Bombay case[1] where the defence set up the custom of *Natra* in answer to the charge of adultery. Couch C. J., observed that the guilt or innocence of the accused depended on his good faith. Did he or did he not believe *honestly* that he was at liberty to marry the woman.

In a later case, which was decided on the civil side of the Bombay High Court, the Court held that the custom which authorized a woman to contract a *Natra* marriage without a divorce, on payment of a certain sum to the caste to which she belonged, was an immoral custom and one which should not be judicially recognized.[2]

In another case the parties were Sompura Brahmans, and the woman remarried in the life-time of her first husband without his consent. It was held that she could not be regarded as the lawful wife of her second husband and was only entitled to maintenance as his concubine from his estate. Westropp C. J., observed thus:—"We concur in the opinion of the Judge of the Court of Small Causes at Ahmedabad that plaintiff Khemkor cannot be regarded as the lawful wife of Ranchhor Panachand, she having married him in the life-time of her husband without the consent of that husband. We reserve our opinion as to whether, even if he had given his consent to her marriage to Ranchhor, such a circumstance would have validated the marriage."[3]

The term *Natra* also applies to a man contracting a second marriage in the life-time of his first wife. A rather curious case is to be found in Borrodaile's reports. A betrothed his daughter to B, who having lately contracted a second marriage (*Natra*) with another woman, A sued B, either to consent to a divorce from his daughter, or to dissolve the *Natra* and admit his daughter to her rights. B asserted that he was full grown and A's daughter

[1] *Manohar Raiji*, 5 Bom. H. C. R. C. C. 17 (1868).

[2] *Uji* v. *Hathi Lalu* 7 Bom. H. C. R. A. C. J. 133 (1870).

[3] *Khemkor* (widow of *Ranchhor*) v. *Umia Shankar Ranchhor* 10 Bom. H. C. R. 381 (1873).

had not arrived at years of puberty, and under the circumstances *Natra* was permitted by the rules of their caste. The Sudder Adawlut, having consulted their Law Officer and obtained further evidence from the caste both in Bombay and Gujrat, decreed that A had no right either by the laws of the *shastra*, or customs of his caste, to demand a divorce for his daughter.[1]

In another case the husband after his first marriage contracted *Natra* with another woman whom he brought into his house. He insisted on his first wife coming and co-habiting with him in the same house and, in fact, obtained an order from a criminal court to that effect. The first wife therefore brought a civil suit claiming a divorce from her husband or a repudiation by the husband of his *Natra* wife. The parties belonged to the *Gundhurvee* caste, or "Musicians and Singers." The first wife alleged that according to the caste custom no man should marry a second time during the life of his first, unless she were barren or blind, or had other material defect, and that her husband must either divorce her or repudiate the *Natra* wife, as bigamy was not permitted. Her allegation was supported by the evidence of her caste people who said that, if there were cause, a man might keep two wives, but not so if no reason existed for doing it. If both the wives agreed he might keep them both; if not, the husband must grant a divorce (*farighkhut*) to the dissentient one. The Court decided that the wife was entitled to a divorce.[2]

Among the common labouring class of *Koonbees* or cultivators of the soil, a person of good family marries his daughter to one of equal rank, and if the girl be very young the husband may wed another wife. The father can only prefer his suit for his daughter's divorce to the

[1] *Huree Bhave Nana* and *Son Bhugoo* v. *Nathoo Koober* 1 Borr. 65 (1814).

[2] *Muha Shunkur Khooshal* v. *His wife Musst. Outtum* 2 Borr. 572 (1822).

Sirkar, but has no right to insist on what her husband is alone capable of doing.[1]

Sagai or *Shunga* marriage.

Sagai is a form of marriage prevalent in Bengal and Behar, and resembles *Pat* or *Natra* of Bombay and Gujrat, and *Kurao* of the N.-W. Provinces and the Punjab. Like the latter, *Sagai* is practised in the re-marriage of widows or of a woman whose husband is alive. It is confined to the lower class and not attended by any religious ceremonies. The Brahmans do not officiate at the *Sagai* marriage. The main ceremony, in Behar, for instance, is the putting of a red or *sindur* mark on the forehead of the bride in the presence of assembled friends and relatives. In the case of the re-marriage of a woman in the life-time of her first husband to another man of the same caste, the woman has to pay some fine to the Punchayet to restore her to caste. The payment of that fine appears to have the effect of a dissolution of the first marriage and a legalization of the subsequent co-habitation. In Behar numerous low castes, such as Koirees, Dosads, Gowalahs, Telees and others, solemnize the marriage of their widow in the *Sagai* form, which has long been and is still prevalent and considered in every way as valid as *Biahi* or first marriage.[2] In the district of Midnapore re-marriage of widows amongst the Nomosudras in the *Shunga* or *Sagai* form is customary and the Bengal High Court has recognized such custom as valid.[3] In Chota Nagpore, among some aborigines, the widow-re-marriage is permissible and the younger brother generally marries his elder brother's widow in *Sagai* form.[4] Among the *Halwaee* caste a man may contract a marriage in the

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[1] *Hurree Bhace Nana* v. *Nuthoo Koober* 1 Borr. 65 p. 74 (1814).

[2] *Bissuram Koiree*, 3 C. L. R. 410 (1878); *Kallychurn Shaw* v. *Dukhee Bibee*, 5 Cal. 692 (1879): s. c., 5 C. L. R. 505: s. c. 3 Shome 81.

[3] *Hurrychurn Dass* v. *Nimaichand Koyal*, 10 Cal. 138 (1883): s.c. 13 C. L. R 207.

[4] Dalton's *Descriptive Ethno. of Bengal* p. 138.

Sagai form with a widow, even if he has a wife living, provided that the wife be childless.[1]

Distinction between *Sagai* and *Biahi* marriage.

Practically there is no distinction between a *Sagai* wife and a *Biahi* wife in regard to her position in the family. Both marriages are good and valid. No distinction is made between the issue of a *Sagai* marriage and a *Biahi* marriage. It has been held that the issue of the son of a *Sagai* wife first married is entitled to inherit the property of the grandfather in priority to the issue of a subsequent *Biahi* wife.[2] *Sagai* wives are legal wives of their husbands, inasmuch as persons committing adultery with them are punishable under the law.[3] Except in respect of participation in oblations to the gods the position of a *Sagai* wife differs in no respect from the position of a wife married in the ordinary *Biahi* form. She may not wear *shanka* (shell bangle worn by a married lady) or take part in cooking or distributing food at a festival. But in respect of the legality of such marriage, and the legitimacy of the children of such marriage, both *Sagai* and *Biahi* stand in the same footing.[4]

Remarriage of Widows according to caste custom Forfeiture of Property. Act XV of 1856.

We have mentioned under Caste Customs that among the lower order of Hindus a re-marriage of widows is prevalent and recognized by customs of the caste. *Pat* and *Natra* marriages prevailing in Bombay and Gujrat, *Sagai* or *Shunga* obtaining in Bengal and the North Western Provinces and *Kurao* in the Punjab afford abundant instances. By Act XV of 1856 a Hindu widow of any caste, high or low, is now competent to contract a second marriage, and such a marriage is valid, one of the legal consequences of such re-marriage being that the widow

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

[2] *Radaik Ghaserain* v. *Budaik Pershad Singh*, 1 Marshal 644 (1863).

[3] *Bissuram Koiree*, 3 C. L. R. 410 (1878) ; *Jukni*, alias, *Parbati*, 19 Cal. 627 (1892).

[4] 3 C. L. R. 412.

thereby forfeits all rights of inheritance to her former husband's estate.

The principle on which a widow takes the life-interest of her deceased husband, when there is no male heir, is that she is a surviving portion of her husband.[1] By re-marrying she ceases to be such and therefore her right of enjoyment of her former husband's estate ceases also. She becomes dead, as it were, in respect to her interests in her deceased husband's estate. Previous to the passing of the Act XV, a Hindu widow forfeited her rights and interests in her deceased husband's estate only in case of her incontinence at the time when succession opened. Her subsequent unchastity did not divest her of the estate already vested in her.[2] It should therefore be necessary to investigate how far the Act would affect the rights of a Hindu widow who marries according to her caste custom. We may state at the outset that there is a clear and absolute difference of opinion on this important question in the decisions of the High Courts in India. The Allahabad High Court holds the view that a widow marrying a second time according to her caste custom and independently of Act XV of 1856 is not deprived of her right to her deceased husband's estate, whereas the Courts at Calcutta, Bombay and Madras hold that she does forfeit on her re-marriage. The following cases will illustrate the different views held by different Courts.

Allahabad High Court.

The Allahabad High Court held that Act XV of 1856 was not intended to place under disability or liability persons who could marry a second time before the Act was passed. It was intended to enable widows to re-marry who could not previously have done so, and section 2 of the Act applied to such persons only. So, when a widow, belonging to the sweeper caste, re-married according to her custom, she did not thereby forfeit her interest in the

[1] Vide *Smriti-chandrika* Ch. XI s. 1 § 4.

[2] *Kerry Kolitanee* v. *Monee Ram Kolita*, 19 W. R. 367 (F.B.) [1873].

property left by her first husband.[1] The same Court followed this ruling in a recent case. There the widow who contracted a second marriage belonged to the *Kurmi* caste, a re-marriage of widows being permissible by the custom of that caste.[2] Their Lordships after referring to many reported and unreported cases said: "We see no reason to doubt the soundness of those decisions which form, as far as we know, a consistent *cursus curiæ* in this court." But see *Matadeen* v. *Musst. Sookhy* which was decided by the Sudder Court. There a widow, of the *Koormee* caste, married a second time and sued to obtain possession as heiress to her deceased husband's share in an estate. The Court held that both by Hindu law and section 2, Act XV of 1856, she had forfeited all right to succeed as heir to her deceased husband's estate.[3]

Calcutta High Court.

The earliest case in which the High Court at Calcutta considered this Act XV of 1856 was *Akora Suthi* v. *Boreani*.[4] Therein it was held that the right of the mother to succeed as to her deceased son is not destroyed by reason of her having contracted a second marriage. Then in *Matungini Gupta* v. *Ram Rutton Roy*,[5] a Full Bench (by a majority) held that a Hindu widow forfeited all her interests in her first husband's property when she subsequently took a second husband, and this result followed even when re-marriage might be customary in the caste. A division Bench in *Rasul Jehan Begum* v. *Ram Sarun Singh*,[6] expressed a strong opinion on the subject. Here the widow belonged to the *Agarhari* caste, and married a second husband. The Court held that although according to the custom prevailing in her caste a re-marriage was

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[1] *Har Saran Das* v. *Nandi*, 11 All. 330 (1889).

[2] *Ranjit* v. *Radha Rani*, 20 All. 476 (1898). See also *Dharam Das* v. *Nand Lal Singh*, Weekly Notes (All.) 1889, p. 78.

[3] N. W. P. Decis. Part I, (1864) p. 434.

[4] 11 W. R. 82 (1868): s. c. 2 B. L. R, 199.

[5] 19 Cal. 289 (F.B.) [1891].

[6] 22 Cal. 589 (1895).

permissible, she forfeited the estate inherited from her former husband.

Bombay High Court.

The Bombay High Court in *Parvati* v. *Bhiku*[1] held that a widow duly re-married would cease to have any right to recover or hold any part of the property of her deceased husband. In *Omkar*[2] it was held that re-marriage was equivalent to the civil death of the widow by reason of the operation of section 2 of Act XV of 1856, and this operation extended to the forfeiture of interests in possession as also in respect of rights still unrealized. In *Vithu* v. *Govinda*,[3] a Full Bench held that even in castes where re-marriage was permitted by caste usage, a Hindu widow, who may have inherited property as heir to her son, forfeited her rights to such property after she re-marries, and the property passes to the next heir. This ruling was based upon what may be described as a liberal construction of section 2 of Act XV of 1856. In *Panchappa* v. *Sanganbasawa*,[4] the Bombay Court, after reviewing all these cases and similar cases of other High Courts, ruled that a Hindu widow, after her re-marriage, has no power to give in adoption her son by her first husband, unless he has expressly authorized her to do so. The only case in which a contrary view was held was *Parekh Ranchor* v. *Bai Bhakat*,[5] which corresponded with the view expressed in *Har Saran Das* v. *Nandi*[6] by the Allahabad High Court.

Madras High Court.

In *Murugyi* v. *Viramakli*,[7] where a widow of the *Maraver* caste re-married, the Madras High Court, applying the principles of Hindu law, held that she had no claim to the property of her first husband. Their Lordships observed "So far as the enquiries extended which are embodied in Steele's Hindu Castes, it appears that it is the practice of a wife or a widow among the Sudra castes of the

[1] 4 Bom. H. C. R. A. C. J. 25 (1867).
[2] P. J. for 1883 p. 280.
[3] 22 Bom. 321 (1896).
[4] 24 Bom. 89 (1899).
[5] 11 Bom. 119 p. 130 (1886).
[6] 11 All. 330 (1889).
[7] 1 Mad. 226 p. 228 (1877).

Deccan on re-marriage to give up all property to her former husband's relations, except what had been given by her own parents, and we have little doubt that the law in this Presidency will not permit the Hindu widow who has re-married, and who must be regarded as no longer surviving her husband to lay claim to the property left by him, nor in the possession of the daughter who, in default of the widow, is the right heir."

Whether a widow marrying according to her caste custom forfeits guardianship to her son by the first husband.

In *Kishun* v. *Enayut Hossein*[1] the question was whether a woman of the *Aheer* caste had by a second marriage, forfeited her rights to act as guardian to her son by the first marriage. The Court said: "Independent of the strong evidence adduced in favour of the existence of the well-known custom prevailing among the *Aheer* caste, according to which the re-marriage of a widow in no way affects her respectability, status or rights, we hold that Act XV of 1856 supersedes all previous laws founded on the *Shastras* affecting the rights and *status* of a widow on her re-marriage. We are of opinion that section 3 of the above Act should rule the present case. That section distinctly provides that the guardianship of a widow over her own children ceases on re-marriage on application being made to that effect by the relatives of her deceased husband. In this case no such application has been made. We are therefore of opinion that the widow has not forfeited her position as guardian to her son by re-marriage."

A re-married Hindu widow's right to inherit her son.

Section 2 of Act XV of 1856 does not deprive a Hindu widow, upon her re-marriage, of any right or interest which she had not at the time of re-marriage. Sir Barnes Peacock C. J., said: "The object of the Act was to remove all legal obstacles to the marriage of Hindu widows. Looking to the words of section 2, I am of opinion that it was not the intention of the Legislature to deprive a Hindu widow, upon her re-marriage, of any right or

[1] N. W. P. Decis. 486 p 487 (1861).

interest which she had not at the time of her re-marriage. In *Akorah Soobh* v. *Bheden Boreanee*,[1] when the widow re-married, the property belonged to her son. It came to her by inheritance from her son, who died after her re-marriage. If the son had pleased, he might have given the property to his mother, notwithstanding her re-marriage. At the time of her re-marriage, she had no interest in her deceased husband's property by inheritance to her husband or to his lineal successors. It could not therefore cease or determine upon her re-marriage and, if she had died at the time when she re-married, the property would never have descended to her. The Bombay High Court followed this case.[2]

Marriage between distinct castes how far sanctioned by custom.

Marriage between persons of different castes, or of two sub-divisions of one primary caste, is against the Hindu law.[3] To make such a marriage valid, the authority or sanction of a local or special custom is necessary.[4] Later decisions, however, have held that such intermarriages between sub-sects of Hindus are valid in Hindu law. In *Narain Dhara's* case Mr. Justice Markby doubted the correctness of the view, that such intermarriage is not legally binding. In the case of *Upama Kuchain* v. *Bholaram Dhubi*[5] in which the parties were *dhobi* and fisherman by caste, and residents of Sibsagar in Assam, the Court held that there was nothing in Hindu law prohibiting marriage between persons belonging to different sections or sub-divisions of the Sudra caste. In this there was no allegation of any custom; at any rate there was admittedly no evidence of any custom on the record. Their Lordships observed :—

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[1] 11 W. R. 82 (F. B.) [1868]: s. c. 2 B. L. R. 199 : s. c. 11 Seves. 151 & 153.

[2] See *Chaman Haree Dalmel* v. *Kashi* 26 Bom. 388 (1902).

[3] See *Anuloma* marriage *Supra*.

[4] *Melaram Nudial* v. *Thanooram, Bamun* 9 W. R. 552 (1868); *Narain Dhara* v. *Rakhal Gain* 23 W. R. 334 (1875) : s. c. 1 Cal. 1.

[5] 15 Cal. 708 p. 710 (1888

"The opinion of Mr. Justice Mitter (in *Narain Dhara's* case) was dissented from by Mr. Justice Markby and the case was not decided on that ground. We further think that the opinion there expressed is inconsistent with the decision of the Judicial Committee of the Privy Council in the case of *Inderun*.[1] The question there was whether the plaintiff, being illegitimate, and therefore, as it was argued, of no caste at all, could contract a legal marriage with a person of the Sudra caste, and their Lordships said: 'Their Lordships are not aware that there is any authority —there has been none quoted, and it does not appear that there is any authority supporting any such proposition as that which is contended for by the Pundits.'. . . .On the whole, seeing that these parties are both of the Sudra caste, and that the utmost that has been alleged really is, that the zemindar was of one part of the Sudra caste, and the lady to whom he was married was of another part, or of a sub-caste, their Lordships held the marriage to have been valid; to hold the contrary would in fact be introducing a new rule which ought not to be countenanced.'

"The same view was taken in *Ramamani Ammal* v. *Kulanthai Natchiar*.[2] There, a similar objection having been taken, their Lordships said: 'On the argument of this appeal this objection was not insisted on; it was conceded on both sides that recent decisions had declared the legality of a marriage between persons of these two sub-classes of the Sudra caste.' We think that these decisions are conclusive as to their being no rule of law rendering such marriages invalid."

In *Raj Kumari*,[3] which was a criminal motion, the Calcutta High Court held that illegitimacy under Hindu law is no absolute disqualification for marriage and that when one or both contracting parties to a marriage are

[1] *Inderun Velungypooly Tavee* v. *Ramswamy Talaver* 13 Moo. I. A. 141 (1869): s. c. 12 W. R. 41: 3 B. L. R. 1.

[2] 14 Moo. I. A. 346 p. 352 (1871).

[3] 18 Cal. 264 (1891).

illegitimate, the marriage must be regarded as valid if they are recognized by their caste people as belonging to the same caste. The latest decision on the point is *Haria* v. *Kanhaya*,[1] which reviewed all the previous cases and held that marriage between two sub-divisions of one of the primary castes is valid and legal according to Hindu law.

In the districts of Dacca and Tipperah marriages between *Vaidya* and *Kayastha* frequently take place and such inter-marriages are recognized by local custom. In a very recent case from Tipperah the Calcutta High Court has held that such marriages are in accordance with local custom and are therefore valid. Their Lordships observed: "The ancient Hindu law did not regard such marriages with the condemnation expressed by later authorities which have been accepted by our Courts so as to make children born from such unequal marriages illegitimate. But however the law may be, there is ample evidence set out in the judgment of the Sub-Judge on which it must be held that such marriages, as in the present case, are recognized by local custom in the district of Tipperah, and there is no instance on which their validity has been questioned. We agree with the Sub-Judge in holding that such marriages are in accordance with local custom in Tipperah and are valid."[2]

Among Lingayets.

According to the Lingayet religion, marriages between members of different sects of the Lingayets are not illegal. Where it is alleged that such a marriage is invalid, the *onus* lies upon the person making such allegation of proving that such marriage is prohibited by immemorial custom.[3]

Odaveli marriage.

Among the *Lingayet Goundans* in the Wynaad there is an immemorial custom by which widows are re-married,

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[1] P. R. Vol. XL. 111 p. 326.

[2] *Ram Lal Sookool* v. *Akhoy Charan Mitter*, 7 C. W. N. 619 p. 633 (1903).

[3] *Fakirgauda* v. *Gangi* 22 Bom 277 (1896).

and the form in which such a marriage takes place is called *Odaveli* or *Kudaveli* as opposed to *Kalianam* the regular form of marriage. It is not accompanied with the same ceremonies as a *Kalianam* marriage; but a feast is given, the bride and bridergoom sit on a mat in the presence of the guests and chew betel; their cloths are tied together and the marriage is consummated the same night. Widows re-married in this form are freely admitted into society. They cease to belong to the family of their first husband and the children of the second marriage inherit the property of their own father. A widow contracting an *odaveli* marriage ceases to inherit her deceased husband's estate.[1]

Serai Udiki marriage.

The second marriage of a wife forsaken by the first husband among the *Lingayets* is called a *serai udiki*, as distinguished from the *lagna* or *dhara*, the first marriage. Such a marriage is sanctioned by custom among the *Lingayets* of South Canara and is valid.[2]

"Dagger" marriage.

"Dagger" marriage is a form of inferior marriage prevalent among the Kumbla Zemindars in the Madras Presidency. This sort of marriage takes place in the case of inequality in the caste or social position of the bride. The use of a dagger is an essential of the marriage ceremony. According to some the Zemindar does not appear at the marriage but is represented by a dagger. And, in the presence of this dagger, the *bottu* is tied to the bride. The presence of a dagger and the tying of the *bottu* indicates that this sort of marriage is not exactly a concubinage, but a certain form of inferior marriage which the Rajahs and Princes are accustomed to contract besides marriages in regular form. Ladies united to a Zemindar according to the dagger form are called *bhoga strees*, whereas a lawfully wedded wife is called a *moha stree*.[3]

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[1] *Koduthi* v. *Madu*, 7 Mad. 321 (1884).

[2] *Virasangappa* v. *Rudrappa*, 8 Mad. 440 (1885).

[3] *Ramasami Kamaya Naik* v. *Sundaralingasami Kamaya Naik*, 17 Mad. 422 at pp. 422-425 (1894).

Anand marriage.

Anand is a form of marriage prevalent among Sikhs and corresponds to the Mahomedan *Nika*.[1] It is an inferior form of marriage, which may be celebrated even with a concubine. The ceremony observed at the marriage consists in the recitation of a certain text called the *Anand* text. A son of such a marriage shares equally with another son of the same father by a wife married in the *biahi* or regular form.[2]

Besides these forms of marriages there are others such as *Bhati* or *Bebhati*,[3] *Chudder Andaj*,[4] *Sarvasvadhanam*,[5] *Ghari Sufa*.[6] These have been described in their respective places.

Conditional *Sata* marriage

In conditional *sata* marriage two families contract for intermarriage. As, for instance, in the family of A there are available for marriage a boy and a girl, in B's family there are also a boy and girl eligible for marriage. A contract for intermarriage takes place between A's boy and B's girl and B's boy and A's girl—one marriage contract is conditional on the performance of the other. Such intermarriages are prevalent in Bombay and also in Bengal. In the latter province it is known as *paribarta* or exchange marriage, and amongst Brahmans such marriages often take place.

In Borrodaile's Reports a case is reported where a suit was brought to compel the performance of the conditions of a contract between the heads of two families under these circumstances. A contracted to marry his sister to S's

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[1] *Nika* is an Arabic term. Its root-meaning is carnal connection. Hence, marriage, *i.e.* any marriage, first, second or any. The term is used in reference to first and regular marriage. It is among the lower order of people only that *Nika* has obtained the signification of *second marriage*.

[2] *Deo dem Juggomohun Mullick* v. *Saumcoomar Beebee*, East's Notes case 31 (29 March 1815); Morley's Digest, Vol. I. 350.

[3] *Vide* Hindu Customs, Inheritance *Supra*.

[4] *Vide* Punjab Customs *Infra*.

[5] *Vide* Malabar Customs, *Infra*.

[6] *Vide* Mahomedan Customs *Infra*.

brother-in-law on condition that S should get A married to T's daughter or, failing that, S should give A his own daughter in marriage. A fulfilled his part of the contract, *i.e.*, he married his sister to S's brother-in-law. But S refused to perform his part of the contract and tried to get his daughter married clandestinely elsewhere. T's daughter having died before she attained her marriageable age, A brought this suit to compel S to give him his daughter in marriage; as he had given his sister only "with a prospect of mutual accommodation." The Court ordered that S should either give his daughter to A, or procure him another wife, or, failing to perform either of these conditions within six months, should pay the sum of Rs. 500. S did not surrender his daughter but paid Rs. 500 as ordered by the Court.[1]

In *Bai Ugri* v. *Patel Purshottam Bhudar*,[2] the parties belonged to the Kudwa Kunbi caste, and, it was said, were only a month old at the date of their marriage, which was contracted for them by their parents on the following basis: A wished to get B's daughter for his son. A was bound, on condition of B giving his daughter in marriage, to provide a girl for B to marry his son. The marriage, which took place with the usual religious ceremonies, was not to be binding and complete until the bridegroom's father performed the condition, *viz.*, found a girl for B's son. In this case, as the condition was not performed, the marriage was dissolved by the decision of the Panch notwithstanding that the plaintiff sued for restitution of conjugal rights. Sargent C. J., observed:— "The findings on the issue sent down by this Court on the 28th September, 1891, are, when read together, to the effect that although the usual religious ceremonies

[1] *Atmaram Kessor* v. *Sheolal Mulvookchund*, 1 Borr. 397 (1809). See also *Bai Ugri* v. *Patel Purshottam Bhudar*, 17 Bom. 400 (1892); and *Mulji Thakersey* v. *Gomti*, 11 Bom. 412 (1887).

[2] 17 Bom. 400 (1892).

were performed on the occasion, what took place in *Samvat* 1927 constituted, by the custom of the caste, only a conditional marriage, between plaintiff and defendant No. 1; that the *farkat*, passed by the father in *Samvat* 1936, and which was signed by the plaintiff, operated to cancel the marriage, but that in any case, a dispute having arisen out of the said *farkat*, the decision of the Panch that plaintiff should find a girl to be married to a male member of the family of defendant No. 2, was binding on him, and that the plaintiff's default in doing so dissolved the marriage. It has, however, been contended that the Court ought not to recognize such a custom, as being contrary to public policy. See *Reg.* v. *Karson Goja*, *Reg.* v. *Bai Rupa*, 2 Bom. H. C. R. 117; *Uji* v. *Hathi Lalu*, 7 Bom. H. C. R. A. C. J. 133; *Reg.* v. *Sambhu*, 1 Bom. 347. All turn upon caste customs by which a woman is enabled to leave her husband and marry another man of her free will or with the consent of the caste and which the Court held to be invalid on the ground that they were immoral as 'legalizing adultery.'

"The question here is of an entirely different nature; as according to the custom relied on, there is no complete and binding marriage within the intention of the parents of the parties, although the ordinary religious ceremonies (presumably those amongst Sudras) are performed. Such a transaction as took place in *Samvat* 1927 cannot in our opinion be regarded as immoral from any point of view. The parties are in all cases, according to the practice of the caste, of very tender years when such marriages are contracted. The Hindu law leaves it entirely to the parents to marry their daughters and although, according to strict Brahmanical law, a marriage is complete when the religious ceremony has been performed, there would seem to be no sufficient reason for refusing to recognize a custom, at any rate amongst the lower castes, by which such transactions, rendered necessary by the paucity of women in the caste, although performed with religious ceremonies, are still

regarded by the parents on both sides as incomplete and conditional marriages.

"In the case of *Boolchand Koleta* v. *Janokee*, 25 W. R. 386 (1876) which was a suit like the present for restitution of conjugal rights, the Calcutta High Court gave effect to a caste custom by which the usual ceremony of marriage was not regarded as binding unless a second ceremony was performed prior to the woman coming to maternity and cohabiting with her husband, and by which, in default of such ceremony, the woman might after puberty, as the defendant in that case had done, marry another man.

"Upon the whole, we are of opinion that there is no reason for not recognizing the custom as proved in this case, and therefore whether upon the ground of the *farkat* passed by the plaintiff's father or of the plaintiff's default in performing the condition imposed on him by the Panch, we must hold that the plaintiff has not established his right to the restitution of the defendant No. 1 as his wife."

Betrothal or *Mangni* or *Pariyam*.

According to Hindu law a betrothal (called *mangni* in Bombay and *pariyam* in Madras) is not to be treated as an actual and complete marriage. It is a promise to give a girl in marriage. Hence a specific performance of a betrothal cannot be enforced. Damages however may be awarded against the father for breach by him of the contract of betrothal.[1] Under the Specific Relief Act, a contract of betrothal cannot be specifically enforced.[2]

With some castes betrothal is irrevocable except for just cause, while, according to others, it can be broken off by mutual consent.[3] Where there is a breach of the agree-

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[1] *Umed Kika* v. *Nagindas Narotam Das* 7 Bom. H. C. R. 122 (1870); *Nowbut Singh* v. *Musst. Lad Koer* 5 N. W. P. (All.) 102 (1873); *Gunput Narain Singh* 1 Cal. 74 (1875); *Mulji Thakersey* v. *Gomti* 11 Bom. 142 (1887).

[2] *Vide* S. 21 Cl. (*b*) Specific Relief Act (Act I of 1877).

[3] *Huree Bhace Bhuwaneedas* v. *Chundun* 1 Borr. 433 (1812); *Umed Kika* v. *Nagindas Narotam Das* 7 Bom. H.C.R. 122 (1870).

ment of betrothal, the party committing the breach is liable to return to the other party the value of the ornaments and the money paid as *upariyaman* and also to pay some damages for the breach of contract.[1]

Among Parsis.

Breach of a marriage contract is not permitted under any circumstances by the rules of the Parsis. Among them *maugnis* are as equally indissoluble as a perfect marriage.[2] By the custom prevailing amongst Parsis, presents of money and ornaments made to a bride at betrothal, and between betrothal and marriage and at marriage, and the increment thereof, belong to the husband and wife jointly during their lives, and on the death of either pass absolutely to the survivor. The same custom appears to prevail with regard to special and costly clothes (*i. e.*, clothes intended to be worn only on special occasions and ceremonies) presented during the same periods.[3]

"Second marriage."

Amongst a certain class of Hindus, after the marriage of a girl and on the first appearance of her menses, a religious ceremony is performed which, in ordinary parlance, is called "second marriage," but otherwise known as *garvadhan*. After this ceremony actual consummation of the marriage takes place, as usually Hindu girls are married before they attain puberty. This "second marriage" before co-habitation is not required by the general Hindu law. In Assam this ceremony is known as *santibiah* or *panchibiah*. It is said there that if a girl cohabits with her husband without this ceremony, she is defiled and both she and her husband are outcasted. There was a case from Goalpara in Assam, in which the husband sued to have it declared that

[1] *Mulji Thakersey* v *Gomti* 11 Bom. 412 (1887).

[2] *Nowrozjee Khoorsedjee* v. *Dhuna Baee* 1 Borr. 423 (1811).

[3] *Byramji Bhimjibhai* v. *Jamsetji Nowroji* 16 Bom. 630 (1892). *Vide* also *Burjorjee Sorabjee* v. *Pestonjee Hormusjee*, suit No. 600 of 1876, decided on the 20th September 1877; *Merwanjee Burjorjee* v. *Rustomjee Nanabhoy*, suit No. 259 of 1883, decided on the 4th September 1884.

the defendant was his wife and was bound to live with him. But the defendant alleged that in order to constitute such a right, the custom required that there should have been a second marriage. As no such second marriage had taken place the suit was dismissed by the Deputy Commissioner. The High Court, however, (though it agreed with the Deputy Commissioner's decision) remanded the case, as no issue was framed on this question of custom in the lower Court.[1]

Bashee Bibaha.

Bashee Bibaha is a ceremony observed among some classes of Hindus which takes place on the day following the night of the celebration of marriage. In a case coming from Dinajpur, the question raised before the High Court in an application for review was whether a certain ceremony described as *bashee bibaha* was to be taken as part of the marriage ceremony, during the continuance of which gifts to the bride come under the denomination of "*Yautuka.*" It was contended that if *bashee bibaha* was included in the marriage ceremonies, then gifts made to the bride on that occasion would be included in the *Yautuka.* If *bashee bibaha* was distinct from marriage proper, then the presents given to the bride on that occasion, must be excluded from the *Yautuka.* The High Court remanded the case as they thought the point could not be satisfactorily determined without an inquiry into the custom of the district in the caste to which the parties belonged, and observed: "If the *bashee bibaha* be found to be customarily as a material portion of the marriage ceremonies, so that gifts made at this particular time are by custom treated as part of the gifts before the nuptial fire, the husband will succeed to the disputed property in the list."[2]

Custom of a child wife to remain with her parents.

Though a husband is the legal guardian of his wife from the moment of his marriage with her, yet, according to custom, she is allowed to remain with her parents until

[1] See *Boolchand Kalta* v. *Musst. Junkee* 24 W. R. 228 (1875).

[2] *Bistoo Pershad Burral* v. *Radha Soonder Nath* 11 Sevestre 591 (1871) : S. C. 26 W. R. 304.

she attains maturity. A Court has been held justified, while such a contingency had not happened, in refusing to direct her to go to her husband.[1]

Marriage within prohibited degrees.

In Madras a marriage between a Hindu and the daughter of his wife's sister is sanctioned by wide-spread usage. Though some Hindu *Shastra* (*e. g.*, *Aswalayana*) has condemned such a marriage on the ground of incongruous relationship, the Madras High Court had no hesitation in holding the marriage valid, as being in perfect accord with the custom satisfactorily established by evidence.[2] A marriage with an adoptive brother's daughter is held not to be sanctioned by usage of sufficient antiquity.[3]

Divorce or Dissolution of marriage.

Divorce is not contemplated by the Hindu law, but it is not repugnant to the principles, and if there be a well-established custom in its support it may over-ride the general provisions of that law.[4] Sir William Strange in his treatise on Hindu law[5] says that in the lowest classes a divorce is attainable between a husband and wife provided it is allowed by the custom of the caste. In a case which came from Gauhati in Assam, the wife stated that as her husband could not provide her with food and clothing and as she sustained cruel treatment in his hands, she left him and went to her father's house. Thereupon her husband divorced her and executed an agreement to that effect, on receipt of a portion of the money which he (the husband) gave her father at the time of her marriage. The Munsiff found that there was a custom in the Province of Assam for "men and women to assent to divorce by deed in this way." But as the District

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[1] *Santosh Ram Dass* v. *Gera Pattuck* 23 W. R. 22 (1875); *Arumuga Mudali* v. *Viraraghava Mudali* 24 Mad. 255 (1900). But see *Kateeram Dokanee* v. *Musst. Gendhenee* 23 W. R. 178 (1875).

[2] *Raghvendra Rau* v. *Joyaram Rau* 20 Mad. 283 (1897).

[3] *Vythilinga Muppanar* v. *Vijayathammal* 6 Mad. 43 (1882).

[4] *Musst. Kudomee Dassee* v. *Jotiram Kolita* 1 Shome 65 (1877): s. c. 3 Cal. 305.

[5] 4th Edn. Vol. I. p. 52.

Judge held that even if the custom were established it would not affect the Hindu law, and as he was wrong in holding such view, the High Court remanded the case to him for his finding on the custom which the Munsiff said was established.[1]

Among the lower classes of people—whether in Bengal, Bombay, United Provinces of Agra and Oudh or in Southern India—divorce is allowed by caste-people. The grounds of divorce are generally habitual ill-treatment, impotency, or the dissolute and depraved habits of the husband. And the divorce is usually effected by mutual consent, on the payment of some compensation for marriage expenses incurred at the first marriage, or the return of *palu* and by a release or *chhar chitti*.[2] The Madras High Court in a recent case has held that there is nothing immoral in the caste custom by which divorce and re-marriage are permissible on mutual agreement, on one party paying to the other the expenses of the latter's original marriage.[3]

The Punchayet or head of a caste could determine marriage and grant divorce.[4] But in some cases the Courts have declined to recognize the authority of the Punchayet in granting a divorce.[5] In an Allahabad case it has been laid down that while the Courts have generally accepted the decisions of properly constituted punchayets on questions of caste, they have accepted them subject to the qualifications that the decision of the Punchayet does not estop the Courts from enquiring into the civil rights

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[1] 3 Cal 305.

[2] *Vide* among Kunsara caste in Surat: *Kaseram Kriparam* v. *Umbaram Hurreechand* 1 Borr. 429 (1811); among Walun caste: *Kasee Dhoolubh* v. *Ruttonbaee* 1 Borr. 452 (1817); *Hurka Shunkur* v. *Baeejee Munohur* 1 Borr. 391 (1809); *Soobra Tevan* v. *Moothookoody* 6 Mad. H. C. R. 40 (1870). *Sankaralingam Chetti* v. *Subban Chetti* 17 Mad. 479 (1894). Parties are of the Potters caste in Tinnevelley.

[3] *Sankaralingam Chetti* v. *Subban Chetti* 17 Mad. 479 (1894). See Caste Customs *supra*.

[4] *Kalee Churn Shaw* v. *Dukhy Bebee* 5 C. L. R. 505 (1879): s. c. 5 Cal. 692.

[5] *Sambu* v. *Raghu* 1 Bom. 347 (1876).

of any member of the caste, and securing to him the enjoyment of such rights if he be found not to be precluded from the enjoyment of them by the *Shastras* or the particular usages of his caste.[1]

Divorce in Assam.

It is very common in Assam for a husband and wife to agree to a divorce by a duly executed deed, stating that they had mutually consented to dissolve the contract, and in such a case the wife has been deemed free to marry again. When no written deed of divorce was executed the ceremony of tearing a betel leaf in two by the parties was considered sufficient for all purposes. Besides, according to local usage, any violation of the condition of the marriage contract deed will operate as a nullity of the marriage contracted before.

A married woman sought divorce on the strength of a bond executed by her husband before marriage, by which he engaged to consider his marriage void if he ever left the village in which his "wife and her friends reside or in case of cruelty, or in event of his ever marrying another wife." The High Court held that such contract, being opposed to public policy, would not render the marriage void.[2]

Whether loss of caste dissolves marriage.

It is a general principle of Hindu law that the degradation of the husband from caste does not dissolve the marriage tie. Unless a caste custom to the contrary is established no court should countenance such a dissolution. It is well-known that there is a distinction between ex-communications for different caste offences. In some cases the out-caste can never be restored to the privileges of his caste, but in the majority of instances he can procure absolution and restoration to caste by undergoing expiation or paying some penalty. It would be extremely inconvenient therefore to hold that by a deprivation of caste, which may be temporary, a member of the caste

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[1] *Bisheshur* v. *Mata Gholam* 2 N. W. P. (All.) 300 (1870).

[2] *Sitaram* alias *Keera Heerah* v. *Musst Aharee Heerahnee* 11 B. L. R. 129 p. 130 (1873).

loses his marital rights, so as to confer on his wife the power of forming a second marriage; for if the husband were restored to caste, he could not be restored to the enjoyment of his marital rights if his wife had availed herself of her liberty to re-marry. In the case of such temporary degradation of her husband the utmost the wife could claim would be that she be relieved from consorting with him as long as he remained out of caste. But she must remain under his protection and must not leave his house.

In *Bisheshur* v. *Mata Gholam*[1] the parties belonged to to the Ugvaru Banyah caste. The plaintiff sought an order from the Court to direct his wife to come to his house from the house of her parents, alleging that his wife had contracted a *sagai* marriage with the defendant. The defence was that the plaintiff had become an outcaste and, therefore, *civiliter mortuus*, and that by reason thereof, and in accordance with the custom of her caste, his wife was at liberty to marry. It appeared that owing to some dissensions, the members of the caste resident in the place separated themselves, as it were, into two sects; and by reason of the plaintiff consorting with a member of one sect he had been declared out of caste by a Punchayet composed of members of the other sect who were numerically in the majority. The High Court framing the following issue remanded the case to the lower court, *viz.*, whether, if a husband is put out of caste for the cause for which the plaintiff had been declared to be out of caste the marriage was by the custom of the Ugvaru Banyah caste dissolved and the wife at liberty to contract a second marriage. The lower court returned a finding to the effect that the plaintiff was excommunicated for eating with one who was not of his caste; being turned out of caste on this account he could not be re-admitted; that his marriage was dis-

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

solved and that his wife was, with the sanction of the Punchayet, at liberty to contract a second marriage. Whereupon the High Court passed the following order :—"No objection having been taken to the findings on the issues remitted for trial, we must accept them, but at the same time we may express our doubts whether the finding is correct. The result of the finding is that the husband cannot insist upon the return of his wife to cohabitation, and the suit must be dismissed."

The above order distinctly shows that the High Court had to pass it with great reluctance, the plaintiff having taken no objection to the findings of the lower Court before their Lordships. It does not establish the alleged caste custom, for their Lordships doubted the correctness of the findings of the lower court. Now, even if such a custom were established by clear evidence we think the Court would hesitate to give countenance to it. A sentence of excommunication, such as was passed in this case, should not have deprived a member of the caste of those civil rights which were claimed in this case.

In *Musst. Emurtee* v. *Nermul*[1] the Sudder Court laid down that loss of caste by a Hindu husband could not dissolve his marriage or justify his wife in forming a second marriage or bar his claim to the possession of her person; that to bar such a claim caste usages could not be pleaded, unless shown to be recognized by the *shastras*.

Authority of Caste to declare a marriage void.

A Court will not recognize the authority of a caste to declare a marriage void or to give permission to a woman to re-marry. *Bona fide* belief that the consent of the caste made the second marriage valid does not constitute a defence to a charge under section 494 I. P. C., marrying again during the life-time of the first husband, or to a charge of abetment of that offence under that section combined with section 109. I. P. C., though the

[1] 7 N. W. P. Decis Part I. p. 583 (1864).

circumstance may be taken into account in mitigation of punishment.[1]

Custom of recouping original expense or *parisam*.

There is a custom amongst the Jats of Ajmere that a man on marrying a widow must reimburse her late husband's relations for the expenses of her first marriage, and the custom is so well-known that no such marriage can be celebrated until these expenses have been paid. The custom, in fact, is so notorious that it may be said to have become part of the marriage contract in cases in which members of the community elect to marry widows.[2] A similar custom of paying *parisam* or original marriage expenses, prevails among the potter's caste in Tinnevelly.[3]

Mahomedan marriage.

Under the Mahomedan law although there may be evidence of actual fact of marriage, yet where a lady co-habits with a person for a number of years and has a child by him, factum of marriage will be presumed, if there be an acknowledgment, either expressed or implied, by the father that the child is his lawful son.[4] Under the Hindu law a Hindu widow on her re marriage is disentitled to inherit. But if she becomes a Mahomedan before her marriage and then marries a Mahomedan her conversion does not involve forfeiture of inheritance.[5] If a Hindu married woman becomes a convert to Moslemism and marries a Mahomedan while her Hindu husband is alive, her first marriage is not dissolved by her conversion. And as under the Mahomedan law a plurality of husbands is not permissible, her subsequent marriage is void. She is liable under section 494 I. P. C.[6] Where a Hindu woman during the life-time of her Hindu husband became a Mahomedan and contracted a *nika* marriage with a Mahomedan, she was held to be in the position of an

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[1] *Sambhu Raghu* 1 Bom. 347 (1876).

[2] *Madda* v. *Sheo Bakhsh*, 3 All. 385 (1881).

[3] *Sankaralingam Chetty* v. *Subban Chetty*, 17, Mad. 479 (1894).

[4] *Mahatala Bibee* v. *Prince Ahmed Haleemoozooman* 4 Shome 241 (1881).

[5] *Gopal Singh* v. *Dhungazee* 3 W. R. 206 (1865).

[6] *Rajkumari* 18 Cal. 264 (1891).

unchaste daughter and therefore disqualified to inherit her father's estate.[1]

Christian marriage

In *Lopez* v *Lopez* a Full Bench has held that among Roman Catholics the marriage of deceased wife's sister is not within the prohibited degree.[2] In *Skinner* v. *Skinner*[3] the parties were adherents of the Mahomedan faith. In order to validate the marriage which they contemplated they had previously become Christians. But some time after marriage, they both reverted to their original creed and went through the form of marriage a second time according to Mahomedan law, and both continued in the practice and profession of the Mahomedan faith until the death of Mr. Skinner. About two years after their *nika* marriage the spouses separated. Mrs. Skinner went to live with her mother. Subsequently she cohabited with her alleged paramour by whom she had several children. Before separation she bore to Mr. Skinner a son and a daughter, whose legitimacy is not impeached. Both the children survived their father. Mr. Skinner after separation from his wife began to cohabit with another woman (Sophia Skinner), whom he treated as his wife and with whom he continued to live on that footing until his death. He was survived by his six children, born of that intercourse, who preferred an appeal to the Privy Council. As the hearing of the appeal was *ex parte*, their Lordships did not think it expedient to express any opinion as to the effect of a change of religion by the spouses, their domicile remaining the same, upon the rights of one or other of them which are incidental to marriage.[3] Where a person who belonged to the Greek church subsequently embraced the Roman Catholic religion and married his deceased wife's sister (necessary dispensation having been granted to him) and thereafter speedily reverted to his original

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[1] *Sundari Letani* v. *Petambari Letani* 9 C. W. N. 1003 (1905).

[2] 12 Cal. 706 (F.B.) [1885] See *Lucas* v. *Lucas* 9 C. W. N. 323 (1904).

[3] 2 C. W. N. 209 (P. C.) [1897].

faith, it was held that this subsequent apostacy did not affect the validity of the marriage. It is not the province of the Courts to examine the sincerity of a man's religious convictions.[1]

Brahmo marriage.

A marriage performed in accordance with the rites of the Brahmo Somaj is invalidated by the fact that either of the parties thereto has a husband or wife by a previous marriage alive.[2]

Change of religion. Escheat.

In *Sinammal* v. *The Administrator General*,[3] both husband and wife were Brahmans. The husband subsequently became a convert to Christianity. On his death his Brahman wife claimed his estate. The Court held that, according to Hindu law, the husband died an outcaste, and degraded, and that as his degradation was unatoned the marriage became absolutely dissolved and no right of inheritance remained to the wife.

Marriage of Gosains; forfeiture.

Among Gosains of the Deccan, and certain other places, marriage does not work forfeiture of the office of Mohunt and the rights and property attendant to it. The burden of proving that marriage works forfeiture lies on the person who impugns another's right on account of his marriage.[4]

Marriage of bastard.

Illegitimacy under Hindu law is no absolute disqualification for marriage, and when one or both contracting parties to a marriage are illegitimate, the marriage must be regarded as valid, if they are recognized by their caste people as belonging to the same caste.[5]

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[1] *Lucas* v. *Lucas*, 9 C.W. N. 323 (1904) : s.c 32 Cal. 187.

[2] *Sonaluxmi* v. *Vishnuprasad Hariprasad*, 28 Bom. 597 O. C. (1903).

[3] 8 Mad. 169 (1883).

[4] *Gosain Rambharti Jagrupbharti* v. *Gasavi Ishvarbharti Haribharti*, 5 Bom. 682 (1880).

[5] *Rajkumari*, 18 Cal. 264 (1891); *Inderun Valangypoolg Tavar* v. *Ramasawmy Pandia Talaver*, 13 Moo. I A. 141 (1869) : s. c 3 B. L. R. 1 ; s. c. 12 W. R. 41 affirming *Pandaiya Telaver* v. *Pule Telaver*, 1 Mad. H. C. R 478 (1863).

CHAPTER IX.

BUDDHIST CUSTOMS.

MARRIAGE.

The institution of marriage is one of the dearest and most cherished institutions in every civilized or semi-civilized country. It is the foundation of the family, and, as such, the foundation of society; for society is after all nothing more than an association of individuals. Unlike the Hindus, marriage is not regarded as a sacrament by the Buddhists, yet among no other class of people does marriage play such an important part as among the Burmans, in determining the devolution of property, both real and personal. Amongst the Hindus succession is regulated on the basis of spiritual benefit and religious efficacy. Amongst the Burmans it may be said that the same is governed on the basis of marriage. Buddhist law favours the equality of the sexes and in many ways treats marriage as creating a partnership in goods. Marriage being the most important part of Buddhist law, it is necessary to take the greatest care so that the mutual rights of husband and wife are not curtailed in any respect without a clear and satisfactory proof that such curtailment is authorized by law, or by custom having the force of law.

Three kinds of marriage.

There are three kinds of marriage among the Burmese: (1) with the consent of parents on both sides; (2) through the negotiation of a third party; (3) by mutual consent only.[1] At the beginning of the twelfth chapter of *Menu Gye* it is thus laid down:—"Amongst men there are only three ways of becoming man and wife, which are as follows:—*First*; a man and woman given in marriage by their parents who live and eat together. *Second*, a man and

[1] Vide *Menu Kyay Dhammathats* Book V. s. 24 and Book XII, p. 336, Richardson's Translation 2nd Edn.

woman brought by the intervention of a go-between, who live and eat together; *Third*, a man and woman who come together by mutual consent, who live and eat together."[1]

What constitutes a valid marriage.

To constitute a valid marriage no ceremony is requisite. All that is necessary is consent on both sides to live together as husband and wife. If the bride's parents are alive, it is usual for them to give their consent to the marriage, and it is also usual to inform relatives and friends and to have some sort of entertainment. But this is not necessary in order to make the marriage binding.[2] Mr. Jardine says: "After such consideration as I have been able to give to the subject, I am inclined to think that consent of both parties is essential to the contract of marriage and that no ceremony is essential either by the *Dhammathat* or by established custom, but that the public banquet or the joining of hands may be some evidence of consent, although that sort of evidence may be overruled by proof that there was no consent or acquiescence, *e.g.*, by showing that immediately afterwards the girl repudiated by quitting the man."[3] A man cannot contract a valid marriage with a minor girl without her guardian's consent.[4] Living and eating together is not an essential of marriage but merely a formal proof of the validity of a marriage.[5] It is worth mentioning that in section 24, Book V of the *Menu Kyay Dhammathat* in which three forms of marriage are laid down, all mention of living and eating together is excluded. It is only in the XIIth Volume p. 336 that the addition of these words is found.

A minor's marriage.

A marriage between a man and a girl under the age of twenty years, without the consent of her parents is

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[1] Chan-Toon p. 383.

[2] *Mah E.* v. *Moung San Da*, 3 Bur L. R 8, (1897). See Jardine's *Notes on Buddhist Law* I, ss. 15, 22 and 23.

[3] Quoted in *Ma Gywe* v. *Ma Thi Da*, civil appeal No. 30 of 1891, Circular No. 11 Civil 1893 U.B.

[4] *Q. E.* V. *Nya Ne U* Cr. Ref. No. 6, Novem. 2, 1883.

[5] *Ma Gywe* v. *Ma Thi Da* Circular No. 11 Civil 1893, U.B.

null and void, and the parents can recover her person from the seducer. But if the parents know where their daughter is, and they fail to reclaim her within a reasonable time, *i.e.*, until a sufficient time has elapsed to allow of a child being born by her, they shall have no power to cause her separation from her husband and the marriage shall stand good.[1]

A Buddhist woman, if she is a minor at the time of her marriage and is duly given in wedlock by her parents, upon marriage is emancipated from parental control and ceases to be a minor so far as matrimony and its incidents are concerned. The Majority Act makes a special exception. Section 87 of the Civil Justice Regulation provides that any question respecting marriage is to be decided in accordance with the Buddhist law when the parties are Buddhists. Section 11 of the Contract Act has no application to the marriage contract among the Buddhists. Such a contract is something more than a contract or at any rate is subject to special conditions.[2] Lord Robertson observes: "The contract of marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilized society. The status of marriage is *juris gentium*, and the foundation of it, like that of all other contracts, rests on the consent of parties. But it differs from other contracts, in this, that the rights, obligations, or duties, arising from it are not left entirely to be regulated by the agreements of parties, but are, to a certain extent, matter of municipal regulation over which the parties have no control by any declaration of their will. * * * * Unlike other contracts, it cannot, in general, amongst civilized nations, be dissolved by mutual consent, and it subsists in full force, even although one of the parties should for ever be rendered incapable, as in the case of incurable insanity,

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[1] *Menu Kyay Dhammathat*, Book VI, ss. 21, 22.

[2] See Story's *Conflict of Laws*, Chap. V.

or the like, from performing his part of the mutual contract."[1]

In *Maung Myat Tha* v. *Ma Thon*,[2] which was a suit for restoration of conjugal rights against a Buddhist girl under the age of 18, the following observations occur:—"According to Buddhist law—Manugye Dhammathat VI, 30—'a young woman who has never had a husband has no right to take one without the consent of her parents or guardians, but if she be a widow, or divorced from her husband, and she marry the man of her choice, her parents, guardians, or relatives have no right to interfere to prevent it; let the woman who has already had a husband take the man of her choice.' No limit of age is here mentioned as in section 28, where it is 20 years. It appears, therefore, that a Buddhist woman in Burma is emancipated from parental control by marriage and ceases to be a minor, if she is one at the time of her marriage, so far as marriage is concerned."

Elopement and marriage.

If a girl elopes with a man, the latter is bound to restore her to her parents three times. If after this she elopes with him again he has a right to keep her and marry her, and her parents cannot cause their separation: because they have proved themselves unable to keep their child under control.[3]

Who can dispose of a girl.

The father has the first right to dispose of his daughter in marriage; after his death the mother; after her death the brothers and sisters of the girl, according to age; failing all these, her guardian, *i.e.*, the relation or other person under whose care and protection she is living.[4] If the parents or guardian do not find a husband for the girl when she attains the age of twenty, she has a right to marry any one she pleases.[1,2] A widow or a divorced woman has a right to marry any one she pleases. Her

[1] Quoted in Story's *Conflict of Laws*, pp. 185, 186. See p. 122 Chan-Toon's Leading Cases, cited there.

[2] Cir. No. 84, Civil, 1893, U.B.

[3] *Menu Kyay Dhammathat* Book VI. s. 23.

[4] *Menu Kyay Dhammathat* Book VI s. 28.

[5] Ibid.

parents and relations cannot prevent it on the ground of her not being of age.[1] Parents, however, cannot compel their daughter to marry any one against her will.

Presumption of marriage.

With regard to the general presumption of marriage arising from cohabitation with habit and repute, the Privy Council in a very recent case[2] has observed thus: "It is necessary, before applying this presumption, to make sure that we have got the conditions necessary for its existence. It is not superfluous to suggest that, first of all, there must be some body of neighbours, many or few, or some sort of public, large or small, before repute can arise. Again the habit and repute, which alone is effective,' is habit and repute of that particular status, which in the country in question, is lawful marriage. The differences between English and Oriental customs about the relations of the sexes make such caution especially necessary. Among most English people, open cohabitation without marriage is so uncommon that the fact of cohabitation in many classes of society of itself sets up, as a matter of fact, a repute of marriage. But, in countries where customs are different it is necessary to be more discriminating, more specially owing to the laxity with which the word "wife" is used by witnesses in regard to connection not reprobated by opinion, but not constituting marriage." A presumption of marriage cannot arise where there is no tangible evidence of recognition of a woman in her quality of wife by people external to the house in which she lives, and where substantially the only evidence is the use of the word "wife" in reference to her, in accordance with a local custom of applying it to persons whose status is not matrimonial.

Prohibited degrees.

A man cannot marry within prohibited degrees of consanguinity and affinity. The prohibited degrees are almost the same as under the Hindu law. A Burmese can marry his wife's sister during the life-time of his wife.

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[1] *Menu Kyay Dkammathat* Book VI. s. 30.

[2] *Ma Wun Di* v. *Ma Kin*, 35 I. A. 41 p. 45 (1907).

He can also legally marry a brother's widow. Alliances on the part of the King and Princes of the Blood with their female relatives, within degrees of consanguinity much nearer than are allowed the people in general, are sanctioned by custom in Burma as well as in many other countries.

Mr. Jardine in his Notes on Buddhist Law[1] says: "I imagine that an issue as to whether any particular alliance was lawful, voidable or void from the beginning would have to be determined on evidence about existing custom as shewn in particular instances known to the witnesses and not on mere expression of unlearned opinion. * * * Where a particular connection is only voidable, not void, it would be held to be marriage until set aside as in the case of marriage with a deceased wife's sister contracted by East Indians domiciled in India, to whom certain Statutes expressly rendering such marriages void do not, in Mr. Mayne's opinion, apply. Such a marriage, he says, is good until set aside, and cannot be questioned after the death of either of the parties."

Polygamy.

Polygamy is said to be lawful by Buddhist law.[2] But it may be doubted whether this conveys a correct impression unless it is understood in a limited or special sense. The leading principle of Buddhism in this respect seems to be rather monogamy than polygamy.[3] This matter has been discussed in other cases though never definitely determined.[4] When a plurality of wives is spoken of and at the same time four or five classes are mentioned, such, in some Dhammathats, as *Pona* or Brahmans, Khattiyas or Kshatryas, &c., it is more with reference to Hindu law and usage than that of Buddhists.[5]

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[1] Notes I. p. 8, cited in Lütter p. 13.

[2] See Jardine's Notes I, 26, 35.

[3] Vide *Ma Shwe Ma* v. *Ma Hlaing*, Cir. No. 107, civil, 1893, U. B. See Chantoon p. 355.

[4] *Maung Ma* v. *Ma Cho*, Cir. No. 35 of 1894; *Maung Kauk* v. *Ma Han*, Cir. No. 36 of 1894; *Maung Kyaik* v. *Ma Gyi*, Civil Appeal No. 152 February 3, 1896.

[5] S. 48, Chap. III and s. 37 Chap. X, *Manugye*; ss. 2, 3, 4 and 33 of the *Wunnana*; s. 34 of the *Mohavicchedani*, and s. 22 of the *Dhammavilasa*.

"Lesser wife" and concubine

Sections 46 & 47, Chapter III and sections 40, 42 & 43, Chapter X of the *Manugye* make mention of the head wife, the "lesser wife," and the six kinds of concubines; the 'lesser wife' being mentioned only in Chapter III, and concubines being spoken of in Chapter X. The expression "lesser wife" or *maya nge* seems to be ambiguous, as meaning a second wife taken either before or after the death of first wife.[1]

As we have already said the principle of Buddhist law is that a man should have but one wife. She is called the head or chief wife. The expression "*maya*" or wife is applied to her. But as in practice the theory of monogamy is more honoured in the breach than in the observance, a relaxation of the theory is allowed and a state of concubinage or living with lesser wives is recognized among the Buddhists and accordingly provision is made for these lesser wives and their offspring sharing in the father's estate.

Generally the chief wife lives in the same house with her husband and eats together with her husband out of the same plate, and takes part in the management of her husband's business. Whereas a "lesser wife," or concubine, generally resides in a separate house and does not eat with the head of the family and does not take part in the management of her husband's business. But the mere fact of a separate establishment existing does not prevent a woman from being a wife. It simply affords a presumption which can certainly be rebutted by evidence showing a higher status.[2]

Sections 37 & 38, Chapter X of the *Manugye* and sections 46, 47 & 48 Chapter III and sections 2 & 5 of the *Wunnana*, refer to the different classes of wives and the effect of their living in separate houses, and to the different degrees of responsibility of the husband for the debts contracted by a head wife, a "lesser wife" and a concubine respectively. The

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[1] See *Manugye X* 6.

[2] *Ma Hmon* v. *Maung Paw Dun*, Second Appeal No. 89, May 17, 1899; *Ma Hlaing* v. *Ma Shwe Ma* Cir No. 18 Civil 1894, U.B.; *Ma Gywe* v. *Ma Thi Da* Cir. 11 Civil 1893, U. B.

Maungye gives to the concubine a somewhat larger share than that of the "lesser wife," but the difference is very trifling. It is considered by some that this distinction was unintentional and perhaps accidental.

Marriage of Burmese converts.

In *Maung Kyaik* v. *Ma Gyi*,[1] the question at issue was whether a man who, while professing the Christian religion, had contracted a marriage in accordance with the law applicable to the marriage of Christians could, by professing another religion, contract a second valid marriage in accordance with the law applicable to the marriage of persons belonging to that religion during the life-time of the first wife. Here the plaintiff was a Burman Buddhist converted to Christianity. He married a similar convert according to the rites of the Roman Catholic Church, subsequently both husband and wife reverted to Buddhism and the husband (the plaintiff) took a second wife according to Burman custom. The second wife subsequently refused to live with the plaintiff on the ground that there was no valid marriage between them. Thereupon the latter brought a suit for restitution of conjugal rights. The whole question rested on the point whether the former marriage subsisted or not. If that had ceased or come to an end there would be no obstacle in the way of the subsequent union according to any religious form. But as in this case it was found that the former wife was still living and there had been no divorce or judicial dissolution of marriage, the first marriage continued in force. And as there was no authority to show that apostasy from the Christian religion has the effect of dissolving a marriage contracted according to that religion it was held that the original marriage having remained unaffected by any subsequent change of religion the Christian marriage law did not permit the plaintiff to enter into a second valid marriage in any form during the existence of the first, even with his first wife's consent; and further, that

[1]Civil Appeal No. 152, Feby. 3, 1896.

even under the Buddhist marriage law he, as a Buddhist, could not claim the liberty of having more wives than one, so long as he remained bound by a Christian marriage and his wife was alive.

Breach of promise of marriage.

If the parents of a girl, after betrothal, refuse to give her in marriage to the betrothed man, they must return to the bridegroom all the presents he made to them on betrothal. They are further liable to pay damages under orders of the Court.[1] Similarly if a betrothed man refuses to fulfil his engagement, he forfeits all the presents and is liable to pay damages. In the case of seduced girls a provision for damages has been made in the *Dhammathats*.[2] The question, *viz.*, whether between Burmans an action for breach of promise of marriage will lie was finally determined in *Maung Hmaing* v. *Ma Pwa Me*.[3] Therein it was held that action for damages for the breach of a contract would lie, and further, in the case of seduction, in assessing damages, the Court would take into consideration the injury done to the seduced girl's "future prospects of marriage, to her feelings and affections, and to her social position." Where there has been no promise to marry, a Burmese woman cannot recover damages for seduction resulting in pregnancy.[4] Nor can she claim damages merely on the ground of pregnancy having resulted from cohabitation.[5]

Second marriage of a man.

In the absence of a special custom to the contrary a husband who, in the life-time of his first wife, marries a second wife without the first wife's consent does not thereby commit a fault against the first wife. Such a second marriage does not in itself constitute a ground of divorce in Lower Burma.[6]

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[1] See *Menu Kyay Dhammathat* Book VI, s. 17.

[2] See Book VI, 26-30.

[3] Civil Ref. No. 4, June 4, 1893. Selected Judgments p. 533.

[4] *Nga Po Thaik* v. *Mi Hnin Zan*, Civ. App. No. 74, December 22, 1883. Sel. Judgts. p. 235.

[5] *Mi Kin* v. *Nga Myin Gyi*. Civ. App. No. 100, Oct. 17, 1882. Sel. Judgts. p. 114.

[6] *Ma In Than* v. *Maung Saw*

Re-marriage of a woman.

A widow or a woman who has been divorced may marry again as soon as she pleases. A woman, whose husband enters the priesthood, must wait seven days. At the expiration of that period, if the husband does not return to the world, she is at liberty to take another husband. And if the man who has become a *phoongyee* does not return to the world within seven days of his ordination he cannot claim back his wife whether she has married or not.[1] If the husband deserts his wife she must wait three years, even if she hears that he has taken another wife, and if she does not receive any present or letter from him. Although she hears that her husband has taken another wife, if she has received a letter or present from him she shall not marry again until three years from the date of receiving the last letter or present, for so long as a husband maintains communication with his wife he may take as many more wives as he pleases.[2] In *Moung Kho* v. *Mah May*,[3] it was held, that three years' absence, with neglect on the part of her husband to provide maintenance, is required before the wife can contract a second marriage. If the widow re-marries, she is to take her half share of the joint property, and the children by the former marriage are to divide the other half.[4]

Divorce.

Major Sparks, in dealing with the subject of Divorce, observed as follows:—"Marriage by the Burmese law is purely a civil contract terminable at any time by mutual consent, or, under certain circumstances, against the will

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Illa, Civ. Ref. No. 1, July 20, 1881. Sel. Judg. p. 103. But see *Maung Kauk* v. *Ma Hon*, Cir. No. 36, Civil 1894, U.B.

[1] See *Menu Kyay Dhammathat* Book V, s. 18; *Wunnana* s. 108, Chap. on Marriage. Jardine's Notes III (translation).

[2] *Menu Kyay* Book V, s. 16; *Wunnana* s. 122 last para and s. 135 Chap. on Marriage. Jardine's Notes III, (translation).

[3] Civil Appeal March 4, 1874 Sandford's Rulings 15.

[4] *Wunnana* s. 26 (Pereira's *Collection of Dhammathats*, p. 122); *Atta Sankhepa Wunnana* s. 159.

of one of the parties. A divorce may either be pronounced by a Court when one party does not consent, or it may be completed by a written agreement executed by both parties in the presence of respectable witnesses specially called together for the purpose." Mr. Jardine takes exception to the statement that marriage is a "purely civil contract" and contends that it is an institution with a moral and religious sanction. He observes:—"As to the contract being purely a civil contract I think it is necessary to quote, as applicable to Buddhist law and the present question, the words of the Judge Ordinary in *Hyde* v. *Hyde** applied with approval to Hindu marriages by Westroff C. J., in *Sidlingapa* v. *Sidava*† 'marriage has been well said to be something more than a contract, either religious or civil, to be an institution. It creates mutual rights and obligations as all contracts do, but beyond that it confers a status." In *Ardasur Cursetjee* v. *Piroze Boye*,‡ their Lordships of the Privy Council observed that 'whatever the form of the contract may be, marriage constitutes, if not an express, at all events, an implied contract between the parties that the husband shall maintain the wife.' In the Buddhist texts we find elaborate provisions against abandonment and careful rules made for the maintenance of sick and diseased husbands and wives and for the maintenance of children if the parties divorce. Much of the law of inheritance is explained by moral duties; this basis appears to have been taken the place occupied by *Shradh* in the Hindu law. It is continually found in the texts on marriage; and besides this, we find that a marriage creates a partnership in property, income and liabilities; and, the division of assets and liabilities is discussed as one of the matters requiring settlement at a divorce as well the distribution of children."[1]

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* I. P. & D. 136.

† 2 Bom. 624.

‡ 6 Moo I. A. 348.

[1] *Nga Lon* v. *Ma Myainy*, Civil Appeal No. 75, November 26, 1883; S. J. p 206.

But whether a marriage is a purely civil contract or not, the chief Court, after thoroughly and exhaustively considering various authorities on the point, has come to the conclusion that a marriage between Burmese Buddhists may be dissolved at any time by *mutual consent*, and that where such consent is wanting, it cannot be dissolved except on some ground recognized by the *Dhammathats* and *not* by the mere volition of one of the parties. This view has subsequently been affirmed by the Calcutta High Court to which the matter came on as a reference from the Recorder of Rangoon.[1]

It should be noted that in divorce proceedings in Burma between Buddhists, the question between the parties is almost invariably as to their respective rights to property which they have hitherto enjoyed together; and this turns in a great measure on their conduct to one another. Therefore, willingness on the part of the parties concerned to have the tie between them severed does not necessarily mean that they are also willing that the severance should be treated as of the kind called "mutual consent," which gives each an equal share in joint property.[2]

Grounds of divorce.

Dr. Forchhammer in his paper, published in Mr. Jardine's Notes, expressed his opinion that the deeds which justify a Buddhist to sever his destiny from that of his or her partner are matricide, patricide, killing, stealing, shedding the blood of a Buddha or Rahan, heresy, and adultery. The Calcutta High Court in *Moung So Min* v. *Ma Ta*[3] has held that besides those offences or faults the *Dhammathats* contemplate other causes from which a divorce may be obtained. A divorce cannot be [illegible] merely because one of the parties has no love for the other, or does

[1] *Nga Nwe* v. *Mi Su Ma*, Cr. Ref. No. 2, July 8, 1886: S. J. p. 391. Affirmed by the Cal. H. C. in *Moung So Min* v. *Mak Tah*, April 27, 1892: S. J. p. 610.

[2] *Maung Kauk* v. *Ma Han*, Cir. No. 36, 1894, U.B.: Chan-Toon 99.

[3] April 27, 1892: S. J. 610: 19 Cal. 469 (1892).

not comply with the desires of the other.[1] A mere willingness on the part of one party to pay *ko-bo*, or the price of the body; or to surrender the whole of the joint property will not constitute a ground for divorce when it is sought against the wish of one of the parties.[2] Before a Court can order a divorce at the wish of one party against that of the other, it must be satisfied on evidence that some fault has been committed by one against the other of a sufficiently serious nature to justify such order according to the *Dhammathats*, or that some evil deed has been committed for which a separation of destinies can take place.[3]

In a later case, however, it has been held that there is no insuperable legal bar to divorce against the party desiring it, where the party is prepared to surrender the share of the joint property to which he or she would, otherwise, be entitled. In this case the sole question was whether a husband, whatever his own conduct may have been, is entitled to obtain a decree for divorce against his faultless wife, on condition of surrendering to her the joint property and paying the joint debts. The Court, on a consideration of the various texts relating to the question, was of opinion that the texts in the *Dhammathats* establish the law that one of the parties to a marriage can separate from the other, even if the latter does not consent, provided that the properties belonging to both and their liabilities are divided.[4] In the case of a slave wife both the payment of *ko-bo* and the assent of the husband are essential when a divorce takes place.[5]

Second marriage.

When a husband marries a second wife without the first wife's consent may in her life-time, that second marriage does not in itself constitute in Lower Burma a ground

[1] *Maung So Min* v. *Ma Ta* 27 April, 1892 : S. J. 610

[2] *Mi Pa Du* v. *Maung Shwe Bank*, Civil Appeal No. 118, July 4, 1891 : S. J. 607.

[3] Ibid.

[4] *Mikin Lat* v. *Nga Ba So*, U. B. R. 1905.

[5] *Ma Pa Du* v *Maung Shwe Bank* Civil Appeal No. 118 July 4, 1891 : S. J. 607.

for divorce.[1] But in *Maung Kauk* v. *Ma Hau*,[2] where a wife brought a suit for divorce on the grounds of cruelty[3] by the husband in taking a second wife, and of the imputation of adultery to her, *i.e.*, the plaintiff's first wife, the Court held that whether the matters alleged by the plaintiff constituted cruelty or not in general, she had, in this instance, by her conduct, acquiesced in or condoned the conduct of her husband, and was not entitled to a decree. In this case the first wife, *i.e.*, the plaintiff, abandoned her husband for the time being and left him to his own devices, and the taking of a lesser wife might have been expected. And as regards the accusation of adultery, the plaintiff, it seems, submitted to it and promised her husband to be circumspect in her future conduct and she had condoned her husband's behaviour in the matter and was ready to return to him. The Court did not follow the ruling laid down in *Augustin* v. *Augustin*,[4] *viz.*, that even if a husband prefers a charge of adultery against his wife without reasonable and probable cause, and wilfully and maliciously, it will not amount to legal cruelty entitling the wife to a judicial separation. The Court doubted whether a similar rule ought to be applied where the parties are Buddhists. In the other case the parties were Christians. But in this case as the wife was the party who put herself in the wrong to begin with, the Court said it would be difficult to hold that this would be sufficient to establish cruelty.

Desertion.

As has already been noticed, three years' absence, with neglect on the part of the husband to provide the wife with the means of subsistence, is required to give the wife the right of re marriage. Until the expiration of that period the relation of marriage subsists unless, of

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[1] *Ma In Than* v. *Maung Saw Hla*, Civil Ref. No. 1 July 20, 1881: Sel. Judgts. p. 103.

[2] Cir. No 36, 1894, U. B. Chan-Toon p. 99.

[3] As to what amounts to "cruelty" as a technical term in English and Buddhist law, see Chan-Toon p. 131.

[4] 4 All 374.

course, it is put a stop to by some formal act of separation.[1] In *Maung Po Maung* v. *L. H. R. L. P. Nagalingum Chetty*[2] it was discussed whether a husband's abandonment of his wife completely for a period of three years puts an end, *ipso facto* and without any special action, to the matrimonial union; or, whether such separation merely confers a right to claim a divorce and does not of itself constitute a divorce without formal steps being taken to give effect to the claim. The learned Judicial Commissioner after referring to section 17, Chap. V., of the *Manugye Dhammathat* and section 291 of the *Attathankepa*, and some cases reported in Selected Judgments and Rulings,[3] Lower Burma, said: "But the precise point which might arise here has not been definitely dealt with, though it seems to be implied that the union is naturally dissolved at the end of three years. The *Dhammathats* give liberty to take another wife or husband at the expiration of three years, and they make no provision for any communication with the former husband or wife, or for the taking of any formal proceedings for declaring a dissolution of the marriage bond. Apparently the severance of the connubial tie is deemed to be sufficiently manifested by open separation for such a length of time. The actual taking of another wife or husband would, of course, make the state of affairs clearer and more public, but it does not appear to be absolutely necessary that this, or anything else, should be done to render the separation a complete divorce."

In *Thein Pe* v. *U. Pet*[4] the point referred to the Full Bench was whether the desertion of the husband by the wife or *vice versa*, for the period specified in the Buddhist Law Texts, has the effect of dissolving the marriage tie

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[1] *Dhammathats* Book V. paras. 14-17; *Maung Ko* v. *Ma Me*, Civil Appeal, March 4, 1874, Sel. Judgts. p. 19.

[2] Cir. No. 53 Cri. 1894, U. B.

[3] *Maung Ko*. v. *Ma Me* p. 19; *Mi Nu* v. *Maung Saing* p. 28; and *Nga Nwe* v. *Mi Su Ma* p. 391.

[4] 3 L. B. R. 175 (F. B.).

in the absence of any further and express act of volition on the part of either of them. It was held that even if the actual texts of the *Dhammathats* supported the proposition that marriage is dissolved by mere desertion, it must be remembered, in applying the personal law, that it is in course of time apt to change by the development of customs inconsistent with such law. Further, it is quite conceivable that a husband and a wife may quarrel and live apart, each on their own means, without the least desire to proceed to the extremity of a divorce, and the idea that marriage can be terminated at all, without the wish of one or the other of the parties to it, is contrary to, and inconsistent with, the fundamental principle of the marriage contract. Further, it was held (by the majority) that the decision should be based only on the correct interpretation of the texts, irrespective of how the Burmese community may regard the matter, and such texts have laid it down that, at the end of three years of continued desertion of a wife by a husband, or at the end of one year's continued desertion by a wife of her husband, the marriage of the husband and wife is dissolved without any further and express act of volition on the part of either party.

Where a wife leaves her husband's house for the mere reason that she no longer wishes to live with him, without any fault whatsoever on his part, and remains separate for a year unsupported by him, it was held, that she cannot claim a divorce, as no desertion of any kind by the husband is proved or asserted.[1] Whether the husband would in such a case be able to claim a divorce against a woman who left him for a year and whom he did not support, even though she resisted the divorce, is a matter which was left open in that case, though the learned Judicial Commissioner observed that "very probably he would, he being the deserted party." But this was merely *obiter dicta*.

[1] *Ma Thin* v. *Maung Kyaw Ya* Cir. No. 20 Civil 1896, U. B.

Kan-ma-sat.

A divorce cannot be granted merely on the ground that the destinies of the husband and wife are not cast together (*i.e., Kan-ma-sat*).[1]

Validity of divorce.

In order to constitute a valid divorce between Burman Buddhists, neither a decree or order of Court, nor a written agreement executed by both parties in the presence of respectable witnesses is essential.[2] When one of the spouse is not in a condition to express dissent or consent in the matter, it cannot be said that a valid divorce has been made. So, where a husband, a short time before his death, sent to his wife, who was at that time out of her mind, a paper containing an intimation of divorce, the Court held that that did not constitute a valid divorce.[3] In determining on the mutual consent which gives validity to a divorce the Court has a right to consider whether the consent was really free and deliberate.

Division of property on divorce.

Where husband and wife both assent to a divorce and no fault is proved, each is entitled to take back property brought at the marriage, and to an equal division of the property that may have been acquired conjointly during wedlock.[4] A woman having a separate establishment from her husband and taking no share in the management of his business, and performing the duties of a wife no more than by receiving his visits, is not entitled to hold the propety acquired by her husband, who carried on business in the house of his first wife, as joint property.[5]

Actual division of goods not essential.

Actual division of goods is not essential to the validity of divorce. The actual separation of goods is (as very often is the case) evidence of previous divorce and shows

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[1] *Ibid.* See *Manukye XII*, 3; *Moung Tso Min* v. *Mah Htah* 19 Cal. 469 p. 476 (1892); *Mi Pa Du* v. *Maung Shwe Bauk* S.J. 607. The word *kan-ma-sat* literally means, *kan* fate, *ma* not *sat* linked. See Chan-Toon p. 63.

[2] *Mi Hnin Ngon* v. *Nga Aung* Civil Ref. No. 7, June 11, 1896, Sel. Judgts. p. 73.

[3] *Mi Chin Mari* v. *Mi Tu Ma*, Civil Appeal No. 20, Sep. 14, 1876. S. J. p. 74.

[4] *Mi Dwe Naw* v. *Maung Tu*, Civil Appeal, Sep. 3, 1873. S. J. p. 14.

[5] *Maung Kyin* v. *Ma Saung*. Civil Appeal, June 3, 1874, S. J. 27

deliberate intention to terminate the *status* of husband and wife. A divorce may be proved by other evidence of intention showing that a termination of the marriage, and not a mere temporary separation, was deliberately intended. In *Nga Lón* v. *Ma Myaing*,[1] the plaintiff was a sister of the defendant's wife who committed suicide five days after her divorce from her husband (the defendant)by mútual consent; the divorce having been effected by a written document showing their deliberate intentions to divorce. There being no children of the marriage the plaintiff claimed the property of her deceased sister, alleging that her sister was in possession of her share after the divorce, but that the defendant had seized it wrongfully. The defendant answered admitting the divorce, but averring that the property had not been divided, and that he and his deceased wife became re-united three days afterwards as husband and wife, and that he had, therefore, acted on the principle that the husband and wife inherit from each other. No re-union was proved in this case. The whole case then turned upon the point whether the divorce evidenced by the written agreement was valid, notwithstanding the fact that the joint property had not been divided. The Court found that the transaction, *viz.*, the written agreement to divorce, clearly showed that the parties intended to put an end to their marriage *status*. Further, there was clear evidence of a deliberate selection of particular goods by each as his or her share. Actual corporal partition was no more an essential than under the Hindu law of partition of an undivided family. The transaction might be treated as a valid divorce. Accordingly it was held that the sister of the deceased woman was entitled to the latter's property.

In *Ma Gyan* v. *Maung Su Wa*,[2] which was a suit by the wife for divorce without division of property, it was held that divorce without, and distinct from, division of property

[1] Civil Appeal No. 75 Novem. 26, 1883. S. J. p. 206.

[2] Civil Appeal No. 21 May 3, 1897.

was incompatible with Buddhist law and that, therefore, there was no cause of action, for when a divorce is sought through the intervention of a Court, the suit should be framed both for divorce and partition. Otherwise, a Court's decree for bare divorce would leave all the property to the party against whom the decree might be made. But in such a case the suit would be superfluous, as, under the Buddhist law, either party to the marriage is at liberty to withdraw from the union upon submission to the penalty of forfeiture of claims to the substantial assets of the conjugal association in favour of the party disinclined to the severance of the nuptial bonds. There would be no cause of action where there was no resistance to the exercise of this privilege and the assistance of the Court would not be required except in the form of a declaration. Where, of course, the party seeking divorce wants his or her legitimate share of the joint property, the proper form of the suit is both for divorce and partition of property together.

Disposal of property on divorce for adultery.

There are two rules of Buddhist law on the subject of a divorce for adultery; one relates to the case of husband and wife married from their youth, and the other, to the case of husband and wife where there has been a previous marriage by one or both, or at least by the wife. The reason for making such a distinction, in the words of Burgess J., is as follows: "When a woman has been married before, the probability is that she has formed relations through giving birth to children or through the acquisition of property, which ought to be considered when she has entered into a subsequent union which has to be dissolved. Although she may be in fault there are others besides herself to be considered, and it would be unjust and cruel to make them suffer for her misconduct. On the other hand, when the woman has been only once married there is nobody to be considered but herself and the children, and as the latter are the offspring of the husband, it is probably immaterial, so far as they are

concerned, to which parent the property goes, as they would eventually inherit from one or the other. The same, *mutatis mutandis*, would apply in the case of a husband whom the wife was entitled to divorce for misconduct."[1] In *Maung Yin Manng* v. *Ma So*[2] the parties were unmarried before they became husband and wife, but they subsequently separated and then re-united. There seemed to be no precedent on the point. It was, however, decided on the principle, stated by Burgess J., as above, that as neither of the parties, though both were re-married, had married a stranger, but had only re-united with each other, they must be regarded as still the husband and wife of youth. Consequently the first rule applied to them.

In the judgment in Cir. No. 24 of 1893 it has been laid down that the adulterous wife forfeits every thing without reservation. This ruling was based on the texts in the *Attathankepa* which have been quoted and translated in that judgment. This is also supported by passages in sections 3 & 43, Chapter XII, of the *Manugye*. Reversing the judgment of the lower Appellate Court which upheld the decree of the Court of first instance holding that the right of the husband extended only to joint property and that the rule of Buddhist law was penal and not enforceable to the extent to which it was penal, the Rangoon Chief Court held that the rule applied without restriction and there was no obligation on the Courts to import a restriction in regard to salutary provision of the sort. The fact that there was a child of the marriage to be provided for did not properly come into consideration in the case at all. The first Court, in this case, granted a decree for divorce, but allowed the husband only a portion of the property claimed on the ground that the wife had the custody of a child of the marriage who was six years old, and that

[1] Vide *Maung Yin Maung* v. *Ma So* Civil Appeal No. 141, 28 September 1897. U. B.: Chan-Toon p. 133.

[2] Civil Appeal No. 141, Sept. 28, 1897. U. B.

in order to enable her to bring up the child she ought to retain the portion disallowed. The husband claimed the whole of the property which belonged to his wife, and to his wife and himself together.

Forfeiture of property cannot follow a divorce decreed by court.

A woman who has obtained a divorce by a decree of the Court cannot be made to relinquish all her property. The forfeiture of property appears to be a punishment for improper desertion, and cannot, therefore, follow a divorce decreed by the Court.[1]

Strict proof required when re-union set up after divorce.

When a divorce has taken place between husband and wife and re-union is set up by the former wife, on the death of the former husband, in order to support a claim to his estate, strict proof is required of the renewal of connubial relations, just as clear proof of marriage in the first instance is required, when the question is whether the *status* of wife has been acquired at all.[2]

Collusive divorce to avoid attachment of property.

In an execution proceeding husband's lands were attached by the judgment-creditor and the wife sued to have the attachment removed on the ground that the lands were her separate ancestral property and that her husband and she were divorced. It was admitted that under section 3, Chapter XII, of the *Manugye*, upon divorce by mutual consent, both husband and wife being noble, each takes clothes and ornaments of his or her rank; and in the case of property acquired by the husband alone or by the wife alone, the party who separately acquired it gets two-thirds and the other one-third. But where the husband assigned all his property to his wife excepting his own personal belongings, though the separation was by mutual consent, and where the deed of divorce itself showed frivolous nature of the proceeding in assigning as the cause for the separation the failure of the union to result in any profit to the parties and where the divorce was effected on the very day the

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[1] *Maung Po Lat* v. *Mi Po Le*, Civil Appeal No. 71, Novem. 26, 1883, S. J. p. 212.

[2] *Maung Lu Gyi* v. *Ma Nyan* Cir. No. 15, Civil 1895.

execution was applied for, it was held that the arrangement was collusive for the purpose of defeating the judgment-creditor. The Court decreed that the husband's admitted share of one-third should remain under attachment.[1]

Presumption on divorce as to settlement of affairs.

In the absence of special circumstances, it is presumed that the affairs of the people divorcing and re-marrying are settled definitely at the divorce or re-marriage.[2]

Suit for divorce by Burmese wife against Mahomedan husband.

In a suit for a divorce from a Mahomedan husband, brought by a Burmese woman professing the Buddhist faith, but at the time of her marriage, simulating conversion to Islam, and married with Mahomedan ceremonies, the Mahomedan rule should form the rule of decision; and that the Courts cannot grant a divorce in such a case when no fault is established on the husband's side.[3]

Jobya-nanbya.

By a custom prevailing among Burmans *Jobya-nanbya* is a divorce given by either husband or wife to the other in order to secure that other's recovery from serious illness. In *Maung Bah Oh* v. *Maung San Bu*,[4] the husband consulted an astrologer about his wife's illness on the day before she died, and was told by him that he must do certain things, among other things, give her a temporary divorce. Accordingly he gave his wife a document of divorce, telling her that it was only temporary. It was held that the divorce was a temporary one given, in the superstitious belief that it would be for the benefit of the wife's health. The High Court of Calcutta confirmed this case on appeal on the 1st March 1894.

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[1] *Maung Tha Dun Aung* v. *Ma Min Aung*, Cir. No. 58, Civil 1893. U. B. See *Ma Me* v. *Maung Gyi*, Cir. No. 117 Cri. 1893. U. B.

[2] *Maung Shwe Lin* v. *Mi Nyein Byu*, Civil Appeal No. 28, June 20, 1878 S. J. p. 175.

[3] *Kumal Sheriff* v. *Mi Shwe Ywet*, Civil Refce. No. 1, May 12, 1875. S. J. p. 49.

[4] 1 Burma L. R. 14.

Adoption.

Two kinds of adoption prevail among the Burman Buddhists, viz., *Kittima* and *Ditika*. A *Kittima* is a child of known parents, adopted formally and publicly, with the consent of those parents, and with a promise that the adopted child shall inherit as a child of the adoptive parents. A *Ditika* is a foundling, whose parents and relatives are unknown, casually taken charge of, and adopted out of charity.[1] The *Dhammathat* speaks of "the sons and daughters of another person" as eligible for adoption. In this respect the Burman custom of adoption resembles that of the Tamils of Jaffna in Ceylon, who adopt boys as well as girls. The terms *kittima* and *ditika* are evidently mispronunciations of the words *kritima* and *duttaka* used by Hindu jurists. Mr. Jardine in speaking of *kittima* says it "bears an Indian name; but we know it to be in force as a custom here as much as among non-Aryan races or communities who attach no religious importance to it.... It is probable enough that the Burmans like the Dravidians of Southern India have been following, perhaps unconsciously, the rules of the Hindu rulers or colonists; and indeed I know of no other key to many things in their customs as well as their laws."[2]

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[1] *Menu Kyay*, Book X, s. 81, and Book VIII, s. 4. See also the following :—"The sons & daughters of another person, who shall be publicly taken and brought up (in order or with the understanding) that they should be made children to inherit—they are called *kittima i.e.*, notoriously adopted children."—*Dhammathat*, Book X, p. 305.

"Children obtained by request from their parents and adopted publicly."—*Ibid* p. 311.

The *Manugye Dhammathat* describes *kittima* children as those publicly adopted with the recognized intention of making them heirs—p. 314 (3rd Edn.).

There is another class of children mentioned at pp. 314, 315 of *Manugye* under the head of the sixth class of children entitled to inherit. They are "children, male or female, who have no parents or whose parents or relations are not known, or whose parents or relations are known, who have been casually taken charge of and brought up."—*Apatitha* or *Appadita* son spoken of in the *Wunnana* s. 84. Mr. Jardine's Notes V. 29.

[2] Vide *Ma Le* v. *Ma Pauk Pin*,

No ceremony or written document is required to constitute a public adoption. There must be a request from parents and a notorious and public taking and bringing up in order that, or with the understanding that, the child shall inherit.[1] As to the requirement of request, where the parents of the child to be adopted are dead, it cannot be complied with. In this connection it may be noted that such request is mentioned at p. 319 of the *Manugye Dhammathat*, but it is not referred to at p. 314 which only speaks of the "children of others."[2] Though young children are no doubt primarily intended, there seems to be no limit as to age. Instances of the adoption of elderly persons are not rare.[3]

As openly living together is presumptive proof of marriage among Burmans, so the bringing up of a child with publicity and supporting him or her for a number of years is presumptive proof of adoption, especially where the parents are childless and the child is a nephew or a niece.[4]

Duties of an adopted child.

The duties of an adopted child are similar to those of a natural child. Separate living may constitute a disqualification to inheritance by the adopted child, but the question as to what constitutes separate living depends upon the circumstances of each particular case.[5] An adopted child, by marrying and living separately from the adoptive parents does not by the mere fact of marriage forfeit the rights of inheritance in his or her adoptive family. But the burden of proving that he has performed

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Decem. 12, 1883: S. J. p. 225: Chan-Toon p. 255.

[1] *Ma Gun* v. *Ma Gun*, Civil Appeal, May 29, 1874, 1 Lower Burma 25; *Ma Me Gale* v. *Ma Sa Yi*, 32 I. A. 72 (1904): S.C. 32 Cal. 219.

[2] Vide *Manugye Dhammathat*.

[3] *Maung Aing* v. *Ma Kin*, Cir. No. 35 Civil 1893. U. B.: Chan-Toon 161.

[4] *Ma Gun* v. *Ma Gun*, Civil Appeal, May 29, 1874: S. J. 25; *Maung Aing* v. *Ma Kin*, Cir. No 35, Civil 1893: *Ma Gyan* v. *Maung Kywin*, Cir. No. 77, Civil 1895. U. B.

[5] *Maung Aing* v. *Ma Kin*, Cir. No. 35, Civil 1893.

the duties necessary to be performed by an adopted child will be thrown upon him, and, in the absence of such proof, the Courts will disallow his claim to inherit. Mere occasional assistance on the part of the adopted child is not sufficient to preserve his or her right of inheritance.[1]

A Buddhist can adopt a child, he having a child of his own *at the time*. As far as the *Dhammathat* goes, it shows that there is no objection, as there is amongst Hindus, to persons adopting a child whilst they have one of their own living.[2]

The publicly adopted child stands in the same position as regards inheritance as the natural child.[3] Under section 27, Chapter X., of the *Manugye Dhammathat* a *kittima* adopted son takes the position of a natural son when there are no natural children.[4]

Publicity and notoriety essential to establish *kittima*.

An essential part of adoption is the publicity of the relationship and of the intentions of the adoptive parents with regard to the inheritance to their estate by the adoptive child. The *Manugye Dhammathat* requires that the child should be brought up "*akyaw asaw thuthi thutin.*" The English equivalents given in the translation (Chapter X, section 26) are "publicly state his intention of adopting the child of another person, and shall take and support the child openly"... .."being a notoriously adopted child." The reason why the child gets a share of the inheritance is that a child so publicly and notoriously adopted shall not return and share in the inheritance left by his or her own parents.[5]

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[1] *Nga Min Gyaw* v. *Me Pi*, Civil Appeal, May 28, 1873. S. J. p. 8. See also *Maung Po Sein* v. *Maung In Dun*, Civil Appeal No. 44, Sep. 8, 1883. S. J. p. 191 L. B.

[2] *Ma Bwin* v. *Ma Yin*, Civil Appeal No. 6, Novem. 27, 1879. S J. p. 100.

[3] *Ma Gun v. Ma Gun* Civil Appeal, September 18, 1874 : S. J. p. 23.

[4] *Maung Sa So* v. *Mi Han*. Cir. No. 68, Civil, 1893. U.B

[5] *Ma Mein Gale* v. *Ma Kin* Cir. No. 61, Civil, 1893 U. B Chan-Toon p. 162.

Separation from adoptive parents if undutiful conduct on the part of an adopted child.

Let us consider if wilful separation from adoptive parents constitutes an undutiful conduct on the part of an adopted child. *Nga Min Gyaw* v. *Me Pi*[1] is the earliest case on the point. It laid down that an adopted child who, on marriage, separated himself from his adoptive parents should be presumed to relinquish the strict performance of the necessary duties, and the Court would require him to prove strictly the performance of those duties before allowing him any share in the inheritance, when there were natural children or their issue living with the adoptive parents. The necessary duties were stated as follows: "If there is anything to be done on behalf of the parents, the child must leave his own work and perform it. The child must minister to the parent in sickness; the child must bury the parent, and pay certain ceremonial offerings." In this case the adopted child (a girl) rendered occasional assistance to her adoptive parents after her marriage, but it was held that the occasional assistance did not approach the required standard.

In *Maung Po Sein* v. *Maung In Dun*,[2] the question was whether an adopted son who, for many years, has lived apart from his adoptive father has been guilty of such negligent and undutiful conduct as to disentitle him to inherit. It would seem that mere separate living does not of itself constitute a disqualification, though the fact, if proved, will shift the burden on the adopted child to prove that he was not negligent to his adoptive father. Where it was proved that the father on his death acknowledged the adopted person as his son and that he (the adopted son) had afterwards, without dispute, performed the funeral ceremony, the latter was said to have discharged the burden rightly.

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[1] S. J. p. 8 L. B. Chak-Toon p. 146.

[2] Civil Appeal No. 44, Septem. 8, 1883, S. J. p. 191.

In *Maung Aing* v. *Ma Kin*[1] it was laid down that separate living may constitute a disqualification to inheritance by the adopted child, but that the question as to what constitutes separate living depends upon the circumstances of each case. It was suggested, in this case, that the possible reason for disqualification might be that the separate living on the part of the adopted child might indicate a severance of the tie of adoption.

Where an adopted daughter married and lived in a different house from her adoptive father, but the residences were close together and there was no interruption of filial relations, it was held that the continuance of the adoptive state must be presumed.[2]

In a later case all the above cases were considered and the learned Judge observed :—"Nothing has been advanced in argument to show that the above rulings, which in their main principles seem to me identical, require modification. The plain rule of law is that a *Keiktima* (*i.e.*, adopted) son living apart from his adoptive parents loses his claim to inherit their estate.* But this rule is to be construed with due regard to the circumstances of each case; and if it is shown that, though living separately, the adopted son maintained the tie of relationship with his adoptive parents, he will not be excluded from the inheritance. The burden of proving that the case is an exception to the strict rule and that the tie of relationship was maintained lies on the adopted son." In the present case it was held that the adopted son failed to maintain filial relations with his adoptive mother up to the time of her death. So he was excluded from the inheritance.[3]

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[1] Cir. No. 35 Civil, 1893, U. B.

[2] *Ma Gyan* v. *Maung Kywin* Cir. No. 77 Civil, 1895, U. B.

* *Attathankepa*, section 178.

[3] *Maung Shwe Thwe* v. *Ma Saing* Civil Second Appeal No. 16, March 15, 1899. Chan-Toon p. 168.

Natural parents' right to reclaim their child given in adoption.

The natural parents of an adopted child have generally no right to reclaim it from its adoptive parents so long as the child desires to remain with them. But if the child consents to return to its own parents, it should be restored to them. In such cases, the adoptive parents are entitled to recover from the natural parents compensation for the expenses they incurred in bringing up the child. Where the adoptive parents refuse to maintain their adoptive child, they cannot claim from the natural parents any expenses incurred by them in bringing up the child.[1]

INHERITANCE.

A Buddhist wife's right in relation to her husband.

Unlike the Hindu wife, the Buddhist wife is considered practically on an equality with her husband, and she generally takes an equal part in the management of the family affairs. Consequently she has for the most part an interest equal to her husband's in the family property, and when the husband dies this interest is carefully protected by the law of inheritance.[2]

"The first principle of mutual right of inheritance of husband and wife," says Jardine J., "resembles that of joint property of husband and wife, which idea Sandford J., in the case of *Maung Kyin* v. *Ma Saung*,[3] says, must have arisen from the fact of the husband and wife living together and managing their concerns together. . . . . The Buddhist law presumes, from the close intimacy existing between husband and wife, that whatever profits they make are the results of their joint care and thrift."[4] This principle is well illustrated in section 7, *Dhammathat*, where the sons of different wives are dealt with in the following way:—"If the father had property

[1] See *Manu Kyay*, Book VIII, 4.

[2] Chan-Toon p. 320.

[3] 1 Sel. Judgts. p. 27.

[4] *Maung Shwe Ngon* (representative of *Ma Thin* deceased original Plaintiff) v. *Ma Min Dwe*, Civil Appeal No. 17, July 10, 1882. S. J. p. 11, L B.

at the time of his marriage, and the second wife none, and if none has been acquired during their marriage, let the property be divided into four shares: let the son of the first marriage have three, and the son of the second one share. If the father had no property, and the second wife had, let the son of the first marriage have one share and the son of the second three." This rule emphasizes the joint interest a husband and a wife have in the results of their mutual efforts in managing a business. The first wife's children participate only in the profits made during the period of coverture of their mother; and the children of the second wife share among themselves the profits which accrued since their mother's marriage.

Jardine J., has further observed:—"These two principles must be borne in mind, in adjudicating the case according to the spirit of the Buddhist law: the wife is entitled to some share because, while she lives with her husband, she has a joint interest in all the household concerns; and although the property may have descended from the husband's ancestor, it might be wasted or become profitless if the wife did not do her share in taking care of it. But at the same time the surviving husband or wife is jealously excluded from complete appropriation of what property came direct to one or other, from his or her own family; such property is not to be diverted in its entirety from the whole-blood to the half-blood or to the step-parent's own family, who are not even blood relations.

"These rules are both observed in the decision of the *Dhammathat* between a daughter and a step-father of some property inherited by the mother from her ancestors during the coverture. The step-father gets half because of his position and duty as husband and partner of deceased; the daughter gets the other half because the property came from her mother's family."[1]

[1] Ibid. See Chan-Toon p. 197.

Husband and wife inherit from each other.

There is a rule, mentioned by Mr. Gillbanks, which says that husband and wife inherit from each other. But this conjugal right is expressly limited in section 8 of the *Dhammathat*.[1] In *U. Guna* v. *U. Kyaw Gaung*,[2] the learned Judge said:—"The property which is acquired together by husband and wife during coverture belongs, according to Buddhist law, to each equally, and there is joint possession, but it seems to be held on the principle of a tenancy in common and not on that of a joint tenancy. It is not only enjoyed equally, but each is entitled to a half of the principal, and can take that half in the event of a divorce.* There is nothing in Buddhist law corresponding with the Hindu law according to the Mitakshara school, where, when one of the co-parceners drops out on death, he leaves absolutely nothing behind him, his interest in the joint estate merely swelling the interest of the co-parceners who outlive him. There seems to be no mention of survivorship in the Buddhist *Dhammathats*. Inheritance is spoken of throughout. If survivorship were the acknowledged principle, only the heirs of the survivor would have a claim on the survivor's death in his turn, but section 32, X, *Manugyé*, gives a share to the parents of the husband or wife who died first. It is only where there is no issue, that the husband or wife takes completely from the other on death. When there are children, their right of inheritance is recognized, as in sections 2, 3, 4, 5, 8, 10, 11 and 12 of the tenth Chapter of *Manugyé*. These provisions show that the deceased is considered to have left property behind, which is inconsistent with the theory of absorption of everything by

[1] See s. 8, p. 273 and s. 66, p. 301 *Dhammathat*.

[2] Cir. No 92 Civil 1895. U. B. Agabeg's 2 Burma L. R. 50. Chan-Toon p. 115.

* Where husband and wife both assent to divorce and no fault is proved, each is entitled to take back property brought at marriage, and to *an equal division of the property that may have been acquired conjointly during marriage*. See *Mi Dwe Naw* v. *Maung Tu*, Civil Appeal Septem. 3, 1873, S. J. p. 14.

survivorship. When there is no issue, the position no doubt resembles that of survivorship, but it is also consistent with that of succession, and on the considerations set out above, it may reasonably be held that husband and wife, under Buddhist law, always takes from each other by succession and not by survivorship.'[1]

Husband's power to sell joint property.

A Burmese husband cannot sell or alienate the joint property of himself and his wife without her consent or against her will.[2] The property jointly owned by a Buddhist husband and wife should ordinarily be deemed to be in the possession of the former.[3] While it is the common practice for a Buddhist husband alone to execute deeds of transfer of the joint property of himself and his wife; a sale by the wife alone of such property, provided that she has her husband's consent to such sale, is valid as a sale by the husband.[4] The Burmese law recognizes the husband as lord of his household. The wife cannot retain possession of joint property in opposition to her husband. So long as marriage subsists the Courts cannot decree an absolute dominion over it to either husband or wife; but the husband rather than the wife, is entitled to retain possession of it in trust for both.[5]

Second wife's right.

On the death of the husband a second wife has a right to share with a first wife in the property of the husband, although some of it had been acquired since the second marriage. Her share in the joint property of the first marriage will be one-fourth, as compared to three-fourths falling to the share of the first wife.[6]

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[1] See also *Ma Naw Za* v. *Ma Thet Pon*, Second Appeal No. 7, April 5, 1897. P. J. L. B. p. 34 which followed this case.

[2] *Ma Thu* v. *Ma Bu* Second Appeal No. 16 Feby. 26, 1891. S. J. p. 578.

[3] *Maung On Sin* v. *Ma O Net*, Cir. No. 80, civil 1894. *U.B.*

[4] *Maung Tun Myat* v. *Raman Chetty*, Second Appeal No. 69, June 30, 1893. P. J. L. B. p. 37.

[5] *Maung Ko* v. *Ma Me* Civil Appeal, March 4, 1874, *Nga Kan Za* v. *Mi Le*, Civil Appeal No. 114, Novem. 22, 1882. S. J. p. 126.

[6] *Mi Ka* v. *Maung Thet*, Civil Appeal, Feby. 24, 1873: S. J. p. 6 L. B.

Feudal right or impartible property.

A husband or a wife cannot inherit from each other rights of a feudal or official character, nor impartible immoveable property the succession to which is governed by special rules.[1]

Unfaithful wife.

A wife who is unfaithful to her husband forfeits whatever rights she had to the property of her husband at his death, although there may have been no formal divorce.[2]

Whether a Burmese woman loses right to property by becoming a Methila nun.

The question as to whether, under the Burmese law, a woman becoming a nun renounces her property and dies a civil death arose in *Mi Min Din* v. *Mi Hle*,[3] and it was held that a nun does not occupy a position analogous to that of a monk. The Methila nuns especially undergo no ceremony of ordination as nuns, but are simply lay devotees corresponding to religious laymen. Consequently there is nothing in the Buddhist law to support the proposition that a woman loses her rights to the property held by her, by reason of her having joined the order of Methila nuns.

When inheritance goes by ascent.

The Buddhist law is opposed to the ascent of inheritance,[4] but when it cannot go by descent the inheritance is allowed to ascend, first to the father and mother, and, failing them, to the first collateral line, and, in the absence of heirs in that degree, to the grand-father and grand-mother, and, after them, to the next line of collaterals.[5] In *Maung Shwe Bo* v. *Maung Pya*, the learned Judge said: "There is no definite rule preferring uncles and aunts to grand-parents. The texts are not unanimous. But there is abundant weight of authority for the preference of parents to brothers and sisters, there is good authority

[1] *Mi Lan* v. *Maung Shwe Daing*, Cir. No. 64, Civil 1893. U. B.

[2] *Maung Tok* v. *Ma Kin* Cir. No. 24 Civil, 1893. U. B.

[3] U. B. R. (1905).

[4] See *Manu Kyay*, X. ss. 1, 18, 19.

[5] *Chit Kywe* v. *Maung Pye* Cir. No. 75 of 1895. This case was followed in *Ma Sa Bwin* v. *Ma Thi*, Civil Appeal No. 122, July 20, 1898 U. B.; and in *Maung Shwe Bo*, v. *Maung Pya*, Second Appeal No. 327, Feby. 27, 1899, L.

for the preferance of grand-parents to uncles and aunts, which would be in accordance with the same principle. There is a definite rule in *Manu Kyay* X. 19, by which grand-parents exclude uncles and aunts, and there is no text which explicitly states the contrary rule."[1]

Parents and children.

The rule of division of property as between the surviving husband or wife and their children is that the former takes the dwelling-house and three-fourths of the estate, and the eldest son the remaining one-fourth. According to Mr. Spark's Code (section 68) this one-fourth share "the children divide equally among themselves."[2] The matter was fully threshed out in *Mi Saung* v. *Mi Kun*,[3] by Jardine J.. At the hearing of the appeal the learned Judge appointed two Burmese assessors of great experience and one of them made a study of the *Dhammathats*. These two assessors were of opinion that they never heard of the younger children sharing in the one quarter share given to the eldest son, or of his share being chargeable with the maintenance of the younger children. They said that where the *Dhammathat* awarded an eldest son a quarter share he took it absolutely and was not entitled afterwards to share with the other brothers and sisters in the other three quarters on the death of the surviving parent.

There is no doubt that the position of the eldest son, the *auratha thagyi* as he is called, is superior to that of the others. Among the Hindus, either in the Punjab or in Bengal, by custom, the eldest son is accorded an extra

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[1] Second Appeal No 327 Feby.27. 1899 : P.J.L.B. 524. Chan-Toon p. 479. See also *Mi San Hla Me* v. *Kya Tun*, Second Appeal No. 90 Novem. 12, 1894, P. J. L. B. p. 116.

[2] There are authorities in support of the division of one-fourth among the eldest son and his brothers. *Dhamma Vilasa*, s. 2 (Pereiro's Collection of portions of *Dhammathats* p. 151); *Wagaru* s. 2 (do. p. 142); *Moha Vicchedani* ss. 1, 2 (do. p. 145); *Manusara Shwemyin*, (do. p. 113). The daughters appear to have a claim upon the mother's share for maintenance. (See *Maung Hlaing* v. *Maung Tha Ka Do*, March 12, 1894. P. J. L. B. p. 65.)

[3] Civil Appeal No. 541, Nov. 11, 1882. S. J. p. 115.

share of the paternal property. In section 81, Book X., of the *Manu Kyay* it is said that the *auratha* only has a perfect right to property of his parents. Other children cannot demand property from the surviving parent on the ground that the deceased parent had promised it. Under section 50, the *auratha* has the first choice. During the life of parents, the children have some rights of user, at least while they live with the parents, but without the parents' consent they cannot waste or give away the property.

The *Manu Kyay*[1] awards, on the death of the father, one quarter to the eldest son and three quarters to the mother with the younger daughters ; and, on the death of the mother, one quarter to the daughter and three quarters to the father. In section 13, the rule is laid down for partition when both parents are dead, leaving only daughters; and in section 14, when only sons are left and when both sons and daughters are left. But there is no rule either in the *Manu Kyay* or any other *Dhammathat,* allowing any but an eldest son or eldest daughter to claim a share until both parents are dead.

It was accordingly found in the above case that younger daughters are not entitled to sue the mother for a share of the property on the death of the father, but must wait until the mother is dead also before they can claim their shares.[2] In *Ma On* v. *Ko Shwe O*[3] it was held that on the death of one of the parents the eldest son or daughter may claim his or her share, and the remainder of the property vests in the surviving parent for himself or herself and the remaining children.

On the death of Buddhist parents who have, during their life-time, divided the bulk of their property, but have reserved

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[1] Secs. 3 and 5, Book X.

[2] This case was followed in *Maung Po Lat* v. *Mi Po Le.* Civil Appeal No. 71, Novem. 26, 1883 : S. J. 212.

[3] Civil Ref. No. 1, April 7, 1886. S. J. p. 378. See also *Maung Po Saung* v. *Ma Ngwe Su*, Cir. No. 63 Civil, 1893 ; and *Maung Hmu* v. *Ma Min Dok*, Cir. No. 39 Civil 1895, U. B.

a share for their own support, that share should be divided among the children according to the ordinary rules of succession.[1]

Where there is a son competent to assume the parental duty, an eldest daughter by a second wife cannot claim a share in her deceased father's estate during the life-time of her mother.[2]

Between brothers and sisters.

The *Manu Kyay*, Book X, section 18, says:—"If, after the heirs have received their share and established themselves separately, one shall die without leaving direct heirs, let the property *not ascend* to the elder brothers or sisters; let the younger brothers or sisters only of the deceased share it." The principle of this section is that property in the possession of a brother shall not ascend to his elder brothers or sisters, but shall go to the younger brothers and sisters. A property according to the principle of Buddhist law shall not ascend except where there are no other relations.[3]

Widow and children of former marriage.

Where a father on the death of his wife marries again and dies leaving no issue by the second wife, the child or children of the first marriage take one-eighth of the joint property during the second marriage and the widow seven-eighths.[4]

Widow's estate.

A special Court, after a full consideration of various authorities, came to the conclusion that a Burmese Buddhist widow has not an absolute interest in the whole of the family property on the death of the husband, but that she has an absolute right in respect of her own share and a life-interest in the remainder, and that she has not the right of absolute disposal of the remainder, but only a power of sale in case of necessity.[5] In *Nga Shwe Yo* v. *Mi San*

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[1] *Ko-Ti* v. *Ma Dut*, Appeal No. 113, 1883. S. J. p. 170, L.B.

[2] *Ma Me* v. *Mu Myit*, Second Appeal No. 123, Oct. 20, 1893. P. J. L. B. p. 48.

[3] See *Mi A Pruzan* v. *Mi Chumra*, Oct. 23, 1874. S. J. p. 37, L.B.

[4] *Mi So* v. *Mi Hmat Tha*, Civ. Ref. No. 4, 1883. S. J. p. 177. *Nga Po Thit* v. *Mi Thaing*, Civil Appeal, Oct. 24, 1873. S. J. p. 18. L.B.

[5] *Ma On* v. *Ko Shwe O*, Civil Ref. No. 1, April 7, 1886. S.J. p. 378.

Byu,[1] it was held that children have rights in their deceased father's property as well as the widow. She may use it for necessary subsistence but ought not, except for their benefit, to dispose of it otherwise. In case of sale by her the burden of proving necessity for the sale would rest on the purchaser. In *Maung Hlaing* v. *Maung Tha Ka Do*,[2] it was ruled that a widow has absolute power of disposal over one-half of the joint property of herself and her deceased husband. On the death of a father leaving a widow with an *auratha* son and no other children, the widow has an absolute right of disposal over her share of three-fourths of the estate.[3] While a widowed mother is alive the children are not entitled to claim partition of inheritance. When the mother attempts to alienate the estate improperly they may possibly be entitled to sue to restrain her from parting with it.[4]

As to the division of property on divorce, see *Divorce*.

Adopted child.

An adopted child ordinarily forfeits all claim to a share of inheritance to the estate of his natural parents.[5] By marrying and living separately from his adoptive parents he does not, by the mere fact of marriage, forfeit his rights of inheritance in his adoptive family. But the burden of proving that he has performed the duties necessary to be performed by an adopted child will be thrown upon him, and in the absence of such proof the Courts will disallow his claim to inherit. Mere occasional assistance on the part of the adopted child is not sufficient to preserve his rights of inheritance.[6] The second wife is

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See also *Mi Saung* v. *Mi Kun* Civil Appeal No. 54, Nov. 11, 1882. S. J. p. 115 L. B. Chan-Toon p. 202 for opinions of the two assessors appointed by Jardine J.

[1] Civil Appeal No. 166, Sep. 30, 1881. S. J. p. 108, L. B.

[2] Civil Second Appeal No. 210, March 12, 1894. P. J. L. B. p. 65.

[3] *Manugyé* X. ss. 3, 5, 7; *Atta-thankepa* 155. *Maung Sa So* v. *Mi Han*, Cir. No. 68, 193, U. B.

[4] *Maung Hmu* v. *Ma Min Dok*, Cir. No. 39, 1895, U. B.

[5] Vide *Manugyé*, Chap. X, S. 26. *Maung Pan* v. *Ma Hnyi* Civil Appeal No. 109, Nov. 3, 1897.

[6] *Nga Min Gyaw* v. *Me Pi*, Civil Appeal, May 28, 1873, S. J. p. 8.

entitled to share with an adopted child in the estate of the deceased husband, although all the property was acquired prior to her marriage.[1] Where after separation from his adopted brothers and his sisters, an adopted son lives with his adoptive mother, such mother succeeds to his property on his death to the exclusion of his adopted brothers and sisters.[2] Adoptive parents stand in the same position as natural parents and have the same rights so long as the relationship constituted by adoption subsists; parents are also entitled to inherit in the absence of direct descendants.[3]

Shares of adopted and natural children.

In *Ma Gyan* v. *Maung Kywin*[4] it was held that though the texts in the *Dhammathats* are conflicting, the preponderance is in favour of that in *Manugyé* X, 26, and of the equitable interpretation that the adoptive child takes its place in the family just as a naturally born child would do, and that its rights of inheritance depend upon such position in the same way as if it were a natural child. The *Manugyé* grants the adopted child the same share as the natural child would have in the same position, and it is the practice of the Courts to follow the *Manugyé Dhammathat* where possible. It has, in fact, been the practice of the Courts, both in Upper and in Lower Burma, to treat the *kittima* adopted child generally as filling the same position as the natural born child.

The *Attathankepa* in sections 172 to 179 discusses the respective claims of the *Apatitha*, *Kittima*, and *Auratha* sons. The *apatitha* son seems to be the same as the adopted son spoken of in section 25, Vol. X of the *Manugyé*. Sections 26 and 27 deal with the *kittima* son. The name *kittima* is not employed in section 25.[5]

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[1] *Ma Gun*, v. *Ma Gun*, Civil Appeal, Septem. 18, 1874: S. J p 23.

[2] *Mi San Hla Me* v. *Kya Tun*, Nov. 12, 1894: P. J. L. B. p. 116.

[3] *Ma E. Dok* v. *Maung Ngwe Hlaing*, May 18, 1898. U. B.

[4] Cir. No. 77 Civil, 1895. U. B.

[5] See *Maung Aing* v. *Ma Kin*, Cir. No. 35. Civil, 1893, U.B Chan-Toon p. 162,

Child of a divorced wife.

The children of a divorced wife are not entitled to any share in the property of their deceased father acquired after his marriage with a second or third wife, unless they have continued after their mother's divorce to live and to plan and work with their father.[1] Where a husband and wife were divorced by mutual consent and the young daughter remained till her father's death in the house of her mother and her mother's second husband, and did not renew filial relationship with her own father, and where there was no special contract to a contrary effect at the time of the divorce, the daughter is not entitled to a share of the joint property acquired by the father and the second wife.[2]

The mere fact of a divorce having taken place between the parents, by mutual consent, with equal division of the parent's joint property, accompanied by the fact that the son by the first marriage has, during his minority, lived with his divorced mother, does not divest the son of his ordinary legal right of inheritance under Buddhist law expressed in the ordinary rule that, "on the death of the father who has married two wives in succession, the child of the first marriage is entitled to one-eighth share in property acquired during the continuance of the second marriage," as propounded by Sandford J. C., in *Nga Po Thit* v. *Mi Thing*.[3] The relationship of husband and wife ends when the parents become divorced, but the relationship of father and son does not end because of that divorce. There is no general and equitable principle to show why a divorce of the parents should deprive the son of his right of inheritance under the ordinary rule of inheritance, as between a father who has married again and the son by the first marriage.[4] In *Ma Pon* v. *Maung Po*

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[1] *Ma Shwe Ge* v. *Nga Lan*, Octo. 29, 1884 : S. J. p. 296.

[2] *Mi Thaik* v. *Mi Tu*, Sep. 6, 1883 : S. J. p. 18.

[3] B. S. J. 18.

[4] See *Maung Ba Kyu* v. *Ma Zan Byu*, Novem. 23, 1896 P. J. L. B. p. 299. Chan-Toon pp. 285-286.

Chan,[1] it was ruled that daughters of a divorced wife, who live with their mother and do not maintain filial relations with their father, but live entirely separate from him, are not entitled to a share in his estate when there has been a division of property at time of divorce.[2]

Illegitimate children.

It is very probable that, among the Burman Buddhists, an exception is made in the case of an illegitimate child when there is no legitimate descendant, in order to prevent the inheritance from ascending or the succession from failing altogether. Regular heirs always exclude illegitimate ones. The illegitimate child cannot inherit except when there are no legitimate children of the deceased father.[3] "As regards the prohibition of certain children from inheriting, if there be no good children let the bad inherit, even if the child have been begotten by chance intercourse of its parents; if there be no good (legitimate) children, let the bad (illegitimate) one according to the law laid down above receive the property and bear the debts."[4] In *Ma Le* v. *Ma Pauk Pin*,[5] it was held that when the deceased left legitimate children, his daughter by a damsel, not recognized as a concubine, could not share in the property. In this case Jardine J., has elaborately dealt with the various kind of wives and their children with respect to their rights to inheritance. In *Maung Pyu* v. *Ma Chit*,[6] the question was the status of a child born of parents whose union was imperfect in its inception but subsequently regular by marriage, and publicly living together. Here the marriage was at first not made with the consent of the parents of the bridegroom. The man eloped with the woman and disappeared for some time. Subsequently the

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[1] Civil Appeal, No. 166, Oct. 10, 1898, U. B.

[2] See also *Ma Sein Nyo* v. *Ma Kywe*, Cir. No. 41, 1894, U. B.

[3] *Nga Ka Yin* v. *Ma Gyi*, Sep. 3, 1873. S. J. p. 15. L. B. *Ma Le* v. *Ma Pauk Pin*, appeal No. 91, Dec. 12, 1883. *Maung Pyu* v. *Ma Chit* Cir. No. 75, Civil, 1893 U.B.

[4] *Manu Kyay* p. 307; *Manugyé* Chap. X. 3 Edn. pp 314, 315, 319.

[5] Appeal No. 91 December 12, 1883.

[6] Cir. No. 75, 1893, U.B.

man returned and lived near his parents with the woman as man and wife. It was held that imperfection of birth is not cured by subsequent regular union of parents, and that illegitimate grand-children are excluded from inheritance of grand-parents when the latter have left legitimate children surviving them.

Inheritance by persons giving assistance in sickness and performing funeral rites

The passage in *Manu Kyay*, Book X, paragraph 63, lays down that "if any person being sick shall be assisted by another who is not related to him and dying in the hands of the person he shall bury him; let him take all the property in the possession of the deceased; his parents, children or relatives shall have no share." This rule, in the opinion of Sandford J., "might be productive of the highest inconvenience and injustice." And there cannot be any doubt about it. For instance, where a man dies in a foreign country or in a distant place having none of his children or relatives with him, and the villager treats him and performs his funeral ceremonies, it would be absurd for the villager to claim the right of inheritance to the deceased's property. Or for instance, if a man dies in a village, and his children and relatives are too poor to pay the funeral expenses and somebody else pays them, the latter cannot claim the whole property of the deceased; all that he is entitled to are the expenses of funeral ceremonies &c., actually incurred by him. It was accordingly held that, only when actual neglect or desertion is shown on the part of those who would otherwise be entitled to inherit, is the person who assists in sickness and buries in death entitled to exclude the heirs from the inheritance.[1] A hired attendant who attends members of a family during their sickness and buries them with means derived from the family estate does not thereby acquire a right to inheritance in that estate.[2]

[1] *Nga San Yun* v. *Nga Myat Thin*, Civil Appeal, Feby. 27, 1875. S. J. p. 46. L. B.

[2] *Maung Shwe No* v. *Maung Chit Twe*, Appeal No. 67, Oct. 26, 1898, followed *Nga San Yun* v. *Nga Myat Thin*, S. J. p. 46.

WILL.

The Buddhist in practice has no testamentary power which can prevail against the established rules of inheritance.[1] The question whether the Will as known to the English law has any place in the Buddhist law was discussed in the course of an argument in a certain case before Sandford J., and the conclusion to which the discussion led was that "the idea of a Will to take effect after death upon property not actually passing into the possession of the legatee was foreign to Buddhist law, and that no Will can cause the devolution of property contrary to the law of inheritance." The learned Judge, however, observed that this point was not actually raised in the reference by the Deputy Commissioner to the Court, nor was it raised by the applicant in his petition for a reference to that Court. "I think it better, therefore, not to pronounce any definite decision upon it," said the learned Judge, "although I am inclined to think that the conclusion above stated is *sound*."[2]

The Court of the Chief Commissioner, in considering the question of the validity of Wills made by Burmese Buddhists in several proceedings, observed: "No Will by a Burmese Buddhist having heirs, which disposes of property moveable or immoveable, contrary to the Burmese Buddhist law of inheritance, should be admitted as valid. There may possibly be some family customs in some remote part of the province which the Chief Commissioner is unacquainted with, where this rule would not apply. In that case, of course, there would be an exception; and it appears probable that in some cases, as for cruelty, or for a blow, a father or mother may legally disinherit an heir; but as a general rule, and without some special act of the Legislature, the Courts are bound to

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[1] *Ma Gyan* v. *Maung Kywin*, Cir. No. 77, 1895 U. B.

[2] *Nga San Yun* v. *Nga Myat Thin*, Feby. 27, 1875. S. J. p. 46 L. B.

decide questions of inheritance between Burmese Buddhists solely by the law of Burmese Buddhists, or by well-ascertained custom."[1]

In *Ma Bwin* v. *Ma Yin*,[2] a special Court composed of two Judges, has ruled that *a Buddhist cannot dispose of his property by Will*. In the course of his judgment one of the learned Judges, after referring to several authorities regarding the origin of testamentary power of a person, observed as follows :—

"In considering therefore the question of whether a Buddhist can dispose of his property by Will, I start with this principle, that the power making a testamentary alienation of property is not a natural right possessed by owners of property, but is a creation of the Legislature, and that if the law does not confer that right on owners of property, they cannot exercise it. Especially when the law declares who shall be a man's heirs and in what order they are to inherit, the power of alienation during life-time cannot enable the owner of property to defeat the legal claims of his heir by testamentary disposition. While the heir has an indisputable legal title, the claimant under the Will has nothing to rely on but an inchoate gift, or rather, a promise to give on the happening of a certain event, which event has not only rendered the giving impossible by the death of the intended donor, but has also transferred to the heir the property proposed to be given. Now the Buddhist law, while it provides for the succession to property and gives rules for inheritance, says nothing about testamentary alienation. We are therefore nearly in the same position as the Indian Courts were when the question of the validity of a Hindu Will first had to be decided. The Buddhist law on the death

[1] Order of the Chief Commissioner of British Burma (Civil Side). February 14 1866. Cited in a footnote of the Judgment in *Maung Me* v. *Sit Kin Nya*, Civil Appeal No. 1887, decided Feby. 12, 1889 : S. J. p. 429.

[2] Civil Appeal No. 5, 1878, decided January 10, 1880 ; S. J. p. 95 L. B.

of a person distributes his estate among certain persons in certain fixed shares, and, like the Hindu law, it nowhere gives the owner of property the power to disappoint the heirs by disposing of his property by Will. I therefore hold that, unless it can be shown that the power of testamentary alienation had been enjoyed and recognized for so long as to become an established usage, and a part of Buddhist law, the Will of a Buddhist cannot be maintained.

"Now as to the question of usage we have had further enquiry made and the result is that, though there can be no doubt that Buddhists have for some years been disposing of their property by Will, yet there is no evidence of such long established usage as would justify the conclusion that the power of testamentary alienation has become a recognized part of Buddhist law.

"The earliest Will of which probate was granted is of the year 1864, and the only case[1] which has been discovered in which the question was authoritatively decided by a superior Court was one decided a few years ago before the Judicial Commissioner, in which he held that a Buddhist could not dispose of his property by Will; and in so doing concurred in the opinion expressed by the Judge of the Court of first instance and the Buddhist assessors who sat with him.

"There was also another case[2] in 1875 in which the Judicial Commissioner expressed an opinion that no Buddhist Will can cause the devolution of property contrary to the law of inheritance. The question, therefore, of the validity of a Buddhist Will has only recently come before the Courts and there is no evidence of long established usage. It follows, therefore, that the right to make a testamentary disposition of property has not become by usage a part

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[1] *Ma Thi* v. *Ma Nu*, Civil Appeal No. 28, June 26, 1875 S. J. L, B. p. 70.

[2] *Nga San Yun* v. *Nga Myat Thin*. S. J. p. 46 Civil Appeal, Feby. 27, 1875.

of Buddhist law and as Buddhist law does not confer that right, I am of opinion that a Burman Buddhist cannot exercise it.

"The argument that the Buddhist law does not prohibit testamentary alienation, and that, therefore, property can be so disposed of, I have, I think, sufficiently answered already in the words of Mr. Justice Markby, and in the views which I take of the basis of the testamentary right, and which I think is supported by the best authority, a mere non-prohibition is of no avail. There is no natural right of testamentary alienation, and therefore unless that right be conferred by the Legislature, the heir cannot be deprived of the succession by the testamentary disposition of his ancestor."

This case was followed in *Maung Me* v. *Sit Kin Nga*.[1] It would seem that after the passing of the decision in *Ma Bwin* v. *Ma Yin*, the Local Government instituted inquiries in the lower Province in 1881 as to exercise of testamentary power by Burman Buddhists. Meres J., who, in the *Maung Me* case, re-examined the question of the validity of a Buddhist Will, brought into the record all the opinions and evidence collected by the Local Government at the inquiry. The learned Judge himself also collected information and opinions of Burmese gentlemen and others on this question of Buddhist Will, and a large number of European Burmese gentlemen, official and non-official, in the Upper and Lower Provinces, sent full notes. All these notes also were brought into the record. The learned Judge said "the inquiry, I think, brings out clearly that the notion of a Will is not to be traced in the Burmese Buddhist Scriptures.... . On the full review of the whole question, I concur in the opinion laid down in *Ma Bwin* v.

[1] Civil Appeal No. 76 of 1887. p. 429
Decided February 12, 1889, S. J.

Ma Yin that the testamentary power is not in a Burmese Buddhist." Regarding the argument, *viz.*, that the Buddhist law does not prohibit the making of Wills, his Honour said: "I think that argument is sufficiently disposed of in the judgment in *Ma Bwin* v. *Ma Yin*."

Family arrangement.

Among Burman Buddhists the father, fore-seeing that the heirs may quarrel about the division of the property on his death, not infrequently arranges a special contract before his death among his heirs whereby they bind themselves to accept a certain method of partition, but such an arrangement will not usually give them a cause of action against him during his life.[1]

Inheritance among Hindu Buddhists of Arakan and Chittagong.

In *Ma Tin* v. *Doop Raj Barna*,[2] one of the points for determination was what was the law of inheritance to which deceased's estate was subject. The deceased in this case came from Chittagong and was described as a *Mug* or Rajbansi and a Buddhist, though he was also spoken of as a Hindu, perhaps because in dress and some habits he resembled a Hindu. The Court held that, *prima facie*, as a Buddhist, deceased would come under the Buddhist law of the country at large, and the *onus* of proving any special custom or usage varying the ordinary Buddhist rules of inheritance would be on the person asserting the variance. Whether there was any foundation for alleging a difference of rules except on account of deceased's coming from India and his wearing Hindu dress and following possibly some Hindu habits, there was no distinct evidence to show. But as a Buddhist the presumption no doubt was that there would be no legal impediment, as in the case of a Hindu, to his taking a Buddhist woman to wife.

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[1] *Mi Thit* v. *Maung To Aung*, p. 197, L. B. Appeal No. 62, Oct, 24, 1883. S J.

[2] Cir No. 116 Civil, 1894, U. B.

Among *Zerbadis* or Burmese Mahomedans.

The *Zerbadis* or Burmese Mussulmans reside in Upper Burma. They as often as not speak Burmese alone; they speak Hindustani also indifferently. Both men and women, as a rule, go by both Burmese and Indian names. Prior to the British annexation, their affairs, so far as they came before the Court, used to be governed by the Buddhist *Dhammathats*, as they had no option; under the Burmese Government the *Dhammathats* were applicable to everybody. But since the annexation, in matters of inheritance, the Mahomedan, and not the Buddhist, law is applicable to them.[1]

Among Chins.

Among the Chins the mode of dividing a joint family property is this: the Chin elders divide the property, and the interested parties touch the pipe or tube for sucking *kaung* from the *kaung* pot in token of their acquiescence. In a case where such division took place and where afterwards one of the parties claimed the whole of the property in repudiation of a previous performance of this kind, the Court held that the plaintiff had accepted the division of property and could not afterwards challenge or go back upon what had been done.[2] According to Chin custom, if a widow desires to return to her parents and to separate from the family of her husband, she can claim none of her husband's property: she must leave with what she has on her body.[3]

Chinese.

Buddhist law as administered in Burma is not usually applicable to Chinese residents. Confucians, and Taoists are not Buddhists, and are therefore not exempted by section 331 from the provisions of the Indian Succession Act, 1865.[4]

Kanwin property: succession.

Kanwin is a property set apart at the time of marriage by the bridegroom or his parents for the joint purposes

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[1] *Ahmed* v. *Ma Pwa*, Cir. No. 55, Civil, 1895. U. B.

[2] *Maung Hmon* v. *Ma Pyu*, Appeal No. 138. Decem. 23, 1896.

[3] Ibid.

[4] *Hong Ku* v. *Ma Thin*, Appeal No. 4, August 1881. S. J. p. 135 L. B.

of the married pair. Where property is not set apart as *kanwin*, but is simply entrusted by the parents to the bridegroom to manage, he and the parents shall share it equally. If he dies without children his widow will take half and his parents half.[1]

GIFT.

Delivery of possession essential.

Though a Buddhist cannot dispose of his property by a Will he has a right to transfer property *inter vivos* by way of gifts. A gift, to be complete, must be accompanied by delivery and be followed by possession. The delivery into possession is an indispensable condition of the validity of a gift.[2] In *Maung Ni* v. *Nga Po Min* it is further laid down that even though there be a written deed of gift, or though the name of the donee at the instance of the grantor be entered in the revenue register but there be no delivery into possession, the gift will not be complete.[3]

Religious usage : an exception to the general rule,

In the *Manu Kyay Dhammathat*[4] it is clearly laid down that the absence of delivery into possession shall not invalidate a gift given on the occasion of the child entering the priesthood : the gift, though it remains in the possession of the donors, is to become the separate property of the donee, and the other children of the donors are to have no share. In *Nga Pan U.* v. *Mi Kyu*[5] the subject-matter of dispute was certain moveable property given to the deceased husband of the plaintiff by his parents on his entering the priesthood. The Court held that the gift was a valid one, although unaccompanied by delivery and not followed by possession. The *Dhammathat* allows parents

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[1] *Ma Hla Aung* v. *Ma E.* Appeal No. 54, Dec. 3, 1883 S J p. 219.

[2] *Ma Thi* v. *Ma Nu*, Appeal No 28, June, 26, 1875, S. J. L. B. p 70; *Maung Ni* v. *Nga Po Min* S. J. L. B. p. 44; *Gura* v. *San Tun Baw*. Civil Appeal 120 of 1898, Feby 1, 1899; *Maung Shwe Thwe* v. *Ma Saing*, Appeal No. 199 of 1897, Jany. 28, 1898 U. B

[3] S. J. L. B. 44.

[4] Ibid p p. 317, 318.

[5] July 17, 1847, S. J. L B p. 30.

to have the use of property, and only gives absolute ownership in the gift to the donee on the death of the parents. The Court accordingly refused to give a decree of immediate exclusive possession of the gift to the wife, or to a representative of the donee as against his parents, the donors, until their death.[1]

Conditional gift.

Where a gift has been accepted under a condition expressed or implied that the donee would support the donor in case of need, the right in the gift will terminate if the donee neglects to fulfil the condition.[2] But a gift from a parent to a child does not raise by necessity the inference that the child is bound, by a condition of the gift, to support the parent in case of need. For so to rule would be to shake the security of property, by invalidating every gift from a parent to a child, unless it were made with an express condition that it was absolute.[3]

Revocation of gift.

The *Manu Kyay* has expressly dealt with gifts from affection.[4] These gifts are divided into two classes :—

(1) Gifts made from affection when the donor has become poor.

(2) Gifts from parents to their children.

In the first case the gift is revocable at the pleasure of the donor, so long as the gift is in possession of the donee, unless the donee has become equally poor with the donor. In the second case, the rule is that where parents from affection have made presents to their children, if they wish to take back their gift during the life-time of the children, they have the right to do so.

In *Mra Do Aung's*[5] case mentioned above, the Court, although under Buddhist law a donor who has become poor may revoke his gift, declined to apply the law where

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[1] See *Maung Ni* v. *Nga Po Min*, S. J. L. B. p. 44, another case on the point.

[2] See *Manu Kyay* pp. 228, 297 and 298.

[3] *Mra Do Aung* v. *Shwe U*, March 23, 1874; S. J. L. B. p. 22.

[4] See Ibid p. 228.

[5] S. J. L. B. p. 22.

a gift of immoveable property had been perfected by ten years' possession, and where the donee's name had been registered as owner.

Death-bed gift.

In *Ma Thi* v. *Ma Nu*[1] a claim to certain property was based on a document which was alternately argued as a Will and as a deed of gift. It appears that a very old woman, shortly before her death, purporting to convey everything she possessed to one member of the family with whom she had been living to the exclusion of all the others, executed a deed in favour of that person. But this transfer was apparently not followed by possession. For the Court rejected the claim holding that under Burmese law delivery into possession is an indispensable condition of the *validity* of a gift, even though there be a written deed of gift or (still stronger) though the name of the donee at the instance of the grantor be inscribed in the government register, as held in the case of *Maung Ni* v. *Nga Po Min*.[2] The Court further suspected that the alleged gift was made under undue influence.

Verbal gift, whether valid: *donatio mortis causa*.

A Burmese woman was the mortgagee in possession of certain land and a garden. She was on bad terms with her husband, and anxious to dispose of her property to others as effectually as possible during her life-time. So a few days before her death, she sent for the martgagor's representative and in her presence made over the mortgage-deed to M.O. as trustee for her minor grand-children and told her if she wished to redeem she must pay them. M.O. accepted the trust. On the day of her death she executed a deed of gift in favour of her minor grand-children, but it was not registered during her life-time. It was contended that there was a complete gift verbally on the occasion when the mortgage-deed was handed over to M.O. the trustee, and that the document was merely executed for greater caution. It seemed that not until her death, did

[1] Appeal No. 23, June 26, 1875. [2] Civil Appeal, S. J L. B. p. 44 S. J. L. B p. 70.

either the trustee or the grand-children assume possession of the property. The Judicial Commissioner finding the authorities[1] conflicting referred the matter to a Special Court. On the basis of *Duffield* v. *Hicks*,[2] where the House of Lords held that the delivery of the mortgage deeds of real estate constituted a valid *donatio mortis causa*, the Special Court decided as follows:—"The Statute of Frauds is not applicable here, and a trust of lands may be declared by parol. There was in this case a declaration of trust accepted by the trustee and accompanied by the handing over of the title-deeds. That is a valid *donatio mortis causa*, which must be accompanied by a delivery."[3]

Gift by a Buddhist monk.

In *Ma Pwe* v. *Maung Myat Tha*,[4] the point for decision was whether a man by becoming a Buddhist monk ceases *ipso facto* to own property of which he was possessed before he abandoned his lay-condition. Or, in other words, does a Buddhist layman upon conversion into a religious person die a civil death in respect of the ownership of the property he possessed as a layman?

There appears to be no text expressly declaring what becomes of a man's property when he embraces a religious life, but the sacred books indicate what happens by clear enough implication. In this case the husband of the plaintiff left her and his child and gave up his condition of a Buddhist layman in order to live the religious life of a Buddhist monk. Subsequently he made a gift of certain lands which he possessed before entering the monastery to the defendant, whom the plaintiff sued for the recovery of the lands on the ground of the invalidity of the gift. It was held that the plaintiff's husband retained no interest in the property in the suit after becoming a Buddhist monk.

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[1] The rule relating to death-bed gifts is mentioned in *Manusara Shwemyin Dhammathat* Chap. I, s. 68; *Manu Wunnana*, s. 344; *Menu Kyay* p. 317.

[2] 1 Dow and Clark. 1. (1827).

[3] *Maung Kyaw* v. *Maung Shwe Yo*, Civil Ref. No. 6 of 1892, Jany. 9, 1893. See *Ward* v. *Turner*, 1 Wh. and T. L. C. 390 (7th Edn): S.C. 1 Dick. 170 (1752).

[4] Appeal No. 130 of 1897, Jany. 3, 1898. U. B.

Poggalika and *Thingika* gifts.

In section 3, Chapter X, of *Manugyé* it is said—"In *poggalika* gifts, the person to whom the offering is made has a right to keep it. In *thingika* gifts, it becomes the property of the chief of the assembly of priests (*Gaing twin akyi*). After a supporter of religion has made such gifts, he has no right to any further claim on them." See *U Te Za* v. *U Pyinnya*,[1] as to the authority of *Thathanabaing* and *Thudama* Council in matters of ecclesiastical discipline and control, and the Civil Court's power to interfere with it.

PARTITION.

Between two sisters.

In a suit for partition of their mother's estate between two sisters who were her sole heirs and successors, the question for determination was what was each sister's right share of inheritance. The defendant, who was about fifteen years older than the plaintiff, contended that she was entitled, as the elder, to a larger share. The District Court gave each a half share partly on a consideration of some texts of the *Dhammathat*,[2] and partly on the evidence of custom. The Appellate Court, after discussing the various conflicting texts on the subject, remanded the case for additional evidence on certain specified issues. The Court below returned the additional evidence called for, with a finding in favour of the respondent plaintiff. There was no evidence that any of the *Dhammathats* or any particular rule in the *Dhammathats* was observed in practice, and the Court below stated in its finding:—"On the whole I am of opinion that there is considerable evidence that in this part of the country there is a custom of equal division and that, in the division of inheritance made by arbitrators with the consent of the parties, this custom is followed and not one or any of the rules in the *Dhammathats*." The Appellate Court thereupon observed that, although it could not be ascertained

[1] Cir No. 72, 1893 U. B. 81.

[2] *Manugyé*, Chap. X, s.s. 39 and

in the present proceedings, by having witnesses examined all over the province, whether there was a universal prevalence of the same custom of equality of partition, there was little reason to doubt that the general tendency was in that direction. When a younger brother or sister is brought up by an elder, or is, or has been, dependent on the latter, there may be ground for making a difference in their respective shares. But in the present case the younger sister was grown up at the time of her mother's death and had already been married, and now is married again, so that she was in no way dependent upon the elder sister's care or good offices. The learned Judge said: "So far as this case goes at least, the only rule of Buddhist law shown to be operative in respect of the partition of inheritance between two sisters on the same footing, except as regards age, is that of equality of partition." It was further observed that when the rules were conflicting and uncertain, when there was no proof as to what *Dhammathat* ought to be followed, or what rule ought to prevail, when it could not be shown that a particular direction was a living rule and not merely a dead letter, and when the circumstances of the case were not such as were contemplated by the object of the rule, the Courts might safely accept a custom which there was a reasonable amount of evidence to establish if such custom was consonant with equitable principle.[1] In *Ma Kyi Kyi* v. *Ma Thein*,[2] the question for decision was whether Burmese daughters inherited the estate of their deceased parents in equal or unequal shares. It was held, on consideration of all the authorities on the subject, that children of the same parents, dividing an inheritance after their parents' death, take each an equal share.

Between two brothers.

The principle governing the respective shares of the elder and younger brother in a joint estate is laid down in

[1] *Ma Po* v. *Ma Swe Mi*, Appeal No. 49, Aug. 31, 1897.

[2] 3 L. B. R. 8.

section 163 of the *Attathankepa Dhammathat*, according to which the shares are about two-thirds and one-third.[1] There is now a general tendency in favour of equality, and we have seen in the case of *Ma Po*[2] that the mother's estate was equally divided between two daughters.

Between brothers and sisters.

In *Maung Pan* v. *Ma Hnyi*[3] the estate of a deceased father was divided among a son and two daughters equally. In this case the deceased left two sons and two daughters. Of these the eldest was a son, the second and third, daughters, and the fourth and youngest, a son. It was alleged that the eldest son was adopted into another family. The second child, *i.e.*, the eldest daughter, sued all the other children and claimed one-third of her father's estate. As it was proved that eldest son had been really adopted into another family, the estate was ordered to be divided among the remaining children in equal shares, as there was nothing against partition in equal shares.

Between husband and wife.

With regard to the respective shares of the husband and wife on divorce the following passages in the *Mann Kyay* are to the point :—"If under the same circumstances (*i.e.* where both parties have been married before) the husband wishes to separate and the wife does not, or the wife wishes to separate and the husband does not, let each take back the property they brought at marriage ; *but of the property acquired since*, which is the common property of both, the person wishing to separate shall have no share, the party not wishing to separate shall have the whole, and the person who does shall pay the debts."[4] And again :—"Let the wife, the party not wishing to separate, take the whole of the property acquired after they became man and wife, and let the husband pay the debts mutually contracted during the same time."[5]

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[1] *Ma Gyan* v. *Maung Kywin*, Cir. No. 77, 1895, U. B.

[2] See *Ma Po* v. *Ma Swe Mi*, Civil Appeal No. 49, Aug. 31, 1897.

[3] Appeal No. 109, Novem. 3, 1897.

[4] Ibid p. 336.

[5] Ibid p. 338.

Where husband and wife both assent to divorce and no fault is proved each is entitled to take back property which he or she brought into the common stock on the occasion of the last marriage so far as it has not been expended, and to an equal share in what remains of the property acquired conjointly during the continuation of that marriage.[1] But where a divorce takes place against the wish and without any fault on the part of the wife, the husband may take his separate property.[2] A woman having a separate establishment from her husband and taking no share in the management of his business, and performing the duties of a wife no more than by receiving his visits, is not entitled to hold the property acquired by her husband, who carried on his business in the house of his first wife, as joint property.[3]

Between adopted child and step-mother.

The publicly adopted child stands in the same position as the real child, and what his or her share would be with reference to the second wife, is set out at length at paragraph 38, of *Manu Kyay*.[4] From this it appears that the daughter is entitled to her mother's personal belongings and also to one-fourth of the property as her own share while the father lives. On the death of the father she further inherits three-fourths of the remainder, while the step mother gets one-fourth of the three-fourths, *i.e.*, three-sixteenths. In *Ma Gun* v. *Ma Gun*,[5] it was held that the second wife is entitled to share with an adopted child in the estate of the deceased husband although all the property was acquired prior to his marriage. Her share will be three-sixteenths only.

Between first and second wife.

On the death of the husband a second wife has a right to share with a first wife in the property of the husband, although none of it had been acquired since the second marriage. Her share in the joint pro-

[1] *Mi Dwe Naw* v. *Maung Tu*, Septem. 3, 1873, S. J. p. 14.

[2] *Munng Kyin* v. *Ma Saung*, June 3, 1874, S. J. p. 27.

[3] Ibid.

[4] Ibid p. 281.

[5] Septem. 18, 1874, S. J. p. 23.

perty of the first marriage will be one-fourth as compared to three-fourths falling to the share of the first wife. In the separate property of the husband, the second wife is entitled to a half share.[1]

Between step-mother and step daughter.

Property inherited by a father from his ancestor during marriage is not *Anapzon* or joint property of the husband and wife. On his death, leaving a daughter by a previous marriage and a widow, the daughter is entitled to one half and the widow to an equal share. In deciding such a case the Court must be guided by analogy in applying the rule prescribed by the *Dhammathat* for the division between a daughter and her step-father of property inherited during coverture by the mother from her ancestors.[2]

Between children of first marriage and second wife.

If a father on the death of his wife marries again and dies leaving no issue by the second wife, the child or children of the first marriage take one-eighth of the joint property during the second marriage and the widow seven-eigths.[3] This matter came up as a reference before the Chief Court and Jardine J., said:—"The present case has not been argued, and I have not been helped by the Courts below, so I must give a ruling with some doubt. It appears to me that the weight of authority is in favour of the proportions of one and seven, *i.e.*, the son or children of the former marriage get only one share out of eight. This is the rule of the *Manu Kyay* as expounded by Sandford J., and of the authoritative *Wunnana*, and the very recent *Mahavicchhedani*. I do not think it clear that I violate the spirit of these Codes if I hold that the one-eighth is the share of the child or all the children of the former marriage, and that the widow is to take the other seven-eighths in a case like the present where

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[1] *Mi Ka* v. *Maung Thet*, Feby. 24, 1873. See also *Manu Kyay*, Dr. Richardson's Translation, para. 7 p. 268, para. 38, p. 281.

[2] *Maung Shwe Ngon* v. *Ma Min Dwe*. July 10, 1882 S. J. p. 11 L. B.

[3] *Mi So* v. *Mi Hmat Tha* Ref. No. 4, June, 20 1883; S. J. p. 177.

she has no children. The *Manu Kyay*, Book X, section 10, gives the one share to the children collectively in Dr. Richardson's translation, which I think gives the sense. The husband and wife are heirs to each other. For these reasons I answer the question stated by the Deputy Commissioner in the following terms:—The children of the former marriage take collectively one share out of eight of the property acquired during the second marriage: the widow takes the remaining seven shares." His Honour regretted that "as usual neither the Extra Assistant Commissioner nor the Deputy Commissioner treats the subject as a matter of custom, but purely as a matter of construction of written and codified law. The Deputy Commissioner finds that the rule of division is differently stated in different *Dhammathats* and therefore he has referred the matter here."

Ancestral Property in Lower Burma.

In Lower Burma an heir's right to a share in ancestral property is not affected by any instructions or Will on the part of a co-heir.[1] On the the death of a wife, the husband is entitled to retain possession of his wife's share in ancestral estate, which has been in their separate possession to the exclusion of the wife's mother.[2] In a question whether or not a sister, living separately, is entitled to inherit from her brother, to the entire exclusion of his widow, ancestral land, which, although there had been no actual partition by measurement or express agreement between the brother and sister, was redeemed by the brother during the marriage and worked by him, it was held that the widow was entitled to retain possession against the sister.[3] Mere possession for seven or eight years by a grandfather of land which it is not clear was

[1] *La Uv. Mi Saung Ma*, Septem. 3, 1873.

[2] *Mi Tun Byu* v. *Nga Yun*, Septem 5, 1874. S. J. p. 32.

[3] *Mi Pyu* v. *Mi Bon Dok*, Sep. 30, 1874. S. J. L. B. p. 35.

his and which he abandons to his daughter does not make the land ancestral property.[1] In a claim to land on the ground of descent from a remote common ancestor, the plaintiff failed to show satisfactory possession or enjoyment of the land claimed within twelve years of the date of the suit, and it was held that the suit was barred by limitation.[2]

Sale of undivided ancestral property.

Consent of all the co-heirs is necessary to the sale of undivided ancestral property. A sale effected without such consent is invalid even to the extent of the vendor's own share. Sandford J., said:—"Under the recent ruling of the Court a co-sharer cannot sell even his own interest in joint undivided family estate without giving to each one of his co-sharers the option of purchasing. One co-sharer, that is, cannot alienate even his own interest in undivided family estate without consulting his co-sharers and ascertaining their unwillingness to buy him out. This doctrine has its parallel in the rule which prevails in those parts of India which are governed by the strictest Hindu law, where the consent of all the share-holders is necessary even to the alienation of an undivided share."[3] After a division of an ancestral estate the holder thereof, being a member of the family, wishing to sell the land falling to his share, must offer it first to his co-heirs; and a sale to a stranger, without such offer being made, is invalid.[4] The burden of proving the division of ancestral property lies upon the party asserting division.[5] Separate possession and separate

[1] *Maung Shwe On* v. *Maung Shwe Nu*, Appeal No. 79: Octo. 26 of 1898. L. B. P. J. p. 468.

[2] *Maung Shwe Hmyin* v. *Ma Pu Ma*, Cir. No. 134, 1893. See also *Maung Tun* v. *Ma Taw*, Appeal No. 145 of 1894, April 22, 1895. P. J. L. B. p. 132; *Ma Kon Y* v. *Tun E.*, 3 L. B. R. 7; *Maung Pe* v. *Ma Hla Win*, Appeal No. 336, Feby. 27, 1898 L. B. P. J. p. 522.

[3] *Mi Te* v. *Po Maung*, Novem. 24, 1874: S. J. L. B. p. 41. See *Nga Myaing* v. *Mi Baw*, Novem. 24, 1874. S. J. L. B. p. 39.

[4] *Ma Ngwe* v. *Lu Bu*, Appeal No. 21 July 14, 1877, S. J. L. B. p. 76.

[5] *Ma Hnin Si* v. *Ma Hnin Yi*, March 7, 1874. S.J. p. 22.

living will shift the *onus* of proving the property to be joint estate on the party alleging the property to be joint.[1]

Pre-emption.

The right of pre-emption among Buddhists is an incident of the law of succession and inheritance and cannot be separated from it.[2] By the term "pre-emption" is to be understood the option of purchasing if one of the co-heirs of undivided ancestral property wishes to sell. The passages in the *Manu Kyay Dhammathat* on which this alleged right is founded are section 36, Book VII, and section 1, Book VIII. Sandford J., said: "It may, I think, be concluded from these passages, that, if ancestral property has passed into the hands of third persons, the heirs of the original owner do not possess an absolute right of buying it back. But if the possessor wishes to sell, he must offer it first to them who have a right of inheritance in the land. Now, if this be the law binding on strangers to the original owner who have obtained possession of property that was once ancestral estate, surely it binds much more stringently joint possessors of undivided ancestral property. If a stranger in possession of land which has once formed portion of an ancestral estate, but which by its sale to him has been separated from the estate, is bound, on his wishing to sell, to offer it first to the heirs of the original owner, much more is a co-heir of undivided ancestral property bound, under the law contained in the passages I have cited, to offer it first to those who have a joint right of inheritance with himself."[3] His Honour quoted passages from the *Wunnana* and *Thara Shwe-myin* confirming the same view and held that a sharer in undivided ancestral property, if he wishes to sell his share, must first offer his share to his co-heirs, and consequently a sale to strangers effected without such offer is invalid if the co-heirs promptly assert their right.

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[1] *Mi Pyu* v. *Mi Bon Dok*, Sep. 30, 1874. S. J. L. B. p. 35.

[2] *Ebrahim* v. *Arasi*, Appeal No. 218 of 1892; March 27, 1893. P. J. L. B. p. 26.

[3] *Nya Myaing* v. *Mi Baw*, Novem. 24, 1874. S. J. L. B. p. 39.

In *Ma Ngwe* v. *Lu Bu*[1] a co-sharer was the holder of the ancestral estate after its division. It was held in this case that he was bound, if he wished to sell, to offer his share to his original co-heirs. "The original object of the custom," said Sandford J., "is no doubt the desire of keeping family estate in the family, and in interpreting the law I must have regard to its origin and object. Property that has formed part of a family estate is subject, if the possessor wishes to sell, to a right of pre-emption on the part of the members of the family. Whether the possessor be a stranger who has acquired possession by sale or a member of the family who has acquired possession by partition, the principle of the rule, namely, the maintenance in tact of a family estate, equally requires that the other members of the family should have a right of purchase."

Alienation of joint property by husband.

A Burmese husband cannot sell or alienate the joint property of himself and his wife without her consent or against her will.[2] Property jointly owned by a Buddhist husband and wife would usually be deemed to be in the possession of the former. Under ordinary circumstances the presumption would be that a sale of cattle by a Burman is made with the assent of his wife and is valid if made to a *bonâ fide* purchaser and cannot subsequently be challenged by the wife.[3]

In *Ma Shwe U* v. *Ma Kyu*,[4] two questions were referred to a Full Bench: (i) Whether a Burmese Buddhist husband can validly sell or alienate the *hnapazon* property of himself and his wife without her consent or against her will: (ii) Whether such a sale by the husband, made without the consent of his wife, constitutes a valid transfer of his share and interest in the property sold. The Full Bench upheld the decision of *Ma Thu* v. *Ma Bu*

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[1] Appeal No. 21. 1877, July 14, S. J. L. B. p. 76.
Ma Thu v. *Ma Bu*, Appeal No 1.6, Feby, 26, 1891.

[2] *Mg On Sin* v. *Ma O Net*, Cir. No. 80 Civil, 1894 U. B.

[4] 3 B. L. R. 66 (F. B.)

and answered the first question in the negative and the second in the affirmative.

Widow's power to alienate.

As among the Buddhists children have rights in their father's property as well as the widow, the latter may use it for necessary subsistence but cannot, except for their benefit, dispose of it otherwise. In case of sale by her the burthen of proving necessity for the sale would rest on the purchaser.[1] While a widowed mother is alive the children are not entitled under Buddhist law to claim partition of inheritance. When the mother attempts to alienate the estate improperly they might possibly be entitled to sue to restrain her from parting with it.[2] An only daughter has not, after her father's death and before partition with her mother, an interest in the estate capable of alienation.[3]

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[1] *Nga Shwe Yo* v. *Mi San Byu*, Appeal No. 166 of 1880 Sep. 30, 1881. S. J. p. 108 L. B.

[2] *Mg Hmu* v. *Ma Min Dok*, Cir. No. 39, 1895 U. B.

[3] *Mg Po Lat* v. *Mi Po Le*, Appeal No. 71, Novem. 26, 1883. S. J. p. 212.

MAHOMEDAN CUSTOMS.

The intimate connection between law and religion in the Mahomedan faith is very great and consequently the authority of law is supreme among Mahomedans. Any variation or modification of that Koranic law,—especially in matters of inheritance and succession,—by family or local custom is usually not permitted. "The Mahomedan law of inheritance is based on *Sura-i-Nissa* in the Koran, which was revealed in order to abrogate the customs of the Arabs, and on the *Hadis* or traditions of the Prophet. According to the principles of Mahomedan law any attempt to repudiate the law of the Koran would amount to a declaration of infidelity, such as would render the individual concerned liable to civil punishment by the *Kazee* in this world and to eternal punishment in the next. No custom opposed to the ordinary law of inheritance which was created to destroy custom, would be recognized by the Doctors of the Mahomedan law, and in our opinion it follows as a natural consequence, that no such custom should be recognized by our Courts which are bound by express enactment to administer Mahomedan law in questions of inheritance among Mahomedans."[1] In *Jammya v. Diwan*,[2] the Allahabad High Court observed : "The law which governs these Provinces gives no opening where parties are Mahomedans to a consideration of custom." The learned Judges referred to section 37 of Act XII of 1887 (Bengal Civil Courts Act), which lays down that whenever it is necessary for a Civil Court to decide any question with regard to succession, inheritance, marriage,

[1] *Per* O'Kinealy J., in *Hakim Khan* v. *Gool Khan* 8 Cal. 826 p. 830 (1882).

[2] 23 All. 20 (1900). The custom proved in this case was the exclusion of daughters from inheritance. But the High Court refused to recognize it on the basis of s. 37 of the Bengal Civil Courts.

caste or any religious usage or institution, the Mahomedan law in the case of Mahomedans shall form the rule of decision, except where such law has by legislative enactment been altered or abolished. Mr. Justice O'Kinealy also had this section in his mind when he said that courts were "bound by express enactment to administer Mahomedan law" to the Mahomedans.

Section 37, it should be noted, is merely directory as to the rule which should form the basis of a decision between Mahomedans on the one hand and Hindus on the other. It refers to the Hindus as well as to the Mahomedans but applies to the Mahomedans of Bengal, North West Provinces and Assam only. We are not aware of any such provisions being in force in any other parts of India.

In disputes between Mahomedans respecting zemindaris during the Marhatta Government, the custom of the country was always followed in preference to Mahomedan law, but they were left at liberty to settle matters as they liked in their own families, or in private disputes. We shall see how in many instances the text of the Koran has been set aside in favour of prevailing customs.[1] Sir Erskine Perry in the Khojas and Memons case,[2] held that "customs conflicting with the express text of the Koran can be valid among a Mahomedan sect."

In dealing with Mahomedan converts, *i.e.*, people who were originally Hindus, Scott J., (after referring to the Privy Council decision in *Abraham* v. *Abraham*,[3] that in questions of succession and inheritance the Hindu law must be applied to Hindus and the Mahomedan law to Mahomedans, and that this rule refers to Hindus and Mahomedans not by birth merely but by religion also) said :— "But at the same time it is quite clear that where the natives of India are concerned, usage must override the

[1] Vide *Musst. Humeedon Nisa* v. *Ghoolam Moheeood Deen*, 2 Bor. 38 (1821).

[2] *Vide* Perry's O.C. 110.

[3] 9 Moo. I.A. 195 (1863).

presumption of general law in matters of inheritance among converts to new religions just as much as in other matters." And his Lordship concluded by holding that although the Mahomedan law pure and simple, as found in the Koran, is part of the Mahomedan religion, it does not of necessity bind all who embrace that creed.[1] Besides Bombay, custom takes precedence of Mahomedan law in the Punjab, Oudh and Central Provinces.

Primogeniture.

The custom of primogeniture is not unknown among estates owned by Mahomedans. Indeed, there are some decided cases in which the custom of primogeniture has been given preference to the general Mahomedan law.[2] The first case that may be mentioned is the one from the district of Cuttack in Orissa. In this case two younger brothers sued to recover from their elder brother their shares of the property left by their father. The property in dispute was originally granted to the common ancestor of the parties by the Mogul Emperor. It had been held by a succession of elder brothers for a long course of years. The exclusive right of the elder brother to inherit it had been upheld by previous decisions of the Courts. It was accordingly decided that, in the absence of any *sunads* declaring the contrary, the practice of succession by primogeniture must be accepted as prevailing in the estate. The Regulation XI of 1793 which was made applicable to Cuttack by Regulation XII of 1805 had no application to this, and did not abolish this exceptional course of succession.[2] In a very recent case which came from Oudh the rule of descent by primogeniture was admitted by the contending parties. The suit was in respect of an estate whose Talookdar was entered in List II of the Oudh Estates Act, *viz.*, as one whose estates according to the custom of the family, on and before the 13th February, 1856, ordinarily devolved on a single heir. One of the questions

[1] *Mahomed Sidick* v. *Hajee Ahmed* 10 Bom. I pp. 9, 11 (1885).

[2] *Mirza Mahomed Kayun Beg*, 25 W.R. 199 (1876).

[2] *Mirza Mahomed Akul Beg* v.

which incidentally came up for decision was whether the estate descended by lineal primogeniture or by primogeniture by proximity of degree (the only alternative to lineal primogeniture). The Privy Council held that there was no evidence that it was by the latter, in which case the elder in the line was to be preferred among those who were equal in proximity.[1]

The custom of primogeniture to the exclusion of females and other heirs was alleged to have prevailed in a Beluch family of the Sunni sect, whose ancestors had for many years settled at Jhajhar in the district of Meerut. The court after reviewing the evidence came to the conclusion that no such special course of descent had been established to prevail in Jhajhar and the district of Bulandshahr, where so many Beluchis and foreigners, who were all Sunnis, had settled; and that no legal origin of such custom was shown; and, if it had been, that no continuance of it had been proved.[2]

In *Rajah Deedar Hossain* v. *Rani Zuhooroon Nissa*,[3] the question at issue was the right to a moiety of Parganah Soorjapore in the district of Purnea, and the suit was brought by a party in possession of one moiety of the Zemindari for the recovery of the other on the ground that the estate was, according to family custom, indivisible and devolved entire on every succession. The Judicial Committee held that as the property in dispute was not Jungle Mahal within the provisions of Regulation X of 1800, the family rule, if proved, was abrogated by Regulation XI of 1793; that the descent must be governed, according to Regulation IV of 1793, by the laws of the religious sect to which the litigant parties belonged. The Zemindari in question was therefore divisible among the co-heirs of the deceased Zemindar according to the laws

[1] *Muhammad Imam Ali Khan* v. *Sardar Husain Khan* 25 I.A. 161 (1898): s. c. 2 C. W. N. 737.

[2] *Muhammad Ismail Khan* v. *Fidayat-un-Nissa*, 3 All. 723 (1881).

[3] 2 Moo. I.A. 441 (1841).

of the *Shiah* or *Imameean* sect of Mahomedans to which the parties belonged. The property therefore should descend to the daughters of a deceased brother in preference to the surviving brother.

Widow's right to inherit her deceased husband in preference to the latter's brother.

A widow of the Sunni sect in the district of Lucknow claimed to be entitled by custom to the whole of the share of her deceased husband in a village called Saleh Nagar and to a quarter of the residue of his estate by Mahomedan law. The brother of the deceased opposed her claim. It was held that the widow according to the custom and the entries made in the settlement *Wajib-ul-urz* had a life interest and was entitled to succeed and to inherit the entire moveable and immoveable property left by her deceased husband.[1] In *Mahammad Azmat* v. *Lalli Begum*[2] it was found that by the custom of a particular family widows were not allowed to inherit as sharers. This finding was accepted by the Chief Court of the Punjab and ultimately by the Privy Council. In several other cases the Chief Court of the Punjab has recognized as widely prevalent among Mahomedan landholders, as custom that widows should take, as by Hindu law, a life estate in the whole property instead of the specific portion which they would inherit absolutely according to the Mahomedan law.[3]

Joint family.

Markby J., said: "Where a Mahomedan family adopts the customs of Hindus, it may do so subject to any modification of those customs which the members may consider desirable."[4] It is not necessary to apply to a Mahomedan family living jointly all the rules and presumptions applicable to a joint Hindu family. In deciding such matters a Judge should see how far those rules and presumptions apply to each particular case. When the

[1] *Mahomed Riasat Ali* v. *Musst. Hasin Banu*, 20 I.A. 155 (1893): s.c. 21 Cal. 157. But see *Sarupi* v. *Mukh Ram* 2 N.W.P. 227 (1871).

[2] 8 Cal. 422 (1881).

[3] See Bulnois and Rattigan's Punjab Customary Law p. 97. See also Rattigan's Digest of Customary Law, p. 20, par 15, (6th Edn.).

[4] *Suddurtonessa* v. *Majada Khatoom*, 3 Cal. 694 p. 695 (1878).

members of a Mahomedan family live in commensality they do not form a "joint family," in the sense in which that expression is used with regard to Hindus. In Mahomedan law there is not, as there is in Hindu law, any presumption that the acquisitions of the several members are made for the benefit of the family jointly.[1] Where there was no allegation that by custom parties had adopted the Hindu law of property a Judge by applying to Mahomedans the presumption of Hindu law, cast the *onus* on the wrong party.[2]

Illegitimate son's right to hereditary office of *Choudharee* of Kulyan Prant in North Konkur.

The office of *Choudharee*,[3] like those of *Adhikaree* and *Kulkarnee*, is an hereditary one. The offspring of kept mistresses, whether in Hindu or Mahomedan families, are excluded from any share in *Wuttun* or hereditary office. In a claim by an illegitimate son of a Mahomedan to his father's sixth share of the family *Wuttun*, the office of *Choudharee* of Kulyan Prant in North Konkun, the defence pleaded that an illegitimate son had no title to succeed to such office and that the custom of the country was against such claim. The Zilla Judge dismissed the claim as contrary to the custom of the country. In appeal before the Sudder Adawlut the main grounds were that the case should have been decided by the principles of Mahomedan law, and that even the custom of the country did not warrant the exclusion of illegitimate offspring. The Court, after adverting to the fact that the offices in dispute were partly of Mussulman and partly of Hindu origin, and that the Konkun had been long freed from Mahomedan rule, since which the law that regulated these matters in former times has fallen into disuse and given place to the customs of the Hindus, observed that the evidence in the lower Court showed that succession to such property as that in dispute in the Konkun was confined to legitimate

[1] *Hakim Khan* v. *Gool Khan* 8 Cal. 826 (1882); *Rupchand Chowdhry* v. *Latu Chowdhury* 3 C.L.R. 97 doubted.

[2] *Abdool Adood* v. *Mahomed Makmil* 10 Cal. 562 (1884).

[3] Literally a holder of four shares or profits. Wilson's Glossary.

offspring, and the application of this rule by the lower Court in preference to the Mahomedan law was what was intended by the Regulations. The lower Court's order dismissing plaintiff's case was therefore affirmed.[1]

Office of *Sajjada-nashin* in Surat.

The expression *Sajjada-nashin* means the person who sits on the carpet on which prayers are offered.[2] He is not only a *mutawulli* but also a spiritual preceptor. He is the curator of the *dargah*[3] where his ancestor lies buried and in him is supposed to continue the spiritual line. It seems that a woman cannot be appointed to this office, nor a child of tender years. The mode in which a *sajjada-nashin* is appointed is described thus:—Upon the death of the last incumbent, generally at the time of what is called the *sium* or *teja* ceremony (performed on the third day after his decease) the *fakirs*, and *murids* of the *dargah* assisted by the heads of neighbouring *dargahs*, instal a competent person on the *gadi*; generally the person chosen is the son of the deceased, or somebody nominated by him, for his nomination is supposed to carry the guarantee that the nominee knows the precepts which he is to communicate to the disciples. In some instances the nomination takes the shape of a formal installation by the electoral body, so to speak, during the life-time of the incumbent. But in every case the person installed is supposed to be competent to initiate *murids* into the mysteries of the *tarikat* (the Holy Path).[4]

In *Sayad Abdulla Edrüs* v. *Sayad Zain Sayad Hasan Edrüs*[5] it was claimed by the plaintiff that the office of *sajjada-nashin* and *khilafat*, or deputyship held by the Edrus family, devolves on the eldest son only and that his

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Musst. Humeedoon Nisa v. *Ghoolam Mohoood Deen*, 2 Borr. 38 (1821).

[2] *Sajjada*, the carpet on which prayers are offered and *nashin*, the person seated thereon. See Ameer Ali's Mahomedan Law Vol. I p. 345.

[3] *Dargahs* are the tombs of celebrated *derrishes*, who in their lifetime were regarded as saints.—Ibid p. 345.

[4] Vide Ameer Ali's M. L. Vol. I p. 346; Herklot's Mahomedan Customs.

[5] 13 Bom. 555 pp. 562, 566 (1888).

younger brother had no right to it. He alleged that, according to the custom of the country, *Shareh* (the Mahomedan law) and family usage, and according to the deed of appointment given by his grandfather to his father, and by his father to him, the offices of *sajjada-nashin* and *khilafat* and *mutawulli* devolved on him alone as the eldest son and that it was his sole right to take possession of, and manage the shrines and the *wakf* property. Mr. Justice Parsons, after examining the past history of the *sajjada-nashinship* in question, found that there had been from the founder to the father of the parties no less than twenty-seven holders of the office; eight of these were only sons, fourteen were eldest sons, and five were other than eldest sons. Such a course of devolution did not certainly sustain the contention of the plaintiff, that there was any right in the eldest son alone to succeed to the office of *sajjada-nashin*. The custom claimed that the eldest son succeeds by virtue of inheritance, being opposed to the general law, must be supported by strict evidence. But as there was no such evidence, the alleged custom was held to be not proved. In the result the younger son who was in possession of the office by reason of an appointment by his father at a date subsequent to the plaintiff's appointment, and after the father had revoked his appointment in favour of the plaintiff, was maintained in his office by the order of the High Court.

In the case of *Sayad Muhammad* v. *Fateh Muhammad*[1] the principal question was whether the recently deceased *sajjada-nashin* who managed the institution had the right of appointing in his life-time a person to be his successor, who might be chosen by him from among the founder's kindred excluding another nearer kinsman upon whom the headship and management would otherwise have devolved. The *sajjada-nashin* or headship in question was

[1] 22 I. A. 4 (1894) : s.c. 22 Cal. 324.

of an ancient *Khangah*, or Mahomedan religious establishment, at Pak Patan in the Montgomery district in Oudh. The Privy Council said that the question was to be determined by the evidence applicable to custom, and they were of opinion that the evidence overwhelmingly established the right of the *diwan* or the *sajjada nashin* to appoint his successor in his lifetime within certain limits, within which limits the plaintiff was, inasmuch as he was both an agnate and a worshipper.

Moslem converts.

The leading case on the subject of the succession of converted Hindus is *Abraham* v. *Abraham*[1] where it has been laid down that though, by the fact of his conversion, Hindu law ceases to have any binding force upon the convert, yet it does not necessarily involve a complete change in the relations of the convert in the matter of his rights and interests, and his power over property. The convert, though not bound by Hindu law, may, by his course of conduct after conversion, show by what law he intended to be governed as to these matters'. This case related to Native Christians among whom certain classes strictly retain their old Hindu usages, others retain their usages in a modified form, and others again wholly abandon those usages. The Christian convert could, before the Indian Succession Act was passed, elect to attach himself to any one of these particular classes, and he would have been governed by the usage of the class to which he so attached himself. The case of *Jowala Buksh* v *Dharum Singh*[2] has laid down that a single family cannot make a special customary law for itself.

The principles which govern the case of Hindu converts to Christianity have been applied to the case of Hindu converts to Mahomedanism in the Bombay Presidency, such as the Khojas and Cutchi Memons with whose customs and usages we shall deal later on. Sir Erskine Perry's famous decisions in these cases have been followed in

[1] 9 Moo. I.A 195 (1863). [2] 10 Moo. I.A. 511 (1866).

numerous other cases[1] and the principles laid down in these decisions, as summarised by their Lordships in *Bai Baiji* v *Bai Santok*,[2] are as follows:—

(i) "That though Mahomedan law generally governs converts to that faith from the Hindu religion, yet (ii) a well established custom of such converts following the Hindu law of inheritance would override the general presumption; (iii) that this custom should be confined strictly to cases of succession and inheritance; (iv) that, if any particular usage, at variance with the general Hindu law, applicable to these communities in matters of succession, be alleged to exist, the burden of proof lies on the party alleging such special custom." These principles may now be regarded as settled and they govern the presumptions of law.

If evidence is given as to general prevalence of Hindu rules of succession in a Mahomedan community in preference to the rules of Mahomedan law, the burden of proof is discharged, and it then rests with the party, disputing the particular Hindu usage in question, to show that it is excluded from the sphere of the proved general usage of the community.[3] It is a well known principle of law in India, that when a Hindu is converted to Christianity or Mahomedanism, the conversion does not of necessity, involve any change of the rights or relations of the convert in matters with which Christianity or Mahomedanism has no concern, such as his rights and interests in, and his powers over, property.[4] In *Laslings* v *Gonsalves*[5] where the parties were Native Christains, the Bombay Court, following the previous cases, laid down that, where, in consequence

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[1] *Jowala Buksh* v. *Dharum Singh*, 10 Moore's I.A. 511 (1866); *Mahomed Sidick* v *Haji Ahmed*: *Abdulla Haji Abdastar* v *Haji Ahmed*, 10 Bom. 1 (1885); *Pannusami Nadan* v *Dora Sami Ayyan*, 2 Mad. 209 (1880). *Bai Baiji* v *Bai Santok*, 20 Bom. 53 (1894), and a number of cases mentioned therein.

[2] 20 Bom. 53 (1894).

[3] *Bai Baiji* v. *Bai Santok* 20 Bom. 53 (1894) See *Abdul Kader Haji Mahomed* v. *C.A. Turner* 9 Bom. 158 p. 162 (1884).

[4] *Abraham* v. *Abraham*, 9 Moo. 195 (1863).

[5] 23 Bom. 539 (1899).

of the conversion of a person from one form of religion to another, the question arises as to the law to be applied to such person, that question is to be determined not by ascertaining the law which was applicable to such person prior to the conversion, but by ascertaining the law or custom of the class to which the person attached himself after conversion, and by which he preferred that his succession should be governed.

The general presumption, arising from the intimate connection between law and religion in the Mahomedan faith, is that the Mahomedan law governs converts from the Hindu religion to Mahomedanism. But a well-established custom in the case of such converts who follow their old Hindu law of inheritance would override the general presumption, and a usage establishing a special rule of inheritance as regards a special kind of property would be given the force of law, even though it be at variance with both Hindu and Mahomedan law.[1]

In the case of *Jowala Buksh*,[2] already referred to, the plaintiffs, (originally Rajpoot descendants but, subsequently, converts to Islamism) treated the case on the assumption, which they seemed to have made part of their case, that the family though converted to Mahomedanism was to be taken as still conforming to the Hindu law and usages, and that consequently the questions of title raised were to be governed by Hindu law. The Judicial Committee, however, said that they were far from admitting the correctness of that assumption. This case was distinguishable from *Abraham* v. *Abraham*,[3] where a Hindu became a Christian, who, as such, had no law of inheritance defined by statute and, in the absence of such law, was governed by the law by which that particular family intended to be governed; but the written law of India prescribed broadly that in questions of inheritance

[1] *Mahomed Sidick* v *Haji Ahmed*, 10 Bom. 1 (1885).

[2] 10 Moo. I.A. 511 (1866).

[3] 9 Moo. I.A. 195 (1863).

and succession the Hindu law is to be applied to Hindus and the Mahomedan law to the Mahomedans, and this, according to the principle laid down in the above case, not only holds good when they are Hindus or Mahomedans by birth but also by religion.

As to whether a Hindu family, converted to Mahomedanism but conforming for several generations to Hindu customs and usages, can by virtue of that retention of Hindu customs and usages set up for itself a special customary law of inheritance, see *infra*.

Usury.

The custom of taking interest as between Mahomedans is recognized by the Courts. Mr. Justice Phear, in *Mia Khan* v *Bibijan*, dissented from *Ram Lal Mookerjee*[1] v. *Haran Chunder Dhur*[2] and held that Act XXVIII of 1855 (the Usury Act) had repealed the Mahomedan laws relating to usury. His Lordship was of opinion that by "laws relating to usury" the legislature meant laws affecting the rate of interest. Mr. Harrington in his Analysis,[3] after remarking that the Mahomedan law forbids the taking of interest for the use of money upon loans from one Mussulman to another, and that the Hindu law permits interest to be taken at prescribed rates only, goes on to say:—"The Hindu legislators have expressly sanctioned, and the Mussulman Government of India appear to have tolerated directly or indirectly, the customary interest of the country which in the plan for the administration of justice proposed by the Committee of Circuit in 1772 is stated to have amounted to the most exhorbitant usury. It would seem that for a considerable time past, the prohibition of the Koran and the Hedaya against the taking of interest have been ignored and have ceased to have any legal force in our courts of justice." *Mia Khan's* case was approved by a Full Bench of the N. W. P. High Court,

[1] 5 B.L.R. 500 (1870); s.c. 14 W.R. 308.

[2] 3 B.L.R. 130 (1869).

[3] Vide Vol I. p. 128. See also 5 B. L. R. p. 507.

which laid down that section 2 of Act XXVIII of 1855 was the law applicable, to suits on contracts whereby interest was recoverable, and that it applied to such contracts indiscriminately of the creed of the contracting parties.[1]

Religious endowments

It is said over and over again in the law books, that no right of inheritance can attach to an endowment. It is by appointment that one officer succeeds to another appointment either by the original appropriator, or by his successor or executor, or by the superintendent for the time being, or failing all these, by the ruling power.[2] Where property has been devoted exclusively to religious and charitable purposes, the determination of the question of succession depends upon the rules which the founder of the endowment may have established whether such rules are defined by writing or are to be inferred from evidence of usage. Where, so far as the will of the founder can be ascertained from the usage of former days, it seemed to authorize a mode of succession originating in an appointment by the incumbent of a successor, the Court would not be authorized to find in favour of any rule of succession by primogeniture solely from the circumstances that the persons appointed were usually the eldest sons.[3]

In determining whether a disposition of property made by a Mahomedan is or is not valid the intention of the *wakif* may be interpreted by reference to the custom prevailing at the time the *wakf* was made; and if there is found to be a substantial dedication of the property dealt with to

[1] *Kuar Lachman Singh* v *Pirbhu Lal* 6 N.W.P. H.C.R. 308 (F.B.) [1874]. See *Surjya Narain Singh* v *Sirdhary Lall* 9 Cal. 825 (1883).

[2] See Macnaghten Chap. on Endowments. §§ 5, 6; his Precedents of Endowment cases IX and X and in Appendix No. 52. See also *Sayad Abdula Edrus* v. *Sayad Zain Sayad Hosan Edrus*, 13 Bom. 555 p. 561 (1888) for other authorities mentioned therein.

[3] *Shah Gulam Rahumatullah Saheb* v. *Mahommed Akbar Sahib* 8 Mad. H. C. R. 63 (1875); see *Sayad Abdula Edrus* v. *Sayad Zain Sayad Hosan Edrus*, 13 Bom. 555 (1888). See Sajjadanashin *supra*.

charitable uses, that dedication will constitute a valid *wakf*.[1]

In the district of Broach, the mortgage of *wakf* land, or land left as a religious endowment, is permissible by local custom, though such practice is contrary to Mahomedan law.[2] Similarly in Surat a sale of a *wakf* by custom is allowed.[3] A custom may sanction *wakf* of moveables.[4]

Mutawulli.

A female may be a *mutawulli* of an endowment; so may a non-Mahomedan. But if the endowment be for the purpose of divine worship, neither females nor non-Mahomedans are competent to act in that capacity.[5] The custom that the office of *mutawulli* should be hereditary must be strictly proved, as it is opposed to the general Mahomedan law.[6]

Fisabilillah wakf in the Chittagong district.

The Privy Council, in the case of *Mahomed Ahsanulla Chowdhry* v. *Amar Chand Kundu*,[7] held that although an instrument purporting to dedicate property as "*fisabilillah wakf*"[8] and vesting it in members of the grantor's family in succession "to carry on the affairs in connection with the *wakf*," might include provisions for the benefit of the grantor's family without its operation being annulled, yet, on the other hand, it would not operate to establish a *wakf* as it did not devote a substantial part of the *property* to religious or charitable purposes. The mere use of the expressions "*fisabilillah wakf*" and similar terms in the outset of the deed is not sufficient to establish a *wakf*. It may be a veil to cover arrangements for the aggrandise-

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[1] *Phulchand* v. *Akbar Yar Khan* 19 All. 211 (1896).

[2] *Abas Ali Zenul Abaddin* v. *Ghulam Muhammad*, 1 Bom. H.C.R. 36 (1863).

[3] *Fatima Beebee* v. *Moolla Abdool Futteh* 1 Borr. 124 (1810).

[4] Wilson's A.M.L. 339 (3rd Edn.). See *Kulsom Bibee* v. *Golam Hossin Cassim Ariff* 10 C. W. N. 449 (1905).

[5] Wilson's A.M.L. 337 (3rd. Edn).

[6] *Sayad Abdula Edrus* v. *Sayad Zain Sayad Hosan Edrus* 13 Bom. 555, (1888)

[7] 17 Cal. 498 P.C. (1889).

[8] *Fi*, in, *sabil*, way, *Illah*, God, *i.e.* In the name of God.

ment of the family and to make their property inalienable. And the gift in question is not a *bonâ fide* dedication of the property.

Public worship in a Mosque. "Ameen" "Rafadain."

If, among the Sunni Mahomedans, the *Imam* of a Mosque pronounces "Ameen" in a loud instead of a low voice, and performs "Rafadain,"—a ceremonial gesture of raising the hands to the ears at a particular point of the service,—that will not be such an important departure from custom as to disqualify him from acting in the Mosque where those ceremonies have not previously been used. There is no general express rule of Mahomedan law, nor any usage among the Sunni communities regulating the tone of voice in pronouncing "Ameen," or forbidding the pronouncement of "Ameen" in a loud tone, or the performance of "Rafadain" during the service. Such practices would not justify a section of the worshippers in setting up another leader of prayer at the same time that the prayer was being conducted by the duly authorized *Imam*.

There is no rule of law which declares that, when public worship has been performed in a certain way for twenty years, there cannot be any variation, however slight, from that method. The question in case of dispute must be as to the magnitude and importance of the alleged departure.[1] The Court ought not to declare that the *imam* or *mutawullis* of the Musjid have authority to eject the dissentients if and when they interfere.[2]

The Sunnis follow the four Imams, who appear to agree in placing the sources of their law in the following order:—1. The *Koran*; 2. The *Hadis*, or traditions handed down from the Prophet; 3. *Ijma*, or concordance among the followers; and 4. *Kias*, or private judgment. Beyond that the four differ in many details, including the loud "Ameen" and the "Rafadain." No Imam can follow all

[1] *Fazil Karim* v. *Maula Buksh*, 18 Cal. 448 (P.C.) [1891].

[2] *Ibid.*

four in everything. But the followers of any are equally orthodox Sunnis. There is nothing in the above authorities to show that the Sunnis of the School of Abu Hanifa would do wrong in following a practice recommended by others of the four Imams.[1]

Saleability of religious offices: custom.

A Mahomedan office to which are attached substantially the conduct of religious worship and the performance of religious duties, is not legally saleable, any custom to the contrary notwithstanding. In *Sarkum Abu Torab Abdul Waheb* v. *Rahaman Buksh*,[2] plaintiffs prayed for a decree declaring them to be the *khadims* of a certain *dargah* and as such to be entilted to perform the duties attached to that office for certain days in each month, and during the period to receive the offerings (*nazar-niaz*) made by worshippers at the *dargah*. They claimed their *khadimi* rights partly by inheritance and partly by purchase. They also alleged that for a long time the transferability of the *khadimi* rights by sale had been recognized. Dealing with the question of transferability of such office their Lordships observed: "We very much doubt whether a custom or practice sanctioning the sale of a religious office for the pecuniary benefit, or for the private debts, of the incumbent could under any circumstances be sustained, and we may refer in this connection to what was said by the Privy Council in the case of *Rajah Vurmah Valia* v. *Ravi Vurmah Mutha*."[3] The Court however did not decide the question, firstly as the custom was not set up; secondly as the evidence in support of the alleged custom or practice was insufficient.

Graveyard.

With regard to the rights of a Mahomedan community to perform their religious ceremonies according to their customs and religion in a graveyard, disused for a number of years, but retaining its character as such, even when

[1] *Ibid* pp. 454, 455. See *Ramzon* 7 All. 461 (F. B.) [1885] which was a criminal case.

[2] 24 Cal. 83 (1896)

[3] 4 I.A. 76 (1876): s.c. 1 Mad 235. See also *Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai*, 1 I A. 209 (1874).

such land has been sold to another person, Fulton J., said:—"By the custom of the country founded on a sentiment which may almost be described as universal, the ground in which human remains are interred is regarded as for ever sacred. The members of the families of the dead are in the habit of performing certain religious services at their tombs. The ownership of the soil may be vested in others, but the permission to bury in the land, granted, as it must be, subject to the custom of the community, carries with it the right to perform all customary rites." The purchaser of this disused graveyard, who began the foundations of a house thereon, was restrained by an order of the Court from further interference with the land. In this case the Court followed Regulation IV of 1827, section 26, which requires Courts to decide according to the usage of the country.[1]

Burial Right.

Where a certain section of the Mahomedan community had been for many years in the habit of burying their dead near a *dargah* in plaintiff's land, and the plaintiff sued for an injunction restraining them from exercising this right in future, it was held that the right of burial claimed by the defendants was not an easement, but a customary right, which, being confined to a limited class of persons and a limited area of land, was sufficiently certain and reasonable to be recognized as a valid local custom.[2] In considering the objection whether this custom of burial can be disallowed as unreasonable Fulton J., said:—"Amongst all races that bury their dead, this right of burial in a particular locality is one that is most dearly prized, and although the plaintiff's land may be rendered practically useless, if these tombs are multiplied exceedingly, the contingency seems too distant to justify the Courts in summarily putting an end to the right. In *Hall* v. *Nottingham*[3] the possibility that the custom there set up

[1] *Ramrao Narayan Bellary* v. *Rustumkhan* 26 Bom. 198 (1901).
[2] *Mohidin* v. *Shivlingappa*, 23 Bom. 666 (1899).
[3] 1 Ex. D. 1. (1875)

might have the effect of taking away from the owner of the freehold the whole use and enjoyment of his property was not thought a sufficient ground for disallowing it. If a custom which allows all lawful games to be played on another person's land at all times of the year is not an unreasonable custom, it seems impossible to hold that the limited custom established by the defendants is bad. The criterion of 'reasonableness' by which the case of *Lutchmeeput Singh* v. *Sadaulla Nushyo*[1] was decided may have been a good one as regards the alleged right of an indefinite number of persons to fish in the Bhils of a private owner; but it cannot be extended as a matter of law to all customs; for, as shown in *Hall* v. *Nottingham* a custom may be good though its exercise may have the effect of depriving the owner of the soil of the whole use and enjoyment of his property."[2] Accordingly his Lordship held that the defendants were entitled to claim for a limited class the right of burial in one corner of a field near a *dargah*. The mere possibility that after many years the number of tombs might have increased so much as to deprive the owner of the use of his field or of a large portion of it, was too remote to describe as unreasonable the custom in dispute.

Dower.

By Mahomedan Law dower is usually of the nature of a debt, and is claimable before the inheritance can be divided.[3] A customary dower must be proved by showing a custom of the women of the wife's family to receive, rather than of the men of the husband's family to pay, a certain dower, the Mahomedan dower being the consideration paid by the bridegroom for the marriage, and therefore regulated by the position and conduct of the bride, especially as Mahomedan men often contract most unequal marriages though the means and position of the bridegroom must

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[1] 9 Cal. 698 (1882).

[2] 23 Bom. p. 671.

[3] *Syud Fuzul-ul Rahman* v. *Beebee Badlan* 2 Sevestre 665 (1863).

not altogether be excluded from consideration. A verbal contract of dower for a large sum is admissible only when proved by most clear and satisfactory evidence.[1] Where the son relinquished his share in his late father's estate in satisfaction of his mother's claim for unpaid dower, the mother would take the whole estate subject to the claims of other creditors; for such relinquishment of his share by the son would be *prima facie* absolute. It cannot be said that the son gave up for only the life of his mother, retaining the legal reversion in himself. The Privy Council was of opinion that the creation of such a life estate did not seem to be consistent with the Mahomedan usage, and where such a case was urged there ought to be very clear proof of so unusual a transaction.[2]

The claim of a Mahomedan widow to hold the property of her deceased husband to satisfy her dower cannot be founded upon an original hypothecation of the estate for her dower—for such a right does not arise by the Mahomedan law as a consequence of the gift of dower. The right of a widow in possession is not a lien in the strict sense of the term, although it was so stated in *Ahmed Hossein* v. *Musst. Khodeejee*.[3] Her right is founded on her power as a creditor for her dower to hold the property of her husband of which she has lawfully, and without force or fraud obtained possession, until her debt is satisfied with the liability to account to those entitled to the property subject to the claim for the profits received.[4] The fact of marriage with a second wife of low status on whom an exceptionally large dower was settled, is not conclusive evidence in

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[1] *Shah Nujumooddeen Ahmed* v. *Beebee Hosseinee* 4 W.R. 110 (1865); S.C. 8 Seves. Part I 573: S.C. Wyman 48; *Hassuna* v *Hushumtoonissa* 4 Wyman 9 (1867).

[2] *Humeeda* v *Budlun* 17 W.R. 525 (1872): S.C. in H.C. 2 Seves. 665 (1863).

[3] 10 W.R. 368 (1868).

[4] *Beebee Bachun* v. *Sheik Hamid Hossien*, 17 W.R. 113 (P.C.) [1871]. See also *Ameroon Nissa* v *Moorodoon-Nissa*, 6 Moo I.A. 211 (1855).

support of a large claim for dower on behalf of the first wife—albeit she had some status.[1]

Prompt and deferred dower.

Under the Mahomedan law, if a wife's dower is "prompt" she is entitled, when her husband sues her to enforce his conjugal rights, to refuse to cohabit with him, until he has paid her dower, notwithstanding that she may have left his house without demanding her dower, and only demands it when he sues, and notwithstanding also that she and her husband have already cohabited with consent since their marriage.[2] When, at the time of marriage, the payment of dower has not been stipulated to be "deferred," payment of a portion of the dower must be considered "prompt." The amount of such portion is to be determined with reference to a custom. Where there is no custom, it must be determined by the Court, with reference to the status of the wife and the amount of the dower.[3] Where a Court following this rule, determined that one-fifth only of a dower of Rs. 5,000, not stipulated to be "deferred," must be considered "prompt", inasmuch as the wife had been a prostitute, and came of a family of prostitutes, it exercised its discretion soundly.[4]

In the absense of specification of dower, the Court to determine its nature.

In *Taufik-un-nissa* v. *Ghulam Kambar*[5] at the time of the marriage it was not specified whether the dower was prompt or deferred. The plaintiff claimed the entire amount exigible as prompt dower on demand though she claimed in the suit a portion. The defendant contended that in the absence of specification by the custom of the place (Budaün) the entire dower was to be considered as deferred. The lower Court accordingly dismissed the claim of the plaintiff, with referrence to what it held to be the custom. The High Court, however, following *Eidan* v.

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[1] *Hossuna* v. *Hushumtoonissa*, 4 Wyman 9 (1867).

[2] *Eidan* v. *Mazhar Husain*, 1 All. 483 (1877). Followed *Abdool Shukkoor* v. *Roheemoonnissa* N.W. P. H.C.R. 94 (1874).

[3] *Eidan* v. *Mazhar Husain* 1 All. 483 (1877).

[4] Ibid.

[5] 1 All 506 (1877).

Mazhar Husain[1] and another unreported case[2] mentioned in the judgment, observed thus: "When nothing has been said as to the character of dower, the Court may determine the amount to be considered prompt with reference to the position of the woman and the amount of the dower named in the contract, taking into consideration at the same time what is customary. The reference to custom appears to be in respect of the proportion to be held as prompt and does not appear to have been contemplated to refer to custom to decide whether or not the entire dower should be deferred."

Extravagant dower: Court's discretion.

In the case of the *Collector of Moradabad* v. *Harbans Singh*,[3] in confirming a decree for an extravagant amount of dower (which in this case amounted to more than a crore and a quarter of Rupees nearly) the learned Judges observed: "We cannot but regret that the Courts in these Provinces have not been vested by the Legislature with the discretion which has been conferred on the Courts in Oudh by section 5 of Act No. XVIII of 1876, to award to a Mahomedan lady only so much of the stipulated amount of dower as the Court may consider 'reasonable with reference to the means of the husband and the status of the wife.'"

Where a Mahomedan, a resident in Patna, married the plaintiff while he was for a time in Lucknow where she lived, and on his death, the plaintiff (his widow) claimed to recover from his estate her deferred dower for Rs. 50,000, and where the High Court of Calcutta in reversing the decree of the Subordinate Judge for the full amount decreed for Rs. 5000 only, the Privy Council agreeing with the Subordinate Judge said that the usages and customs of Oudh, rendering dower reducible in certain cases by the Court, did not apply to this case, and that the place of celebration of marriage, which was in this case in Oudh, did not make them applicable.[4]

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[1] 1 All 483 (1877).

[2] *Habib-un-nissa* v. *Nizam-ud-din* decided 31*st* July, 1877.

[3] 21 All. 17 (1898).

[4] *Zakeri Begum* v. *Sakina Begum* 19 I.A 157.(1892); s.c. 19 Cal. 689.

Divorce : *tilaq* or *khola*

Under the Mahomedan law a husband has the right to divorce his wife. Amongst the Khojas that right is limited by the necessity of obtaining the consent of his *jamat* according to the custom of the community.[1] Divorce may be made in either of two forms—*tilaq* or *khola*. A divorce by *tilaq* is the arbitrary act of the husband, subject to repayment of her dowry and the relinquishment of any jewels or paraphernalia belonging to her. According to usage it is not complete and irrevocable by a *single* declaration of the husband. A divorce by *khola* is a divorce with the consent and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her release from the marriage tie ; and it is *at once* complete and irrevocable from the moment when the husband repudiates the wife and the separation takes place. But seclusion of the wife for a period of some months in both forms of divorce is observed, in order that it may be seen whether she is *enceinte* by her husband, and she is entitled to a sum of money from her husband, called *iddat* for her maintenance.[2]

An order by a Magistrate directing a Mahomedan husband to pay a sum monthly for the maintenance of his wife, does not deprive such husband of his inherent right to divorce his wife, and after such divorce the Magistrate's orders can no longer be enforced.[3] But even after divorce, the maintenance order will have operative force till the expiration of *iddat*.[4]

Kazi : his office and appointment.

In the absence of an established local custom to that effect the office of *kazi*[5] is not hereditary. The enactment

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[1] *Kasam Pirbhai* 8 Bom. H.C.R. Cr. Ca. 95 (1871). *Suleman Varsi* 1 Bom. L. R. 346 (1899).

[2] *Buzl-ul-Raheem* v. *Luteefutoonnissa*, 7 Sevestre 251 (P.C.) [1856].

[3] *Kasam Pirbhai* 8 Bom. H.C.R. Cr. Ca. 95 (1871). *Abdur Rohoman* v. *Sakhina* 5 Cal 558 (1879) ; *Abdul Ali Ishmailji* 7 Bom. 180 (1883) ; *Suleman Varsi* 1 Bmo. L.R. 346 (1899).

[4] *Din Muhammad* 5 All. 226 (1882) ; *Shah Abu Ilyas* v. *Ulfa Bibi* 19 All. 50 (F.B.) [1896] ; over-rules *Mohbubon* 15 All. 143 (1893).

[5] *Kazi*.—A Mahomedan Judge, an officer formerly appointed by

of Bombay Regulation XXVI of 1827 was adverse to any supposition that the office of *kazi* could be hereditary. The repeal of that Regulation by Act XI of 1864 left the Mahomedan law as it stood before the passing of the Regulation; and that law sanctions no grant of such office to a man and his heirs.[1] The appointment of *kazi* lies exclusively with the Sovereign, or other chief executive officer of the state, and ought to be made with the greatest circumspection with regard to the fitness of the individual appointed; and though the Sovereign may have full power to make the *vatan* attached to the office of *kazi* hereditary, yet he has, under the Mahomedan law, no power to make the office itself so.[2] In another case where a *sunnad* granted by the Emperor Aurangzib in 1693 did not purport to confer a hereditary *kazishíp*, but was a grant of the office of *kazi* personally to an ancestor of the plaintiff, the Court held that the subsequent recognitions or appointments of members of his family as *kazis* by native Governments did not prove that the office was or could be made hereditary.[3]

Kharwa community of Broach.

The Mussulman Kharwa community of Broach formed a caste by themselves. They were originally Hindus, but turned Mahomedans several years ago, retaining many traces of Hindu manners and customs. They possess the institution of caste, their Panch and their regulation of

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the Government to administer both civil and criminal law, chiefly in towns, according to the principles of the Koran; under the British authorities the judicial functions of the *kazis* in that capacity ceased, and with the exception of their employment as the legal advisers of the Courts in cases of Mahomedan law, the duties of these stationed in the cities or districts were confined to the preparation and attestation of deeds of conveyance and other legal instruments, and the general superintendence and legalization of the ceremonies of marriage, funerals, and other domestic occurrences among the Mahomedans. Beng. Reg. XXXIX 1793. See Wilson's Glossary.

[1] *Jamal* v. *Jamal* 1 Bom. 633 (1877); *Daudsha* v. *Ishmalsha* 3 Bom. 72 (1878).

[2] *Jamal* v. *Jamal* 1 Bom 633 (1877).

[3] *Daudsha* v. *Ishmalsha* 3 Bom. 72 (1878).

social and domestic matters by the rules framed and resolutions passed by the members as a body—a system in vogue from very ancient times among Hindus. In a suit for restitution of conjugal rights, the parties were members of the Kharwa community at the time of the marriage. Subsequently the plaintiff-husband was ex-communicated from the caste, thereupon the wife left her husband's protection and went to the house of her father. In defence she contended that she could not be compelled by the Court to go and live with her husband before he was re-admitted into the caste. The Court, upholding her contention, held that "at the time of the marriage she was not only Mahomedan by faith but also a member of the Kharwa community. Occupying that *status* she married the husband. Under these circumstances it was of the essence of the marriage contract that they married because they were members of that particular community and they must be regarded as having entered into the matrimonial relation on the basis of that status."[1]

Caste question among Mahomedans.

Referring to the case of *Abdul Kadir* v. *Dharma*[2] Chandavarkar J., said that "there may be a community among Mahomedans, having its own usages and forming a caste within the meaning of Bombay Regulation II of 1827. That is a distinct recognition by this Court of the existence and legal validity of the institution of caste, in some form or other, among Mahomedans. If a Mahomedan belonging to such community or caste marries a woman also belonging to it, the contract must be presumed, in the absence of evidence to the contrary, to have been entered into upon the faith that, as both are Mahomedans of that caste, both shall continue as such so long as they live as husband and wife."[3] In *Abdul Kadir* v. *Dharma* the Court also held that the term "caste" in section 21 of Regulation II of 1827 was not necessarily confined to Hindus but comprised any

[1] *Bai Jina* v. *Kharwa Jina Kalia* 31 Bom. 366 (1907).

[2] 20 Bom. 190 (1895).

[3] Vide *Bai Jina* v. *Kharwa Jina Kalia* 31 Bom. 366 p. 371 (1907.)

well-defined native community governed for certain internal purposes by its own rules and regulations.

Suni Borohs in Gujarat.

Suni Borohs in the Northern part of Gujarat were originally Rajpoots and were converted to Mahomedanism some centuries ago. In matters of succession and inheritance they are governed by the Hindu law. In *Bai Baiji* v. *Bai Santok*[1] where the parties were members of the Boroh community of Ranpur, in the Dhandhuka Taluka, it was held that a widow in this community is entitled to succeed to her husband's estate to the exclusion of a daughter or a step daughter.

Molesalam Girasias in Broach.

Similarly Molesalam Girasias of Broach, who were originally Rajpoot Hindus but became Mahomedans several centuries ago, are governed by Hindu law in matters of inheritance and succession. In *Maharana Shri Fatesangji Jasvatsangji* v. *Kuvar Harisangji Fatesangji*[2] the plaintiff was the second son of the defendant, who was the Thakoor of Amod, a talukdari estate of the nature of an impartible Raj or Principality. The plaintiff's family belonged to the community of Molesalam Girasias. The plaintiff alleged that the Molesalam Girasias followed the Hindu law and custom in matters of inheritance and partition, and that as the estate was impartible, he, as a second son, of his father, who was the holder of the *gadi*, was entitled by ancient family custom to receive *khoraki-poshaki* (maintenance) suitable to his father's rank and means and also to receive special contributions on occasions of death and birth ceremonies in his family. The High Court found in favour of the plaintiff observing thus: "Taking all these circumstances into account, it cannot be maintained that any special custom derogatory to the general law has been established by which a Thakoor in possession of an impartible *Raj* is absolved from the obligation of providing maintenance to his second son."[3]

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[1] 20 Bom. 53 (1894).
[2] 20 Bom. 181 (1894).
[3] Ibid p. 188.

A *ghair kuf*[1] wife is one who is her husband's social inferior. According to some a marriage is *ghair kuf* which takes place between persons whose families have not previously intermarried. A custom, based upon the *Wajib-ul-urz*, to exclude a *ghair kuf* wife and her daughter was alleged in the case of *Sheikh Hub Ali* v. *Wazir-un-nissa*.[2] The wife, a Mahomedan lady, brought a suit to recover possession, as her husband's heir, of his immoveable property. Her claim was opposed on the ground that she was a *ghair kuf* woman and that she and her daughter were therefore, by custom, excluded from inheritance. Apart from the *Wajib-ul-urz* there was absolutely no evidence of any custom on the subject. The only reliable evidence of custom was the village *Wajib-ul-urz*, which, under the heading "transfer of property and right of inheritance" said—"A married wife belonging to a (*ghair kuf*) different caste, and an unmarried wife, or their descendants will, provided they bear good conduct, be entitled to maintenance according to their status; and they will not be entitled to any share whether the property be partitioned or unpartitioned." This document bore the signature, amongst others, of the husband, and commenced with words meaning "by agreement", and so it did not purport to be a record of immemorial custom. The rules of inheritance laid down in it were based not upon Mahomedan but upon Hindu law. Their Lordships held that in the absence of other evidence the entry in the *Wajib-ul-urz* was insufficient to establish the custom.

Ghair kuf wife: custom of exclusion from succession.

The Abhans, who appear to be Mahomedans, have several customs of their own. According to the tribal custom, where a gift is made by way of maintenance it is a gift resumable by the grantor. Such a right to re-

Abhans.

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[1] *Kuf* in Arabic denotes equality and a *ghair kuf* wife is one who is her husband's social inferior.

[2] 33 I. A. 107 (906): s. c. 28 All. 496: s. c. 10 C. W. N. 778.

sumptions by tribal custom has been found to exist by the Privy Council.[1]

Kanchans of Delhi : succession.

Among Kanchans in the district of Delhi the business of brothel-keeping and prostitution is carried on by families or communities who are recruited by adoption. On the death of a woman of this tribe leaving a substantial property her several heirs claimed it. The contest lay between the two sisters claiming customary shares, the two brothers claiming shares by common law, and the third sister contending that none of her father's family had any claim at all. The Privy Council held that certain customs of the Kanchans, which aim at the continuance of prostitution as a family business, are contrary to Mahomedan law, immoral and not enforceable. A Mahomedan woman who is adopted according to one of such customs by the head of a Kanchan brothel is not thereby severed from her family; her property, however acquired, will at her death devolve according to Mahomedan law. Whether she acquires by her adoption any legal rights in the property of the brothel is doubted.[2]

Bhagdari lands in Broach :

There is a custom with reference to lands in the Broach district on the *bhagdari* tenure by virtue of which male first cousins, sons of a paternal uncle, inherit such lands in preference to daughters and sisters among Mahomedans.[3] In a certain case in point a special custom was alleged regulating the succession to *bhagdari* lands in the Collectorate of Broach to the effect that on the death of a *bhagdar*, whether Hindu or Mahomedan, without male issue, his nearest 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. The custom alleged

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[1] *Najban Bibi* v. *Chand Bibi*, 10 I. A. 133 (1883) : s.c. 10 Cal. 238.

[2] *Ghaziti* and *Nanhi Jan* v. *Umrao Jan*, 20 I. A. 193 (1893) : s. c. 21 Cal. 149.

[3] *Bai Kheda* v. *Dasu Sale* 5 Bom. H. C. R. A.C.J 123 (1868).

was held to have been sufficiently proved.[1] Birdwood J., observed:—"Having regard, therefore, to the foregoing considerations, we should be inclined to recognize the custom in any *bhagdari* village in the Broach Collectorate whenever the party relying on it was able to give specific instances of its continuance in other similar adjacent villages, if not in the particular village itself, though it would always be more satisfactory if he could do this, and whenever the opposite party could not or did not prove the adoption of some other custom or of ordinary rules of inheritance in the particular village, or failing such proof, the general prevalence of such rules or such opposing custom in other similar adjacent villages."[2]

Whether males sprung of male relatives of a deceased *bhagdar* have priority over males sprung of female relatives of the same was not decided. Nor was the question whether a daughter or sister of a deceased *bhagdar* is excluded, by the custom, from the line of inheritance, or would, on failure of male relations, succeed to the *bhagdari* lands. His Lordship towards the end of the judgment said:—"We are not to be understood as holding that a daughter or sister is wholly excluded by the custom from the lien of inheritance, *i.e.*, that, if there were not any male relatives of the deceased *bhagdar*, his *bhag* would escheat to the Crown rather than descend upon his daughter or sister."[3]

Cutchi Memons.

Sir Erskine Perry has described the Memons thus:—"The Memons were originally, and still are, seated in Cutch from which they have spread themselves into many of the adjoining countries in Western India, and by their own account, even into Malabar and Bengal. By their traditions they were originally Loannas, a Hindu commercial caste in Cutch; but they are not able, and no records are

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Pranjivan Dayaram v. *Bai Reva* 5 Bom. 482 (1881).

[2] Ibid 490.

[3] Ibid 492.

forthcoming, to indicate the period of their conversion, although there is every reason to believe it must have been some hundreds of years ago. They may be characterized as being more orthodox Mahomedans than the Khojas, and in being in every way their superiors, so far as wealth, numbers and learning are concerned. They make pilgrimmage to Mecca, which is unknown amongst the Khojas; and a branch of the caste, the Hala Memons, who are settled in Kathiwar, are said to observe every portion of the Mahomedan law, including the injunctions as to the division of an inheritance."[1]

In *Rahimathae* v. *Haji Jussap*[2] it was held that if a custom, as to succession, was found to prevail amongst a sect of Mahomedans and to be valid in other respects, the Court would give effect to it, although it differed from the rule of succession laid down in the Koran. The parties in the case were Cutchi Memons and daughters sued for their shares in their paternal estates in accordance with the Koranic law. Their claim was opposed on the ground of custom. The custom set up was that females were excluded from any share of their father's property at his decease; that they were not entitled to any benefit whatever, except, if they should be unmarried, to maintenance out of the estate, and to a sufficient sum to defray the expenses of their marriage according to their condition in life. Sir E. Perry C.J., in an elaborate and classic judgment, having considered the rigidity of the Koranic law on the one hand and the force of immemorial custom on the other, held that "the attempt of these young women, to disturb the course of succession which has prevailed among their ancestors for many hundred years, has failed."

This decision has been followed in a series of cases. In the matter of *Haji Ismail Haji Abdulla*[3] it has been held that Cutchi Memons are not Hindus within the meaning of

[1] Perry's O.C. p. 115.
[2] Perry's O.C. 110 (1847).
[3] 6 Bom. 452 (1880).

section 2 of the Hindu Wills Act (XXI of 1870), and, therefore, probate to take effect throughout India cannot be granted in the case of a Will of a Cutchi Memon testator. They are Mahomedans to whom Mahomedan law is to be applied *except* when an ancient and invariable special custom to the contrary is established. Westropp C. J., said :— "We do not think that Cutchi Memons can be regarded as Hindus within the meaning of section 242 of the Indian Succession Act, with the clause subsequently added by Act XIII of 1875 which is made applicable to Hindus. We know of no difference between Cutchi Memons and any other Mahomedans, except that in one point connected with succession it was proved to Sir E. Perry's satisfaction that they observed a Hindu usage which is not in accordance with Mahomedan law. That is not enough to bring them within the term 'Hindu' as used in the Hindu Wills Act. It is admitted that, among such Memons, marriages are celebrated by the Kazi, they attend the Masjid, they belong to the Sunni division of Mahomedans, and make pilgrimages to Mecca. Under these circumstances we must hold them to be Mahomedans to whom Mahomedan law is to be applied, except when an ancient and invariable special custom to the contrary is established."[1]

Law of inheritance applicable to Cutchi Memons.

As to the law of inheritance applicable to Cutchi Memons Sir Charles Sargent C. J., said : "The ecclesiastical records of this Court show that Khojas and Cutchi Memons have ever since the decree in the case of the Khojas and Memons before Sir E. Perry in 1847 been regarded in the Supreme Court and subsequently in this Court as Hindus who had been converted to Mahomedanism whilst retaining their Hindu law of inheritance; and so far as Khojas are concerned, the decision of the Court of Appeal in the case of *Hirbai* v. *Gorbai*[2] must be taken as conclusively deciding that the *onus* of proving a custom of inheritance not in conformity with Hindu law lies upon those

[1] Ibid, p. 460

[2] 12 Bom. H.C.R. 294 (1875).

who set it up. The above records are even richer in instances of the application of Hindu law of inheritance to the estates of Memons than to those of Khojas, and establish a non-contentious practice extending over many years. I think, therefore, that in the absence of any special ground of distinction, no sufficient reason exists for placing Memons on any different footing from Khojas as regards the application of the Hindu law of inheritance in the absence of proof of any special custom, although undoubtedly it leaves the law, as pointed out by the Chief Justice in the above case of *Hirbai* v. *Gorbai*, in an incomplete state which can only be satisfactorily dealt with by express legislation."[1]

This case was followed in *Abdul Cadur Haji Mahomed* v. *C. A. Turner*,[2] where it was held that Cutchi Memons are governed by the Hindu law of inheritance. Scott J., asid:—"The parties belong to the caste known as the Cutchi Memons who, like the Khojas, are Hindus by origin, converted to Mahomedanism, some centuries ago. It is a well known principle of law in India, that when a Hindu is converted to Christianity or Mahomedanism, the conversion does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity or Mahomedanism has no concern, such as his rights and interests in and his powers over property.[3] As regards the Khojas, it has been decided by this Court that in questions of inheritance they are governed by the Hindu law in the absence of any proved special custom to the contrary.[4] But the point is not so clearly settled as regards Cutchi Memons. Sir E. Perry in *Hirbai* v. *Sonabai*[5] treated two castes on the same footing, and decided that by their customary

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[1] *Ashabai* v. *Haji Tyeb Haji Rahimtulla* 9 Bom. 115 p. 120 (1882).

[2] 9 Bom. 158 p. 162 (1884).

[3] *Abraham* v. *Abraham* 9 Moo. I.A. 195).

[4] *Rahimatbai* v. *Hirbai*, 3 Bom. 34 (1877).

[5] Perry's O. C. 110.

law families were not entitled to a share of their father's property at his death as they would have been according to Mahomedan law, but only to maintenance and marriage expenses. This ruling has been followed and strengthened in the case of Khojas until now they are completely governed by Hindu law in matters of inheritance. But in the case of Memons this Court has decided in *re Haji Ismail Haji Abdula*[1] that Cutchi Memons are not Hindus within the meaning of section 2 of the Hindu Wills Act (XXI of 1870), and the late Chief Justice then added: 'We know of no difference between Cutchi Memons and any other Mahomedans, except that in one point, connected with succession, it was proved to Sir E. Perry's satisfaction that they observed a Hindu usage which is not in accordance with Mahomedan law.' This *dictum* was not, however, necessary for the decision of the point before the Court; and it has not been followed in subsequent cases. In *Ashabi* v. *Haji Tyeb Haji Rahimtulla*[2], the question raised and the present Chief Justice distinctly ruled that Memons as much as Khojas, although converts to Mahomedanism, still retain the Hindu law of inheritance. This ruling, I am informed, has been followed subsequently by Mr. Justice Bayley and Mr. Justice Birdwood, and my own opinion coincides with it."

In *Mahomed Sidick* v. *Haji Ahmed*[3] Scott J., again discussed all the cases on the point, and observed: "I fully concur with these judgments. I have only re-argued the question, because the community showed in the course of this case that they are now somewhat desirous of changing the law of inheritance which has hitherto governed them. The general principle is, therefore, that Cutchi Memons are governed by the Hindu law of inheritance in the absence of proof of special custom." Further on his Lordship said:—"It is also pretty clear that a large and

[1] 6 Bom. 452 (1880).
[2] 9 Bom. 115 (1882)
[3] 10 Bom. 1 p. 13 (1885).

influential section of the community, in fact the great majority, wish to follow in future the law of their religion. A good case is thus made out for the consideration of the Legislature, but no case whatever for the interference of a Court of law."

In the matter of *Haroon Mahomed*[1] the appellant was a Cutchi Memon and had been adjudged insolvent with other members of the family. He denied that he was a partner of the family firm. The Court held that he being a Cutchi Memon the rules of Hindu law and custom applied to him and that his position with regard to the family property was to be determined by the same conditions as would apply in the case of a member of a joint and undivided Hindu family.

In a very recent case the Chief Justice of the Bombay High Court said: "It is beyond dispute that in the absence of proof of any special custom of succession, the Hindu law of inheritance applies to Cutchi Memons"[2] and referred to *Ashabai* v. *Haji Tyeb Haji Rahimtulla*.[3]

Power of alienation : ancestral and acquired property.

With reference to the question as to whether Cutchi Memons by a special usage recognize no difference in the power of alienation between ancestral and self-acquired property, the Court found that the alleged custom was not proved, as the custom was not shewn to be uniform or continuous or accepted by the community.[4]

Wills by Cutchi Memons.

Wills made by members of the Cutchi Memon community, whereby the testators dispose of property which is proved to be ancestral, are held to be invalid.[5] According to the Mahomedan law as well as Hindu law persons not in existence at the death of a testator are incapable of taking any bequest under his Will.[6]

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[1] 14 Bom. 189 (1890).

[2] *Moosa Haji Joonas Noorani* v. *Haji Abdul Rahim Haji Hamed* 30 Bom. 197 p. 201 (1905).

[3] 9 Bom. 115 (1882).

[4] *Mahomed Sidick* v. *Haji Ahmed* 10 Bom. 1 (1885).

[5] Ibid.

[6] *Abdul Cadur Haji Mahomed* v. *C. N. Turner* 9 Bom. 158 (1884).

Descent of *Stridhan*.

In *Moosa Haji Joonas Noorani* v. *Haji Abdul Rahim Haji Hamed*[1] the question was whether on the death of a lady, a Cutchi Memon, her *stridhan* devolves on her husband's brother's son or on her mother. As there was no issue of the marriage, the devolution should be governed by the form of marriage.[2] If the marriage is in an approved form, the property devolves on the heirs of the husband; but if it is in an unapproved form, the property should descend to the heirs of the deceased lady. Crowe J., held that the marriage was in an approved form and the property in dispute should go to the deceased lady's husband's nephew, who brought the suit. In appeal further evidence of custom was added to the record. The Appellate Court held that the marriage of the deceased lady was in an approved form. Their Lordships referred to a Khoja case decided so far back as 1866,[3] in which it was held that, by the custom of Khoja Mahomedans, when a widow dies intestate and without issue property acquired by her from her deceased husband does not descend to her own blood relations, but to the relations of her deceased husband. This rule of succession prevailing among Khojas is in accordance with the rule of inheritance applicable to a Hindu widow married in an approved form. It shows that the rule for which the plaintiff in the above case contended agrees with that which governs in a community to which his own bears so close a resemblance. The Appellate Court accordingly affirmed the decision of the original Court.

Khojas: their history.

We take the following history of the Khojas from the "Oriental Cases" decided by Sir Erskine Perry.[4]

"The Khojas are a small caste in Western India, who appear to have originally come from Sindh or Cutch, and

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[1] 30 Bom. 197 (1905).

[2] Vide *Mayukha* Ch. IV s. X. pp. 97-93 Mandlik's Hindu Law.

[3] In the goods of *Mulbai*; *Karim Khatav* v. *Pardhan Manji* 2 Bom. H. C. R. 276 (1866).

[4] *Vide* Perry's O. C. p. 112.

who by their own traditions, which are probably correct, were converted from Hinduism about four hundred years ago by a Pir named Sadr Din. Their language is Cutchi; their religion Mahomedan; their dress, appearance, and manners, for the most part, Hindu. These latter facts, however, do not warrant the conclusion being drawn, if such conclusion is necessary for decision of the case (and I think it is not) that the Khojas were originally Hindus, for such is the influence of Hindu manners and opinions on all castes and colours who come into connection with them, that gradually all assume an unmistakable Hindu tint. Parsis, Moguls, Afghans, Israelites, and Christians, who have been long settled in India, are seen to have exchanged much of their ancient patrimony of ideas for Hindu tones of thought; and, in observing this phenomenon, I have been often led to compare it with one somewhat similar in the black soil in the Deccan, which geologists tell us possesses the property of converting all foreign substances brought into contact with it into its own material.

"However this may be, the Khojas are now settled principally amongst Hindu communities, such as Cutch, Kathiawar, and Bombay, which latter place probably is their head-quarters. They constitute, at this place, apparently about two thousand souls, and their occupation, for the most part, are confined to the more subordinate departments of trade. Indeed, the caste never seems to have emerged from the obscurity which attends their present history, and the almost total ignorance of letters, of the principles of their religion, and of their own *status*, which they now evince, is probably the same as has always existed among them since they first embraced the precepts of Mahomed.

"Although they call themselves Mussulmans, they evidently know but little of their prophet and of the Koran; and their chief reverence at the present time is reserved for Agha Khan, a Persian nobleman, well known in contemporaneous Indian history, and whom they believe to be

a *descendant of the Pir*, who converted them to Islam.[1] But even to the blood of their saint they adhere by a frail tenure; for it was proved, that when the grandmother of Agha Khan made her appearance in Bombay some years ago, and claimed tithes from the faithful, they repudiated their allegiance, commenced litigation in this Court, and professed to the Kazi of Bombay their intention to incorporate themselves with the general body of Mussulmans in this island. To use the words of one of themselves, they call themselves Shias to a Shia, and Sunnis to a Sunni, and they probably neither know nor care anything as to the distinctive doctrines either of these great divisions of the Mussulman world. They have, moreover, no translation of the Koran into their vernacular language, or into Gujarati, their language of business, which is remarkable when we recollect the long succession of pious Mussulman Kings who reigned in Gujarat, and in the countries in which the Khojas have been located. Nor have they any scholars or men of learning among them, as not a Khoja could be quoted who was acquainted with Arabic or Persian, the two great languages of Mahomedan literature and theology; and the only religious work of which we heard as being current amongst them was one called the Das Avatar, in the Sindhi character, and Cutchi language, of which Narayan, the interpreter, has procured me some translated

[1] This is a mistake, I think. From an instructive note I have seen by Lt. Col. Rawlinson, it appears that Agha Khan is a linial descendant of the Sixth Imam, and that a large section of Mussulmans believe this Sixth Imam is again to appear on the earth. It is probable that the Pir, who converted these Khojas, belonged to this Imamy sect of Persia, and hence the reverence for Agha Khan, which is shown by numbers in Persia, and which induced the late King to bestow to him his daughter in marriage. "The peculiar doctrine of the Ishmaillies, as this section of Mahomedans is called in Persia, is that they believe each successive Imam from Ali to Ismail was an incarnation of the Divine Essence, and further that the incarnation is hereditary in the direct male line; hence Agha Khan is worshipped as a God by all true Ismaillies."—*Col. Rawlinson's Rep. to Govt. of India.*

passages, and which, as professing to give a history, of the tenth incarnation in the person of their Saint, Sudr Din, appears to be a strong combination of Hindu articles of faith with the tenets of Islam."[1]

The term Khoja means both "the honourable or worshipful person" and "the disciple." Its full meaning, as applied to the community, may fairly be taken to amount to "the honourable or worshipful converts."[2] They are not Mahomedans proper, nor Hindus. They are a caste converted from the Hindu religion; and their religion has, since the date of their conversion, been Mahomedan of the Shia division and Imami Ismaili form. In comparatively recent times a schism has occurred amongst them in Bombay. A numerical minority professed to belong to the Sunni division of Mahomedans, insisted that the religion of the Khojas at large was Sunni, that the public property of that community ought to be applied to Sunni purposes and sought to cast off allegiance to H. H. the Aga Khan as Imam of the Shia Imami Ismailis. However, in a suit brought by some of the innovating party with those objects, Sir Joseph Arnould held: "that the Khojas never were Sunnis, but that from the beginning they have been, and (with the exception of the relators and plaintiffs, and their followers in Bombay) still are Shias of the Imami Ismail persuasion."[3]

In order to enjoy the full privileges of membership in the Khoja community a person must be one of that sect whose ancestors were originally Hindus, which was converted to, and has throughout abided in the faith of Shia

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[1] See also *The Advocate-General ex relatione Daya Muhammad* v. *Muhammad Husen Huseni* 12 Bom 323 (decided in April, 1866). for the history of the sects of Sunis, Shias, and Shia Imami Ismailis; history of Aga Khan; history of Khojas and their relations with the hereditary Imam of the Ismailis; relations of Aga Khan with the *Jamat* or public authority of the *Khojas* of Bombay, &c, &c.

[2] Vide 12 Bom. H.C.R. 343

[3] Vide *Daya Muhammad* v. *H. H. Aga Khan* 12 Bom H. C R. 323 (1866).

Imami Ismailis, and which has always been and still is bound by ties of spiritual allegiance to the hereditary Imams of the Ismailis. The Aga Khan, as the spiritual head of the Khojas, is entitled to exercise a potential voice in determining who, on religious grounds, shall or shall not remain members of the Khoja community.[1]

Matrimonial law of Khojas.

In matters matrimonial, the Khojas are regulated by Mahomedan law.[2] Amongst ordinary Mahomedans marriages are performed by the *kazi* or his *naibs* or deputies.[3] The marriages of all Khojas in Bombay used to be performed by him until the schism. Since the schism, however, those Khojas, who regard the Aga Khan as their head, have had their marriages performed by him while the others continue to employ the *kazi* as before.[4]

Females not entitled to share, their fathers property.

In *Hirbai* v. *Sonabai*[5] Sir E. Perry held that, according to the custom amongst Khojas, females are not entitled to any share of their father's property at his decease. By the custom of the Khoja Mahomedans, when a widow dies intestate and without issue, property acquired by her from her deceased husband does not descend to her own blood relations, but to the relations of her deceased husband. If no blood relations of the deceased husband are forthcoming, the property left by the widow belongs to a *jamat*. As to the degree of relationship which will entitle members of the deceased husband's family to succeed has yet remained an open question.[6]

Widow's right.

A Khoja having died intestate, and without leaving issue, was survived by his mother (a widow), his wife, and a married sister. It was held that according to the custom of the Khojas, his mother was entitled to the

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[1] *Daya Muhammad* v. *Muhammad Husen Huseni* 12 Bom. H. C. R. 323 1866).

[2] See *Pirbhai* 8 Bom. H.C.R., cr ca 95.

[3] *Muhammad Ibrahim* v. *Gulam Ahmed* 1 Bom. H.C.R. 236. (1864).

[4] See *Hirbai* v. *Gorbai* 12 Bom. H.C.R. 320, 321 *per* Westropp C. J.

[5] Perry's O. C. 110.

[6] *Karim Khatav* v. *Pardhan Manji* 2 Bom. H. C. R. 292 (1866).

management of his estate, and, therefore, to letters of administration, in preference to his wife or his sister.[1] The widow of a Khoja Mahomedan who has died childless and intestate, succeeds to her husband's estate in preference to his sister.[2]

Son's right to partition.

A son is entitled to obtain partition of ancestral property in his father's lifetime without his father's consent.[3] But this right of a son to partition in the lifetime of his father, more especially where moveable property is concerned, is one upon which the greatest doubt and difference of opinion has always prevailed, and consequently there is no presumption in favour of its inclusion in the Hindu law, which, in the absence of proof of custom to the contrary, is applicable to Khoja Mahomedans. In the case of *Ahmedbhoy Hubebhoy* v. *Cassumbhoy Ahmedbhoy*[4] the Court held that it was not established that amongst Khojas in Bombay there was any recognized right of a son to demand partition in the lifetime of his father, although it was proved to be customary in Kathiawar and Cutch for a father to give a son who wished for it his share of the family property, both ancestral and self-acquired.

Settled rule of inheritance and succession among Khojas.

It is a settled rule in Bombay that, in the absence of sufficient evidence of usage to the contrary, the Hindu law is applicable in matters relating to property, inheritance and succession among Khoja Mahomedans, and this rule is held to apply in a case of Khojas at Thana.[5] But this rule must not be accepted in its widest sense. It is confined only to simple questions of inheritance and succession. It does not apply to the question of partition.[6] If a custom opposed to Hindu law be alleged to exist

[1] *Hirbai* v. *Gorbai* 12 Bom. H. C. R. 294 (1875).

[2] *Rahimatbai* v. *Hirbai* 3 Bom. 34 (1877).

[3] *Cassumbhoy Ahmedbhoy* v. *Ahmedbhoy Hubibhoy* 12 Bom. 280 (1887).

[4] *Ahmedbhoy Hubibhoy* v. *Cassumbhoy Ahmedbhoy* 13 Bom. 534 (1889).

[5] *Shivji Hasan* v. *Datu Mavji Khoja* 12 Bom. H. C. R. 281 (1874); *Hirbai* v. *Gorbai*, Ibid 294 p. 321 (1875).

[6] See *Ahmedbhoy Hubibhoy* v. *Cassumbhoy Ahmedbhoy* 13 Bom. 534 (1889).

amongst Khojas, the burden of proof rests upon the person setting up that custom.[1]

Proof of custom : less stringent rule.

The Khojas, being partly regulated by Mahomedan law, partly by Hindu law and partly by custom, occupy a position so peculiar that the Courts do not apply to them, when seeking a custom of inheritance or succession, differing from the Hindu law, the stringent rule that the custom must be proved to be ancient, invariable and submitted to as legally binding but act upon satisfactory evidence that it has been the general custom and accepted as such by the general majority of the Khoja community.[2] But evidence merely of the opinion of the leading members of the caste is not enough. Instances must be proved in which the alleged custom has been observed and followed.[3]

Widow's right to maintenance.

Although a Khoja and his wife are married according to Mahomedan rites, yet at the time of his death, so far as regards the succession of his property, he is a Hindu. If his brothers lived joint with him, his widow would be entitled to maintenance out of his estate while his property devolved on them. According to *Vyavahr Mayukh* which governs Khojas for the purpose of inheritance and succession, when a person inherits the estate of a person deceased, he takes it as an *universitas* with all the rights and liabilities annexed to it. Maintenance of those whom the deceased was bound to maintain and payment of his debts are liabilities which are annexed to the estate in the hands of those who take it.[4]

Ancestral and self-acquired property.

By the law and customs of Khoja Mahomedans there is a distinction between ancestral and self-acquired pro-

[1] 12 Bom. H. C. R. 294 ; 3 Bom. 34 ; *Cassumbhoy Ahmedbhoy* v. *Ahmedbhoy Hubibhoy*, O. C. 12 Bom. 280 (1887). But in case of partition see above *Ahmedbhoy Hubibhoy* v. *Cassumbhoy Ahmedbhoy* 13 Bom. 534 (1889).

[2] 12 Bom. H. C. R. 294 ; 12 Bom. 280.

[3] *Rahimatbai* v. *Hirbai* 3 Bom. 34 at p. 40 (1877).

[4] *Rashid Karmali* v. *Sherbanoo*, 29 Bom. 85 (1904).

perty in reference to the power of the owner to devise or make a gift thereof similar to that which obtains under the ordinary Hindu law.[1] Where wealth amassed in trade by an individual is said to be ancestral in the hands of that individual, it is not enough to show that he inherited some property; it must be shewn that the property inherited contributed in a material degree to the wealth so amassed.[2]

Wills by a Khoja.

In the case of *Gungabai* v. *Thavar Mulla*[3] it was held that in the Will of a Khoja Mahomedan written in the English language and form, a gift of a fund "to be disposed of in charity as my executor shall think right" was a valid charitable bequest. Where, however, the Will was in the vernacular and the word *dharam* was used, the word was held to be too vague and uncertain for the gift to be carried into effect by the Court, the word *dharam* including many objects not comprehended in the word "charity" as understood in English law.

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[1] *Cassumbhoy Ahmedbhoy* v. *Ahmedbhoy Hubibhoy* 12 Bom. 280 (1887).

[2] *Ahmedbhoy Hubibhoy* v. *Cassumbhoy Ahmedbhoy* 13 Bom. 534 (1889).

[3] 1 Bom. H.C.R. 71 (1863).

CHAPTER XI.

MALABAR CUSTOMS.

Under the heading of "Malabar Customs" we propose to deal briefly with customs and usages of people living in Canara, Malabar, Cochin and Travancore. Hindus and Mahomedans of these parts of India are not governed, in matters of succession, by their respective laws. There are three distinct systems prevalent in these countries, which regulate inheritance. *Marumakkatayam* or heirship of sister's son is the principal system which governs people of Malabar of whom the Nairs are the chief factors. Some Nambudri Brahmans and a great majority of Mapilla families of North Malabar also follow the same system of succession. The system, known as *Makkatayam* or descent in the line of sons, prevails among Nambudris at large and also among other people, such as Tiyans, Thiyyas, Tiyars, &c. The third system, *Aliyasantana*, according to which the descent runs in the female line, is followed by the people of Canara.

Nairs[1] form the bulk of the population in Malabar. Their domestic system is the most perfect form of joint family. "Each *tarwad* lives in its mansion, nestling among its palm trees and surrounded by its rice lands but apart from and independently of its neighbour." Among Nairs inheritance is regulated by the *Marumakkatayam* whereby family estates devolve on the female lines, so that children are not the heirs of the wife's husband but inherit from and through their mother. They have their own laws and usages which are very peculiar. "Some of them are so well established as to be judicially noticed without proof. But others of them are still in that

Nairs.

[1] As to the origin and early position of the Nairs, *vide* Madras Census, 1891, VIII, 222; Logan's Malabar Manual Vol. I, p. 141.

stage in which proof of them is required before they can be judicially recognized and enforced. The Nairs are persons amongst whom polyandry is legally recognized; and descent of property through females is acknowledged law. The right (and perhaps duty) to adopt females into the family or *tarwad*, when necessary to preserve it, appears to be in accordance with their law."[1]

Nair marriage.

Though polyandry is legal among the Nairs, it seems to have now died out, as we find from the Report of the Malabar Marriage Commission of 1894 which contains valuable information on the point. "According to the North Malabar witnesses the rule is that the union of a man and woman lasts for life. The wife lives with her husband. Divorces are almost unheard of, or one extremely rare. Respectable people set their faces against polygamy."[2] The same rule seems to prevail throughout the greater part of South Malabar.[3] As regards freedom to marry, or not to marry, it is conceded to women as well as to men; the rule of Hindu law, which prescribes marriage as indispensable to women, having no obligatory force either among Nambudri Brahmans or among Nairs and Tiyars.[4]

Tali-kettu-kalyanam and *Sambhandham.*

Tali-kettu-kalyanam or marriage by tying the *tali* is indispensable to a Nair girl. It is generally performed before the girl attains her puberty. The ceremony lasts four days and terminates with the tearing of a cloth, the pieces of which are given to the boy and the girl who have been the subject of this sort of mock marriage. For this tearing of the cloth symbolizes a divorce between the pair, as after that they may possibly never see each other again. It is said that if a girl fails to perform this

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[1] *T. Raman Menon* v. *V. P. Raman Menon*, 27 I. A 231 p. 236 (1900) : s.c. 24 Mad. 73 p. 79. Strange's Manual of Hindu Law p. 403.

[2] Malabar Marriage Commission Report, 1894, p. 103.

[3] Ibid p. 36.

[4] Ibid p. 57.

ceremony, she is liable to be excommunicated from her caste. *Sambhandham* is a proper and serious form of marriage. For it is followed by co-habitation. With regard to *sambhandham* the Report of the Malabar Marriage Commission has the following:—"Many respectable witnesses tell us that no formality, religious or secular, need attach to *sambhandham*, and that in very many cases the consent of the girl and of her guardian are all that is thought necessary. But it is also an undoubted fact that recent usage (especially in North Malabar) tends to surround the occasion of first co-habitation with more or less elaborate ceremonial."[1]

Nambudris.

How the Nambudri Brahmans came to settle in Malabar is a matter for antiquarians. But the tradition is that Parasurama, the first King of Malabar, introduced Brahmans into his Kingdom and gave them lands therein. The Nambudris of the present day are supposed to be the descendants of the original settlers. The latter certainly came from the same Aryan stock of Brahmans one finds in other parts of India, but their descendants having been segregated from the original stock and isolated in Malabar for some centuries, adopted the customs and usages of the surrounding people, *i.e.* Nairs. These customs and usages are at variance with the general principles of Hindu law.

The probable period when Nambudris settled in Malabar is a matter of uncertainty. The late Sir Muttusami Ayyar, however, thought that the event must have occurred before the Mitakshara was written, as there is no mention of the *Sarvasvadhanam* form of marriage which was then, and still is, recognized in Malabar. The learned Judge further said that the emigration must have taken place prior to the time of Sankaracharya, the founder of

[1] Mal. Mar. Commn. Report pp. 21-24. See also Mayne's H. L. pp. 122-125 (7th Edn.).

the *Adwaita* or non-dualistic Vedic philosophy. For, Sir Muttusami Ayyar said "that it is in evidence that the *acharams* or practices of Nambudris are believed to have been regulated by him." And the great Sankaracharya is said to have lived about the fifth or seventh century. After referring to other "internal evidence," as he styles these facts, Sir Muttusami Ayyar comes to the conclusion that Nambudris must have settled in Malabar more than 1200 or 1500 years ago.[1] Mr. Logan is of opinion that "Nambudris entered and settled in Malabar in large numbers and as an organized body precisely at the time (end of seventh and first-half of eighth century) when the extinction of Perumal's authority was for the first time menaced by the Western Chalukiyas."[2]

"Whether the first migration was in the seventh century or several centuries before it," says Sir Muttusami Ayyar, "there is enough to show that the personal law which they carried with them is not Hindu law as expounded by the authors of the Mitakshara, Smriti Chandrika, and Madhavya, but ancient Hindu law as it was probably understood and followed about the commencement of the Christian era."[3]

Difference between usages of Nambudris and Brahmans of other Provinces.

The usages of Nambudris differ on some important points from those of Brahmans in other Provinces. The principal and permanent variations are detailed in *E. I. Vishnu Nambudri* v. *E. I. Krishnan Nambudri*.[4] These are :—

(i) The eldest son is alone permitted to marry, the junior sons being allowed to consort with Sudra females.

(ii) A girl attaining puberty without having contracted marriage does not forfeit her caste.

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[1] *Vasudevan* v. *The Secretary of State for India*, 11 Mad. 157 p. 180 (1887).

[2] Logan's Reports on the Nature of the Ancient Malabar Tenures. Appendix I.

[3] 11 Mad. 157 p. 181.

[4] 7 Mad. 3 p. 15, (1883).

(iii) Marriage may take place before as well as after a girl has attained puberty.

(iv) Marriage takes place not immediately but about two years after the completion of the stage of studentship marked by the performance of the ceremony of *samavarthana*.

(v) A boy on whom the ceremony of *upanayana* or investiture with the thread has been performed may be adopted.

(vi) Division cannot be enforced.

Difference between Nambudri and Nair customs in the management of their property.

Nambudris are not governed by the ordinary Hindu law in respect of the management and alienation of their family property. "Their customs in the management and assignment of property do not differ from the customs of Nairs. Impartibility is the rule, and the eldest member is the manager. The eldest member in a Nambudri family, like the eldest member in a Nair family, is called the *karnavan*.[1] The management does not descend from father to son, but invariably devolves on the senior male member however remotely connected, even though the deceased manager may have left adult sons competent to enter upon the management. The only difference between a Nambudri *illam* and a Nair *tarwad* is, that in the former the offspring of the marriage and the married woman become members of the husband's *illam*, while the children of a Nair woman become members of her own *tarwad*. The self-acquired property left undisposed of by a deceased junior male member does not descend to his son, but following the custom of the Nair *tarwad* it lapses to the *illam*."[2]

Rule of succession among Nambudris.

Nambudri Brahmans are governed by Hindu law as modified by special customs adopted by them since their settlement in Malabar. Among them succession is traced

[1] *Nambitan Nambudri* v. *Nambitan Nambudri*, 2 Mad. H. C. R. 110 (1864).

[2] *Nilakandan* v. *Madhavan*, 10 Mad. 9 p. 11 (1886).

through males and property passes from father to son, whereas, among Nairs, succession is traced through females and property descends from mother to daughter. Thus the mode of tracing succession and devolution of property are in accordance with Hindu law and contrary to *Marumakkatayam* usage.[1]

In a very lengthy and learned judgment in the *Vasudevan's* case, the learned Judges have drawn a graphic picture of the distinguishing shades of difference between Nambudri and Nair customs and usages. As these are very interesting and instructive we cannot do better than giving them *in extenso* in their Lordships' language:—"Again, legal marriage is the basis of the law of succession among Nambudris as among Brahmans of the East Coast, while among Nairs there is no recognized connection between marriage and inheritance. Thus, the notion of paternal relation founded upon legal marriage as the cause of inheritance obtains both under Hindu law and among Nambudri Brahmans. Further, a Nambudri woman, in common with a Brahman on this side of the ghâts, takes her husband's *gotram* upon her marriage and passes into his family from that of her father, and perpetual widowhood and incapacity to re-marry on her husband's death are the incidents of marriage both among Nambudris and Brahmans of the East Coast. But among Nairs a woman continues through life to belong to the family in which she is born, and the sexual relation which she forms, or her so-called marriage, operates in law neither to give her the domicile of her husband nor to create a disability in her either to re-marry or to put an end to her marriage at her pleasure during her first husband's life. Moreover, the same rule of collateral succession obtains both among Nambudri Brahmans and other Brahmans in Southern India. Among the former,

[1] *Vasudevan* v. *The Secretary of State for India*, 11 Mad. 157 p. 160. (1887).

dayadies or distant kinsmen are divided into those who have ten and three days' impurity or pollution, and among the latter, such kinsmen are classified as *gotraja sapindas* and *samanodakas*, the *sapinda* and the *samanodaka* relationship being severally the cause of ten and three days' impurity or pollution, arising from the birth or death of any one so related. Moreover, Nambudris and Brahmans on the East Coast recognize alike the authority of the Vedas and of Smritis, and they have faith in the religious efficacy of ceremonial observances and of funeral and annual obsequies. We may also refer to the ceremony of investiture or *upanayanam* and to the notion of second birth as common to both. The view, therefore, that when Nambudris settled in Malabar they carried their personal law with them, though they changed it in some respects after their settlement on the West Coast, is supported not only by the foregoing facts, but also by the fact that *gotrams* of Nambudri Brahmans are said to be the same as those of Brahmans on the East Coast, indicating thereby common descent from the same original ancestors. It was observed by the Privy Council in *Rutcheputty Dutt Jha* v. *Rajunder Narain Rao*,[1] that when a class of Hindus migrates from one place to another and retains ancient religion, the presumption is, unless the contrary is shown, that they carried their personal law with them to the new settlement. There is, therefore, sufficient foundation for the opinion of the Judge that Nambudris are governed *prima facie* by Hindu law; but it must be remembered that the personal law which they presumably carried with them was the Hindu law as received by Brahmans at the time of their settlement in Malabar, and that it is *not* the Hindu law as modified by customs which have since come into prevalence among Brahmans on the East Coast. For instance, the form of marriage called the *sarvasvadhanam*

[1] 2 Moo. I. A. 132 (1839).

marriage, which is referable to the ancient Hindu law of *putrika putra*, or of the appointed daughter and her son, is still in force among Nambudris as a mode of affiliation, though it is obsolete on this Coast. Another qualification with which Hindu law should be applied to Nambudris consists in their adoption of the territorial law or the usage of Nairs in several respects subsequent to their settlement in Malabar. Under Hindu law, both ancient and modern, partibility is an incident of ordinary Hindu property, coparcenary depending for its continuance upon the mutual consent of co-sharers; but among Nambudris, as among Nairs, family property is not liable to be divided at the instance of any one of the coparceners. Again, self-acquired property merges, on the death of the person acquiring it, into family property as is the case among Nairs. It appears further that the senior male, in point of age, is entitled to management in preference to the representative of the senior branch. We may also mention that among Nambudris, the eldest brother alone usually marries, and the others, as is the case, among Nairs, consort with Nair women otherwise than with the sanction of marriage. Having regard to the evidence on both sides, the conclusion we come to is, that Nambudris are governed by Hindu law, except so far as it is shown to have been modified by usage or custom having the force of law, the probable origin of the special usage being either some doctrine of Hindu law as it stood at the date of the settlement, though now obsolete, or some *Marumakkatayam* usage."[1]

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"Again, a Brahman woman becomes an outcaste on the East Coast by not marrying at all, or by marrying after she attains her maturity; but in Nambudri *illams*[2] women marry after they attain their maturity, and some

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[1] *Vasudevan* v. *The Secretary of State for India*, 11 Mad. pp. 160-163 (1887) *per* Collins C. J., and Muttusami Ayyar J.

[2] *Illam* is a Brahman's house. It is also called *Mana*.

never marry at all. Further, the adoption of a son as the son of two fathers, or in *dwyamushyayana* form, is obsolete on this Coast, and, according to the evidence taken on Commission in Travancore and Cochin, it is the ordinary form of adoption recognized in Malabar. Further, on the East Coast, no Hindu widow is competent to adopt in the absence of express authority either from her husband or his *sapindas*; but, according to the evidence taken in Travancore, the Nambudri widow has an implied authority to adopt in the absence of express prohibition.'"[1]

A Hindu widow cannot alienate or, rather, has but restricted powers of alienation. "According to Nair usage, however, women have no doubt full ownership when they are the sole members of their *tarwads*; but the system of law under which they have such ownership is essentially distinct from Hindu law. The *status* and the usage of Nambudri women in other respects are anything but similar to those of the Nair females. The restriction on the disposing power of a Hindu widow is the outcome of her *status* as widow and the austere life prescribed for her by her religion and of the text that Hindu property was designed for religious sacrifices and spiritual purposes. The religion and *status* of Nambudri widows are substantially the same, whilst widowhood and its peculiar religious obligations in the form in which they are recognized among Nambudris are wholly unknown to Nairs. It is, therefore, antecedently improbable that Nambudri women should have adopted Nair usage in respect of the power of disposition only, notwithstanding their custom as to widowhood and its religious obligations."[2]

Modes of affiliation among Nambudris.

There are three different forms of affiliation prevalent among Nambudris, viz., *adoption*, *appointment*, and *sarvasvadhanam*. The last two are peculiar to Nambudris, while the first is common to Nambudris and Nairs. In three differ-

[1] Ibid pp. 166-167. See also *Dattakchandrika*.

[2] Ibid p. 168.

ent ways, again, an adoption may be made: *first*, adoption by ten hands or *pattukayyal datta, i.e.*, by the hands of adopters (male and female), the adoptee and adoptee's parents or guardians; *secondly*, adoption by *chamatha, i.e.* by burning a pan of sacred grass; and *thirdly*, adoption by merely taking into the family. This form is usually resorted to by Brahman widows and Nairs in order to perpetuate the family, when it is in danger of being extinct.[1]

The person adopted must be of the same tribe as the adopter. There is no limit as to age. The adoption of a sister's son by Nambudris is sanctioned by the customary law of Malabar.[2] People following *Marumakkatayam* should adopt a female, but, generally, a male also is adopted with her. Where a Nambudri family following *Marumakkatayam* omitted to adopt a female, it was held that such omission did not invalidate the adoption.[3]

Appointment.

Both Messrs. Wigram and Ramchundra Ayyar[4] refer to the appointment of an heir as an act of adoption and akin to the *kritima* form of adoption in force in the Mithila country. It takes place without any ceremony. A Nambudri widow, or *antharjanam* as she is usually designated, is at liberty to appoint an heir in order to perpetuate her *illam* in the absence of *dayadies* with ten or three days' pollution.[5] There is no limit as to the age of the person appointed. A married man with children is eligible for appointment. He must be of the same caste as his adoptive mother. Whether in such appointment of heir it is necessary to direct that he should marry for the *illam* to which he is appointed as heir is doubtful.[6]

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[1] Wigram's Malabar Law & Custom. Ramchundra Ayyar's Malabar Law and Custom.

[2] *E. I. Vishnu Nambudri* v. *E. I. Krishnan Nambudri* 7 Mad. 3 (F.B.) [1883].

[3] *Subramanyan* v. *Paramaswaram* 11 Mad. 116 (1887).

[4] See Wigram's Malabar Law and Custom, Chap. I. Ramchundra Ayyar's Malabar Law and Custom, Chap. VI.

[5] *Vasudevan* v. *The Secretary of State for India* 11 Mad. 157 (1887).

[6] Ibid.

Sarvasvadhanam.

The *sarvasvadhanam* form of affiliation is peculiar to Nambudris in Malabar. It closely resembles, if it is not identical, with what is called *putrika-karanam*, or *putrika putra*, among other classes of Hindus. The object is to raise up issue to a father whose line is about to be extinct and to place the son to be begotten from a daughter in the place of a real son.[1] This custom is very likely a survival of the obsolete practice of constituting as heir, the son of an appointed daughter.[2] The effect of the custom is to introduce the son into the *illam*, to confer on him the status of a son in respect of the property of the *illam*, coupled with the obligation of managing, or assisting in the management of the estate and of supporting the family.[3] Sir Muttusami Ayyar says: "The legal import of a *sarvasvadhanam* marriage is nothing more than the adoption of a daughter's son as the son of her father by anticipating at the time of the marriage, coupled with a condition that she should retain the status of her father's *illam* in spite of her marriage. Till the birth of a son her status in the family is that of an unmarried daughter; the relation of marriage was ignored as a jural relation for purposes of inheritance in connection with the *illam*."[4]

The formula used at the marriage is: "I give unto thee this virgin, who has no brother, decked with ornaments. The son who may be born of her shall be my son." Thus the first born son of the marriage becomes the son of the father. Nambudris trace this kind of marriage to Hindu law, and the text of Vasistha,[5] which is adopted as the formula to be solemnly pronounced during the marriage, discloses a connection between the usage and the ancient Smriti law. But the form of marriage is unknown on the East Coast, nor is it recognized as a mode of affiliation.

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[1] *Kumaran* v. *Narayanam*, 9 Mad. 260 p. 264 (1886).

[2] Malabar Law and Customs, 5.

[3] *Keshava Tharagan* v. *Rudran Nambudri* 5 Mad. 259 p. 260 (1882).

[4] *Agnithrayan* v. *Ittiheri* 4 Mad. L. J. 303.

[5] Chap. VI, 12.

Incidents of *sarvasvadhanam* marriage.

By *sarvasvadhanam* marriage the property of the wife does not pass to her husband. He may hold his wife's property in trust for the children to be born of the marriage. If the wife dies without issue, or if there be no issue of the marriage, the property reverts to the *illam* of his wife's father. The husband, notwithstanding this *sarvasvadhanam* marriage, remains a member of his natural family.[1]

With reference to the observation in the above passage *viz.*, that if the wife dies without issue the property reverts to the *illam* of his wife's father, we should note that it is merely an *obiter dictum*. The point was fully discussed in a very recent case, where it was held that whether the interest of the son-in-law divests on the wife dying without issue was not concluded by authority.[2]

Right of the son of *sarvasvadhanam* marriage.

As to the right of the son born of *sarvasvadhanam* marriage, he unquestionably inherits the property of his maternal grandfather, to whom he stands in the position of an adopted son. But, as to his right to inherit in the family of his natural father, it is settled now that he possesses none so long as other heirs exist.[3]

Illatam.

According to the custom prevailing amongst Nambudris in Malabar a person may be introduced into an *illam* to perpetuate its existence. Such person becomes a member of the *illam* and is *primâ facie* entitled to hold the property held by the *illam* as trustee as well as to enjoy the property held by the *illam* as its own.[4] The practice of *illatam*[5] is generally resorted to by a person who has no male issue and requires assistance in the management of his family property. The power may be exercised by a man

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[1] *Kumaran* v. *Narayanan* 9 Mad. 260 (1886). See also *Vasudevan* v. *Secretary of State for India* 11 Mad. 157 p. 164 (1887).

[2] *A. L. Amma* v. *P. T. Nambudri* 25Mad. 662 (1901).

[3] *Kumaran* v. *Narayanan*, 9 Mad. 260 (1886).

[4] *Keshavan* v. *Vasudevan* 7 Mad. 297 (1884); see also *T. M. M.N. Nambudripad* v. *P. M. T. Nambudripad* Mad. Dices. p. 125 (1855).

[5] *Illata*, a bride's father having no son and adopting his son-in-law. *Vide* Wilson's Glossary.

who at the time has no son, though he may have more than one daughter and whether or not his hope of having male issue be extinct. But it is not clear whether the affiliation is effected by the mere introduction of a stranger into the family or if it requires for its completion marriage with a daughter. Nor is it clear whether, if the father be dead, the right may be exercised by a surviving paternal grandfather. For the purpose of succession the *illatam* son-in-law stands in the place of a son and, in competition with natural born sons, he takes an equal share. As to his right to inherit the property of his natural father or to demand partition in the life-time of his father-in-law, nothing is definitely settled. It is not safe to consider that the affiliation is, in any other respect, analogous to Hindu adoption, save in the circumstance that the *illatam* is regarded as a member of the family into which he is admitted.[1]

In *Chenchamma* v. *Subbaya*[2] an issue was raised as to whether there could be coparcenary between an adopted son and *illatam* son-in-law, but, no evidence being produced, it was held, in the absence of proof, that the right of survivorship is an incident of custom, and cannot be treated as suggested. The decision of Scotland C. J., and Innes J., in an unreported case,[3] is no doubt in conflict with the later decisions, but no evidence was taken in that case, and it was inferred that there was coparcenary, because the *illatam* custom was a mode of affiliation. We think it is not safe to attach to the usage all the incidents of adoption without specific evidence.[4]

A sonless person having introduced into the family an *illatam* son-in-law can subsequently adopt. Although an *illatam* son-in-law and a son adopted into the same

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[1] *Hanumantamma* v. *Rani Reddi*, 4 Mad. 272 p. 283 (1880).

[2] 9 Mad. 114 (1885).

[3] *Mopur Ademma* v. *Dhamavarapu Subba Reddi*. Appeal No. 103 of 1868.

[4] *Malla Reddi* v. *Padmamma* 17 Mad. 48 (1892).

family may live in commensality, neither they nor their descendants can, in the absence of proof of custom, be treated as Hindu coparceners having the right of survivorship.[1] The question as to whether an *illatam* son-in-law can demand partition from his father-in-law is not a pure question of law, but one that depends upon custom and can only be determined upon evidence.[2]

Illatam among other castes.

The custom of *illatam* obtains among the *Motali*, *Kapu* or *Reddi* caste in the districts of Bellary and Kurnool.[3] The *illatam* son-in law does not thereby lose his rights of succession to the estate of his natural father's divided brother.[4] There is no evidence that the custom of *illatam* exists among the Kondarazu caste of the Vizagapatam district.[5]

Right of the eldest member of a Nambudri family.

The right of the eldest member of a Numbudri family to manage the property as *karnavan* is absolute. Where a junior member has in fact managed it, this is presumed to have been with the eldest member's permission, and the latter may at any time interfere and take the actual control.[6]

Numbudri widow's power of alienation and adoption.

A Numbudri widow, who is the sole surviving member of her *illam*, is not at liberty to alienate the property of the *illam* at her pleasure.[7] According to custom she can adopt or appoint an heir in order to perpetuate her *illam* in the absence of *dayadies* with ten or three days' pollution.[8]

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[1] *Chncchamma* v. *Subbaya* 9 Mad. 114 (1885).

[2] *Chinna Obayya* v. *Sura Reddi* 21 Mad. 226 (1897).

[3] *Hanumantamma* v. *Rani Reddi* 4 Mad. 273 (1880).

[4] *Sivada Balarami Reddi* v. *Sivada Pera Reddi*, 6 Mad 267 (1882).

[5] *Narasimha Razu* v. *Veerabhadra Razu*, 17Mad. 287 (1893)

[6] *Nambiatan Nambudiri* v. *Nambiatan Nambudiri*, 2 Mad. H.C.R. 110 (1864).

[7] *Vasudevan* v. *The Secretary of State for India*, 11 Mad. 157 (1887).

[8] Ibid.

Liability of sons for father's debts.

Under the Hindu law, the father has a share in family property which may be severed by partition and which descends on his death to his sons. The obligation of the sons to discharge the father's debts is incidental to the heritage. For discharge of debts, other than debts incurred for immoral purposes, the interest of the son in the family property may be sold. But among Nambudris, neither the father nor the son has any definite share in family property which may be made available for the father's debt. The property is joint and indivisible and belongs to the whole family. Sons are not liable for a decree against the father. The principle of Hindu law, which imposes a duty on a son to pay his father's debt, contracted for purposes, neither illegal nor immoral, is not applicable to the Nambudris, and Mussads (a class of Nambudris).

Self-acquisition.

Among the Nambudris the rule in respect of devolution of self-acquired property is not quite clear. There is no definite ruling of the High Court on this point. The decision in *Kallati Kunju Menon* v. *Palat Errocha Menon*[1] has settled the law in so far as Nair *tarwads* are concerned. There the Court said; "It is unquestionably the law of Malabar that all acquisitions of any member of a family undisposed of at his death form part of the family property, but they do not go to the nephews of the acquirer, but fall, as all other property does, to the management of the eldest surviving male." In *Vasudevan* v. *The Secretary of State for India*,[2] the learned Judges in discussing certain questions regarding the personal law of Nambudris observed that among them "self-acquired property merges on the death of the person acquiring it in family property as in the case among Nairs." This observation however cannot be looked on as anything more than a mere *obiter dictum*, as no question as to the self-acquisitions of Nambudris was then before the Court.

[1] 2 Mad. H.C.R. 162 (1864). [2] 11 Mad. 157 (1887).

The decision in *A. L. Amma* v. *P. T. Nambudri*[1] did not advance the matter any further. Their Lordships after referring to *Vasudevan's* case, as mentioned above, went on to observe as follows:—"The course of the decisions being as now set forth, we should certainly not be prepared to hold that it is not open to the appellants to contend that the self-acquisition of Sankaran Nambudri passed on his death to his own immediate heirs and not to his *illam* if this contention had been raised either before the Court of first instance or the lower Appellate Court. From the records, however, it is clear that this plea was never even suggested till this case came before us on second appeal. Such being the case we must refuse to refer this point, as we have been requested to do, to the lower Courts for inquiry and decision."

Tarwad.

A *tarwad* is a body of persons with community of property and the common right of the eldest to succeed to the management of it.[2] Sir Muttusami Ayyar, the President of the Malabar Marriage Commission of 1891, added a Memorandum to the report of the Commission. We quote from it the following very clear and concise description of a *tarwad*:—"In its simplest form a *tarwad*, or *marumakkatayam* family, consists of a mother and her children living together with the maternal uncle as their *karnavan*. In its complex form it consists of several mothers and their children or their descendants in the female line, all tracing their descent from a common female ancestor, and living together as a joint family, in subjection to the power, and under the guidance and control of the senior male for the time being, as its head or representative. The link of relationship is descent from a common female ancestor, and the bond of family union is subjection to a common *karnavan*. The notion of *tarwad* property is that the entire family is its owner, that it is impartible except by com-

[1] 25 Mad. 662. (1901).

[2] *Erambapalli Korapen Nayar* v. *E. Chenen Nayar*, 6 Mad. H.C.R. 411 p 413 (1871) *per* Holloway J.

mon consent, and that each individual member is entitled to be maintained in his or her *tarwad* home and to the fruits of joint beneficial enjoyment. The joint family is called a *tarwad* and each of the mothers and her children and descendants in the female line constituting the *tarwad* is called a *taivali*, or the line of a single mother. * * * It is noteworthy that the relation of husband and wife or of father and child is not inherent in the conception of a *marumakkatayam* family. In cases in which a Nair woman resides with her husband, it is still considered to be in accordance with immemorial usage to send her back to her own *tarwad* immediately after, or very shortly after, his death, and not to remove his corpse for cremation until she is first sent away. The person that begot a child on a *marumakkatayam* female was originally regarded as a casual visitor, and the sexual relation depended for its continuance on mutual consent."[1]

Karnavan.

The senior male member of a *tarwad* is called the *karnavan*. He is not a mere trustee but bears the closest resemblance to the father of a Hindu family.[2] His position, rights and obligations have been the subject of various decisions.[3] We quote the following from the judgment in the case of *Varanakot N. Namburi* v. *V. N. Namburi*[4]:—"Under Malabar law, the eldest male member of the *tarwad* is the *karnavan*. In him is vested actually (though in theory in the females) all the property, moveable and immoveable, belonging to the *tarwad*. It is his right and duty to manage alone the property of the *tarwad*, to take care of it, to invest it in his own name (if it be moveable) either on loans on *kanom*[5] or other security, or by purchasing in his own name lands, and to

[1] The above is quoted in *Thiruthipalli Raman Menon* v. *Variangattil Palisseri Raman Menon*, 24 Mad. 73 p. 76 (P.C.) [1900]: s.c. 27 I A. 231.

[2] *Eravanni Revivarman* v *Ittaup Revivarman*, 1 Mad. 153 (1876).

[3] See Norton's Leading Cases, Part 1 pp. 210-212.

[4] 2 Mad. 328 p. 230 (1880).

[5] Sort of a usufructuary mortgage.

receive the rents of lands. He can also grant the land on *kanom* by his own act or on *otti* mortgage. He is not accountable to any member of the *tarwad* in respect of the income of it, nor can a suit be maintained for an account of the *tarwad* property in the absence of fraud on his part. He is entitled in his own name to sue for the purpose of recovering or protecting property of the *tarwad*. None of his acts in relation to the above matters can be legally questioned by the *tarwad* if he has acted *bona fide*. If any of his acts have been done *mala fide* they can be questioned by the members of the *tarwad*, and he may be removed for *mala fides* in his acts, or for incompetency to manage and other causes. He is interested in the property of the *tarwad*, as a member of it, to the same extent as each of the other members. All the members, including the *karnavan*, are entitled to maintenance out of the *tarwad* property. His management may not be as prudent or beneficial as that of another manager would be, but, unless he acts *mala fide*, or with recklessness or utter incompetency, he cannot be removed from such management. Almost the only restraint on him in such management is that he cannot alienate the lands of the *tarwad* except with the assent of the senior *anandravan*, or, in certain circumstances, of others of the *anandravan*.

"In theory, no doubt, property is, according to Malabar usage and law, derived through and from the female members, and, in this view, all the rest of the *tarwad* claim under them. But in practice the property is acquired and possessed by, and in the name of, the *karnavan* for the time being by his own independent act. All the other members claim through him and are bound by his acts (save as to alienations as above explained").

His powers. Though a *karnavan* seems to possess large powers in respect of a *tarwad*, these powers are essentially limited to its management. He cannot apparently alienate the family property without the consent of the other members of the family (*anandravans*), although an unreasonable

and wrong headed opposition may probably be overruled.[1] The ordinary powers of a *karnavan* can be restricted by a family agreement to which he is a party, and if, in breach of such agreement, the *karnavan* makes an alienation to a stranger who has notice of the agreement, the *tarwad* is not bound by the alienation.[2] A decree in a suit, in which the *karnavan* of a Nambudri *illam* or a *marumakkatayam tarwad* is, in his representative capacity, joined as a defendant, and which he honestly defends, is binding on the other members of the family not actually made parties.[3] A *karnavan* singly may create an *otti* mortgage for proper reasons and raise money for the family.[4]

As a *karnavan* is not a mere trustee, the rules of Courts of Equity as to the necessity of making *cestui que* trusts, parties to suits against trustees by strangers do not apply to the case of a *karnavan* and the members of the *tarwad*.[5] As the members of a *tarwad* claim under a *karnavan* they sue as such within the meaning of Explanation 5 of section 13 C. P. C. (old Act). A decree against a *karnavan* of a Malabar *tarwad*, as such, is binding upon the members of that *tarwad*, though they may not be parties to the suit, in the absence of fraud or collusion.[6]

It is open to a *karnavan* of a *tarwad* to renounce his right to manage the *tarwad* affairs.[7] Though he has the power, unless specially limited by family usage or agreement, to himself manage the trust property of the *tarwad*, he has no inherent right, as *karnavan*, to appoint another to take his place as such trustee.[8] If he appoints a junior *anandravan* as his agent to manage part of the *tarwad*

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[1] *Vide* 24 Mad. 73 p. 80.

[2] *Kanna Pisharodi* v. *Kombi Achen*, 8 Mad. 381 (1885).

[3] *Vasudevan* v. *Sankaram*, 20 Mad. 129 (F.B.) [1896].

[4] *Edathi Itti* v. *Kopashon Nayar*, 1 Mad. H. C. R. 122 (1862).

[5] *V. N. Namburi* v. *V. N. Namburi*, 2 Mad. 328 (1880).

[6] Ibid. See also *Subramanyan* v. *Gopala*, 10 Mad. 223 (1886).

[7] *K. P. V. Tavazhi* v. *Narayanan*, 28 Mad. 182 (1904).

[8] *Kannan* v. *Pazhaniandi*, 24 Mad. 438 (1901).

property, collect rents, &c, he can, on behalf of the *tarwad* family, revoke this authority at any time and take the management into his own hands.[1] An individual member of a *tarwad* has no right to claim an account from the *karnavan*.[2]

A Court has no power to confer on *karnavan* larger powers than those sanctioned by usage. If such powers are insufficient to secure to *tarwads* the full enjoyment of their estates, or if they are so limited as to interpose obstacles to the establishment of new industries the extension of such powers must be sought from the Legislature.[3]

Each member of a *tarwad* has a right to succeed by seniority to the management of the family property.[4] On the extinction of a particular house, the *tarwad* property goes over to other houses traditionally connected but long severed in point of rights of property[5].

Adoption by *a karnavan.*

In Strange's Manual of Hindu Law the following passage occurs, relating to adoption by a *karnavan*:—"On failure of the sister's progeny male and female, the head of the family may make adoption. The descent being to the female line, the adoption must be of a female."[6] This right to adopt a female is in accordance with the Nair custom and is vested in the *karnavan* or head of the family. His power to adopt, so as to make the adopted and their heirs members of the *tarwad*, is limited to the extent that, the adoption must be made with the consent of other members of the *tarwad*. Where the elder of two brothers, the only surviving members of a *tarwad*, adopted, in his capacity of *karnavan*, four persons to be joint members thereof without the consent of the younger brother, it

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[1] *Govindan* v. *Kannaran*, 1 Mad. 351 (1878).

[2] *Kunigaratu* v. *Arrangaden* 2 Mad. H. C. R. 12 ((1864).

[3] *P. P. K. Hajee* v. *P. P. K. Hajee*, 3 Mad. 169 (1881).

[4] *Kunigaratu* v. *Arrangaden* 2 Mad. H. C. R. 12 (1864).

[5] Vide *E. K. Nayar* v. *E. Ch. Nayar*, 6 Mad. H. C. R. 411 p. 413. *per* Holloway J.,

[6] Vide Section 403 *Idem*.

was held by the Privy Council that he, the *karnavan*, could not do so, in the absence of a proved custom authorizing such adoption by the *karnavan* alone. Their Lordships said: "such a power may be essential to the preservation of the *tarwad* when the last possible *karnavan* has been reached, but the possession of such a power by any *karnavan* who is not the last surviving head of his *tarwad*, seems to their Lordships to be unnecessary and to be unjust to those members of the family who may survive him and become *karnavans* in their turn. In the absence of proof it would be contrary to sound legal principles to hold that any such power was conferred by any alleged custom."[1]

A female is not precluded from managing the affairs of her *tarwad* when there is no male member in her family capable of performing the duties of a *karnavan*.[2] A female *karnavan*.

We have already said that the position of a *karnavan* is like that of the father of a Hindu family. Like him, his situation as head of the family comes to him by birth. He should certainly not be removed from his situation except on the most cogent grounds. The office is not one conferred by trust or contract, but is the offspring of his natural condition.[3] In considering the question of removing a *karnavan*, the principal point to be remembered is whether such removal will benefit the family. Merely that he is unworthy of the position is not enough. It must be satisfactorily shown that his conduct is such that he cannot be retained in his position without serious risk to the interests of the family. In *Eravanni Revivarman* v. *Ittapu Revivarman* the learned Judges concluded their judgment with these very significant words:—"The state of families and property in Malabar will always create difficulties. Their solution will not be assisted by bringing in the anarchy and insecurity which Removal of a *karnavan*.

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[1] *T. R. Menon* v. *V. P. R. Menon* 24 Mad. 73 (P.C.) 1900: S. C. 27 I. A. 231: S. C. 4 C.W.N. 810

[2] *Subramanyan* v. *Gopala*, 10 Mad. 223 (1886).

[3] *Eravanni Revivarman* v. *Ittapu Revivarman*, 1 Mad. 153 p. 157 (1876).

will always follow upon any attempt to weaken the natural authority of the *karnavan*."[1] Where a *karnavan* was found to have made perpetual grants of certain lands belonging to his *tarwad* for other than family purposes, and to have made demises of certain other lands belonging to his *tarwad* for unusual periods on no justifiable grounds, it was held that that did not constitute sufficient ground for removal of the *karnavan* from his office, his conduct not having been such as to show that he could not be retained in the position without serious risk to the interests of the family.[2] The grant of a very improvident lease following on a course of conduct pursued for some years, in which the interests of the *tarwad* were persistently disregarded, was held to be sufficient ground for removing a *karnavan* from the management of the *tarwad* property.[3]

Anandravan's right to maintenance.

Junior male members of a *tarwad* are called *anandravans*, and are entitled to maintenance. Their right to maintenance is merely a right to be maintained in the family house.[4] In North Malabar they are entitled to receive from the *karnavan* an allowance for the maintenance of their consorts and children in the *tarwad* house.[5] Though the general rule is that an *anandravan* cannot have separate maintenance, there may be rare exceptions. As for instance where the *karnavan* has been the cause of quarrels which necessitated an *anandravan* leaving the family house.[6] The fact that a member of a Malabar *tarwad* has private means does not affect his right to subsistence where the income of the *tarwad* is sufficient to provide for all a suitable maintenance ; but when the income is insufficient the *karnavan* must take into consideration the private means of each of the others.[7] A *karnavan*, as a

[1] 1 Mad. 153 p. 158.

[2] Ibid.

[3] *P. P. K. Hajee* v. *P. P. K. Hajee*, 3 Mad. 169 (1881), approving 1 Mad. 153.

[4] *Kunigaratu* v. *Arrangaden*, 2 Mad. H. C. R. 12 (1864).

[5] *V.V.V. Parvathi* v. V.V.V. *Kamaran Nayar* 6 Mad. 341 (1882).

[6] *Peru Nayar* v. *Ayyappan Nayar* 2 Mad. 282 (1880).

[7] *E. T. K. Ama* v. *E. S. V. Kymal* 5 Mad. 71 (1887).

senior member, enjoys special consideration in the *tarwad* family, but has no higher claim in the enjoyment of the income than any other member of the family. The practice of awarding one moiety of the net income of the *tarwad* to the *karnavan* is not authorized by law.[1]

Effect of gift of property to a female and her children.

A gift of property to a female and to some or all of her children by their father, or the *karnavan* of the *tarwad*, has not the effect of constituting them into a *tarwad* by themselves. They, however, hold the properties so given with the ordinary incidents of *tarwad* property, and when a member dies, his interest passes by survivorship to the others and is not available for attachment at the instance of a decree-holder.[2] Property assigned by the males of a Nair family for the support of their females is still family property and liable as such to be taken in execution of a judgment against the *karnavan*.[3]

Alienation of a *tarwad*.

A *tarwad* is inalienable, unless there be a pressing family necessity and that be well established. The assent of the senior *anandravan* to the alienation is some evidence that the purpose was a proper one, though that is open to rebuttal.[4] There is no rule of Malabar law that makes the assent of every member of a *tarwad* necessary to render valid the alienation of *tarwad* property.[5] When the deed of sale is signed by the *karnavan* and the senior *anandravan*, if *sui juris*, the sale of the property is valid. Such signature is *primâ facie* evidence of the assent of the family, and the burden of proving their dissent rests on those who allege it.[6]

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[1] *Narayani* v. *Govinda* 7 Mad. 352 (1884).

[2] *Koroth Amman Kutti* v. *Perungottil Appu Nambiar* 29 Mad. 322 (1906).

[3] *Parakel Kondi Menon* v. *Vadakentil Kunni Penna* 2 Mad. H.C.R. 41 (1864).

[4] *Koyilothputenpurayil* v. *Puthenpurayal*, 3 Mad. H.C.R. 294 (1867); *Edathil Itti* v. *Kopashon Nayar*, 1 Mad. H. C. R. 123 (1862); see also Wigram's Malabar Law and Customs p. 52.

[5] *Kalliyani* v. *Narayana* 9 Mad. 266 (1885).

[6] *Kondi Menon* v. *Sranginreagatta Ahammada* 1 Mad. H.C.R 248 (1862).

Office of *karnam*: eligibility of females.

In *Alymalammal* v. *Venkataramayyan*[1] it has been held that women are not entitled to succeed to the office of *karnam* though they have been, and sometimes are, allowed to fill the office nominally. Their sex has been regarded as incapacitating them from the office.[2] The office of *karnam* is hereditary and cannot be transferred by a deed of gift, for a *karnam* cannot confer the office upon another without assuming the authority of the proprietor of the district or the ruling power, and without doing injury to his posterity.[3]

Taverai.

The word *taverai* literally means children of the same mother, but has several distinct meanings in Malabar. In its secondary sense the term refers to a branch of the family having separate possession of a portion of the family property for convenience of enjoyment without prejudice to the unity, *tarwad* interest, or to the general control of the *tarwad karnavan*. The term includes also a branch holding self-acquired property. If the *tarwad* is broken up by partition made by common consent each branch is called a new or branch *tarwad*, and the divided kinsmen are called *attaladakkan*, or reversionary heirs.[4]

Families becoming very numerous have often split into various branches and have, in fact, become new families. In the language of the people "there is community of purity and impurity between them, but no community of property." In one sense of the word people so related are still of the same *tarwad*; in the only sense with which Courts of Justice are concerned, people so related are not of the same *tarwad*. Where there are several houses bearing the same original name, but with an addition, and there is no evi-

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[1] Mad. Decis. p. 85 (1844).

[2] See also *Venkataratnamma* v. *Ramanujasami* 2 Mad. 312 (1880); *Chandroma* v. *Venkatraju* 10 Mad. 226 (1887).

[3] *Diggavelly Parummah* v. *Coontamookala Surrauze*. (Case 1 of 1819) 1 Mad. Decis. 214; S.C. Morley's Digest Vol. I. p. 397.

[4] *Vide* Sir Muttusami Ayyar's Memorandum to Malabar Marriage Commission of 1891.

dence of the passing of a member of one house to another; there is the strongest ground for concluding that separation has taken place.[1]

In the families of the Princes, all the houses have separate property and the senior in age of all the houses succeeds to the royalty with the property specially devoted to it. This mode of succession may be regarded as rather due to public than to private law. Private families have sometimes adopted the same customs, but there is the strongest presumption against the truth of this in the case of a private family.[2]

Where an attempt is made to set up a family rule and more specially by contract, excluding the *karnavan* from all management of the property, although the senior of the houses invariably becomes *karnavan*, such an attempt can scarcely succeed. The presumption of the unity and of the existence of the ordinary rule is too strong.[3] A member of a *tarwad* divided into *taverais* with separate dwelling houses may claim to be maintained by the *karnavan* in the house of the *taverai* to which he or she belongs.[4]

Tiyans, Tiyars, &c.

As we have already said Tiyans and Tiyars of South Malabar, and Thiyyas of Calicut, like Nambudris, follow the *Makkatayam* rule of inheritance. They must not be taken to be governed by the Hindu law pure and simple. Their usages with regard to divorce, re-marriage and inheritance are not entirely in accordance with the Hindu law, though the succession of sons obtains among them. A brother succeeds to the self-acquired property of his deceased brother in preference to the widow of the latter.[5] Among Tiyans, compulsory partition cannot be effected at

[1] *E. K. Nayar* v. *E. Ch. Nayar* 6 Mad. H.C.R 411 (1871).

[2] Ibid.

[3] Ibid.

[4] *Ch. K. N. Paravadi* v. *Ch. Ch. Nambiar* 4 Mad. 169 (1881).

[5] *Rarichan* v. *Perachi*, 15 Mad. 281 (1892).

the will of one member of the *tarwad*.[1] On the death of a Tiyan of South Malabar, his mother, widow and daughter are entitled to succeed to his property (acquired by himself and his father) in preference to his father's divided brothers.[2] Among the Thiyyas of Calicut the widow of a deceased owner is a preferential heir to his mother.[3] Iluvans of the Palghat taluq also follow the *Makkatayam* law of inheritance. In their community partition is almost of universal prevalence. It is compulsory rather than dependent on mutual consent. The Iluvans have long separated themselves from the Tiyans and treated themselves as a separate class. Consequently the ruling in *Raman Menon* v. *Chathunni*[4] cannot be taken to govern them as to partibility, even assuming that at one time Iluvans and Tiyans were of one class.[5]

Zamorins of Calicut.

Regarding the customs of the Zamorins of Calicut we take the following from *Vira Rayen* v. *The Valia Rani*,[6] and *Puthia Kovilakath Krishnan Raja Avergal* v. *Puthia Kovilakuth Sridevi*.[7] The family of the Tamuri Rajahs or Zamorins of Calicut comprises three *kovilakams* or houses—the *pudia*, *padinjara* and *keyake* kovilakams. The Zamorins are governed by the *Marumakkatayam* law of inheritance. Each kovilakam has its separate estate and the senior lady of each, known as the *valia thamburatti*, is entitled to the management of the property belonging to it. There are also five *sthanoms*, or places of dignity, with separate properties attached to them, which are enjoyed in succession by the senior male members of the kovilakams. These are in order of dignity (1) the *Zamorin*, (2) the *Eralpad*,

[1] *Raman Menon* v. *Chathunni*, 17 Mad. 184 (1893).

[2] *Imbichi Kandan* v. *Imbichi Pennu* 19 Mad. 1 (1895).

[3] *Kunhi Pennu* v. *Chiruda* 19 Mad. 440 (1896).

[4] 17 Mad. 184 (1893).

[5] *Velu* v. *Chamu* 22 Mad. 297 (1898).

[6] 3 Mad. 141 (1881).

[7] 12 Mad. 512 (P.C.) [1889].

(3) the *Munarpad*, (4) the *Edatharapad* and (5) the *Nadutharpad*. It would seem that, at the beginning of the nineteenth century, there was also a sixth *sthanom*, known as the *Ellearadi Tirumapad*.

"In the management of the properties of the three kovilakams, the senior ladies are often assisted by the males or rajahs who in time may pass out of the kovilakam and attain one of the separate *sthanoms*.

"There are no family names and the *sthanom*-holders are distinguished after their deaths by the name of the year in which they respectively died. All property acquired by the holder of a *sthanom*, which he has not disposed of in his lifetime, or shown an intention to merge in the property attached to the *sthanom*, becomes, on his death, the property of the kovilakam in which he was born. The property acquired by any member of the kovilakam is, in accordance with the principle recognized in the case of the joint Hindu family, presumed to be the common property of the kovilakam, unless proof is given that it has been acquired otherwise than with the aid of the common funds; and as in other Malabar families, properties are sometimes entrusted to the possession of a member, who is not by the customary law entitled to their management, either for the purposes of management or as an assignment for maintenance. Such arrangements are made at the pleasure of the *valia thamburatti* of the kavilakam, who can also at her pleasure resume any properties which have been so dealt with. Lastly, it is not an uncommon practice that sale-deeds for properties purchased by the kavilakam should be taken in the name not of any member of the kovilakam, but of the deity under whose protection the kovilakam has assumed to place itself, or in the name of agents of the kovilakam. The explanation offered of this circumstance is that formerly ladies were averse to obtaining deeds of sale in their own names, lest it should be supposed they had acquired the funds wherewith to make the purchases by dishonourable means; and with

respect to purchases in the name of the tutelary deity, a more probable reason is suggested that religious scruples would interpose additional reasons for preserving it in the *tarwad*."

In *Vira Rayen* v. *The Valia Rani*[1] it was held that, according to the custom obtaining in the family of the Zamorin Rajahs of Calicut, property acquired by a *sthanom*-holder and not merged by him in the property of his *sthanom*, or otherwise disposed of by him in his lifetime, becomes on his death the property of the kavilakam in which he was born, and, if found in the possession of a member of the kavilakam, it belongs presumably to the kavilakam as common property.

Sthanom lands, whether alienable.

Lands attached to the *sthanom* of sthanomdars in Malabar are, unless the contrary be specifically proved in any particular case, liable to alienation and charge, at all events for the payment of debts incurred for the conservation of the *sthanom*. Holloway J., said :—"In the case of the Zamorin there are decisions that the property of his house is held on terms different to those of others. In his case, however, it has never been decided that the property attached to his *sthanom* is not liable for debts incurred for its conservation. He stands in a peculiar position, and, as has been before pointed out, there is strongest presumption against any other family having a right to claim exception from the general law of the Courts."[2]

Alyasantana.

The term *Alyasantana* is composed of two words of two different dialects, viz., *alya*, which is Karnatic, meaning son-in-law, and *santana*, which is Sanskrit, meaning offspring. It is applied to the system of rules prevailing in Canara, regulating succession, which invariably runs in the female line as in Malabar. The system is stated to have been introduced into Canara about the beginning of

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[1] 3 Mad. 141 (1881). 1 Mad. 88 (1876).

[2] *Ch. M. Nair* v. *K. U. Memon*,

the thirteenth century.[1] According to Mr. Mayne, it is said to have been introduced into South Canara by Bhutala Pandya in 77 A.D.[2] The difference between the system of *Alyasantana* and the system known as *Marumakatayam*, prevailing in Malabar, lies in the fact that in the former the doctrine that *all rights to property are derived from females* is more completely and consistently carried out than in the latter. Another point of difference is that in Canara the management of property vests generally in females whereas, in Malabar, the management of a *tarwad* is commonly held by males. Besides these points of difference the two systems governing inheritance prevailing in Malabar and Canara are similar.[3]

"There is some support," said Turner C.J., "for the contention that the *Alyasantana* was not the original law of the Hindus in Canara, and although, if it were borrowed from the South, it may in many features resemble Malabar law, it is not to be assumed that they are on all points identical."[4] There is so little extant in the form of text or decision on the *Alyasantana* system that the Courts have frequently to rely on prevailing custom and local usages in determining many doubtful questions of right.[5] But in justice to the school of *Alyasantana*, we should mention that the treatise known as "Bhutala Pandya's Law" is admittedly the best existing authority on the *Alyasantana* system prevailing in Canara, and has again and again been recognized as such by the Courts.[6]

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[1] Strange's Hindu Law, 2nd Edn. § 404; Chamier's Land Assessment and Landed Tenures in Canara Mangalore, pp. 16, 86, (1853).

[2] Hindu Law and Usage, p. 121.

[3] *Munda Chetti* v. *Timmaju Hensu* 1 Mad. H. C. R. 380 p. 383 (1863). Strange's Hindu Law, 2nd Edn. § 404.

[4] *Antamma* v. *Kaveri*, 7 Mad. 575 p. 577 (1884).

[5] *Subbu Hegadi* v. *Tongu*, 4 Mad. H. C. R. 196, p. 200 (1869); 7 Mad. 575 (1884).

[6] *Koraga* 6 Mad. 374 p. 376 (1883).

Compulsory division of property not allowed.

In Canara, as we have already said, females in preference to males are recognized as the proprietors of the family estate. In the families in Canara, in which inheritance is governed by the *Alyasantana* rules, no member of the family can claim compulsory division of the family property.[1]

Pattam or office of dignity is indivisible.

The *pattam*, or office of dignity in a family governed by the *Alyasantana* system, is indivisible, and whether the family be divided or not, the *pattam*, no special arrangement having been made about it, descends to the eldest male of the surviving members of the family.[2]

Marriage under *Alyasantana*.

The marriage relations of the ordinary *Alyasantana* castes of Canara are dealt with in the first eight of the sixteen *kutalis* or rules, subject to the leading *Alyasantana* principle of succession in the female line under which a wife and her children have no share in the inheritance of the husband's property.[3] The customary cohabitation of the sexes seems to do no more than create a casual relation, which the woman may terminate at her pleasure, subject, perhaps, to certain conventional restraints among the more respectable classes, such as a money payment and the control of relations, etc., which may be prescribed as a check upon capricious conduct.[4] The cohabitation of a man and woman under the *Alyasantana* law does not constitute such a marriage as is intended in those sections of the Indian Penal Code which deal with offences against marriage. That the *Alyasantana* law does not recognize such cohabitation as marriage appears from the circumstance that it implies no rights of property or of inheritance.[5]

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[1] *Munda Chetti* v. *Timmaju Hensu*, 1 Mad. H. C. R. 380 (1863).

[2] *Timmappa Heggade* v. *Mahalinga Heggade*, 4 Mad. H. C. R. 28 (1868). See also a passage translated from Bhutala Pandya's work and quoted in Ibid p. 30, which questions the correctness of the same quoted in 1 Mad. H. C. R. 381 note.

[3] *Koraga* 6 Mad. p. 374, p. 376 (1883).

[4] Ibid.

[5] Ibid.

A female who is a member of a family governed by the *Alyasantana* system of law, living apart from the family with her husband, is not entitled to a separate maintenance out of the income of the family property.[1]

Yajamana.

The question whether according to the *Alyasantana* usage obtaining in South Canara, it is the senior male or female, or only the senior female that is entitled to be the *yajamana* of the family was the subject-matter of decision in the case of *Devu* v. *Deyi*.[2] The Court, after considering all the judicial decisions and authoritative writings on the point, came to the conclusion that the question was still *res integra* and it was impossible to come to a satisfactory conclusion regarding it without evidence of usage. Where, by a family arrangement between all the members of an *Alyasantana* family in settlement of disputes in the family, it was agreed that the senior male for his life should enjoy the possession of the family land and protect the females, the senior female, assuming that she was *de jure* yajamana, could not ordinarily revoke this arrangement.[3]

In the case of *Mahalinga* v. *Mariyamma* the Court observed thus:—"Though it was considered not yet settled whether the senior female might not exclude the senior member of the family from management if he is a male, still it was never doubted that the senior member, if a female, is entitled to the yajamanaship. It is true that females are generally excluded from management in Malabar by reason of their sex, but it is the incident of a special usage which has been recognized to obtain in that district. As observed by the Judge, the *Alyasantana* system of inheritance as well as the *Marumakkatayam* usage has probably originated from a type of polyandry which prevailed in ancient times, and the natural result of that system would lead to the senior female being the *yajamana* of the

[1] *Subbu Hegadi* v. *Tongu*, 4 Mad. H. C. R. 196 (1869).

[2] 8 Mad. 353 (1885).

[3] Ibid.

family. We agree in the opinion of the Judge that the practice obtaining in Malabar, whereby females are excluded from management, cannot be extended to the *Alyasantana* families in South Canara."[1] The senior female of an *Alyasantana* family is *primâ facie* entitled to the yajamanaship; and, in the absence of a special family custom or a binding family arrangement to the contrary, the management of the family affairs by another member is to be presumed to be by the sufferance of the *yajamana* for the time being, and it does not preclude the *yajamana* from resuming the management at his or her pleasure at any time.[2] It has been held that such a presumption is legal, with reference to a Malabar *tarwad*, the constitution of which is similar to that of an *Alyasantana* family.[3]

Alyasantana family: adoption.

The Sudder Court in the case of *Cotay Hegaday* v. *Manjoo Kumpty*[4] held that the last female member of an *Alyasantana* family, having a son, cannot without his consent make a valid adoption. In *Chamâu* v. *Subba*[5] the question was whether, if the son suffered from ulcerous leprosy, his consent was necessary for the mother to adopt a son in his life-time. It was found that there was no custom in South Canara excluding lepers either from management or from inheritance. Besides, there is no reason why a physical infirmity which unfits a man to be *karnavan* should further deprive him of other rights attached to the *status* which he enjoys in the family. The question is one of *Alyasantana* usage. And in the absence of any authority warranting such adoption, the Court held that the son was entitled to have the adoption set aside.

Self-acquisition.

According to the custom obtaining in South Canara, the self-acquisition of a member devolves on the heirs of

[1] 12 Mad. 462 p. 464 (1889).

[2] *Mahalinga* v. *Mariyamma* 12 Mad. 462 (1889).

[3] See *Nambiatan* v. *Nambiatan* 2 Mad. H. C. R. 110, Reporter's Note; also 12 Mad. 462 p. 464. (1889).

[4] Mad. Decis. 138 (1859).

[5] 13 Mad. 209 (1889).

the acquirer in his branch. The *tarwad* has no claim to it.[1] In *Kallati Kunju Menon* v. *Palat Erracha Menon* the Court observed:—"It is unquestionably the law of Malabar that all acquisitions of any member of a family undisposed of at his death, form part of the family property, that they do not go to the nephews of the acquirer, but fall, as all other property does, to the management of the eldest surviving male."[2] This decision has been uniformly followed by the Courts, and has settled the law in so far as Nair *tarwads* are concerned.[3]

The self-acquired property of a member of a Malabar *tarwad*, which, not being disposed of at the death of the acquirer, lapses into the property of the *tarwad*, enures as assets of the deceased for the payment of his debts in the hands of the members of the *tarwad*.[4] A female who is a member of a family governed by the *Alyasantana* system of law, living apart from the family with her husband, is not entitled to a separate allowance for maintenance out of the income of the family property. The husband is bound to maintain his wife out of his self-acquired means so long as she continues to live with him.[5]

Mapillas.

The early history of the Mapillas is not accurately known. The term Mapillas, or Maplas, literally means mother's sons.[6] They are chiefly descendants of Arab settlers and other colonists in Malabar. The designation was conferred on them because they sprang from the intercourse of foreign colonists who were persons unknown. The term was also applied to the descendants of the Nestorian Christians.[7] But it is now confined to Mahomedans. The Mapillas of the present day are certainly descendants of converts to

[1] *Antamma* v. *Kaveri* 7 Mad. 575 (1884).

[2] 2 Mad. H.C.R. 162.

[3] *Vide* 25 Mad. p. 666 wherein 3 Mad. H.C.R. has been referred to.

[4] *Ryrappan Nambiar* v. *Kelu Kurup* 4 Mad. 150 (1881).

[5] *Subbu Hegadi* v. *Tongu* 4 Mad. H.C.R. 196 (1869).

[6] From *ma* mother, and *pilla*, son.

[7] *Vide* Wilson's Glossary.

Islam from various castes of Hindus in Malabar. It is said that during the sixteenth and seventeenth centuries the Zamorin encouraged their conversion in order to have his war-boats manned by Mapillas to fight the Portuguese on the seas. They have since increased in number and have materially improved their social position.

Although as a rule succession among them is by sons, yet in the Mapilla families residing in North Malabar, the inheritance by nephews is observed. Except in matters of inheritance they are governed by Mahomedan law. Other Mapillas, though professed Moslems, follow either the *Marumakkatayam* or *Makkatayam* system of Malabar. Sometimes both the *Marumakkatayam* system and the Mahomedan law may be followed by a Mapilla *tarwad*. As for instance the former system as governing the descent of the *tarwad* property, and the latter as governing the self-acquisition of the members of the family.[1]

Devolution of property.

In North Malabar, if the late owner was governed by the Mahomedan law, the presumption would be that the law governing the devolution of his estate would be the Mahomedan law, notwithstanding that the deceased was, through his mother, interested in *tarwad* property.[2] In *Assan* v. *Pathumma*[3] the property, the devolution of which was in question, had belonged to a person who was admittedly governed by Mahomedan law. That case should not be understood as laying down that in every dispute relating to property between Mahomedans in North Malabar, even where they are members of a *Marumakkatayam tarwad*, the devolution of property is to be governed by Mahomedan law until the contrary is shown. Where the deceased has followed the *Marumakkatayam* law his self-acquired property passes, on his death, to his *tarwad*.[4]

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[1] *Byathamma* v. *Avulla* 15 Mad. 19 (1891).

[2] *Kunhimbi Umma* v. *Kandy Moithin* 27 Mad. 77 (1903).

[3] 22 Mad. 494 (1898).

[4] Ibid.

In *Serumah Umah* v. *Palathan Vitil Marya Coothy Umah*[1] the parties belonged to a Mapilla family and the disputed property was not one the devolution of which was governed by any local law or custom. The Privy Council said that if it was contended that the succession to it was regulated by any special family custom, that custom ought to have been alleged and proved with a distinctness and certainty. And as such proof was not forthcoming their Lordships dismissed the appeal.

Presumption of joint ownership.

Although the Mapillas in Malabar ordinarily follow closely the Hindu custom of holding family property undivided, yet as the Mapillas are not subject to the same personal law as the Hindus their claims cannot be governed by the legal presumption of joint ownership.[2]

Anandravan's maintenance.

By the custom of the country the junior male members of a Mapilla *tarwad* governed by the *Marumakkatayam* law are entitled to maintenance from the *tarwad* when living in the houses of their consorts and also to a higher rate of maintenance when living with their consorts than when living as single man.[3]

Self-acquisition.

As to the descent of self-acquired property in a Mapilla family, the Madras High Court's decisions are not uniform. In *Panangatt Unda Pakramar* v. *Vadakkel Suppi*[4] the question was raised and it was found that Mapillas are governed in that respect by the ordinary *Marumakkatayam* law as declared in *Kallati Kunja Menon* v. *Palat Erracha Menon*.[5] Subsequently in *Kunhi Pathumma* v. *Mama*[6] the question was raised again, and after inquiry the finding was in favour of the deviation from *Marumakkatayam* law. The High Court accepted that finding so far as it concerned the particular family and held that there existed sufficient evidence of custom. In *Illika Pakramar* v. *Kutti*

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[1] 15 W. R. (P. C.) [1871].

[2] *Ammutti* v *Kunji Keyi* 8 Mad 452 (1885).

[3] *Ch. O. Bappan* v. *Ch. Ch. O. Makki* 6 Mad. 259 (1882).

[4] Second Appeal No. 576 of 1883, unreported.

[5] 2 Mad. H.C.R. 162.

[6] Appeal No. 125 of 1885, unreported.

Kunhamed[1] the question was discussed but no definite conclusion was arrived at. In this case, however, the District Judge remanded the case for the trial of the general issue as to the mode of devolution of self-acquired property in *Marumakkatayam* Mapilla families in North Malabar, and ultimately ruled that in *Marumakkatayam* families the self-acquired property of a female descends to her children and does not lapse on her death to her *tarwad*. But the High Court held that the order of remand was not in accordance with section 556 C.P.C. (old Act) and that the proceedings taken under it were irregular.[2]

Ravuthans of Palghat.

The Ravuthans of Palghat are generally governed by Mahomedan law. In the case of *Mirabivi* v. *Villayanna*[3] a claim by the widow and her daughters for their shares in the estate of the deceased was opposed by other members of the family, who pleaded, *inter alia*, that according to a special custom obtaining among the Ravuthans of that part of the country, adopted from Hindu law, females are excluded from inheritance if sons or sons' sons exist. In two instances it was proved that women of this class had obtained shares under Mahomedan law by suits without this special custom having been even pleaded against them. The High Court held that no valid custom had been established by evidence.

Among Mahomedans of Mabaral.

In a case among Mahomedans of Malabar a nephew claimed to succeed as heir to his deceased uncle's estate in conformity with certain local usages observed chiefly by the Hindus there. But as the nephew failed to prove that such custom prevailed in the family, the estate was adjudged to the sons of the deceased according to the Mahomedan law of inheritance by the Madras Sudder Court.[4]

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[1] 17 Mad. 69 (1893).

[2] See *Kunhacha Umma* v. *Kutti Mammi Hajee* 16 Mad. 201 (F. B.) [1892].

[3] 8 Mad. 464 (1885).

[4] Case 5 of 1809, 1 Mad. Decis. 29 : s.c. Morley's Digest Vol. I. p. 346.

Superintendence of mosques.

In Malabar, when the right to superintend a Mosque is in dispute the Mahomedan law of succession must be applied unless a custom to the contrary is proved. Proof that the management of most mosques in a certain district is in the hands of persons who would inherit under the *Marumakkatayam* law will not warrant a finding of the existence of such a custom in such district.[1]

Mortgage tenures: *Iladarawara*.

Iladarawara mortgage occurs in Kanara and resembles a Welsh mortgage, the mortgagee being in possession and taking the rents and profits in lieu of interest, and the security carrying a right to redeem but none to foreclose. The *iladarawara* mortgagee pays the Government revenue.[2]

Kanom.

A *Kanom* mortgage is one in which the mortgagee holds the land as security. The mortgagee is entitled to the possession of the property for a period of twelve years from the date of the mortgage. "A *kanom* ... combines in it the ingredients of both a simple usufructuary mortgage. According to the usage of Malabar it is a mortgage with possession for twelve years with a right in the *kanomdar* to appropriate the usufruct in lieu of interest or both principal and interest and the *jenmi* or mortgagor is bound under the contract to pay the *kanom* amount on the expiration of twelve years."[3] A *kanom* mortgagee does not forfeit his right to hold for twelve years from the date of the *kanom* by allowing the *porapad* or net rent to fall into arrears.[4] A *kanomdar's* right to hold for twelve years depends on his acting conformably to usage and the *jenmi's* interest, and is lost if he repudiates the *jenmi's* title and questions the validity of the *kanom*.[5]

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[1] *R. Kunhi Bivi Sheriff* v. *Ch. Abdul Aziz* 6 Mad. 103 (1882).

[2] *Mailaraya* v. *Subbaraya Bhut* 1 Mad H.C.R. 81 note.

[3] *Per* Muttusami Ayyar J., in *Ramunni* v. *Brahma Dattan* 15 Mad. 366 p. 369 (1892).

[4] *Shaikh Rautan* v. *Kadangot Shupan* 1 Mad. H.C.R. 112 (1862).

[5] *Mayavanjari Chumaren* v. *Nimini Mayuran* 2 Mad. H.C.R. 109 (1864). *Ramen Nayar* v. *Kandapuni Nayar* 1 Mad. H.C.R. 445 (1863).

Although the right to hold for twelve years is inherent in every *kanom* according to the custom of the country, it is competent in the *jenmi* to exclude its operation by express agreement.[1] On the expiry of the term, the *kanom* must either be discharged or renewed.[2]

The contract of *kanom* is substantially an agreement by one party, on consideration of the receipt of a sum of money from the other, to place real property in possession of that other for a period of twelve years. As the mortgage cannot be discharged before the lapse of twelve years, it seems only consistent with justice that the money should not be reclaimable until that period has elapsed. Where, however, the demisor is unable to give possession, it is reasonable that the demisee should be allowed to repudiate the contract and sue for his money.[3]

Effect of *Anubhavam* in a *kanom-deed.*

A stipulation in a *kanom* deed that a certain amount of grain or money is granted to the mortgagee as *anubhavam* does not necessarily create an irredeemable tenure. The word *anubhavam* will create an irredeemable tenure only when used with reference to the tenure itself, but when used with reference to the allowance, such allowance will be perpetual but not the tenure. Whether, in any particular case, the words create an irredeemable tenure or only a perpetual rent charge in respect of the allowance must be decided by the language of the document. If the amount of the grant is not specified and if the terms of the document indicate that only a fixed rent is reserved for the grantor and the rest of the produce is given as *anubhavam*, an irredeemable tenure will be created; but otherwise if the amount of the grant is fixed and the rest is reserved as rent.[4]

Redemption of a *kanom.*

By the custom of Malabar a *kanom* enures for twelve years unless the parties to it have by express contract

[1] *Shekhara Paniker* v. *Raru Nayar* 2 Mad. 193 (1879).

[2] *Narayana* v. *Narayana* 8 Mad. 284 (1884).

[3] *Vayalil Pudia Modathemmil Moidin Kutti* v. *Udaya Varma Valia Rajah* 2 Mad. H. C. R. 315 (1865).

[4] *Vythilingam Pillai* v. *Kuthiravattah Na'ir* 29 Mad. 501 (1906).