as representing the Sovereign.'[4]

In default of *chela* a *gurubhai* or some other spiritual relation.

When the last *Mohunt* dies without leaving any *chela* the succession goes to the *gurubhai* or some other spiritual relation according to the usage and custom of the institution. In *Ram Dass Bairagee* v. *Gunga Dass*,[5] the *Mohunt* of a *bairagee mutt* died without leaving any *chela*.

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[1] *The Collector of Dacca* v. *Jagat Chunder Goswami* 28 Cal. 608 p. 611 (1901) : s. c. 5 C. W. N. 873.

[2] *Mohunt Ramji Dass* v. *Lachhu Dass* 7 C. W. N. 145 (1902).

[3] *Ibid.*

[4] *Vedyapurna Tirtha Swami* v. *Vidyapurna Tirtha Swami* 27 Mad. 435 p. 457. (1904)

[5] 3 Ag. H.C. 295 (1868).

Ordinarily a successor to this *mutt* is appointed by the *mohunts* of other *bairagee mutts*. But a custom was set up to the effect that the property of a deceased *mohunt* leaving no *chela* passed to the *brother* of his spiritual preceptor. The Court directed inquiry into the alleged custom. In *Mohunt Bhagaban Ramanuj Das* v. *Mohunt Raghunundan Ramanuj Dass*[1] the rule of succession to a *mutt* in Puri, called *Dakhinparsa*, was proved to be as follows :—The *Mohunt* had power to select his successor from amongst his *chelas*; that in the absence of appointment, a *chela* succeeds; if more than one *chela*, the eldest; and *in the absence of a chela*, the *mohunt's gurubhai* or *co-chela* *i. e.* the *chela* of the predecessor of the deceased *mohunt*) succeeds.

A *Mohunt* by his Will may appoint his spiritual brother to be his successor.[2]

Removal of a *mohunt*.

If a *Mohunt* is found guilty of crimes or misconduct he may be removed from the office.[3] The *Mohunt* of a temple is not liable to dismissal at the instance of the Advocate-General, when no cause of misconduct has been established against him.[4]

Lunacy.

A *Swami* or head of a *mutt* who is not mere a trustee does not (in the absence of evidence of custom to the contrary) forfeit his position by reason of his having become a lunatic. Under the Hindu law itself, lunacy does not operate to divest a right already acquired.[5]

Leprosy.

If leprosy is relied upon as disqualifying a *Mohunt* from adopting a *chela*, it must be shewn to have been of a virulent form.[6]

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[1] 22 I. A. 91 (1895) : s. c. 22 Cal. 843.

[2] *Greedharee Dass* v. *Nundkissore Dutt Mohunt*. 1 Marshal 573 (1863).

[3] *Bhoobun Mohun Deb* v. *Bikram Deb* 6 Beng. Sel. Rep. 387 (1850) ; *Berjaye Govind Burral Kalee Das*, Ibid 447 (1850).

[4] *Dhuncoorbai* v. *The Advocate-General* 1 Bom. L. R. 743 (1899). See *Prayag Dass Jivaru* v. *Pirumala* 30 Mad. 138 (P. C) [1907]

[5] *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* 27 Mad. 435 (1903).

[6] *Mohunt Bhagaban* v. *Mohunt*

Succession to *Vaishnava akharas* and *Shivite mutts.*

Vaishnava akharas and *Shivite mutts* are no doubt religious institutions of a public character. But as in some of these the *mohunts* are householders and allowed to marry, the succession to the *gadi* of these is generally governed by the ordinary Hindu law. Where the *mohunts* are married and their children succeed to the *gadi* as heirs, it is difficult to say then whether those *mutts* are public *devutter* property or otherwise.

Succession to religious trust properties.

The devolution of the office of *shebait* or manager is regulated by the terms upon which the trust was created, or the usage of each particular institution where no express trust-deed exists. Where no terms are mentioned in the grant, the *shebaitship* devolves upon the legal heirs of the founder.[1] When the worship of a *thakur* has been founded, the office of a *shebait* is held to be vested in the heir or heirs of the founder, in default of evidence that he has disposed of it otherwise, provided that there has not been some usage, course of dealing or circumstances, showing different mode of devolution.[2] Where a *shebait* does not appoint his or her successor as provided in the will of the founder, and where there is no other provision for the appointment of *shebait*, the management of the endowment must revert to the heirs of the founder.[3]

Raghunandan 22 I. A. 91 (1895): s. c. 22 Cal 843.

[1] *Peet Koonwar* v. *Chuttur Dharee Singh* 13 W. R. 396 (1870); *Srimati Janoki Debi* v *Sri Gopal Acharjia* 10 I. A. 32 (1882): s. c. 9 Cal. 766; *Jagannath Prasad Gupta* v. *Runjit Singh*, 25 Cal. 354 p. 369 (1897). *Gossamee Sree Greedharee jee* v. *Rumanlolljee* 16 I. A. 137 (1889); s. c. 17 Cal. 3; *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* 27 I. A. 69 (1899): s. c. 23 Mad. 271; *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* 32 Cal. 129 (1904): s. c. 8 C. W. N. 809:

[2] *Gossamee Sree Greedharee jee* v. *Rumanlolljee*, 16 I.A. 137 (1889): s. c. 17 Cal. 3.

[3] *Jai Bansi Kunwar* v. *Chattardhari Singh* 5 B. L. R 181 (1870): s. c. 13 W. R. 396; *Gossamee Sree Greedharee jee* v. *Rumanlolljee*, 16 I. A. 137 (1889) s. c. 17 Cal 3; *Jagannath Prasad Gupta* v. *Runjit Singh*, 25 Cal. 354 (1897.

Where the *mutwallee* of an endowment dies without nominating a successor, the management must revert to the heirs of the person who endowed the property.[1] Where a testator had made a bequest for charitable purposes, and had made no express provision for the management of the charitable trust so created, except by directing that, in the event of his heirs failing to carry out his wishes in respect of the trust fund, the Civil Court should take the fund and the management of the trust summarily in its own hand, it was held that in the absence of misconduct, the widow, and not the Collector, was the proper person to be appointed trustee.[2]

The Privy Council in a very recent case (which came from Calcutta) has laid down that in cases where there is no evidence as to who founded a religious endowment, or as to the terms or conditions of the foundation, the legal inference is that the title to the property, or to the management and control of the property, as the case may be, follows the line of inheritance from the founder.[3]

Succession by woman as trustee.

In *Joydeb Surmah* v. *Hurroputty Surmah*[4] the question for decision was whether a female can succeed to the office of *dolloi* (*i.e.* priest) of a temple. Hindu text-writers[5] say that a priestly office cannot be performed by a woman. The Court, however, remanded the case for, amongst other reasons, a finding on the point as to whether there was any custom or rule of Hindu law by which a woman is entitled to succeed in the priestly office. In *Mujavar Ibrahim Bibi* v. *Mujavar Hussain Sheriff*[6] it has been laid down that a woman is not competent to perform the duties of *Mujavar* (manager) of a

[1] *Peet Koonwar* v. *Chutturdharee Singh* 13 W. R. 396 (1870).

[2] *Hari Dasi Dabe* v. *The Secretary of State for India in Council* 5 Cal. 228 (1879).

[3] *Maharaja Jagadindranath* v. *Rani Hemanta Kumari*, 32 Cal. 129 (P. C.) [1904].

[4] 16 W. R. 282 (1871).

[5] *Vide* Colebrooke's *Digest*.

[6] 3 Mad. 95 (1880).

durga which are not of a secular nature. In *Hari Dasi Devi*[1] it was held that a widow can be appointed trustee of some charitable trust. But this, the Court held, was in accordance with the terms of the Will of the testator, as there was no direction whatever that the Government should take control on the failure of Hari Dasi's line, but only that the estate should go to Government in the event of her being disqualified, *i.e.*, "if her decease occurs before she brings forth a son, or she be (when the succession falls in) barren (*avira*), or otherwise disqualified, then my whole estate shall go to the Government." Of course her appointment as trustee was subject to removal in case of misconduct or negligence.

In *Srimati Janoki Debi* v. *Sri Gopal Acharjia*[2] the plaintiff, a Hindu widow, claimed to succeed to the *shebaitship* in question with possession of the *devuttur* properties in dispute by right of inheritance as widow and heiress of the last *shebait*. It was found in this case that the succession was not according to Hindu law, that there was great difficulty in ascertaining what was the rule of succession to this office, but it was certain that the usage had not been according to the ordinary rules of inheritance of Hindu law. The Privy Council observed that "not only does the usage not support the plaintiff's claim but it is opposed to it" and dismissed the appeal.

Succession to *mutts* in Cuttack.

There seemed to be three descriptions of *mutts* in Cuttack *viz.*, *Mourosi*, *Punchaiti* and *Hakimi*. In the first, the office of chief *Mohunt* was hereditary and devolved upon the chief disciple of the existing *Mohunt*, who, moreover, usually nominated him as his successor. In the second, the office was elective, the presiding *Mohunt* being selected by an assembly of *Mohunts*. In the third, the appointment of presiding *Mohunt* was vested in the

[1] 5 Cal. 228 (1879). Cal. 766.
[2] 10 I. A. 32 (1882); S. C. 9

ruling power, or in the party who endowed the temple.[1] In *Mohunt Rama Nooj Doss* v. *Mohunt Debraj Doss*[2] the plaintiff claimed the office of presiding *Mohunt* of a temple at Juggurnath on the grounds of his having been principal *chela* of the late *Mohunt*, of his having been nominated by the latter to the succession, and of the nomination having been adhered to by the appointing *Mohunt* during the latter years of his life. The *mohuntee* under litigation was found to be *mourasi*. The Court decided in favour of the plaintiff against the defendant who based his claim on a prior nomination to the succession by the presiding *Mohunt* and a deed of gift, in his favour, of the temple and its appenages.

In the case of a *mourasi mutt* the investiture by the leading neighbouring *Mohunts* at the *bundhara* ceremony of one who cannot prove that he was actually appointed by the last *Mohunt*, is not sufficient, in the absence of proof that he has no right to be so appointed as being senior *chela* of the last *Mohunt*, to entitle him to succeed to the *gadi*.[3]

Rule of succession to the office of *Geer*.

The rule of succession to the office of *Geer* is very much like that of a *mutt*. It seems that in accordance with the immemorial custom the *Geer* for the time being nominated his successor. Failing such nomination the disciples assemble at the place where he died, elect his successor and the person so nominated becomes *Geer* by virtue of such nomination. He must be initiated and become a *sannyasi*, otherwise he cannot be entitled to the rights and privileges of *Geer*. The essence of initiation consists in the person initiated repeating the *presha* or *sannyasa mantram* as it is pronounced by the *Geer* who nominates him. The text of the *presha mantram*

[1] *Mohunt Rama Nooj Doss* v. *Mohunt Debraj Doss* 6 S. D. Sel. Rep. 262 p. 268 (1839). This case was referred to in *Dhuncoover-bai* v. *The Advocate-General* 1 Bom. L. R. 743 p. 748 (1899).

[2] 6 S. D. Sel. Rep. 262 (1839).

[3] *Sitapershad* v. *Thakurdass* 5 C. L. R. 73 (1879).

as given in the *Diskshitiyam* means 'I hereby renounce love of children, of wealth, and of the world'; and when time and circumstances permit, it is uttered whilst going through the ritual prescribed for becoming *sannyasi* and after performing certain preliminary ceremonies, one of which consists in *jeeva-sraddham* whereby the person becoming a *sannyasi* is required to perform his own *sraddha* or death ceremony and thereby determine his *status* as a *grihastha* or house-holder, or, in legal phraseology, to suffer civil death in relation to his natural family. He receives *upadesam* if made in the regular mode, after performing *jeeva-sraddham* and by pronouncing the *presha mantram*.[1] Having regard to the intention with which the *upadesam* is made the repetition of the *upadesa mantram* by the disciple was of its essence, otherwise he could not have become the disciple of the late *Geer*. So where a plaintiff alleged that he was nominated by the late *Geer*, although the nomination was not concurred in by the disciples, and that he was directed to become a *sannyasi* a day or two after his initiation but did not become so; the Court held that on its appearing that the plaintiff did not repeat the *presha mantram* his *upadesam* was insufficient, and that as he did not become a *sannyasi* soon after the alleged initiation his right, if any, to the *status* of *Geer* ceased on his omission to do so.[2]

Office of *Dharmakarta* at Rameswaram.

Regarding the rights of succession to the office of a *Dharmakarta*, or trustee, of a *devasthanam*, or temple, at Rameswaram in Madura, the only law applicable is the custom and practice which are to be proved by evidence. The temple is one of the class of religious institutions described in section 4 of Act XX of 1863. And according to immemorial usage the *dharmakarta* should be a *Vellala pandaram*, *i. e.*, an ascetic of the *Vellala* caste. According to the established usage of the religious founda-

[1] *Rangachariar* v. *Yegna Dikshotur* 13 Mad. 524 p. 543 (1890).

[2] *Rangachariar* v. *Yegna Dikshatur* 13 Mad. 524 (1890).

tion, each *dharmakarta* initiates a Vellala layman and makes him an ascetic and thereafter appoints him as his successor while in office and shortly before his death. It follows, therefore, that the appointment of a *dharmakarta* by one who has already ceased to hold the office will not be in accordance with the usage and will therefore be invalid.[1]

Dwandva mutts in South Canara.

A very curious custom relating to the appointment of a *Swami* or head of a *mutt* was alleged in a very recent Madras case.[2] There the allegation of the plaintiff was that the two *mutts, viz., Bhandarkare* and *Bhimasalu,* were *dwandva, i. e.,* interdependent *mutts,* and that therefore, the *Swami* of each was entitled to appoint the other, in the event of the *Swami* of either dying without having appointed and leaving a successor, or a vacancy occurring. But the Court did not go into the question as to whether the head of the *mutt* had such power to appoint as claimed by the plaintiff. The case was disposed of on the ground that as there was no vacancy no appointment could be made. For, it would seem, the *Swami* who was adjudged a lunatic was alive when the plaintiff was appointed and lunacy does not operate as a forfeiture of the acquired rights.

Religious office *res extra commercium.*

Religious offices, as a rule, cannot be the subject of sale. The office is *res extra commercium* and no trustee or *shebait* has power to transfer or sell it for pecuniary consideration. Whether by custom of any particular institution such alienation would be valid is a matter worth consideration. In a Madras case[3] the High Court did not go into the question, as the trustees of the temple did not appear in the Court of first appeal to raise the question of the inalienability of the office. But the facts were

[1] *Ramalingam Pillai* v. *Vythilingam Pillai* 16 Mad. 490 pp. 496, 497 (P.C.) [1893].

[2] *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* 27 Mad. 435 (1903).

[3] *Rangasami* v. *Ranaga* 16 Mad. 146 (1892).

these: the plaintiff sued for a declaration of his title as holder of a *mirasi* office in a certain temple under a sale-deed, by which the office and its emoluments were assigned to him by the first defendant. The second defendant claimed title to the office by purchase: other defendants were the trustees of the temple. The Court of first instance passed a decree as prayed for, but it was reversed on an appeal by the second defendant alone; the trustees did not appear on appeal. On second appeal, it was held that the second defendant was not entitled to a decree on the sole ground that the office was *res extra commercium*. As a matter of fact the second defendant himself admitted that the office was saleable, and the first defendant, who sold the office to the plaintiff, acquired his right to it by purchase. It is, therefore, beyond all doubt, that the office in question is saleable and if so, that must be by custom attached to the institution. But supposing that such custom of sale of the office was established, would the alienation be valid? In this connection let us consider what the Privy Council said in *Rajah Vurmah Valia* v. *Ravi Vurma Mutha*.[1] There the point for determination was whether the *uraima* right, or the right of management of a *pagoda*, was transferable by custom. A certain Rajah (in Tellichery) claimed to be the assignee of the *uraima* right of certain *pagoda* and its subordinate *chetrons* under an assignment from the *uralleers* (trustees or managers) of the religious foundation. The *uralleers* had no power under what may be called the common Law of India to transfer the *uraima* right to the Rajah, who relied on the custom of the institution sanctioning such assignment. The Privy Council held that "no custom which can qualify the general principle of law has been established in this case, and they desire to add that if the custom set up was one to sanction not merely the transfer of a trusteeship, but as in this case, the sale

[1] 4 I. A. 76 (1876) s. c. 1 Mad. 235.

of a trusteeship for the pecuniary advantage of the trustee, they would be disposed to hold that circumstance alone would justify a decision that the custom was bad in law." In view of this observation of their Lordships and on the broad ground of public policy, the sale of religious offices even by the custom of the institution should not be permitted. Apart from the question of public policy, since such alienation may render the object of the founder futile or frustrate the same altogether, any custom or usage sanctioning such alienation should certainly be regarded as bad or as an illegal custom, and must not be permitted to operate against or qualify the general principle of law. In *Guanasambanda Pandara Sannadhi* v. *Velu Pandaram*[1] where the hereditary trustees of a religious endowment sold their hereditary right of management and transferred the endowed property, the Judicial Committee held that the sales were null and void, in the absence of custom allowing them. The Judicial Committee referred to *Rajah Vurmah's* case but did not discuss whether such a custom would be valid.

Priestly office.

Priestly office may be hereditary, and succession thereto is chiefly confined to the male line. In default of males, however, females may succeed.[2] Like the office of a *shebait*, a priestly office with emoluments attached to it is also inalienable, and it would be contrary to public policy to allow offices like this to be transferred either by private sale or by sale in execution of a decree.[3] A person is not precluded from raising the question that his priestly office with emoluments are inalienable, because he mortgaged the same.[4] It has, however, been held that the right to perform worship carrying emoluments with it, is property subject to partition.[5]

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[1] 27 I. A. 69 (1898).

[2] *Sitarambhat* v. *Sitaram Ganesh*, 6 Bom H. C. R. 250 (1869).

[3] *Srimati Mallika Dasi* v. *Ratanmani Chakravarti*, 1 C. W. N 493 (1897).

[4] Ibid

[5] *Mitta Kunth Audhicary* v. *Neerunjun Audhicary*, 14 B. L. R. 166 (1874), s.c. 22 W. R. 437.

Brahmacharee and his nephew.

In *Sheoram Brahmacharee* v. *Subsookh Brahmacharee*,[1] it was held that the nephew of a deceased *Brahmacharee*, appointed to succeed him in the *gadi* of a religious endowment had a superior title to a *chela* in possession. It was found that the late *Brahmacharee* and his nephew belonged to the same tribe and country and that the former intended that the latter should succeed to the *gadi* on his death. The nephew being away on a pilgrimage to Juggernath his uncle died, and the *chela*, who was in no way related to the deceased, performed his funeral ceremonies and took possession of the *gadi*. The Court decided in favour of the nephew on no less than twelve solid reasons.

Bairagee and his successor.

A *Bairagee* is not necessarily such a religious devotee that his goods are inherited by his pupil in the event of intestacy.[2] The goods of a *Yati* are inherited by his *sishya* and not by his *chela*.[3] In *Gopaldas Kishandas* v. *Damodhur*,[4] in which the alienation of a *mandeer* by one of the six *chelas* of a *bairagee guru* without the concurrence of them all, was declared illegal, the court said: "It was an old and unalterable rule among *bairagees* that the *chelas* were joint heirs to the *mandeer* and had an equal interest in it, so that one alone could not alienate it without the consent of all." A person having become a *bairagee*, but retained the style and title of Rajah, and mixed in worldly affair and continued with his family, was held not to have become an ascetic or religious devotee, to such an extent as to exclude his adopted son from succeeding to his property, whether acquired before or after his becoming a *bairagee*.[5]

Principle of succession among ascetics.

The principle of succession upon which one member of an order of ascetics succeeds to another is based entirely

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[1] 3 S. D. Sel. Rep. 477 (1824).

[2] *Gobind Dass* v. *Ramsahoy Jemadar*, 1 Fulton 217 (1843).

[3] *Ibid.* 1 Borr. 439 (1812). See *In the goods* of *Sittaram Doss*, 2 Boulnois 8 (1859).

[4] *Mohunt Mudhoobun Dass* v. *Hurry Kishen Bhunj*, 8 S. D. Decis, 1089 (1852).

upon fellowship and personal association with that other, and a stranger, though of the same order, is excluded.[1]

Devuttur lands. *Devuttur* lands are endowed lands for religious purposes. They are not hereditable property. But the management of them for religious uses devolves on the heirs of the person who made the endowment. The heirs may, by mutual consent, separate and form distinct religious endowments. But should one of the heirs sell the portion of the endowed land under his management, he cannot claim a share of the portion managed by the others.[2] Strictly speaking *devuttur* property is not divisible. The succession to the office of the *shebait* is regulated by the rules laid down by the founder. Where no such rules have been laid down, the management may be held by turns by the heirs.[3] In a Madras case, however, it has been held that according to the usage, in the Tinnevelly district, the eldest male heir of a deceased trustee succeeds as trustee.[4] This, according to the Hindu law, is the rule of succession to the office of a *shebait, viz.*, by primogeniture.

Grihastha Gosains of Hardwar. The sect of *grihastha Gosains* living mostly in Hardwar, Dehra Dun and other adjacent places in the United Provinces belong to the order of *sannyasis* known as *Giris*. This order was founded by Sankaracharya in the eighth century of the Christian era. Originally the members of this order were supposed to renounce the world and were strictly ascetics. The wealth of the ascetic consisted of his stick, begging bowl and the like, and was invalu-

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[1] *Khuggendur Narain Chowdhury* v. *Sharupgir Oghorenath*, 4 Cal. 543 (1878), s. c. 3 Shome 29 Notes. See also *Chhajju Gir* v. *Diwan*, 29 All. 109 (1906).

[2] *Elder Widow of Raja Chutter Sein*, v. *Younger Widow of Raja Chutter Sen* 1 S. D. Sel. Rep., 180 (1807).

[3] *Nubakissen* v. *Harris Chunder* 2 Morley's Digest 146. *Mitta Kunth Audhicary* v. *Neerunjun Audhicary*, 14 B. L. R. 166 (1874); s. c. 22 W. R. 437; *Mancharam* v. *Pranshankar*, 6 Bom. 298 (1882).

[4] *Purapparanalingam Chetti* v. *Nullasivan Chetti*, 1 Mad. H. C. R., 415 (1863).

able to his disciples. In course of time these bodies acquired wealth, and so far from practising habits of stern austerity took to habits of luxury and worldliness. A section of them married and became *grihastha* (house-holder) while the remainder observed celibacy and are known as *Nihangs*.[1] The *grihastha Gosains* are subject generally to Hindu Law.[2] Among the *Nihangs*, *i.e.*, naked, free from care, as distinguished from *grihastha*, succession is governed by the special custom of the sect, *i. e.*, in favour of the disciples of the *guru* and not of his heirs.[3]

In *Chhajan Gir* v. *Diwan*[4] in which the parties belonged to the order of *Giris*, a sect of *grihastha gosains*, a custom was set up by virtue of which the widow of a deceased *gosain* was entitled, with the concurrence of the elders of the sect, to adopt a *chela* and successor to her deceased husband. But upon the evidence it was found that this novel custom was not substantiated.

Posthumous *chela*.

In the above case the Court also made certain observations with reference to a posthumous *chela*. The authority that a posthumous disciple may be appointed to a deceased ascetic may be found in West and Bühler's Hindu Law.[5] There, in answer to the question whether a *Gosain*, either of the sect *Puri*, *Giri* or *Bharathi* acquired a *vatan* like that of a *Patil* or *Kulkarani*, can it descend to his or his wife's disciple, the reply is :—"Among the *Gosains* of the above-mentioned sects, a disciple is as good an heir as a son among other people. If a disciple was not nominated by the male *Gosain* his wife may nominate one to succeed to her estate in the same manner as a widow among other classes is allowed to adopt a son." The

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[1] *Chhajju Gir* v. *Diwan* 29 All. 109 p. 111 (1906) ; see also *Basdeo* v. *Gharib Das*, 13 All. 256 p. 259 (1890) ;

[2] *Collector of Dacca* v. *Jagat Chunder Gosain* 28 Cal. 608 (1901).

[3] *Mohunt Gajraj Puri* v. *Achaibar Puri* 21 I. A. 17 (1893).

[4] 29 All 109 (1906).

[5] See Vol. [illegible] p. 565.

Court, however, said that the authority cited by the Pundits in support of this answer did not bear out the alleged practice. Moreover the answer would aim to presuppose that the deceased *gosain* for whom his wife may nominate a *chela* to succeed him had disciples, and that it was one of these disciples whom she might nominate as his successor. A person who has had no association with a spiritual guide cannot, except by a fiction, be his *chela*. A posthumous *chela* is a contradiction in terms.[1]

In Bombay there is a class of *gosains*, called *gharbari Gosains*, who are competent to contract valid marriage.[2]

Vaishnavite gurus are, as a rule, house-holders and so are the *Shivites*. A *Mohunt* of a *vaishnavite akhara*, or of a *shivite mutt* may marry. And the ordinary Hindu law of inheritance governs the succession to these institutions.

Dasname Sannyasi and *Gosavi Zundivale*.

The expressions *Dasname Sannyasi* and *Gosavis Zundivale* do not indicate individuals. They indicate a group or community of *sannyasis* or *gosains*.[3] In Steele's *Hindu Law and Customs* there is an appendix which deals with the custom of *Gosains*, and it is there said that "all questions relating to the internal administration and discipline of the order are decided by an assembly called the *Dasname* which should consist of the disciples of the ten founders from whom they take their name." A grant to *dasname sannyasi* or *gosain zundivale* is a grant to an assembly or community of *sannyasis*, or to a group or community of *gosains*, and not any particular individuals as such.

The law of the country recognizes fluctuating communities as legal *personæ* capable of owning property, as for instance, the caste, the village. *Dasname Sannaysis* and *Gosavi Zundivale* are similar communities composed of the religious elements their names indicate. A corporate body

[1] 29 All. 115.

[2] *Gitbai* v. *Shivbakas Gir* 5 Bom. L. R. 318 (1903).

[3] Steele's *Hindu Law and Customs*. p. 435.

is dissolved by the total loss of all its members, but on such dissolution there is no escheat to the Crown either of its lands or its rent-charges. On the dissolution of the corporations the cause of the grant fails and the effect of a dissolution on the corporation's rent-charges is that they become extinguished. As in the case of the death of a grantee of an annual payment out of land to last during the term of his life, the payment sinks into land on its determination, so where a grantee is a community and the grant is to last during the term of its existence, on its dissolution a similar result follows.[1]

Marriage among *mohunts* and disqualification.

Ordinarily a marriage by a *mohunt* or *gosain* of a temple is a disqualification to his right to the *gadi*. As a *mohunt* is supposed to have renounced all worldly desires and pleasures his marriage would be regarded as invalid and his widow will have no right to inherit.[2] The Hindu Law does not recognize the validity of a marriage by a *gosain* who officiates as a priest of a temple. At Hardwar no doubt there are *gosains* who contract marriages. But they are known as *grihastha gosains* and are entirely engaged in secular occupations.

Amongst the class of *Fakirs*, called *Burkut*,[3] marriage incapacitates for election to the office of a *mohunt*. A *mohunt* having nominated one of his pupils to be his heir and successor is competent to depose such pupil by reason of his subsequent marriage, and to nominate another of his pupils to succeed him in his office and property in the room of the pupil so deposed.[4] The Court Pundit gave the following opinion :—"The adoption of a

[1] *The Secretary of State for India* v. *Haibatrao* 28 Bom. 276 (1903).

[2] *Gungapuree* v. *Musst. Jeunee* 2 N. W. P. Decis (Sel. Rep.) 49 (1854).

[3] A *Burkut* ascetic is one who has no desire for the enjoyments and pleasures, either of this world *viz.*, the earth, or of the next world *viz*, paradise. (This is the definition given in the Vedant Books).

[4] *Nursing Doss* v. *Pearee Lall* 2 N. W. P. Decis 249 (1855).

gosain by a *mohunt* is an act not mentioned in the *Shastras*, nor spoken of among men; for adoption is the practice of worldly persons; whereas amongst *mohunts*, it is customary merely to select pupils. Yet if a *mohunt* should adopt, the act would not prove worldliness on his part, nor would he thereby become a worldly, or a family man, but such a procedure would certainly be opposed to the religious customs of his fraternity. Amongst *gosains* it is considered highly improper for a *mohunt* to marry. A *guru*, can, therefore, deprive a pupil, who has contracted marriage, of his right to succeed to the office of *mohunt* and bestow the same to another pupil." This was a case of the *gosains* of Brindabun, and with reference to them the Pundit said:— "Among the *gosains* of Brindabun, also, a *guru* is competent to deprive the *chela* first appointed, if he marry, of his title to succession and to appoint another *chela* in his stead; for a virtuous *chela*, who is entitled to inherit the estate of a deceased *guru*, become disqualified by marriage as this is the condition of family men, and a *chela* has no title to inherit the estate of a family man."

Among *gosains* of the Deccan marriage does not work a forfeiture.

But among the *gosains* of the Deccan and certain other places marriage does not work a forfeiture of the office of *mohunt* and the rights and property appendant to it. In *Gosain Rambharti Jagrupbharti* v. *Mahunt Ishvarbharti*[1] the Court held that where the plaintiff proved his right of succession to a *mutt* on the death of its *mohunt*, the burden of proving that his subsequent marriage worked a forfeiture of his office and its appendant property and rights, lay upon the defendant who impugned the plaintiff's right on account of the marriage. Their Lordships observed: "In paragraph 6 of Appendix B, the Essay of Mr. Warden on *Gosains* annexed to Mr. Steele's Work on Caste p. 434 (2nd Edn.) it is, in sub-

[1] 5 Bom. 682 (1880).

stance, said that *Gasains* wandered so far from the road (asceticism, celebacy, chastity) they professed to follow as to form matrimonial connections and became in every respect as worldly as their neighbours, but are not acknowledged as *Gosains* except in the Deccan. The evidence in this case, however, shows that the exceptions made by the author must be extended to other places than the Deccan also. It has been proved that the *Bharti* sect of *Gosains* in the locality whence this appeal comes, very generally marry; and although it has not been proved that there has been within the memory of the witnesses in this case any instance of a *Mohunt* of the *mutt* of *Dhudhadari* being married, yet it has been established that the *Mohunts* of several adjacent *mutts* are so, and there is one, if not two, instances, of married member of the *Bharti* sect being a *Mohunt* of a *mutt*."[1]

Female Adhikari.

The question of the right of women to be *Adhikari* was decided in *Poorun Narain Dutt* v. *Kashissurree Dossee*.[2] There it was found that the lady, the widow of the deceased *Adhikari*, gave "*montros*" which were accepted and was nominated by her deceased husband to be *Adhikari*. And prior to the institution of the suit no one disputed her right to be such. The Court observed: "It has been held in this Court that a woman can be a *mutwallee* and that the profits of a *devuttur* can be received by a female. We are not shown that a woman cannot be an *Adhikari*." The Court, in this case, did not call for any *Vyavastha* from the Pundits. In an early case[3] in Bombay the question for determination was whether a Hindu female was competent to perform, either in person or vicariously, the services for the maintenance of which a religious endowment had been granted. There the widow of one of the descendants of the grantee of a *Varshashan*, or annual

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[1] 5 Bom. 684. See *Balgir* v. *Dhond Gir* 5 Bom. L. R. 114 (1902) and *Gitabai* v. *Shivabakas Gir*. Ibid 318 (1903). See *Gharbari Gosavis* in Bombay *Infra*.

[2] 3 W. R. 180 (1865).

[3] *Kesharbhat* v. *Bhagirathi Bai*, 3 Bom. H. C. R. 75 (1865).

allowance,—paid from the Government Treasury for the performance of religious services in a Hindu temple,—sued to recover arrears due to her husband's branch of the family from another descendant who had received the whole stipend, and it had been found by the Court below that, by the usage of the family, the duties of the office had been performed in rotation, and the stipend distributed amongst the descendants of the grantee in certain fixed proportions. The High Court, however, dismissed her claim on other grounds.

In *Sitaram Bhat* v. *Sitaram Ganesh*[1] the same Court held that the descendants claiming through females (daughter's sons) could claim to succeed to a hereditary priestly office. In *Dhuncooverbai* v. *The Advocate General*,[2] it was held that, in the *sunjogee bairagee* community, females are recognized as *mohunts* and that the position and *status* of these *bairagee mohunts* was almost identical with that of *mohunts* in other parts of India. The Madras High Court in several cases has laid down that females may be *dharmakartas*.[3] But the Sudder Court of the N.-W. Provinces has held that though a female may be the disciple of a *gossain*, she cannot succeed to his property, the succession being confined to male *chelas* or disciples.[4]

Nispraha and *Gharbari Gosavi* in Bombay.

Nisprahi and *Gharbari Gosavis*[5] are found in Bombay. The former are a class of celebates who are, in other respects, secular. Among them the devolution of property is governed by the rules which apply to strict ascetics.

[1] 6 Bom. H. C. R. (A. C. J.) 250 (1869).

[2] 1 Bom. L. R. 743 (1899).

[3] *Soondararaja Chenar* v. *Poonamungar*, Mad. S. D. A. 43 (1850); *Sashummal* v. *Purker*, Mad. S.D.A. 237 (1853); *Sadagopah Cherry* v. *Sadagopah Cherry*, Mad. S. D, A. 55 (1854). See also *Hari Dasi Dabi* v. *The Secy. of State for India*, 5 Cal. 228 (1879); *Radhamohun Mundul* v. *Jadoomonee Dossee*, 23 W. R. 369 (P. C.) [1875]; *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo*, 13 Moo. I. A. 270 (1869).

[4] *Sungram Singh* v. *Debee Dutt*, 2 N. W. P. Decis, 235 (1855).

[5] See Steele's *Law and Customs of Hindu Castes* p. 444 *re* Gharbari Gosavis.

But in practice *nisprahi gosavis* have in numerous cases contracted morganatic or formal marriages and thus become known as *gharbari gosavis*. The *gharbari gosavis* are competent to contract valid and lawful marriage. They do not form a distinct body governed by a different rule of inheritance from the *nisprahi gosavis*. The widow of a *gharbari gosavi* is not entitled to succeed to his property in preference to the *chela* of a *gurubhauband* of the deceased, but she is entitled to residence in and maintenance from the property of her deceased husband.[1]

According to the custom obtaining among *gharbari gosavis*, a stranger may be adopted, who would acquire rights of succession superior to a son born, but one son is never adopted to the prejudice of the others, and in the absence of an adopted stranger, sons succeed equally.[2]

Grant to a *Gosavi* and his disciples.

A grant to a *gosavi* and his disciples in perpetual succession coupled with discretions which practically make it an endowment of a *mutt* with a limitation of the enjoyment to a particular line of celebrants of the worship therein, does not entitle an individual *gosavi* to encumber the endowment beyond his own life. A grant to a *gosavi* and his disciples is intended by a Hindu grantor to be a perpetual fountain of merit producing benefit to himself, and this intention would be entirely defeated by the division of the gift at the will of any unprincipled successor of the original grantee to purely secular uses. In a particular case[3] the grant declared that the allowance was to be enjoyed by the grantees and by his disciples and successors from generation to generation. The grant was for the worship of the goddess of wealth and for feeding and otherwise supporting poor and deserving people. Such a grant cannot be said to be equivalent to a grant to a man and his heirs.

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[1] *Gitabai* v. *Shivabakas Gir.* 5 Bom. L. R. 318 (1903).

[2] *Balgir* v. *Dhond Gir*, 5 Bom. L. R, 114 (1902).

[3] *Khusalchand* v. *Mahadevgiri*, 12 Bom. H. C. R. 214 (1875).

In the case of *Mohunt Burm Suroop Dass* v. *Kashee Jha*,[1] it has been held that a *mohunt* in charge of an endowment cannot, except distinctly for its benefit, encumber it beyond his own life. The same principle should govern the grant to a *gosavi* and his disciples. An individual *gosavi* is no more at liberty to sell the endowment than a *vatandar* the endowment of his office.

Temple endowments and dancing girls.

The existence in India of dancing girls in connection with Hindu temples is according to the ancient established usage of the country, and the Court "would be taking far too much upon itself," (to quote the words of Sargent, C.J.,) "to say that it is so opposed to 'the legal consciousness' of the community at the present day as to justify the Court in refusing to recognize existing endowments in connection with such an institution".[2] Accordingly, where the plaintiff sued, as the adopted daughter of a dancing girl attached to a temple, to redeem and have her right recognized to manage the *inam* lands assigned as the remuneration for the temple office, her claim having been rejected on the ground that the adoption could not be recognized by the Civil Court, the High Court held that the plaintiff's suit should be allowed. The lands in question were not claimed as being the property of the last incumbent, but as a part of the endowment of the temple of which she had been the manager. The alleged adoption only had effect as nominating the plaintiff to be the successor in the management, and if it was the custom of the temple that the actual incumbent of the office of dancing girl in the temple should nominate her successor, the Courts of Law could not refuse to recognize it, such custom being recognized in the country.[3]

Katlai.

In ordinary parlance, the term *'katlai,'* as applied to temple endowments, signifies a special endowment for certain specific service or religious charity in the temple.

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[1] 20 W. R. 471.

[2] 14 Bom. 90 p. 93.

[3] *Tara Naikin* v. *Nana Lakshman*, 14 Bom. 90 (1889).

Ardajama katlai, or endowment for midnight service, is an instance of the former and *Annadana katlai*, or an endowment for distributing *gratis* food for the poor, is an example of the latter. In this sense the word *katlai* is used in contradistinction to the endowment designed generally for the up-keep and maintenance of the temple. In the case of some important temples, the sources of their income are classified into distinct endowments according to their importance; each endowment is placed under a separate trustee and specific items of expenditure are assigned to its legitimate charges to be paid therefrom. Each of such endowments is called also a *katlai*, and the trustee who administers it is called the *katlaigar*, or the *stanik* of the particular *katlai*.[1]

In *Vythilinga Pandura Sannadhi* v. *Somasundara Mudaliar*[2] the term *katlai* is used in this sense. There the *punchyetdars*, or managers of a temple, being directed by the Magistrate to repair the gateway of a store-house within the temple precincts and under their immediate control, spent some money in so doing from the funds of a *katlai*, or endowment of which they were managers. They then sued the trustees of two other *katlais* for recovery of the said sum on the ground that, by the usage of the temple, the costs of repairs were payable from the defendant's income and asked for a declaration that the duty of executing repairs fell upon the defendant's *katlais*. It was held that in the absence of any endowment or trust-deed regarding the *katlais* the decision must be found in the usage of the temple, upon proof of which judgment was given for the plaintiffs, and a declaration added to the effect that the defendants were liable for repairs to the temple so far as the surplus funds of their *katlais* should permit.

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[1] *Vythilinga Pandura Sannadhi* v. *Somasundara Mudaliar* 17 Mad. 199 p. 200 (1899).
[2] 17 Mad. 199 (1893).

Temple of *Kachankurissi*: *Melkoima* rights.

The temple of *Kachankurissi* is an ancient Hindu temple in South Malabar. It is of such antiquity that nothing is known as to its foundation or original constitution. In a suit its *urallers*, or managers, sought for a declaration that they themselves were entitled to the exclusive management of the temple and that the defendants had no right over, or right of management in, the said temple. The defendants, representing the *Numbuidri* family, were the descendants of the former rulers of the locality, and, as such, possessed certain sovereign rights of superintending the temple. These rights were called their *melkoima* rights. Disputes having arisen, the predecessors of the parties in 1845 and again in 1874 had compromised litigation and agreed, with the result that they had since then continued to act upon the agreement that they should jointly exercise the powers of management. It was accordingly decided that the compromise so agreed to was binding upon the plaintiffs, (*urallers*) and that the usage which had been followed since 1846, was the best exponent of the *melkoima* right and that the compromise could not be re-opened.[1]

Sanjogee Bairagees of Bombay.

Sanjogee bairagees are religious mendicants, drawn from any caste. They are a distinct section of the Hindu community in Bombay. The origin and *status* of the Bombay *hairagee mohunts* is not wholly free from obscurity. Their position, if not identical with that of *mohunts* in other parts of India, bears a strong analogy to it. Among these *bairagees* a female can be appointed a *mohunt*. The procedure of appointing a *mohunt* is the same as in other cases, *viz.*, the *mohunt* incumbent nominates his successor, and other *bairagees* at the *bundhara* of the deceased *mohunt* invest the person elected with the *mohunt's chudder* according to the recognized formalities prescribed for such an occasion.[2]

[1] *Cherukunneth Manukel Nilakandhen Nambudirapad* v. *Vengunat Sivarupathil P. R. V.* v. *Nambidi* 18 Mad. 1 (1894).

[2] *Dhuncooverbai* v. *Advocate-General* 1 Bom. L. R. 743 p. 747, 749 (1899).

A reference to *sanjogees* was made by the Sudder Dewany Adawlut in relation to succession to a *mutt* in Puri. There it was held that the office of a *mohunt* of that particular *mutt* passed to that class of *mohunts* who are known as *nyhunjee*, or *beyjogee*, *i. e.*, *ascetics*, and not to the *sanjogees*.[1]

Bairagee mutts': succession.

The term *bairagee* is applied to the *vaishnavas* of the *ramanundee* class or its ramifications.[2] The *ramanundee* class would appear to have recognized custom in respect of succession, and where on the demise of the superior of a *mutt* there is no *chela* to succeed, the heads of the *mutts*, who look up to some one of their own order as chief, and refer to that superior connected with their founder as the common head, assemble under the presidence of such superior *mohunt*, or, in his absence, some other *mohunt*, and elect a successor from the pupils of some other teacher. The Court observed: "It should be ascertained upon evidence to what sect of *bairagees*, the deceased *mohunt* and his predecessors belonged, whether they acknowledge any superior of any *mutt* as entitled to preside at the election of a successor or whether this *mutt* is isolated and apart from other *bairagees'* *mutts*, and, further, whether there is any usage to regulate the successor to a *mutt* or whether each *mutt* has its own peculiar custom and is not bound by what prevails amongst *bairagees* of the same tribe. It may be that hitherto the *chela* has succeeded to the *guru* as a matter of course. But here, as there are no *chelas*, so the case should be decided according to usage of other *mutts* of the same tribe, unless it be established that each *mutt* can regulate its own successor, and that some particular rule has prevailed in the case of this *mutt*, so as to entitle the plaintiff to succeed: and that the late *bairagee* belonged to no tribe or com-

[1] *Mohunt Gopal Das* v. *Mohunt Kirpa Ram Dass* 7 S. D. Decis 162 (1851).

[2] Vide Wilson's *Sects of Hindus*.

munity so as to bind the succession by the rules of that community."[1]

Succession to an *Adhinam*.

The rule of succession to an *Adhinam* formed the subject of decision in a Madras case.[2] The plaintiff was *pandara sannadhi* and, as such, the representative for the time being of the *adhinam*, and the defendant claimed to be *tambiran* of the disputed *mutt*, which was founded by a member of the *adhinam*. The plaintiff contended that the *mutt* belonged to his *adhinam*, that the appointment of *tambiran* of that *mutt* rested with him, and that only *tambirans* of his *adhinam* were eligible to be appointed; that the defendant's succession to that appointment under the Will of his predecessor was illegal and invalid. The Court held that the *mutt* was affiliated to the *adhinam*, but that the head of the *adhinam* was not entitled to an order for delivery of the property of the *mutt* to himself or to his appointee. On the evidence as to the usage in the establishments in question, it was found that the head of the *mutt* was entitled to appoint his successor, but that his election was limited to members of the *adhinam*; and the head of the *adhinam* was entitled to enforce this rule, though he was bound to invest a disciple's property nominated by the head of the *mutt*, the defendant not being a disciple of the *adhinam*.

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[1] *Ram Das Byragee* v. *Gunga Das*, 3 Ag. H. C. 295 (1868).

[2] *Giyana Sambandha Pandara Sannadhi* v *Kandasami Tambiran*, 10 Mad. 375 (1886).

CHAPTER VII.

HINDU CUSTOMS.

Inheritance.

In dealing with customary rules of inheritance in this chapter we should remind our readers that those regarding Impartible Estates or Religious Establishments have been noted under each head separately and we do not wish to repeat them here. Herein we propose to delineate other customs relating to succession which have received recognition by the British Courts. In cases of inheritance *kulachar* or family custom has the prescriptive force of law[1] and we will see how family custom has prevailed over ordinary law.

Exclusive right of succession of an eldest son.

The exclusive right of succession of an eldest son is limited to Regalities and ancient zemindaries when the common Hindu law of inheritance gives place to the usage of the family or of the country.[2] Such right does not affect zemindaries acquired by recent purchase, it being only applicable to Regalities and ancient zemindaries.[3]

Succession by sons by different wives

In matters of succession there is no difference between sons by a first wife and those by subsequent wife or wives. According to the Hindu law sons by different mothers inherit equally. A distribution of the paternal estate is made among them not with reference to mothers but with reference to the number of sons. Similarly ,where by family custom the rule of primogeniture prevails, the eldest son whether born of the first wife or any one of the other

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[1] *Sumrun Singh* v. *Khedun Singh*, 2 S. D. Sel Rep., 116 (147) [1814].

[2] *Mootaovengadadachellasamy Manigar* v. *Tombayasamy Manigar*, Mad. Decis. 27 (1849).

[3] *Jugunnadharow* v. *Kondarow*, Mad. Decis. 112 (1849). 1 Morley's Dig. 188

subsequently married wives, will have the preferential right to succeed to the estate of his deceased father. The rank of the senior wife or the priority of her marriage will have nothing to do with her son's succession, if he does not happen to be the first born or eldest son of his father.[1] Sometimes by custom the reverse rule may prevail, as among the Kumbla zemindars. There, according to a valid custom, the son by a senior wife has a prior right of succession to a son by a junior wife, even if the latter is the elder son.[2] The Privy Council has held in two cases that priority of birth of a son is not affected by the prior marriage of the mother.[3] But both these decisions are authorities only for the proposition that as between sons born of wives, equals in class and without any other distinctions, there is no seniority in right of their mothers, but that the seniority recognized, is according to birth. Their Lordships did not decide the rule of succession in the case when the wives are of different caste or class, and their marriages have taken place under different forms. In *Ramasami Kamaya Naik* v. *Sundaralingasami Kamaya Naik*,[4] the Madras High Court had to decide this point. There, the plaintiff's mother and the defendant's mother were not equal in caste or class. There was the further distinction, *viz.*, the former was a dagger wife,[5] whilst the latter was married by the pure caste rites without the intervention of a dagger. After considering various authorities the Court was of opinion that the rule of succession should be one of pre-

[1] *Rajah Rughonath Singh* v. *Rajah Hurrihur Singh*, 7 S. D. Sel Rep. 126 (1813).

[2] *Ramasami K. Naik* v. *S.K. Naik* 17 Mad. 422 p. 437 (1894) : s. c. in the Privy Council 26 I.A. 55 (1899).

[3] *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar*, 14 Moo. I. A. 570 (1872) ; s. c. 17 W. R. 553 : s. c. 12 B. L. R. 396 : *Pedda Ramappa Nayanivaru* v. *Bangari Seshamma Nayanivaru*, 8 I. A 1 (1880) : s.c. 8 C. L. R. 315 : 2 Mad. 286. See also 5 Bom. H. C. R. 161.

[4] 17 Mad. 422 (1894).

[5] See *infra* under Marriage and Divorce, Chap. VIII.

ference in favour of the son by a wife of the same caste or rank. Thus between sons of mothers of the same caste but of different classes therein, the right of a junior son by a first married wife, if she be of a higher class, is superior to that of an elder son of a wife of lower class.[1]

Among Tipperah Rajahs, sons of slave girls or *kachua* Ranis married in an inferior form have equal right of succession to the Raj with the sons by Ranis married in a regular form.[2]

Foolkoosunah Raj: whether a son by a *bhati* Rani has preference to a son by a *bebhati* Rani.

In the family of the Rajah of Foolkoosunah in Manbhoom, there are two classes of Ranis—*bhati* and *bebhati*. *Bhati* Ranis are those who can eat rice with the Rajah or whose rice can be taken by the Rajah. *Bebhati* or *bhegurbhati* Ranis are those whose rice cannot be eaten by, or, who cannot eat rice, with the Rajah. In *Rajah Nagendur Narain* v. *Rughoonath Narain Dey*,[3] the defendant, a younger son of the Rajah, opposed the claim of the plaintiff on the ground that the latter was the son of a *bebhati* Rani she being of the Silda family, and as such could not attain to the Raj: and that, in order to succeed he must prove a *kulachar* or family custom to that effect. It was undisputed, however, that according to the custom of inheritance in the family, the succession to the estate devolved to a single heir to the exclusion of the other heirs of the deceased. The plaintiff was the eldest son and therefore presumably would be the successor to his father. The parties were *Kshatryas*. It appeared that the family of the Rajahs of nine Mahals in the Jungle Mahals were of higher dignity than the other Rajput families. One of these was the Tong family, that of the Rajah of Foolkoosunah; others were the Dholl, Mull, &c. The

[1] See Family Customs, *supra* p. 58, for a rule of succession between a son by a *paat* Rani and a son by a *phoolbibahi* Rani in the Tributary Mahals in Cuttack; and also under Marriage and Divorce, Chap. VIII *infra* as between the issue of a *sagai* marriage and a *biahi* marriage.

[2] See under Marriage and Divorce, *infra*.

[3] W. R. (1864) 20.

Silda, Samunt, and Soor families, though Rajputs and *Kshatryas*, were considered of somewhat inferior grades. The High Court of Bengal having considered the evidence observed :—"The conclusion is that there is absolutely nothing in the evidence to show that the son of a Rani of the Samunt family may not succeed to the Raj in the Tong or Foolkoosunah family; that, on the contrary, there is strong evidence that he may do so. No single instance has been cited or referred to in any of the proceedings to show that amongst the legitimate sons of these Rajput families, the claim of an elder son born of a Samunt mother has been treated as subordinate, or postponed to, that of a younger son, born of a Rani of the nine families. And there is nothing in Hindu law to countenance such a distinction between legitimate children born of mothers of the same great caste."

Exclusion of females from succession.

We have already dealt with the exclusion of females from succession in connection with Impartible Estates.[1] In *Russic Lall Bhunj* v. *Purnah Munnee*[2] a childless widow claimed the share of her husband. Her claim was opposed by other sharers on the ground that by a custom of the family, if a person died without direct male issue, neither his wife, daughter or daughter's son can succeed. Upon the evidence it was held by a majority of Judges that the custom of excluding childless widows had been fully and satisfactorily established. In *Burjore* v. *Bhagana*[3] the paternal grandmother of a deceased share-holder claimed to inherit in preference to his male collateral relations. The latter replied that she being a female was excluded from the inheritance by the custom of the family and tribes of the Pande Brahmans in Oudh to which the parties belonged. But upon evidence, including the village Wajib-ul-urz, the customary exclusion of females as alleged was not substantiated. According to the law and usage

Widows.

[1] *Vide. Supra* p. 186.

[2] S. D. Decis 205 (1847).

[3] 10 Cal. 557 (P. C.) (1883).

of the Benares school, a brother's widow has no place in the line of heirs; nor is she entitled to succeed by right of survivorship.[1]

In a Bombay case the allegation was that among the Gohel Girassias, according to the custom, the widows and daughters were excluded from inheritance. The lower court found that the custom proved excluded daughters, but not widows, from inheritance. The High Court, however, after examining evidence, held that the custom to exclude daughters was not proved.[2] From the absence of any finding regarding widow's claim it may be surmised that the widows are not excluded.

In a Madras case it was alleged that according to the custom prevailing in Southern India, the senior widow by date of marriage succeeds in the first instance, the others inheriting in their turn as they survive, but being only entitled in the meantime to be maintained by the first. This custom is not supported by the decision of the Courts, nor by any text-writer of paramount authority in the Madras Presidency. Consequently it was held that the ordinary Hindu law prevailed, according to which the separate property of the deceased husband is taken by all the widows as a joint estate for life, with rights of equal beneficial enjoyment and of survivorship.[3]

Daughters.

Among the Jamboo Brahmans if a man dies leaving a daughter and no male issue, the daughter and her daughter would inherit his property, even when undivided, in preference to the collaterals of the deceased, in accordance with the custom of the caste.[4] Among the members of the Utpat families of Pandharpur in the Solapur district, daughters are excluded from succession by a long and a

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[1] *Jagdamba Koer* v. *Secretary of State* 16 Cal. 367 (1889).

[2] *Desai Ranchhoddas Vithaldas* v. *Rawal Nathubhai Keshabai* 21 Bom. 110 (1895).

[3] *Gajapathi Nilamani* v. *Gajapathi Radhamani* 1 Mad. 290 (P. C.) [1877].

[4] *Dessaees Hurreeshunkur* v. *Baees Mankoowar and Umba* Bom. Sel. Rep. 122 (1838). Morley's Dig. 334.

uniform family usage.[1] Similarly in the Bahrulia clan in Oudh there exists a custom excluding daughters from inheritance.[2]

In *bhagdari* lands in Broach.

A special custom regulating the succession to *bhagdari* lands in the Collectorate of Broach is that on the death of a *bhagdar*, whether Hindu or Mahomedan, without male issue, his married male relations (after the death of his widow) whether sprung through male or female relatives of the deceased *bhagdar* succeed to his *bhagdari* lands to the exclusion of his daughter or sister.[3]

Right of a sister to succeed.

A sister is entitled to succeed to her deceased brother's property as heir of her son who has died, and it is immaterial for the protection of her title as heir, whether her son be born before or after the deceased party whose property she claims.[4] A sister's son inherits in Bengal.[5] Till the year 1867, the prevailing opinion was that in the provinces governed by the *Mitakshara*, a sister's son could not inherit; the estate would escheat rather than pass to him. Even the Judicial Committee was of that opinion.[6] But the question again came up before them the following year and their Lordships by their decision, dated the 17th July, 1868, in the case of *Gridhari Lall Roy* v. *Government of Bengal*,[7] held that the maternal uncle of the father of the deceased was not excluded from the class of *bundhus* capable of inheriting, and that the text contained in the 1st article, sixth section, of the second chapter of the *Mitakshara*, does not purport to be an exhaustive enumeration

[1] *Bhau Nanaji Utpat* v. *Sundrabai* 11 Bom. H. C. R. 249 (1874).

[2] *Lekraj Kuar* v. *Mahpal Singh* 5 Cal. 744 (P. C.) [1879] : S. C. 6 C. L. R. 593 : S. C. 4 Shome's Notes 42.

[3] *Pranjivan Dayaram* v. *Bai Reva* 5 Bom 482 (1881).

[4] *Damoodur Chunder Roy* v. *Mst. Beeroojamoyee* 6 Sevestre 865 (1859).

[5] *Jowahir Rawut* v. *Musst. Kailasoo* 8 Sevestre Part I p. 519 (1864). 2 Strange's Hindu Law p. 168 ; *Rajchunder* v. *Goculchand* 2 S. D. Sel. Rep. 43 (1801).

[6] *Thakoorain* v. *Mohun* 11 Moo. I. A. 386.

[7] 12 Moo. I. A. 448 (1868) : S. C. 1 B. L. R. 44 ; S. C. 10 W. R. 32.

of all *bandhus* who are capable of inheriting; that it is not cited as such or for that purpose by the author of the *Mitakshara*. In the case of *Amirto Kumari* v. *Lukhynarayan Chukerbutty*[1] a Full Bench of the Calcutta High Court held that in the absence of nearer relatives a man may be heir to his mother's brother as regards property subject to the *Mitakshara*. The Full Bench made reference to the afore-mentioned Privy Council decision. It should be noted that a division Bench of the Calcutta High Court had decided *Amirto Kumari's* case while *Gridhari Lall Roy's* case was pending in the Privy Council, and at its hearing the Calcutta High Court's decision was cited and approved of by the Privy Council. The Full Bench after citing the Privy Council's decision confirmed the division Bench's ruling.

The general rule in Bombay has long been and is to treat the sisters as heirs to the brothers rather than the paternal relatives.[2] In *Lakshmi* v. *Dada Nanaji*[3] and *Biru* v. *Khandu*[4] it has been decided that the sister, in the Sholapur district, is not only an heir, but is entitled to preference even over some who are *gotraja sapindas*. In a very recent case[5] the Bombay High Court has laid down that in the district of Dharwar a sister is preferred as an heir to a brother's widow. In this case his Lordship the Chief Justice observed thus:—"These questions in which the right of female heirs comes under debate, turn in Bombay, on considerations peculiar to this Presidency, and it is therefore useless to seek guidance in the decision of the other High Courts. In Gujrat and the Island of Bombay the right of a sister to a high place in the order of succession has long been determined and has the sanction of the *Mayukha*, whose author is said to have flourished about 250 years ago....That there is a usage,

[1] 10 Sevestre 20 (1868): S. C. 12 B. L. R. 28 (F. B.)

[2] *Venayeck Anundrow* v. *Luxmeebaee* 7 Sevestre 1085 (1864).

[3] 4 Bom. 210 (1879).

[4] *Ibid* 214 (1879).

[5] *Rudrapa* v. *Irava* 28 Bom. 82. p. 85 (1903).

under which the sister succeeds as an heir when outside Gujrat and the Island of Bombay, is, we think, beyond doubt ; the struggle has been to reconcile that usage with the Sanskrit commentaries, but in view of the decided cases, it appears to us immaterial whether we invoke in support of it the rule of Nilkantha, or the interpretation of Balambhatta or Nunda Pandit."

According to the Hindu law of succession in force in the Madras Presidency a sister's son, being a *bandhu*, is in the line of heirs.[1]

Inheritance among Jains.

When a question regarding inheritance arises between parties of the Jain sect the Court should enquire into the customs of the sect and be guided by the result of the inquiry. If the party alleging the custom succeeds in establishing the same to the satisfaction of the Court, then, whether the custom be at variance, or in accordance with, Hindu law, the Court is bound to give effect to the custom.[2] In the same case the Privy Council held that although ordinary Hindu law, in the absence of proof of special customs, has usually been applied to persons of the Jain sect in Bombay, yet the Jains possess the privilege of being governed by their own peculiar laws and customs when the same are by sufficient evidence capable of being ascertained and defined, and are not open to objection on grounds of public policy or otherwise.[3]

Jains are dissenters and are mostly of *Vaishya* origin. The four main divisions of Jains are *Pramar*, *Oswal*, *Agarwal*, and *Khandewal*. In a very recent case[4] the Bombay High Court held that unless a special custom to the contrary be established, the ordinary Hindu law governs succession among the Jains. By ordinary Hindu law is

[1] *Chelikani Tirupati Rayaningaru* v. *Rajah Suraneni Venkata Gopala Narasimha Rao Bahadur* Mad. H. C. R. 278 (1871).

[2] *Sheo Singh Rai* v. *Musst. Dakho*, 6 N.-W. P. 382 (1874) ; s. c. 1 All. 688.

[3] 5 I. A. 87 (1878).

[4] *Ambabai* v. *Govind*, 23 Bom. 257 (1898).

meant the law that governs the three superior castes of Hindus *viz.*, Brahmans, Kshatryas and Vaishyas. The High Court in Bengal expressed the same view.[1]

The term "Hindu" in section 331 of Act X of 1865 means and includes a "Jain" and consequently, in matters of succession, Jains are not governed by that Act.[2]

Jain widow's right.

Under the *Mitakshara* the right of surviving coparceners of a joint Hindu family depends upon survivorship and not upon inheritance. There being a community of interest and unity of possession between all the members of a joint family, upon the death of any one of them, the others take by survivorship that in which during the life-time of the deceased they had a common interest and a common possession. This principle of coparcenership applies to the Jains who, like Hindus, are governed by the *Mitakshara* doctrines. Therefore, as between husband and wife, the interest of a deceased husband when joint survives to the co-sharers in preference to his widow's right of inheritance. But where the husband is separated and there is no community of interest, the deceased husband's estate does not pass by survivorship to the other sharers but descends to his widow.[3] The Privy Council in *Sheo Singh Rai* v. *Mussl. Dakho*,[4] held on the evidence adduced in the case, that a sonless widow of a *saraogi-agarwala* takes, by the custom of the sect, a very much larger dominion over the estate of her husband than is conceded by Hindu law to the widows of orthodox Hindus, to the extent at least of an absolute interest in the self-acquired property of her husband. In *Ambabai* v. *Govind*,[5]

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[1] *Lallah Mohabeer Pershad* v. *Musst. Kundur Koonwar*, Ind. Jur. N. S. 312 (1867) : S. C. 8 W. R. 116 ; *Chotay Lall* v. *Chunno Lall*, 6 I. A. 15 (1878) ; *Bachebi* v. *Makhan Lall*, 3 All. 55 (1880).

[2] *Bachebi* v. *Makhan Lal*, 3 All. 55 (1880).

[2] *Lallah Mohabeer Prosad* v. *Musst. Kundun Koowar*, Sevestre Part IV. 123 (1867) : 8 W. R. 116.

[4] 5 I. A. 87 (1878).

[5] 23 Bom. 257 (1898).

it was held that among Jains of the *dassa parwad* caste, who came from Gujrat to the Belgaum district and carried their laws and customs with them, the widow is the sole heir of her deceased husband, and that the illegitimate sons of her husband are not entitled to inherit their deceased father. Amongst *agarwala banias* of the *saraogi* sect of the Jain religion a widow has full power of alienation in respect of the non-ancestral property of her deceased husband, but she has no such power in respect of the property which is ancestral.[1] The alienation by gift by the widow of a *bindala* Jain of her husband's ancestral property is invalid according to the *Mitakshara*, which is the ordinary law governing *bindala* Jains in the absence of custom to the contrary.[2] A custom was alleged, in a recent Allahabad case,[3] to prevail amongst the members of the *saraogi* community in the N.- W. Provinces of India to the effect that, by reason of it, females are excluded from inheriting the property of their father. But as the evidence given upon this point was conflicting, the custom was held to be not established.

Rights of adopted son among Jains.

Jain *Shastra* recognizes the heritable right of the adopted son.[4] In a case where the parties were descended, either directly or by adoption, from a common ancestor, and the plaintiff claimed by right of inheritance a certain portion of the property as his share, the Sudder Dewany Adawlut in the N.-W. Provinces held that in a claim for inheritance, based on the *Shastras* and the usages of the sect, where both parties are *saraogis* the term "*Shastras*" used in the plaint does not necessarily imply the *Shastras* of the Hindus and that the plaintiff is entitled to a decision of his claim under the Jain law.[5]

[1] *Shimbhu Nath* v. *Gayan Chand* 16 All. 379 (1894).

[2] *Bachehi* v. *Mukhan Lal*, 3 All. 55 (1880).

[3] *Bansi Lal* v. *Dhapo*, 24 All. 212 (1902).

[4] *Maharaja Govindnath Roy* v. *Gulalchand*, 5 S. D. Sel. Rep. 276 (1833).

[5] *Munnoo Lall* v. *Gakul Pershad*, N.-W. P. Decis 263 (1860).

Sikh succession.

By the Sikh law the widow inherits the property solely, if there be no children.[1] There is no difference between the rights of inheritance of a *nikah* or second wife and of a woman who had been married only once; and therefore the widow of two husbands would inherit the property of her last husband, in the same right and manner as if she had never been married before.[2] Where an intestate Sikh dies leaving a widow and an adopted or natural son surviving him, the widow is entitled to five-sixteenths of the intestate's property and the son to the remainder.[3] A son by the *anand* marriage[4] (which is a sort of inferior marriage) gets a share of his father's property equal to one-half of the share of a son by the *biah* or regular form of marriage.[5]

Among Jats.

Where two half-brothers, Jats, claimed to inherit the landed estate of their father, the one being born of a married wife, and the other the issue of a woman who had been united to their common father by the ceremony of *kaje* or *kerao*; and it was proved to be the father's intention that each son should get an equal share of his estate, the Court decreed accordingly.[6] In *Khooshal Singh* v. *Rao Omrao Singh*,[7] it was held that the illegitimate son of a Jat, who is of Sudra class, by a woman of unequal caste, cannot inherit paternal property, as no proof was adduced proving that custom prevails among Jats to unite themselves by the ceremony of *kerao* or *dhericha* with women of unequal caste and that the sons of such unions succeeded to their father's estate.

Succession to the property of ascetics.

The principle of succession upon which one member of an order of ascetics succeeds to another is based entirely

[1] *Kissenchunder Shaw* v. *Baidam Beebee*, East's Notes, case 14, Jan, 1815; Morley's Dig. p. 350.

[2] Ibid.

[3] Ibid.

[4] See *infra* Marriage & Divorce.

[5] *Juggomohun Mullick* v. *Saumcoomar Beebee*, East's Notes, case 31, Mar. 1815.

[6] *Konwar Kishen Singh* v. *Konwar Golab Singh*, N.-W. P. 173 (1861).

[7] N.-W. P. Decis Part II. 320 (1864).

upon fellowship and personal association with that other, and a stranger, though of the same order, is excluded.[1] Amongst *sannyasis* generally no *chela* has a right as such to succeed to the property of his deceased *guru*. His right of succession depends upon his nomination by the deceased in his life-time as his successor, which nomination is generally confirmed by the *mohunts* of the neighbourhood assembled together to perform the funeral obsequies of the deceased. Where a *guru* does not nominate his successor from among the *chelas*, such successor is elected and installed by the *mohunts* and principal persons of the sect in the neighbourhood upon the occasion of the funeral obsequies of the deceased.[2]

Where a *chela* sued for possession of a village belonging to his deceased *guru*, founding such suit on his right of succession as *chela* without alleging that he had been nominated by the deceased as his successor and confirmed, or that he had been elected as successor to the deceased, such suit was held to be unmaintainable.[3]

Among *Nihangs* in Goruckpore.

In *Gajraj Puri* v. *Achaibar Puri*[4] the plaintiffs claimed that they as members of a fraternity of *nihangs* were, on the decease of another member, entitled to the succession to the property possessed by him, according to rules of inheritance prevailing in their religious brotherhood. They thus claimed to exclude the defendant, an alleged son of the deceased. This son, who was a minor, was in possession through his mother and guardian. The Judicial Committee, without deciding as to the alleged mode of succession to property among *nihangs* forming this brotherhood, affirmed the decision of the High Court to the effect that it had not been proved that the deceased

[1] *Khuggender Narain Chowdhury* v. *Sharupgir Oghorenath* 4 Cal. 543 (1878) : s. c. 3 Shome's Notes 29. See also 29 All. 109 (1906).

[2] *Madho Das* v. *Kamta Das* 1 All. 539 (1878); *Nirunjun Barthee* v. *Padarath Bharthee* S. D. Decis. N.-W. P. Vol. I. 512 (1864).

[3] *Madho Das* v. *Kamta Das* 1 All. 539 (1878).

[4] 21 I.A. 17 (1893): s.c. 16 All. 191.

was a member of the sect; and on this ground the dismissal of the suit was maintained.

Succession to the estate of a *gosavi* in the Deccan.

According to the authorities cited in West and Bühler's Hindu Law[1] a *guru* in the Deccan has a right to nominate his successor from amongst his *chelas* by a written declaration. In *Trimbakpuri Guru Sitalpuri* v. *Ganga Bai*[2] the plaintiff did not set up against this general local law any special custom of the institution or the community to which he belonged. He relied on his mere discipleship and his recognition by the *dasname* after the death of the last incumbent. These grounds were held insufficient.

Bairagi: letters of administration by preceptor's preceptor.

On the death of a *bairagi* or an ascetic, his preceptor's preceptor applied for letters of administration claiming that, according to the custom prevailing in the sect of which he and the deceased disciple were respectively members, he, as the preceptor of the dead man's preceptor, was entitled to his property. The Court held that the custom set up was proved.[3]

Migrating families: rule of succession.

Where a family migrates from one territory to another, if they preserve their ancient religious ceremonies, they also preserve their law of succession. The earliest reported case on the point is *Rajchunder Narain Chowdhry* v. *Goculchund Goh*.[4] There the suit was for a landed estate situated in Bengal, and the contending parties were the deceased's nephews, *i.e.*, his sister's son *versus* his brother's son. According to the Bengal school the former, and according to the Mithila school the latter, is the heir. The family originally came from Mithila and resided for generations in Bengal; had intermarried with Bengal women and had not uniformly observed the religious observances of Mithila. It was therefore held that the Bengal school must govern the case. The Judicial Committee followed this case in *Rutcheputty Dutt Jha* v.

[1] *Vide* Ibid 554, 556.
[2] 11 Bom. 514 (1887).
[3] *The Collector of Dacca* v. *Jagat Chunder Goswami* 5 C. W. N. 873 [1901].
[4] 1 S. D. Sel. Rep. 43 (56) [1801].

Rajender Narain Rai,[1] which is the leading case on the point. Their Lordships have held that Mithila law continues to regulate the succession to property in a family who have migrated from that district but have retained the religious observances and ceremonies of Mithila.

The general principle is that a person settling in a foreign country shall not be deprived of the benefit of the laws of his native district, provided he adheres to its customs and usages.[2] If a person of a Mithila family living in Bengal has a Mithila *purohit* and performs the ceremonies used on occasions of joy and mourning according to Mithila *shastra*, his right of inheritance and other claims are determinable by the law-authorities current in that country. But, on the contrary, if he abandons the customs and usages and religious observances of the place of his birth and adopts those of his domicile, he will be governed by the laws and customs of the latter place.[3]

Test to be applied.

In deciding the question whether the *lex loci* or the system of law prevailing in the country of origin governs the succession of a migrating family, the test to be applied is whether it has retained the original form and character of the religious rites and usages of the family as observed before the migration.[4] Thus, where a Hindu family came many generations ago from Mithila where the *Mitakshara* prevailed and settled in Bengal where the *Dayabhaga* prevails, and acquired real and personal property situate in Bengal; and it was found that the family retained their customs and usages and observed their religious rites and ceremonies according to doctrine of the *Mitakshara*, the Judicial Committee held, on a question of succession, that the *Mitakshara* and not the *Dayabhaga*,

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[1] 2 Moo. I. A. 132 (1839).

[2] *Gunga Dutt Jha* v. *Sreenarain Rai* 2 S. D. Sel. Rep. 11 (15) [1812].

[3] *Rany Srimuty Dibeah* v. *Rany Koond Luta* 4 Moo. I. A. 292 (1847); *Rany Padmavati* v. *Baboo Dooler Singh* 4 Moo. I. A. 259 (1847): S. C. 7 W. R. 41 (P. C.).

[4] *Rany Padmavati* v. *Baboo Dooler Singh* 4 Moo. I. A. 259 (1847): S. C. 7 W. R. 41 (P. C.).

the *lex loci*, was the governing authority to determine the right of succession.[1]

Presumption.

A Hindu migrating from one province to another and acquiring property in the territory where he has settled, is at liberty to carry with him his personal law so as to override the law of domicile or that of the *locus rei sitæ*. Regard being had to the constitution of Hindu society and the well-known attachment of Hindus to their ancient religious customs and observances, it should be presumed until the contrary be proved, that a Hindu so migrating must have brought with him, and retained, all his religious ceremonies and customs and, consequently, his law of succession. This presumption becomes stronger where the family is shown to have brought with it its own priests, who, and their descendants after them, continue their ministrations to the family.[2]

The presumption may be supported by (*a*) previous instances of succession in the family which had followed that law rather than that of the domicile; (*b*) testimony as to the observance of rites and ceremonies at marriages, births and deaths which will show a strong body of affirmative evidence in favour of the continuance and against the relinquishment of the laws and customs of the land of origin; (*c*) or documentary evidence pointing of the same conclusion.[3]

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

[2] *Ootum Chunder Bhuttacharjee* v. *Obhoychurn Misser*, W. R. (F. B.) 67 (1862): S. C. 1 Hay 534; *Kumud Chunder Ray* v. *Seeta Kanth Roy*, W. R. (F. B.) 75 (1863): S. C. 2 Hay 232; *Obunnessurree Dabea* v. *Kishen Chunder Mahato*, 4 Wyman 226 (1867); *Junaruddeen Misser* v. *Nobin Chunder Perdhani*, 1 Marshal 232 (1862); *Rani Parbati Kumari Debi* v. *Jogadischunder Dhubal*, 29 I. A. 82, (1902); S.C. 29 Cal. 433 *Lukkea Debia* v. *Gungagobind Dobey*, W. R. 56 (1864); *Sonatun Misser* v. *Ruttan Mullah* alias *Sookhoorda Debia*, W. R. 95 (1864); *Pirthee Singh* v. *Musst. Sheo Soondaree*, 8 W. R. 261 (1867): *Surendro Nath Roy* v. *Hiramani Barmoni*, 12 Moo. I. A. 81 (1868): S. C. 1 B. L. R. 26: S. C. 10 W. R. 35 (P. C.)

[3] *Parbati Kumari Debi* v. *Jagadis Chunder Dhubal*, 29 Cal. 433 (1902): (S. C.) 6 C. W. N. 490.

The presumption that a migrating family carries with them their own customs and usages may be negatived on proof of the fact that in matters connected with succession the laws of the country of domicile have been adopted by the migrating family.[1] Or, by showing that, except as regards marriage, all other ceremonies are performed according to the laws and customs of the domicile and by local priests.[2] The mere adoption of local customs and the observance of occasional local festivals and ceremonies would not prove that the law which originally governed a family had been set aside and another law substituted.[3]

Onus probandi.

The *onus* of proving the fact of old rites, customs and laws of succession having been abandoned and new one having been adopted lies upon the party who alleges cessation of such customs.[4] Where a family migrated from Mithila, resided for generations in Bengal, intermarried with Bengal women and had not universally observed the religious observances of Mithila, there the Bengal law of inheritance was held to be applicable.[5]

Sukuldipi Brahmans.

The tribe of Brahmans, called *Sukuldipi*, living in various parts of Northern India, quite separate in social intercourse from other tribes of Brahmans, are governed by the *Mitakshara* school of Hindu law. Although they are scattered over a large tract of country, they are not blended with the tribes of Brahmans of the district in which they reside. A short description of this tribe

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[1] *Chundra Sheekhur Roy* v. *Nobin Soondur Roy*, 2 W. R. 197 (1865).

[2] *Ram Bromo Pandah* v. *Kaminee Sundaree Dossee*, 6 W. R. 295 (1866) s. c. 3 Wyman 3.

[3] *Huro Pershad Roy Chowdhry* v. *Shibo Shunkuree Chowdhrain*, 13 W. R 47 (1870).

[4] *Sonatan Misser* v. *Ruttan Mullah* alias *Sookhoorda Debi*, 1 W. R. 95 (1864); *Huro Pershad Roy Chowdhry* v. *Shibo Shunkuree Chowdhrain*, 13 W. R. 47 (1870); *Lukkea Debia* v. *Gungagobind Dobey*, W. R. 56 (1864); *Pirthee Singh* v. *Musst. Sheo Soondaree*, 8 W. R. 261 (1867); *Soorendranath Roy* v. *Musst Heeramoni Burmonah*, 12 Moo. I. A. 81 (1868).

[5] *Rajchunder Narain Chowdhry* v. *Gocul Chund Goh*, 1 S. D. Sel. Rep. 43 (1801).

is to be found in Sherring's "Hindu Tribes and Castes" at p. 102. It has been held that even if a family of the tribe resides in a country where the Mithila law prevails, it is governed by the *Mitakshara*.[1]

Change of *habitat* by act of Govt.

When lands situate in one district are arbitrarily transferred by Government to another having a different system of law in matters of succession, the owners of those lands cannot be presumed to change their observances with their districts, presumption being against such change.[2]

Migration from French India to British India

Migration by the widow of a Hindu subject of French India to British India and acquisition of a British Indian domicile, does not change the character of the estate held by the widow, and if she does not adopt the system of law prevalent among Hindus in British India, the property inherited by her from her former husband will be held by her according to the customary law of French India.[3]

Eldest male heir of a deceased trustee succeeds.

In a suit to recover joint possession of certain lands, attached to a certain temple in the district of Tinnevelly, Holloway J., said: "It is found as a fact that the deceased father of the plaintiff and the first defendant, his brother, were joint trustees of this *pagoda*. The custom of the country so far as I know universally recognizes the right of the eldest male heir of a deceased trustee to succeed as trustee him from whom he inherits. It has not been attempted at the bar to deny that this is the law. If it is a question of special usage then the fact that the first defendant was a trustee while his elder brother was alive proves its existence in this case."[4]

Posthumous son or heir.

The property of a deceased owner vesting intermediately diverts in favour of a posthumous son at his birth. There is

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[1] *Ruder Perkash Misser* v. *Hurdai Narain Sahu*, 9 C. L. R. 16 (1881).

[2] *Prithee Singh* v. *The Court of Wards* on behalf of *Musst. Sheo Soondaree*, 23 W. R. 272 (1875).

[3] *Mailathi Anni* v. *Subbaraya Mudaliar*, 24 Mad. 650 (1901).

[4] *Purapparanalingam Chetti* v. *Nallasivan Chetti* 1 Mad. H. C. R. 415 p. 417 (1863).

no rule of Hindu law which prevents such a custom operating in favour of any other posthumous heir who had been conceived at the time of the possessor's death.[1]

Sadhs.

In *Gopi Chand* v. *Sujan Kuar*[2] the parties were *Sadhs* and it was held that the Hindu law of inheritance was presumably applicable to them, the defendants having failed to show any custom prevailing opposed to the Hindu law.

Rajbansis.

The rule of succession applicable to the *Rajbansis* is the one which prevails in the locality in which they reside. They are distinguished from the migrating families who always carry their personal law wherever they go unless the contrary is shewn. The *Rajbansis* are Hindus and it must be taken that they have adopted in its entirety one form or other of that law. In the absence of any custom to the contrary or of any satisfactory evidence to show what form of Hindu law they have adopted, it is not unreasonable to infer that they adopted the form which prevailed in the locality.[3]

Succession by a brother to the exclusion of sons.

In *Pertab Deb* v. *Surrup Deb Raikut*[4] a claim was made by a brother to the estate of the deceased proprietor on the ground of a family usage whereby a brother succeeds to a deceased brother to the prejudice of the latter's surviving sons. But as the alleged family custom was not proved, his claim was disallowed.

Partition of ancestral property in father's lifetime.

A custom alleged to exist among the *Kapali Bania* caste, according to which a son is not entitled to the partition of ancestral property in his father's life-time and against his father's will, was not proved.[5]

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[1] *Musst. Berogah Moye* v. *Nubokissen Roy* 2 Sevestre 238 p. 243 (1863). See also another case at p. 240 *Idem* foot note: *Keshub Chunder Ghose* v. *Bishnopurshad Bose* decided 13 Decem. 1863.

[2] 8 All. 646 (1886).

[3] *Ram Das* v. *Chandra Dassia* 20 Cal. 409 (1892). See *Fanindra Deb Raiket* v. *Rajeswar Das* 12 I. A. 72 (1885).

[4] 2 S. D. Sel. Rep. 249 (321) [1818].

[5] *Jugomohan Das* v. *Sir Mangaldas Nathubhoy* 10 Bom. 628 (1886).

Succession to *mafee-birt* tenures.

Whatever the words *mafee-birt* tenure may have implied originally, the *prima facie* meaning of the words has come to be an "hereditary tenure." Where ancestral property has apparently descended in the ordinary way of Hindu property, first to the son, and thence to the mother, it lies on those who say that it is confined to the direct descendants of the original donee to prove their case, and show by some custom that that was the proper construction of the grant. Where the original donee of a service tenure ceases to do any service and pays in lieu of a rent which his descendants continue to pay, the condition of the tenure become altered from service to rent.[1]

Tenant right.

In the absence of any evidence of a special custom a nephew should not inherit the tenant right from an uncle whose legal heirs were his sons; nor could the latter transfer their right of inheritance to their cousin, or confer on him such a right by consenting to his occupation of the land.[2]

Rule of succession among illegitimate sons.

By the Hindu law a son not born in lawful wedlock may inherit, if such be the custom of the province, but not otherwise. Among the *Nagur* Brahmans in Benares for instance, it was alleged in a case that such custom had existed, but the allegation was not established and the evidence proved the contrary.[3] But in the case of an illegitimate son by an adulterous intercourse, a custom recognizing his right of heirship would be regarded as bad custom, and, as such, would not be given effect to.[4]

Where parties are actually married, it is a fair presumption that the husband is father of the issue of his wife, but where a person is born of wedlock, the clearest evidence should be adduced to establish the fact of parentage. Thus, where a son, born in wedlock of a Rajput

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[1] *Rajah Mahendra Singh* v. *Jokha Singh* 19 W. R. 211 (P. C.) [1873].

[2] *Omrao Singh* v. *Pertab* 3 N. W. P. (Ag.) 143 (1868).

[3] *Mokun Singh* v. *Chumun Rai* 1 S. D. Sel. Rep. 28 (1799).

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

Rajah by a Sudra woman, claimed that the Rajah having died without male issue, he, by the custom of the family, was entitled to inherit the deceased Rajah's property, the Court rejected his claim as there was no sufficient proof that the late Rajah was his father.[1]

Among regenerate classes.

An illegitimate son of any of the three regenerate castes by a Sudra woman cannot succeed to the inheritance of his putative father. But he is entitled to maintenance out of his deceased father's estate.[2] This right of maintenance is a right personal to the illegitimate son and not inheritable by his offspring.[3] An assignment to the illegitimate son by his father, before the birth of a legitimate son and heir, an ancestral immoveable estate for the purpose of his maintenance, has been held to be valid.[4] Among Gujrati Jains who have settled in Belgaum and who are considered as Vaisyas, an illegitimate son is entitled to maintenance only.[5] In a very recent case it has been held that the father of an illegitimate child is bound to provide for its maintenance. A suit lies in the Civil Court for maintenance of an illegitimate child notwithstanding an order of the Magistrate under section 488 Cr. P. C.[6]

Among Sudras.

In the case of the Sudra class, illegitimate children are qualified to inherit from their father.[7] But the son of a Sudra

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[1] *Prshad Singh* v. *Rani Muhesreee* 3 S. D. Sel. Rep. 132 (176) [1821].

[2] *Pershad Singh* v. *Rani Muhesree*, 3 S. D. Sel. Rep. 132 (176) [1821] ; *Chuoturya Run Mundun Syn* v. *Saheeb Purhulad Syn*, 7 Moo. I. A. 18 (1857) ; *Moonnee Ram* v. *Pirthee Singh*, N. W. P. Decis (Sel. cases) 491 (1857); *Pandaiya Telavar* v. *Puli Telavar*, 1 Mad. H. C R. 478 (1863) ; *Rajah Parichat* v. *Zalim Singh*, 4 I. A. 159 (1877) ; *Roshan Singh* v. *Bulwunt Singh*, 22 All. 191 (P. C.) (1899); *Ambabai* v. *Govind*, 23 Bom. 257 (1898) ; *Rahi* v. *Govinda* 1 Bom. 97 (1875) ; *Rungadhur* v. *Juggernath*, 1 Shome 92 (1877).

[3] *Roshan Singh* v. *Balwunt Singh*, 22 All. 191 (P.C.) [1899] : S. c. 4 C. W. N. 353.

[4] *Rajah Parichat* v. *Zalim Singh*, 4 I. A. 159 (1877).

[5] *Ambabai* v. *Govind*, 23 Bom. 257 (1898).

[6] *Ghana Kanta Mohanta* v. *Gereli*, 32 Cal. 479 (1904).

[7] *Chuoturya Run Murdum Syn* v. *Sahub Purhulad Syn* 7 Moo. I. A. 18 (1857) ; *Goordyal* v. *Raja Ram*, N.-W. P. Decis

by a slave girl is not entitled to share with his legitimate sons in the inheritance of an uncle by the father's side.[1] To entitle the illegitimate sons of a Sudra by a Sudra woman to inherit a share in the family property, the intercourse between the parents must have been continuous, and not incestuous or adulterous.[2] Among Sudras, governed by the *Mitakshara*, an illegitimate son does not inherit collaterally to a legitimate son by the same father.[3]

Regarding the right of inheritance of an illegitimate son among the Sudra class, one uniform rule does not prevail all over India. On the contrary there is a great divergence of rules, as will be seen from the following summaries :—

In Bengal.

In *Navain Dhara* v. *Rakhal Gain*,[4] Mitter, J., said : "From an examination of these authorities, it is clear that according to the doctrine of the Bengal school of the Hindu law, a certain description of illegitimate sons of a Sudra by an unmarried Sudra woman is entitled to inherit to their father's property in the absence of legitimate issue—*viz.*, the illegitimate sons of a Sudra by a female slave or a female slave of his slave.[5] This was followed in another case, which held that the

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218 (1865) ; *Pandaiya Telavar* v. *Pali Telavar*, 1 Mad. H. C. R. 478 (1863) : s. c. in the Privy Council, *I. V. Taver* v. *R. P. Talever*, 13 Moo. I. A. 141 : s. c. 3 B. L. R. 1 : s. c. 12 W. R. 41 (1869) ; *Mayna Bai* v. *Uttaram*, 2 Mad. H. C. R. 196 (1884) ; *Kesaree* v. *Samardhan*. 5 N.-W. P. (All.) 94 (1873) ; *Chinnammal* v. *Varadarajula*, 15 Mad. 307 (1891).

[1] *Nissar Murtojah* v. *Kowar Dhunwunt Roy*, 1 Marshal 609 (1863).

[2] *Karuppannan Chetti* v *Bulokam Chetti*, 23 Mad. 16 (1899).

[3] *Skome Shankar Rajendra Vareri* v. *Rajesur Swami Jaungow* 21 All. 99 (1898) ; *Sarasuti* v. *Mannu* 2 All. 134 (1879) ; *Sadu* v. *Baiza* 4 Bom. 37 (1878) ; *Krishnayyan* v. *Muttusami*. 7 Mad. 407 (1883) ; *Nissar Murtojah* v. *Kowar Dhunwunt Roy* 1 Marshal 609 (1863) ; *Rajah Jogendra Bhupati Hurri Chundun Mahapatra* v. *Nityanund Mansingji* 17 I. A. 128 (1890) s. c. 18 Cal. 151.

[4] 1 Cal. 1 (1875).

[5] *Bulbhuddur* v. *Rajah Juggernath Sree Chundun Mahapatra*, 6 S. D. Sel. Rep. 296 (372) [1840] ; *Rajah Janurdhun Ummer Singh Mahendra* v. *Obhoy Singh Ibid* 42 (49) [1840].

son of a Sudra by a kept woman or continuous concubine does not inherit his father's estate.[1] The Privy Council, however, have held that an illegitimate son is a co-parcener of his father's legitimate son and where the only legitimate son of a deceased Rajah had succeeded to an impartible Raj and died without leaving any male issue, his illegitimate brother was held to be entitled to succeed under the *Mitakshara* by survivorship. The family belonged to the Sudra caste. But this principle of survivorship was not extended to the case of other collateral heirs.[2]

In N. W. P.

In the N. W. Provinces an illegitimate son of a Sudra (a Jat for instance) by a woman of unequal caste cannot inherit paternal property.[3] Illegitimate son does not inherit collaterally to a legitimate son by the same father.[4]

In Bombay.

The general result of authorities, both judicial and forensic, is that among the three regenerate classes in the Bombay Presidency illegitimate children are entitled to maintenance, but cannot inherit unless there be local usage to the contrary. Among the Sudra class illegitimate children, in certain cases, at least, do inherit.[5] The sons of a *punarbhu* (twice-married woman) by a duly contracted *pat* marriage *i.e.* in accordance with the custom of the caste, are legitimate, and as to the right of inheritance and extent of shares, rank on a par with the sons by *lagna* marriage.[6] In a recent case it has been held that among Sudras the sons of the illegitimate son of a person by a kept mistress are entitled to share with the sons of legitimate sons.[7]

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[1] *Kirpal Narain Tewari* v. *Sukumoni* (Widow of Bhopal) 19 Cal. 91 (1891). See also *Ramasaran* v. *Tekchand*, 28 Cal. 194.

[2] *Rajah Jogendra Bhupati Hurri Chundun Mahapatra* v. *Nityanund Mansingji*, 17 I. A. 128 : 18 Cal. 151 1890).

[3] *Khooshal Singh* v. *Rao Omrao Singh*, 7 N. W. P. Decis Part II 320 (1864).

[4] *Shome Shanker Rajendra Vareri* v. *Rajesar Swami Jangove*, 21 All. 99 (1898).

[5] *Rahi* v. *Govinda* Valad *Teja*, 1 Bom. 97 (1875).

[6] Ibid.

[7] *Fakirappa* v. *Fakirappa*, 4 Bom. L. R. 809.

In Madras.

In Madras bastards succeed their father by right of inheritance.[1] But an adulterous or incestuous intercourse with the mother of the son is a bar to such a right of the son.[2] Where the illegitimate son is the offspring of mixed classes between the second and third of the regenerate classes, he has no title to inherit, and the circumstance that his father was illegitimate does not help him.[3] An illegitimate son is not entitled to a share in the property of his father's brother's sons.[4] An illegitimate son of a Sudra by his concubine is his heir in preference to a brother's son.[5]

Among prostitutes.

Under the Hindu law prostitute daughters living with their prostitute mother succeed to the mother's property in preference to a married daughter, because the relation of the latter to her outcaste mother has been severed.[6] Following this principle the Madras High Court held that as between the sister of a prostitute associated with her in her degraded condition and her brother who remained in caste and treated his sisters as outcastes, the right to succeed to the estate of a deceased prostitute sister lay with the prostitute sister in preference to the brother.[7] This case has been distinguished by the Calcutta High Court in *Sarna Moyee Bewa* v. *The Secretary of State*.[8] There their Lordships say that by lapsing into prostitution a Hindu woman becomes degraded and outcaste but does not cease to be a Hindu, and the Indian Succession Act (Act X of 1865, section 331) cannot therefore apply to the

[1] *Pandaiya Telavar* v. *Pali Telavar* 1 Mad. H. C. R. 478 (1863).

[2] *Datti Parisi Nayudu* v. *Datti Bangaru Nayadu* 4 Mad. H. C. R. 204 (1869); *Vencata Chella Chetti* v. *Parvathammal* 8 Mad. H. C. R. 134 (1875); *Viraramuthi Udayan* v. *Singaravelu* 1 Mad. 306 1877; see also *Karuppannan Chetti* v. *Bulokam Chetti* 23 Mad. 16 (1899).

[3] *Sri Gajapaty Hari Krishna Devi Garu* v. *Sri Gajapati Radika Patta Maha Devi Garu* 2 Mad. H. C. R. 369 (1865).

[4] *Karuppa Goundan* v. *Kumarasami Goundan* 25 Mad. 429 (1901).

[5] *N. Krishnamma* v. *N. Papa* 4 Mad. H. C. R 234 (1869).

[6] *Tara Munnee Dassea*, v. *Motee Buneanee* v. *Heera Buneanee* 7 S. D. Sel Rep. 273 (325) [1846].

[7] *Sivasangu* v. *Minal* 12 Mad. 277 (1888).

[8] 25 Cal. 254 s. c. 2 C. W. N. 97 (1897).

succession of her property. A sister is no heir to a female proprietor under the Bengal school of Hindu law, and if they both lapse into prostitution, one does not thereby become an heir of the other.

In *Kaminy Money Bewah*[1] it was held that the general rule, *viz.*, that the tie of kindred between a woman's natural family and herself ceases when she becomes degraded and an outcaste, applied even with greater force as between her and the members of her husband's family. Those members therefore have no right of inheritance in property acquired by a woman who left her husband's family and lived as a prostitute.

In a very recent case a brother's son of a deceased prostitute applied for letters of administration to her estate. The deceased acquired her estate by prostitution. Following the above rulings his application was rejected.[2]

Among dancing girls.

As a matter of private law the class of dancing women being recognized by Hindu law as a separate class having a legal *status*, the usage of that class, in the absence of positive legislation to the contrary, regulates rights of *status* and of inheritance, adoption and survivorship.[3] Where a hereditary office of dancing girls attached to a *pagoda* passed to two sisters on the death of their mothers, on the death of one of the sisters, the daughter, and not the sister of the deceased, would succeed to the office and effects of the deceased.[4] An adopted niece, (a dancing girl) succeeds to the property of a prostitute dancing girl at her death in preference to the latter's own brother remaining in caste.[5] According to the custom of the *bogam* or

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[1] 21 Cal. 697 (1894).

[2] *Bhutnath Mondol* v. *Secretary of State* 10 C. W.N. (1085) (1906). See Woodroffe J's. view at p. 1086.

[3] *Muttukannu* v. *Paramasami* 12 Mad. 214 (1888).

[4] *Kamakshi* v. *Nagathram* 5 Mad. H. C. R. 161 (1870).

[5] *Narasanna* v. *Gangu* 13 Mad. 133 (1889).

dancing girl caste in the Godavari District, property left by a mother is divided between the sons and daughters.[1]

West J., in *Mathura Naikin's* case,[2] held that the adoption by Naikins cannot be recognized by law and confers no right on the person adopted. As *Mathura Naikin* sought to recover a share of the property in the hands of her adoptive mother, non-recognition of the custom of adoption took away the ground of her claim. And further, though the daughters succeed to their mother's property, they cannot call for a partition during her life. That is a right peculiar to the son and grandson as joint owners by birth with the father of the ancestral estate. His Lordship made strong observations on the practices and usages of the Naikins by which they endeavour to make their class and its mischievous influences perpetual. Such usages being directly opposed to the laws of God, should be regarded as invalid and inoperative.

In *Tara Naiain's* case[3] it was held that inasmuch as the existence in India of dancing girls in connection with Hindu temples is according to the ancient established usage, the Court would not be justified in refusing to recognize existing endowments in connection with such an institution. Accordingly, where an adopted daughter of a dancing girl attached to a temple sued to redeem and have her right recognized to manage the *inam* lands assigned as remuneration for the temple office, the Lower Court rejected her claim on the ground that the adoption could not be recognized by the Civil Court. But the High Court allowed her suit and held that the lands in question were not claimed as being the property of the last incumbent, but as a part of the endowment of the temple of which she had been the manager. The alleged adoption only had effect as nominating the plaintiff to be successor

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[1] *Chandravcka* v. *Secretary of State* 14 Mad. 163 (1890).

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

[3] *Tara Naikin*. v. *Nana Lakshman* 14 Bom. 90 (1897).

in the management, and it was the custom of the temple that the actual incumbent of the office of dancing girl in the temple should nominate her successor. The Courts of Law could not refuse to recognize it, such custom being recognized in the country.

CHAPTER VIII.

HINDU CUSTOMS.

Marriage and Divorce.

According to family, caste, local and tribal customs, various descriptions of marriage are prevalent amongst Hindus and those who are not strictly speaking Hindus. These customary forms of marriage, when duly performed, are as valid and binding as any marriage celebrated in orthodox or regular form. British Courts are bound to recognize such customary marriages if custom is satisfactorily established. We will note below some of these customary forms of marriages which have received recognition from our courts.

Mookhochundrika and Santigrihita.

Among the Tipperah Rajahs two species of marriages prevail. One species is called *mookhochandrika*, by which marriage takes place by mutual interchange of glances between the bridegroom and the bride according to the *Shastras* in the orthodox fashion. The other species is performed according to the *Gandharva* form, by the worship of the goddess Tripoora and taking *santi* water. The ceremony of the latter species of marriage is described as follows:—"According to the custom prevailing in Tipperah, the worship of the goddess of Tripoora is performed, then the priests present garlands and sandal wood powder to the Rajah and Rani, who then receive *santi* water (water of absolution)." This is called *santigrihita*.[1]

In *Rajkumar Nobodip* v. *Rajah Birchunder*[2] Mr. Justice Morris observed thus:—"It is manifest that the people of Tipperah, from the Rajah downwards, are very primitive, and that in their manners and customs, they by no means

[1] *Chuckrodhuj Thakoor* v. *Beer Chunder Jubraj*, 1 W. R. 194 (1864).

[2] 25 W. R. 404 at 414 (1876).

follow the strict tenets of the Hindu religion. The *gandharva* or *santigrihita* form of marriage is commonly adopted. It is simple in character and requires little ceremony. At the same time a marriage in this form is binding and perfectly valid." A son of a *Kachua* Rani may become a Rajah. It is in evidence that Rajah Ramgunga Manick, Kassy Chunder and others were born of *Kachuas*.[1] Since a Rajah can make any *Kachua* (or slave girl), whom he loves, his Rani, it has been held that, according to the law and custom of marriage prevailing in Tipperah, the Rajah can legitimise his children born of a *Kachua* by going through a marriage ceremony with the mother.[2]

Phoolbibahi marriage

Among the Chiefs of the Tributary Mahals in Cuttack there is prevalent a kind of marriage known as *phoolbibahi*, a description of which willl be found under Family Customs.[3]

Asura form.

The *Asura* form of marriage is one of eight distinct kinds of marriage mentioned by Manu.[4] According to this sage, "When the bridegroom, having given as much wealth as he can afford to the father and paternal kinsmen and to the damsel herself, takes her voluntarily as his bride, that form is called *Asura*."[5] Yajnavalkya has described it to be a marriage "contracted by receiving property from the bridegroom."

"The essential characteristic of the *Asura* form of marriage appears to be the giving of money or presents by the bridegroom or his family to the father or parental kinsmen of the bride, or, in fact, a sale of the girl by her father or other relation having the disposal of her in marriage in consideration of money or money's worth paid to them by the intended husband or his family."[6] This

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[1] *Chuckrodhuj* v. *Beer Chunder* 1 W. R. 194. (1864).

[2] Ibid.

Vide *Supra* p. 59.

[4] *Vide* Manu III, 21-41.

Manu III, 31.

[6] In the goods of *Nathubai Jaikisondas Gopaldas*, 2 Bom. 9 p. 13 (1876); *Vijiarangam* v. *Laksheeman*, 8 Bom. H. C. R. O. C. J. 244 (1871).

species of marriage is peculiar to the *Vaishya* and *Sudra* castes, *i.e.*, mercantile and servile classes in Bombay.[1] According to Sir T. Strange, it is questionable whether in Southern India any other form than the *Asura* be now observed.[2]

Amongst Hindus of the Bhandari and other inferior castes the *Asura* form is more customary than the four approved forms of marriage.[3] Among the Nagar Vissa section of the *rania* caste, the form of marriage in use corresponds with one or other of the approved forms and not to the *Asura*, and the giving of *palu* does not constitute a purchasing of the bride.[4] The money given to the bride's father is variously known as *palu*, *dez*, *pon*.

Gandharva form.

Gandharva is the sixth form of marriage mentioned by Manu.[5] "The reciprocal connection of a youth and a damsel with mutual desire is the marriage denominated *Gandharva*, contracted for the purpose of amorous embraces and proceeding from sensual inclination."[6] This form of marriage is still prevalent among Rajahs and Chiefs. The ceremony observed at the marriage consists in an exchange of garlands of flowers between the bride and the bridegroom without a nuptial rite, *homam*, and without the customary token of legal marriage, called *pustelu* being tied round the neck of the bride. Sir William Macnaughten also says: "The *Gandharva* marriage is the only one of the eight modes for the legalizing of which no ceremonies are necessary, and it seems that mutual cohabitation, as it implies what the law declares to be alone necessary, namely, a reciprocal amorous agreement, would be sufficient to establish such a marriage if corroborated by any word or deed on the part of the man."[7] But according to Hindu texts the religious

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[1] *Vide* Steele's *Summary* p. 31.

[2] Strange, Vol. I. 43; Bannerjee's Tagore Lec. p. 84.

[3] *Vijiarangam* v. *Laksheeman*, 8 Bom. H. C. R., O. C. J. 244, (1871).

[4] *Nathubai* 2 Bom. 9 (1876).

[5] Manu III. 21-41.

[6] Manu III. 32.

[7] Macnaughten's *Principles of Hindu Law*, p. 61.

element appears to be indispensable to a valid *Gandharva* marriage.[1]

In *Bhaoni* v. *Maharaj Singh*[2] it has been held by the Allahabad High Court that a marriage by the *Gandharva* form is nothing more or less than concubinage, and has become obsolete as a form of marriage giving the *status* of a wife and making the offspring legitimate.

The Calcutta High Court, in *Rajah Haimum Chull Singh* v. *Kumar Ghunshiam Singh*,[3] decided that amongst Kshatryas *Gandharva* marriage was valid. It also prevails among the Rajahs of Tipperah.[4] The Madras High Court held that, in order to constitute a valid marriage in *Gandharva* form, nuptial rites are essential.[5]

Anuloma marriage.

Anuloma was a form of intermarriage prevalent in ancient days, by which a Brahman was at liberty to marry four wives, *viz.*, a Brahman wife, a Kshatrya wife, a Vaishya wife and a Sudra wife. A Kshatrya was entitled to have three, *viz.*, a Kshatrya wife, a Vaishya wife and a Sudra wife. A Vaishya was permitted to have two, *viz.*, a Vaishya wife and a Sudra wife. The offspring of *Anuloma* marriage, where the mother was of a caste inferior to that of their father, were not of equal caste to their father, but were allowed to inherit their father. Though *Anuloma* union with women of inferior castes was permissible, yet its reverse *viz.*, *Pratiloma* union, that is to say, the union of a man of inferior *varna* or caste with a woman of superior *varna*, was a prohibited connection and the issue of such connection was called *Pratilomaja* and had no right to his father's estate and was entitled to mainte-

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[1] Devala 4; Colebrook's Digest 370; *Nirnaya Sindhu*, Ch. III 37; Shyamacharan's *Vyavasta Darpana* 702.

[2] 3 All. 738 (1881).

[3] 2 Knapp 203 (1834).

[4] *Chuckradhuj Thakoor* v. *Beer Chunder Jubraj*, 1 W. R. 194 (1864).

[5] *Brindavana* v. *Radhamani*, 12 Mad. 72 (1888).

nance only.[1] But in the *Kolijuga* intermarriage between different castes is prohibited.[2]

Kurao marriage.

Kurao marriage prevails amongst the Jats, Goozars and Aheers in the North-Western Provinces. The marriage is also known as *Kerao, Kaje, Dhericha* or *Dhareyja*[3] marriage. This form of marriage is inferior to *Shadee,* or marriage with a maiden, and is generally contracted with a widow and attended with some ceremonies.[4] Among the Jats the marriage of a widow with the brother of a deceased husband is common and recognized as lawful. According to Sir Henry Elliot, an authority of much weight regarding the tribes and customs of the people of these provinces, children born in *Kurao* are considered legitimate and entitled to inheritance accordingly.[5]

The ceremony of *Kurao* being of equal validity as that of the *Biah* or *Shadee* the sons of the former inherit their father's estate equally with the sons of the latter.[6] There is no custom, however, among the Jats sanctioning their union with the women of unequal caste by the ceremony of *Kurao* or *Dhericha,* consequently the sons of such union cannot succeed to their father's estate.

Among Lodh caste.

The custom of *Kurao* is prevalent among the Lodh caste, but in the life-time of a wife by regular marriage it can only take place with the consent of the brotherhood.[7]

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[1] Dyabhagha Chap. IX ; Manu X, 5-29 ; Mitakshara Chap. 1. S. VIII, V. 2-4. Sir Gooroodass Banerjee's Tagore Lectures p. 157. 2nd. Edition and also 17 Mad. 422 at p. 437.

[2] *Vyavastha Darpana* p p. 14, 15 ; Manu General Note VI.

[3] *Dhareyja* means the second husband of a Hindu widow among the lower classes. *Vide* Shakespear's Dictionary, quoted at p. 328 N. W. P. Decis. Part II. (1864).

[4] The ceremony being "making the bride's head with *minim* "—Vide N. W. P. Decis. Part II. (1864) p. 328.

[5] *Purunmull* v. *Toolseeram* 3 Ag. H. C. R. 350 (1868) ; *The Queen* v. *Bahadur Singh* 4 N.W.P. (All.) 128 (1872) ; *Khooshal Singh* v. *Rao Omrao Singh* N. W. P. Decis. (1864) Part II 320.

[6] *Konwar Kisken Singh* v. *Konwar Golab Singh* N. W. P. Decis. 173 (1861).

[7] *Kesaree* v. *Samardhan* 5 N. W.P. (All.) 94 (1873).

Re-marriage of a woman during the life-time of her husband.

For a woman to contract a second marriage during the life-time of her first husband is invalid and criminal, but sometimes, under custom, such a marriage is rendered valid and non-criminal. A woman of the caste of Mehter in the district of Monghyr married another man of the same caste while her former husband was alive. She alleged that in her caste, as well as in other low castes, it was customary for women to leave their husbands at any time and marry other men and that she had left her former husband because he failed to provide for her properly. The Sessions Judge found her guilty under section 494 I. P. C., but the High Court, finding that such marriages are not uncommon among the Mehter caste, and the second marriage in consequence not being void, set aside the conviction.[1]

Pat and *Natra* marriage.

Such second marriage of a wife or a widow is known amongst the Marhattas as *Pat*, and in Gujrat as *Natra* marriage.[2] Caste rules allow a woman to contract a *Natra* during the life of her first husband.[3] In *Kursan Gaja*[4] a custom prevalent among the Talapoda Koli caste in Surat was set up, to the effect that a woman should be permitted to leave the husband to whom she has been first married and to contract a second marriage (*Natra*) with another man in his (the first husband's) life-time and without his consent. But the Court considered such caste custom invalid, "being entirely opposed to the spirit of Hindu law," and the second marriage null and void. This was a criminal case and the Court went so far as to lay down that such a caste custom, even if it were proved to exist, would be invalid as *being entirely opposed to the spirit of the Hindu law*. This case was distinguished in another

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[1] *Musst. Chamia*, 7 C. L. R. 354 (1880).

[2] *Pat* wife is also called *udki* wife *i. e.* widow remarried. A maiden married is known as *biahi* or *shadee* or *lagan* wife.

[3] *Hurka Shunkur* v. *Bacejee Munohur* 1 Porr. 391 (1809).

[4] 2 Bom. H. C. R. 124 (1864).