provided for its redemption at an earlier date.[1] Where a first *kanom*-holder in his answer to a redemption suit by a second mortgagee, for the first time denied his own *kanom* and alleged an independent *janmam* right, it was held that he had not thereby forfeited his right to rely upon the option to make a further advance, to which as a *kanom*-holder he was entitled.[2] In a suit to redeem *kanom*, a *jenmi* has not had to prove "some special exigency" as a condition precedent to his right to recover "on demand" before twelve years.[3] On redemption of a *kanom*, the *kanom*-holder is not entitled to claim under the head of improvements the value of trees of spontaneous growth.[4] The right of a *jenmi* to deduct arrears of rent from the amount payable by him on redemption of a *kanom*, being a customary incident of the tenure, is not affected by the three years' period of limitation for recovery of arrears of rent.[5] According to the local usage prevalent in Ernad a *jenmi* on redemption of a *kanom* takes credit for one-half of the value of improvements effected by the *kanomdar*.[6]

Kuikanom.

A *kuikanom* lease is one in which no term is fixed. In a question whether a *kuikanom* lease is determined on the expiration of twelve years from its date, it was held that "the customary law of Malabar requires that a tenant under a *kanom* or *kuikanom* lease should not be redeemed or ejected until the expiration of twelve years from its date, but it does not determine the lease at the expiration of the twelve years."[7]

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[1] *Kelu Nedungadi* v. *Krishnan Nair* 26 Mad. 727 (F. B) [1903].

[2] *Paidal Kidavu* v. *Parakal Imbichuni Kidavu* 1 Mad. H. C. R. 13 (1862).

[3] *Narayana* v. *Narayana* 8 Mad. 284 (1884).

[4] 26 Mad. 727 (F.B.); *V.K. Bappoo* v. *K.A. Ayissa* 14 Mad. 76 dissented from, in which it was held that "Special exigency" must be proved.

[5] *Unnian* v. *Rama* 8 Mad. 415 (1884). *Kanna Pisharodi* v. *Kombi Achen* 8 Mad. 381 (1885).

[6] Ibid 415.

[7] *Kelappan* v. *Madhavi*, 25 Mad. 452 (1901).

Otti.

An *Otti*[1] mortgage in Malabar is what is designated a usufructuary mortgage elsewhere. The *Sudder Adawlut* of Madras described *otti* thus:—"This tenure gives the mortgagee possession and the entire produce of the land, the landlord merely retaining the proprietary title and the power to redeem. When no period has been stipulated the landlord may pay off the mortgage at any time. The principal alone is repayable, the mortgagee recovering the interest of his money from the produce of the land. If the landlord be desirous of raising a further sum and the *otti* mortgagee refuse to advance it, the money may be received from a third party and the mortgage transferred to him. But the original mortgagee has a right to be first consulted."[2] Some slight modification of the above description has been effected by judicial decisions.

An *otti* mortgage is not an absolute sale. For the *jenmi* proprietor has a distinct right to redeem it. An *otti* right entitles the mortgagee to hold without redemption for twelve years from the date of the mortgage. In other words, an *otti* mortgage is irredeemable before the lapse of twelve years.[3] In Malabar it is necessary for a sale of family property that the senior *anandravan* (if *sui juris*) should concur in the conveyance. But as an *otti* mortgage is not a sale, and an *otti* right is a mortgage right, a *karnavan* may singly create it for proper reasons.[4]

Difference between *otti* and *kanom*.

An *otti* differs from a *kanom* in two respects. First, the right of pre-emption which the *otti*-holder possesses in case the *jenmi* wishes to sell the premises, and, secondly, in the amount secured, which is generally so large as

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[1] Also known as *Palissa Madakka*, *Vari Madakka Nierpalissa* or *Veppu* in several parts of Malabar.

[2] See also Wilson's Glossary. Proceedings of the Sudder Adawlut, 5th August, 1855.

[3] See Special Appeal No. 101 of 1862, Madras High Court, dated March 21, 1863; *Edathel Itti* v. *Kopashon Nayar*, 1 Mad. H. C. R. 122 (1862). *Kumini Ama* v. *Parkam Kolusheri* Ibid 261 (1863); *Keshava* v. *Keshava* 2 Mad. 45 (1877).

[4] *Edathil Itti* v. *Kopashon Nayar* 1 Mad. H.C.R. 122 (1860).

practically to absorb in the payment of the interest the rent that would otherwise have been paid to the *jenmi*, who is thus entitled to a mere pepper-corn rent.[1]

Otti-holder's right.

An *otti*-holder, like a *kanomdar*, forfeits his right to hold for twelve years by denying the *jenmi's* title.[2] But he does not forfeit his right as holder of an *otti* by endeavouring to set up further charges (which he has failed to prove) in answer to a suit for redemption. Nor does he lose his rights by setting up as a plea, that an assignment of the *jenmi's* title was invalid, because it was made without his consent in writing, or because, in defeasance of his rights of pre-emption, it was made without any previous offer to him.[3] An *ottidar* loses his right of pre-emption if he refuses to bid at a court sale of the land comprised in his *otti*, held in execution of a decree against the *karnavan* and senior *anandravan* of the *tarwad*, in which the *jenmi* right is vested, after having been specially invited to attend and exercise that right, and if he makes no offer to take the property for a long time after the court-sale.[4]

An *otti* mortgagee, if he avails himself of his right of pre-emption, must pay for pre-emption whatever sum is *bona fide* offered to the *jenmi* for the purchase, if the former has the offer made to him by the *jenmi* and is rightly informed of the circumstances in reference to the offer. If he does not pay such sum, then his right of pre-emption is gone and the *jenmi* may sell to another. He is not obliged to give any fancy auction price at an auction but is "entitled to the advantage which his position gives him, to be fully informed what price he is to pay before he makes up his mind to buy." Public notice of, and the option of, bidding at a court-sale of the *jenmi's* rights do not constitute a valid offer of pre-emption so as to deprive

[1] *Kumini Ama* v. *Parkam Kolusheri* 1 Mad. H.C.R. 261 (1863).

[2] *Kellu Eradi* v. *Puapalli*, 2 Mad. H. C. R. 161 (1864).

[3] *K. T. P. Kunhali* v. *V. V. Kinathe*, 3 Mad. 74 (1880).

[4] *Ammotti Haji* v. *Kunhayen Kutti*, 15 Mad. 480 (1892). *Vasudevan* v. *Kashavan* 7 Mad. 309 (1884).

the *otti*-holder of his right of pre-emption, if he does not purchase the *jenmi's* rights.[1]

Jenmi's right.

During the continuance of a first *otti* mortgage the *jenmi* is in the same position as regards his right to make a second *otti* mortgage to a stranger as he was before, after the lapse of twelve years from the date of the first mortgage. In *Ali Husain* v. *Nillakanden Nambudri*,[2] the Court observed:—"It has been frequently decided and is now well settled that an *otti* mortgagee must, if the *jenmi* proprietor is desirous of obtaining a further advance by way of mortgage on the property, be allowed as a matter of right the option of making the advance himself, before the lands can be offered on superior mortgage, and be made a valid security for an advance by a stranger, and no distinction has been made between the rights of the first mortgagee before and after the lapse of the twelve years." So where a *jenmi* made an *otti* mortgage and more than twelve years after made a second *otti* mortgage to a stranger without having given notice to the first mortgagees so as to admit of the exercise of their option to advance the further sum required by the *jenmi*, it was held that the second mortgagee could not redeem the lands comprised in the first mortgage.[3]

Peruarthum.

A *Peruarthum* tenure is confined to one or two taluqs of Malabar. It is a mortgage "in which the proprietor receives the full marketable value of the property for the time being, retaining the empty title of *jenmi*, (not being entitled to the smallest token of acknowledgment of proprietorship), and in redeeming the property he repays, not the amount originally advanced to him, but the actual

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[1] *R. P. I. Ch. K. Nambudri* v. *R.P. I. V. Nambudri* 5 Mad. 198 (1882). *Kankarankutti* v. *Uthotti*, 13 Mad. 490 (1890). See also *Krishna Menon* v. *Kesavan*, 20 Mad. 305 (1897).

[2] 1 Mad. H. C. R. 356 (1863).

[3] Ibid. As to the necessity of giving a first *otti* mortgagee the opportunity of making the further advance required by the mortgagor, see S. A. No. 17 of 1860, Mad. Decis. 249 (1860), referred to in 1 Mad. H. C. R. 15, note.

value of it in the market at the time of redemption. If he is to repay only the amount so advanced then he does not pay the *peruarthum*, because that term means full value realizable." In a case in which a *peruarthum* mortage was the subject for decision, the High Court, on the authority of the Sudder Court's decision, held that on restoration of land under a demise of the kind the market value at the time of redemption, and not the amount originally advanced, should be paid to the tenant.[1]

Land tenure.

There is no universal usage in Malabar, nor any presumption of its existence that a tenant is not entitled to compensation for improvements effected prior to the date of the *kanom* under which he holds land not specially reserved to him by the *kanom* deed.[2]

Adimayavana.

An *Adimayavana* tenure in South Malabar is a permanent one and where land has been granted on it for services rendered prior to the grant, the landlord cannot eject the tenant as long as the land remains in the family of the grantee.[3]

Tanjore custom.

There is a practice in the Tanjore district by which *purakudis* or artizans are allowed to occupy *manaikats* belonging to *mirasidars*, free of rent, so long as they cultivate the lands of the *mirasidars* or render them services in other ways.[4]

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[1] *P. S. V. V. Rojah* v. *Mangalom Amugar* 1 Mad. 57 (1876).

[2] *M. N. Nayar* v. *V. Nambudripad* 4 Mad. 287 (1881).

[3] *Theyyan Nair* v. *Zamorin of Calicut* 27 Mad. 202 (1903).

[4] *Lakshmana Padayachi* v. *Ramanathan Chettiar* 27 Mad. 517 (1897).

CHAPTER XII.

PUNJAB CUSTOMS.

In no country, throughout British India, is the reign of custom so paramount as in the Punjab. Here, in village communities, among Hindus and Mahomedans, agriculturists and non-agriculturists, customs and usages regulate and determine the civil and municipal rights of the people much more than Statutes and Laws. Decisions by the highest court of the land abound in the recognition of such customs and usages.

The Punjab Civil Code has fully recognized the legal force of custom in all matters of civil right and that it prevails against Hindu law where the latter is shown to have been superseded by it. But customs or usages opposed to morality, public policy or positive law cannot have any such recognition.[1] A family custom in derogation of ordinary law cannot be supported on slender evidence of a few instances of modern date.[2] To form the basis of a right a custom must be continuous; the right cannot be enforced on the ground of custom alone, when it has been interrupted.[3] A local custom, to override the general Hindu law, must be clearly established.[4]

As in other countries, a custom to be valid in the Punjab must satisfy all its requisites, *viz.*, it must be *ancient, consistent, continuous* and *certain*. On the point of antiquity it should be remembered that the Punjab has been annexed to the British territory in India since 1849. Prior to that period there is little possibility of ascertaining

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[1] Vide s. 3; and *Hursahai* v. *Bhawani Dass* 9 P.R. (1868).

[2] *Jamna Devi* v. *Chuni Lal* 30 P.R. (1903); see also 108 P. R. (1888); 116 P. R. (1893) and 43 P.R. (1899).

[3] *Gaman* v. *Gholam Mahomed* 52 P.R. (1868).

[4] *Doolram* v. *Bhujjooram* 33 P.R. (1866).

what were the customs of the people except by their traditions,—the traditions which have come down from generation to generation. These traditions are to be found recorded in the *Wajib-ul-urz, Riwaj-i-am,*—Settlement records and Administration papers of the villages. The statements recorded therein are of considerable value in determining customs. They may not be accepted as proof absolute and conclusive but are invariably regarded as a strong *prima facie* evidence in support of any one of the customs to which they refer. The Chief Court of the Punjab in *Hajja* v. *Mir Mahomed*[1] laid down that the *Wajib-ul-urz*, where it speaks plainly, must be taken to establish the true custom and rule of property in the village in question, and to signify the consent of the community to be bound by it. It is not final and it is open to any proprietor to prove that he is not bound by it, or did not consent to it. But the presumption is in favour of the document.

We propose to deal with customs relating to Hindus and Mahomedans separately, although in most cases the same custom governs both equally. We begin with customs as obtain among Hindus in the Punjab.

INHERITANCE.

The customary law of succession among many classes of Hindus in the Punjab shows several points of difference from the Hindu law. The principle that the right of inheritance is wholly regulated with reference to the spiritual benefits to be conferred on the deceased proprietor does not hold good among the Hindus of the Punjab. The order of succession among them is regulated by custom and not by spiritual considerations.[2] "Excepting all matters connected with the property of religious institutions and succession thereto, it may be said that throughout the Punjab there

[1] 54 P.R. (1867). Law Vol. II. p p. 100, 142.

[2] Tupper's Punjab Customary

is a tendency towards a separation of civil and religious obligations; and the Courts generally consider traditional rules of custom regarding inheritance without those explanations of a spiritual character which have been applied in other parts of india."[1]

With regard to the devolution of property among the people of the Punjab Sir W. H. Rattigan observes as follows :—

"There are four leading canons governing succession to an estate amongst agriculturists. *First*, that male descendants invariably exclude the widow and all other relations; *second*, that when the male line of descendants has died out, it is treated as never having existed, the last male who left descendants being regarded as the propositus;[2] *third*, that a right of representation exists, whereby descendants in different degrees from a common ancestor succeed to the share which their immediate ancestor, if alive, would succeed to; and *fourth*, that females other than the widow or mother of the deceased are usually excluded by near male collaterals, an exception being occasionally allowed in favour of daughters or their issue, chiefly amongst tribes that are strictly endogamous.

"In the case of several sons the ordinary rule is, that they take *per capita* and equally, primogeniture not being recognized except in the case of ruling Chiefs or Jagirdars whose ancestors were ruling chiefs, or in regard to the succession to the post of Lomberdar. But sometimes an eldest son is allowed an extra share, and amongst some tribes the division in the case of sons by different wives is *per stirpes* : these, however, are exceptional cases, and persons who claim a right of this kind must be required to prove that it is recognized by the customary law applicable to them. In a contest between relations of the whole and the half-blood, the decision will largely depend on the rule followed at the distribution of the estate on

[1] Boul. and Ratti. p. 67.

[2] 146 P.R. (1889).

the death of the common ancestor, which will give rise to a presumption in favour of the continuance of the rule then adopted."[1]

Sons succeed to their deceased father whether the latter was joint with others or not. But a son at the life-time of his father cannot by custom enforce partition of the ancestral immoveable property. This custom is common to Hindus as well as Mahomedans.[2] Where a father dies leaving sons and daughters surviving him, the sons exclude daughters.[3] As a general rule, sons, whether by the same or different wives, share equally.[4] As in some parts of Bengal, in the Punjab too, sometimes an eldest son is allowed a somewhat larger share than his younger brothers, which is usually known as *huq jethansi* or *jesthansa*. In *Gopal Singh* v. *Khosal Singh*,[5] it was held that in the absence of express agreement, the mere fact that in the division of joint ancestral property, the eldest brother received a larger share than his younger brothers, did not operate to deprive him of any share to which he would otherwise be entitled to succeed, on the death of any of his brothers; the presumption being that he received an additional share on account of his being the eldest born, a case sometimes occurring in practice. The rule, however, is that sons share equally in the property of their father; the eldest having no right to a greater share than the rest. *Huq jethansi* also prevails in Oudh in Zemindari villages.[6] The rule of primogeniture only prevails in families of ruling Chiefs or of Jagirdars whose ancestors were ruling chiefs.[7] Sons

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[1] Ratti's Customary Law p. 12.

[2] 113 P.R. (1886) among Brahmans of Sialkote; 109 P.R. (1888) among Brahmans of Lahore; 1 P.R. (1867) among Mahomedans of Rawulpindi.

[3] 113 P. R. (1886); 52 and 109 P.R. (1888).

[4] See Tupper's Customary Law Vol. II. 138; 101 P.R. (1879).

[5] 62 P.R. (1868).

[6] *Manick Chand* v. *Hira Lal*, 20 Cal. 45. (P. C.) [1892].

[7] *Vide* The Abstract Principles of Law, Sec. IV, para 17.

Pagvand and *Chundavand.*

With regard to the succession of sons of the same father by different mothers, there appears to be two rules prevailing in the Punjab, *viz.*, *Pagvand* and *Chundavand.* According to the former the sons represent units and all share alike. And this seems to be the normal custom in the Punjab regarding the division of paternal property amongst sons. According to the latter, the inheritance is sometimes divided equally between the issue of each wife. If a man left two sons by one wife and one son by another wife, the two sons would receive one half of the property and the one son the other half. This custom of *chundavand* is comparatively rare.[1] Even in those tribes in which the *chundavand* system at one time prevailed, in more recent years the *pagvand* system of division of property has been gradually adopted by them.[2]

Among Aroras in the Multan district it was found to be the custom that sons by different wives succeed to equal shares according to the *pagvand* rule, and that if one of the sons, having so succeeded dies without male issue, his uterine brothers, or their descendants, are entitled to succeed to the exclusion of half brothers.[3] Among Sikh Jats of the Ludhiana district, and also of the Ferozepur district, the *pagvand* rule was found to prevail,[4] and also amongst the Randhawa Jats in the Gurdaspur district.[5] The

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[1] *Vide* Tupper's Customary Law, Vol. II. p. 202. It is so called in the provincial dialect; in legal phrase, *Patnibhag.* (পত্নী-ভাগ)

[2] 134 P. R. (1892)

[3] *Jhinda Mal* v. *Wallia Mal*, 855 (1872); 25 P.R. (1873).

[4] *Dya Singh* v. *Sujan Singh* 1228 (1871) [Ludhiana]. *Sukha Singh* v. *Nathu* 519 (1871) [Ferozepur].

[5] *Bir Singh* v. *KaisraSingh* 659 (1875). For other instances amongst Sikh Jats and other tribes see 62 of 1868 (Jalandhar Bedis); 1056 of 1877; 34 P. R. 1879 (Jats of Rupar); 1126 of 1880, (Gant Jats); 101 P.R. 1879 and 125 P. R. 1884; (Sindhu Jats of Mogha Tahsil); 172 P. R. 1882 (Mahmars of Ludhiana); 81 P.R. 1884 (Acharjis of Bhawani in Hassar); 127 P.R. 1884 (Sindhu Jats of Jagadri, Amballa); 63 P.R. 1885 (Sindhu Jats of Kot Jograj Gurdaspur); 62 P.R. 1885 (Panda Jats of Gurdaspur); 74 of 1898 (Sindhu Jats of Bagiara Kalan).

chundavand rule prevails amongst the Kolair Jats in the Amritsar district.[1] It was not established that the *chundavand* rule of succession governs Bedis of Chawinda village of the Sialkote district.[2] In *Natha* v. *Hurmat*[3] it was found that the *chundavand* rule of succession prevailed among Naru Rajputs of Hoshiarpur Tahsil, and that the agnates of the whole-blood had preference over the agnates of the half-blood on the principle laid down in the Full Bench case.[4] Among Sarai Jats of Dholpur village, Batala Tahsil, in the district of Gurdaspur, the custom of *chundavand* prevails in matters of succession.[5] Rathis of Palampur are governed by *chundavand* rule in matters of succession.[6]

Exclusion of females.

Custom excludes females and their offspring with varying degrees of strictness. As a rule, daughters and their sons, as well as sisters and their sons, are excluded by near male collaterals. The Hindu law universally allows the right of a daughter to succeed, but there is no shadow of a foundation for the sister's claim in Hindu law. In the absence of male lineal descendants the widow of the deceased ordinarily succeeds to a life estate.[7] If there are two or more widows they succeed jointly and, on the death of the one, the surviving co-widows take by survivorship.[8] But where a male descendant of the deceased is alive, the widow is only entitled to a suitable maintenance, whether such descendant is the issue of the surviving widow or of another wife.[9] Amongst the Singpuria Jagirdars, the widow

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[1] 1160 of 1877; 101 P. R, 1879; 48 P.R. 1886 (Aulakh Jats); 53 *Ibid* (Sanwan Jats); 63 P. R 1885 (Sindhu Jats); 134 P.R. 1892 (Randhawa Jats of Ajnala); 84 P.R. 1893 (Samrai Jats of Buttala) 119 *Ibid* and 31 P.R. 1894 (Ghumman Jats in Sialkote district.)

[2] *Bawa Sant Singh* v. *Ganga Singh* 47 P.R. 1901.

[3] 31 P.R. 1903.

[4] 4 P.R. 1891.

[5] *Labh Singh* v. *Narain Singh* 142 P.L.R. (1906).

[6] *Kundo* v. *Shib Dial* 17 P.L.R. 1902).

[7] See. 22, 49 and 89 of 1866; 20 P.R. 1867; 24 and 114 P. R. 1893; 59 P.R. 1894; 20 P.R. 1895.

[8] See. 128 P.R. 1893.

[9] See. 11 P R. 1882; 17 P.R. 1891.

receives for life some portion of her husband's holding in addition to a cash allowance for maintenance.[1] By custom widows of minor Sikh Chiefs in Cis-Sutlej States are excluded from inheritance, *e.g.*, the Sikh Sirdars of Arnauli,[2] of Lodhran,[3] the Mandals of Karnal ;[4] the Ranas of Manaswal in Hoshiarpur.[5] Amongst Basal Banias of the Jullundar City, a widow is not entitled to succeed to her husband's share in property jointly acquired by him and his brothers.[6] Among Sikh Jats of Sirsa Tahsil, the son of a widow, by her second husband cannot take the property of the first husband to the exclusion of the male collaterals of the latter.[7]

When a person governed by customary law makes a gift of his property in favour of his wife for her life in lieu of maintenance, in case she has no sons of her own, her step-sons have a vested interest in the property which may be alienated during her life-time.[8]

Widow's estate.

According to the custom of the Singhpooria Jagirdars, a childless widow is entitled to receive for life some portion of her deceased husband's holding, in addition to any cash allowance assigned for her maintenance; she may even succeed for life to the whole of the land, if the quantity be not excessive.[9]

According to the custom of Arians in the village of Faizpur Khund, a widow is entitled to share her husband's estate on a life-tenure with a son by another wife.[10] A similar custom is said to prevail in the Gurgaon and Sirsa District. Village custom generally favours the succession of a widow to her husband's estate for her own life.[11] A

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[1] 30 P.R. 1868.
[2] 40 P. R. 1869.
[3] 16 P. R. 1890.
[4] 13 P.R. 1875.
[5] 52 P. R. 1886.
[6] 103 P. R. 1891.
[7] *Kanwar Singh* v. *Sampuran Singh*, 75 P. R. 1906.
[8] *Jowala Singh* v *Dawarka Das*, 143 P.L.R. 1905.
[9] *Sirdar Soba Singh* v. *Attur Kour*, 30 P. R. 1868.
[10] 1131 of 1873.
[11] 38 P. R. 1873 ; 382 of 1868 ; 17 P. R. 1902.

local custom did not authorize a widow to dispose of her husband's property, ancestral or acquired.[1] Property acquired by gift from her own relation is her special property.[2] A mother succeeding to the estate of her deceased son by right of inheritance has only a life-interest.[3] A widow cannot alienate except for proved necessity, even where the *Wajib-ul-urz* permits alienation.[4] A widow cannot ordinarily claim partition of her deceased husband's share in joint property.[5] In the case of a widow claiming the power of gift absolutely with the assent of reversioners, the *onus* of proof rests heavily on the person who seeks to maintain such an alienation contrary to the usual custom which restricts the widow's power to alienate to the term of her life-tenure. The fact that certain nearer reversioners have assented to a gift by a widow in favour of a near reversioner does not bar the claim of a reversioner who is equally entitled.[6]

Amongst Bhanant Rajputs of the Garshankar Tahsil, Hoshiarpur district, a widow is allowed to succeed to property left by collaterals of her husband for her life, in the same way as her husband could have succeeded had he been alive when the succession opened out; and this, notwithstanding the fact that she was not in possession of her deceased husband's estate.[7] Among Mahton Rajputs of Jullundar a widow has a preferential right to succeed to any property of her husband's collaterals, just as her husband would have succeeded thereto, if alive.[8] Among non-agricultural Brahmans of Karnol a widow is entitled to succeed to the share held by her deceased husband in joint ancestral

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[1] 382 of 1868; 11 P.R. 1867; 49 P. R. 1866; 40 P. R. 1867.

[2] 56 P. R. 1870.

[3] 11 P. R. 1870.

[4] 551 of 1870; but see 41 P. R. 1874.

[5] 93 P.R. 1869; 28 P R. 1870; 954 of 1873.

[6] *Thakar Singh* v. *Hira Singh*, 47 P. R. 1903.

[7] *Anar Devi* v. *Kanlan* 43 P. R. 1905.

[8] *Khem Singh* v. *Biru*, 44 P. R. 1905.

property.[1] Among Johal Jats of Jograon Tahsil of the Ludhiana district, the widow of a sonless proprietor can succeed, on a widow's tenure, to the property of her deceased husband's brother to which her husband could, if he had been alive, when the succession opened, have succeeded.[2] Among the Girths of Kangra district, a widow is entitled to succeed collaterally to any property to which her husband, if alive, could have succeeded.[3] A widow, among Cahchasr of Mouza Chachar in the Shahpur district, can take her husband's estate for life without power to alienate outside Mouza Chachar. By an established custom obtaining in the said Mouza she can alienate the land of her sonless husband to her daughter, if that daughter be married within the village.[4]

Forfeiture of widow's estate.

There is no general custom in the Punjab by which a Hindu widow forfeits her husband's estate, when vested in her, by an act of unchastity. In the absence of a proved special custom, where the parties are Hindus, Hindu law applies and according to that law the widow's estate is not forfeited.[5] But according to a general custom prevalent in agricultural villages a widow holds her husband's estate only so long as she remains chaste, and forfeits it on proof of unchastity.[6] A widow also forfeits her life interest in her first husband's estate if she re-marries.[7] Amongst certain tribes a re-marriage in the *kurao* form with the brother of the deceased husband does not cause a forfeiture of the widow's life-estate in the property of her first husband.[8]

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[1] *Gokul Chand* v. *Reja Devi*, 83 P. R. 1905.

[2] *Saddan* v. *Khemi* 15 P. R. 1906.

[3] *Lahori* v. *Radho*, 72 P.R.1906.

[4] *Nawab* v. *Wallan*, 91 P.R.1906.

[5] *Atri* v. *Didar Singh* 76 P. R. 1901, followed 107 P. R. 1888; 5 Cal. 776 (P.C.).

[6] 677 of 1871; *Ramdhun* v. *Kurm Kour*, 85 P R. 1868 (Amritsar); 78 and 92 P.R. 1869; 34 P.R. 1893. See Tupper's Customary Law Vol. II, p 144; see also *Kery Kolitany* v. *Moniram Kolita* 13 B. L. R. 1: 5 Cal. 776 (F.B.)

[7] 143, 144 and 145 P. R. 1893; 88 and 115 of 1900.

[8] 1211 of 1876, (Rohtak); 137 P. R. 1883, (Sikh Jats of Sirsa);

Among agricultural tribes in the Ferozepur district, if a widow, up to the time of her husband's death, is living in unchastity in open revolt against him, she is no longer a member of his household, and cannot succeed to the usual widow's interest in his estate after his death.[1] In a suit by reversioners to set aside a sale of property inherited by a widow as made without necessity, it was held that the allegations by the plaintiffs could not be enquired into, that, prior to the date of the sale, the widow had become unchaste and had by custom forfeited her right to the property left by her deceased husband.[2]

Mother of the deceased.

If a person dies leaving no male lineal descendants and if his wife predeceases him, then his mother succeeds to a life-interest, provided she has not re-married.[3] The village custom generally recognizes the mother's right of succession in preference to that of the male collaterals or married daughters, except where the latter have lived with the deceased father and their husbands have been treated as *ghar-jamais* or *khana-damads*.[4] If the mother remarries, then she is excluded by the male collaterals of her son.[5] The mother is only entitled to a maintenance if her daughter-in-law survives her son.[6]

Daughters.

A daughter's right to the ancestral landed property of her father is recognized when there are no male lineal descendants; nor a widow or a mother of the deceased; nor any near male collaterals of the deceased, surviving him. A daughter's son is not recognized as an heir of his maternal grandfather, except in succession to his

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100 P. R. 1891 (Rains of Sirsa); 74 P. R. 1893 (Hinjra Jats of Amritsar).

[1] *Bholi* v. *Suttee* 24 P. L. R 1903.

[2] *Bainta* v. *Achhar* 188 P. L. R. 1905.

[3] 11 & 37 P. R. 1870; 95 P. R. 1882 (Gujars of Gujrat); 49 P. R. 1883; 135 P. R. 1884 (Gharbari Gosains of Kangra); 89 P. R. 1886 (Kussuria Pathans).

[4] See Tribal Law in the Punjab, Chap. II. pp. 59-60.

[5] 117 P. R. 1888.

[6] 41 P. R. 1895.

mother. A married daughter sometimes excludes near male collaterals, especially amongst Mahomedan tribes. As, for instance, when she has married a near collateral descended from the same common ancestor as her father; or where she has, with her husband, continuously lived with her father since her marriage, looking after his domestic wants, and assisting him in the management of his estate; or where, being married to a collateral of the father's family, she has been appointed by her father as his heir. In a village community, where a daughter succeeds, either in preference to, or in default of heirs male, to property which, if the descent has been through a son, would be "ancestral," she simply acts as a conduit to pass on the property as ancestral to her sons and their descendants, and does not alter the character of the property simply because she happens to be a female.[1]

Exclude collaterals.

In *Ram* v. *Lorindi*,[2] it was held that a childless widowed daughter, inheriting from her father, does not take absolutely, but only for life, with no power of alienation except for necessity. This was agreeably to the custom in the Lahore district and also according to the general Hindu law. In *Rajrub* v. *Ladhu*,[3] the Courts found that the daughter (in a family of Brahmans of the Sialkote district) had, agreeably with custom, inherited a house owned and acquired by her father who died leaving a widow and the daughter. The widow having died, the nephews of the deceased owner set up this claim to the house. But the Court held that the daughter, by custom, had inherited. There are other instances where a daughter's claim has been upheld to the exclusion of collaterals.[4] In *Mari* v.

[1] *Kala Singh* v. *Buta Singh*, 16 P. R. 1903.

[2] 40 P. R. 1867.

[3] 51 P. R. 1873.

[4] 38 P. R. 1870 (Jullundar Brahmans); 2 P.R. 1874 (Amballa Jats excluding distant cousins); 73 P. R. 1879 (Brahmans excluding collaterals in eighth and ninth degree); 143 P. R. 1882 (Khatris of Lahore excluding brother's son); 172 P. R. 1882, (Mahmars of Ludhiana, daughter's son, excluding collaterals beyond sixth

Jawahra it was held that a daughter was, by custom, entitled to retain her father's estate until her death or marriage as against her distant collaterals.[1] In *Jumna Devi* v. *Chuni Lal* the contention has not been proved that, by custom among Tewari Brahmans of Amritsar City, a nephew of a childless proprietor excludes his daughter's son in matters of succession to his estate.[2]

Exclusion of daughters.

The exclusion of the daughter in favour of collaterals is generally confined to landed property derived from a common ancestor. The rule is not so strictly enforced in regard to a self-acquired property of a deceased father.[3] The exclusion is more rigidly observed in tribes which do not practise strict endogamy.[4]

Daughters have been excluded by father's nephews;[5] by nephews and cousins amongst Dako Brahmans of Rupar;[6] by collaterals within the fifth degree amongst Mahtums of Hoshiarpur;[7] by collaterals descended from a great grandfather amongst Manjh Rajputs of Jullundar;[8] by collaterals amongst Kumbohs of Lahore.[9] Amongst Brahmans of the Baraker *gotra*, collateral relatives in the eighth or ninth degree are not within the customary limit.[10] By general custom amongst Khatris and Aroras in the Multan Division, a nephew excluded a daughter in succession to a shop and business.[11] In the latter case nephews amongst Aroras of Dera Ismail Khan were held to exclude daughters in succession to immoveable property, whether ancestral or

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degree); 108 P.R. 1888 (Ath Bans Brahmans of Amritsar, daughter excluding brothers and nephews in succession to acquired property); 67 P. R. 1888, (Khatris of Peshwar, daughters excluding nephew).

[1] 12 P. R. 1902.

[2] 30 P. R. 1903.

[3] 77 P.R. 1881; 64 P.R. 1893.

[4] *Vide* Tupper's Customary Law, Vol. II p.p. 56, 57; *Cf.* also 73 P.R. 1893 and 25 P.R. 1895.

[5] 2 P. R. 1874; 16 P. R. 1877; 150 P. R. 1879.

[6] 44 P. R. 1879.

[7] 104 of 1880; 55 P. R. 1881.

[8] 176 P. R. 1882.

[9] 40 P. R. 1888.

[10] 73 P. R. 1879.

[11] Cir. No. 190, October 16, 1875; see also 15 P. R. 1884; 148 P. R. 1890.

acquired.[1] Among non-agricultural Aroras of Kasur, in the Lahore district, the daughter is, by custom, excluded by brothers.[2]

Unmarried daughters.

Unmarried daughters, when excluded from inheritance, must be maintained out of the estate of the deceased father.[3] They are sometimes permitted to remain in possession of their father's estate till their marriage.[4] Amongst Kots, in Jhelum, unmarried motherless daughters succeed to their father for life, so long as they are unmarried.[5] In *Maul Singh* v. *Khanu* it was held that under customary law a daughter, entitled to hold the estate of her father till marriage, is competent to alienate it for necessity.[6]

Exclusion of sisters.

The customary exclusion of a sister is established among Jats, both Hindu and Sikh. In this respect the custom agrees with Hindu law. In *Attar Kaur* v. *Atma Singh*[7] it was found that by the custom of the Sikh Jats, sisters are not recognized as heirs. There are other instances in which sisters have been excluded by a daughter,[8] by a half brother,[9] by collaterals in the fourth degree[10] and by other collaterals.[11] But there are exceptions to this custom. Amongst the Bhatti non-agricultural Arains of Lahore and Amitsar sisters are not excluded by brother's sons;[12] nor by a neice amongst Balli Arains of Lahore;[13] nor by cousins amongst Gholam Arains of Lahore;[14] nor by grandmother's brother amongst Brahmans of Multan;[15] nor by collaterals within the sixth and seventh degrees amongst Gujars of Kharian in Gujarat.[16]

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[1] See 126 P. R. 1890; 116 P. R. 1893; 55 P. R. 1895.

[2] *Anant Ram* v. *Hukman Mal*, 62 P. R. 1902.

[3] 50 P R. 1892 (Hindu Jats of Ludhiana).

[4] 139 P. R. 1892.

[5] 56 P. R. 1899.

[6] 90 P. R. 1903.

[7] 47 P. R. 1870.

[8] 53 P. R. 1888.

[9] 163 P R. 1890.

[10] 65 P. R. 1892.

[11] 71 and 113 P. R. 1892.

[12] 25 P. R. 1882.

[13] 180 P. R. 1888

[14] 174 P. R. 1889.

[15] 180 P. R. 1889.

[16] 116 P. R. 1884.

Among the Brahmans of Gujarat there is no custom prohibiting sisters to succeed along with the sister's sons.[1] Among Bhatias of Bannu, who originally came from Gujarat in the Bombay Presidency, according to a custom prevailing in their community modifying the personal law, sisters succeed their deceased brother's property. A sister thus succeeding to the estate of her deceased brother is entitled to succeed for life or until marriage.[2]

Sister's sons.

Whether the sister's son of a deceased Hindu can inherit ancestral land in the presence of remote kindred in the male line, is a question to be determined by the custom of the place to which the parties belong. If the existence of such custom is established he succeeds, although according to the Mitakshara he cannot so inherit. In *Gunput* v. *Kanah*[3] it was found that in the village of Mousapoor, Tahsil Nowashur in the district of Jullundar, a sister's son can inherit the landed property of a deceased aunt in the absence of nearest *juddees* (relations). The recognition of the sister's son as entitled to succeed to the exclusion of distant collaterals has been insisted on in some cases as supported by custom.[4] Amongst the Brahmans of Multan a sister's grandson succeeds by custom to the estate left by his grandmother's brother.[5]

Among the Ghinths of Tika Bonehr in Kangra district a sister's son succeeds to the estate of the deceased maternal uncles. In *Ballu* v. *Gur Dyal*,[6] the plaintiff, as a sister's son, claimed the land owned by his deceased maternal uncle, which mutated after his death in favour of the owners of Tika Bonehr, a heterogenous body consisting of men of various castes. The lower courts dismissed plaintiff's claim on the ground that, under customary law, a sister's son is not recognized as an heir. The Chief Court, however,

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[1] 47 P. R. 1890.

[2] *Wasna Ram* v. *Uttam (Devi) Bai* 79 P. R. 1903.

[3] 19 P. R. 1868.

[4] See *Ranjee Mal* v. *Saudagar* 701 of 1868.

[5] 180 P. R. 1889.

[6] 95 P. R. 1905.

by reversing their decision held that as the custom obtaining is merely silent and not positively adverse to the plaintiff, as a sister's son, the alternative, under section 5, of the Punjab Laws Act, 1872, is to fall back on the personal law; and under the Mitakshara to which the parties were subject, the plaintiff was an heir, as a *bandhu*, there being no male collateral within the fourteenth degree.

A sister's son is excluded by paternal uncle's son.[1]

Daughters-in-law.

In the absence of a custom to the contrary, the widow of a predeceased son is not entitled to inherit, under Hindu law, Mitakshara school, as applicable to the Punjab, property left by her father-in-law in the presence of collaterals related to him in the fourth degree. Nor does she take by survivorship, not being a joint owner with her father-in-law. In *Radha Mal* v. *Kirpi*[2] it was held that amongst Khatris of Akalba, in the Ludhiana district, no custom was proved to exist under which a widow of a predeceased son could succeed to the property of her father-in-law.

Special property of females.

Amongst agricultural tribes, a wife's personal property merges in that of the husband.[3] A wife cannot dispose of her ornaments which have been made up and given to her by her husband subsequent to marriage in opposition to her husband's wishes.[4] A husband usually succeeds to his wife's property on her death. But where a husband predeceases his wife, all immoveable property passes to her sons; failing them to the collaterals; and all moveable property goes to daughters. The unmarried daughters take by precedence.

Immoveable property, purchased from the proceeds of moveable property given to the wife by the husband as a present during marriage or from proceeds of her jewellery,

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[1] 173 P. R. 1889.

[2] 100 P.R. 1901.

[3] *Vide* Tupper's Customary Law Vol. II, p. 158; Vol. IV. p. 145; Vol. V. p. 73; Punjab Civil Code s. 5 cl. (b).

[4] 81 P. R. 1880.

is the special property of the wife, which she can dispose of at pleasure after her husband's death.[1] But the immoveable property purchased by a Hindu widow out of the savings of her income derived from her husband's estate is not her special property; on her death it descends to her husband's heirs.[2]

Khana-damad or *ghur-jamai.*

By custom a *khana-damad* or resident son-in-law (*ghur-jamai* as he is also called in Bengal and other places) succeeds to his father-in-law's estate in default of male issue This particular custom of the Punjab is somewhat similar to that of *illatam* in Malabar. But in the Punjab the *khana-damad* or *ghur-jamai* is not thus entitled to exclude ordinary heirs in his own right. The custom has, in reality, inured for the benefit of the daughters and her male issue by reason of her continued residence at her father's place after her marriage. As a matter of fact, where the usage of *khana-damad* is recognized as giving rise to customary rights, it is for the benefit of the daughter's sons; the daughter and her husband only benefit incidentally. In many districts, the right of a *ghur-jamai* depends on the nomination of him by his deceased father-in-law as the heir by a formal writing.[3]

If a *khana-dumad*, who has succeeded to his father-in-law's estate, dies without sons, the estate used to pass to his heirs and not to those of the father-in-law. This was the rule until the year 1892. A Full Bench in that year laid down the general principle that the property would revert to the original owners's family in all cases where the daughter's direct male descendants had died out.[4]

Illegitimate children.

Illegitimate children are not entitled to any share in their putative father's estate, but they can claim mainten-

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[1] *Venkata Rama Rau* v. *Venkata Suriya Rau*, 1 Mad. 281 (1877); s.c. in Privy Council 2 Mad. 333 1880; 14 Cal. 886 and *Sowdamini Dassi* v. *Broughton*, 16 Cal. 574 (1889).

[2] 58 P.R. 1880; 121 P.R. 1893.

[3] See 919 of 1871 (Ludhiana Jats); 661 of 1879 (Sindhus of Ferozepur); 162 P. R. 1881; 134 and 146 P.R. 1894.

[4] 12 P.R. 1892. (F.B.).

ance only. In a certain case it was found that the illegitimate son (*khwas*) of a high caste Rajput was by custom entitled to maintenance during his life-time, provided he was not guilty of any gross misconduct towards the head of the family; and that the descendants of the illegitimate son had no right to maintenance which entirely depended on the pleasure of the head of the family for the time being.[1]

Migrating families.

There are many families in the Punjab who originally came from other places and settled down in the Punjab. The principle governing succession in their cases is determined by how far they have assimilated the customs and usages and manners and habits of their neighbours or retained their own. Certain Sikh Jats of the Amritsar district, who migrated from Rajputana and have for generations lived generally on the profits of agricultural land, though a few of the members thereof had enlisted in the army and were in military service elsewhere, are held to be governed by the customary law of the Punjab and not by Hindu law.[2] Then again there are some Sikh Brahmans of Mouza Chadwala, in Ambala, who have for several generations abandoned the Brahmanical thread and ceased to perform priestly functions and taken to agriculture in the main. They are governed not by Hindu law but by the agricultural customs which obtained around them.[3] Similarly the Brahmans of Manhala village in Lahore, holding lands, are agriculturists pure and simple and are governed by customary law in matters of succession. So an alienation among them by a childless proprietor is governed by custom and not by Hindu law.[4] Tewari Brahmans of Amritsar City, belonging to a non-agricultural class, migrated from Oudh, and, therefore, are presumed to have retained after immigration the law of their sect in the

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[1] 40 P.R. 1880.

[2] *Ram Rakha Mal* v. *Balwant Singh* 51 P.R. 1905.

[3] *Gopal Singh* v. *Sukha Singh* 58 P.R. 1906.

[4] *Moti Ram* v. *Sant Ram* 103 P.R. 1902.

country of their adoption. So where it was alleged that among them by custom a nephew of a childless proprietor excluded his daughter's son in matters of succession and the custom was not proved, the ordinary law took its course.[1]

Khatris of Bhagtana Talianwala in Gurdaspur are governed by Hindu law and not by the agricultural custom of their neighbours.[2] In the absence of proof of special custom Hindu goldsmiths of Umballa City are governed by Hindu law.[3] Hindu goldsmiths of Saharanpur, trading at Dagshai, are governed by Hindu law.[4] Mahrotra Khatris of Multan City are governed by the Hindu law, no custom to the contrary having been proved.[5]

ADOPTION.

Adoption amongst the agriculturists of the village communities in the Punjab is not connected with religion. "It is a more or less public institution by a sonless owner of land of a person to succeed him as his heir." The object is simply to make an heir. Thus, in the olden days it was not unfrequently the case for an old villiage proprietor without any male issue of his own, to select from amongst his clansmen some promising young man and make him his heir. Consequently, no religious ceremonies are used or necessary.

A widow cannot adopt unless she has an express permission from her husband in his life-time. The sanction of her husband's kindred is not imperative. Where it is asserted that such sanction is customary, it must be proved, for it is not presumed to exist.[6] Where an adoption by the widow is not authorized by the deceased

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[1] *Jomni Devi* v. *Chuni Lall*, 30 P.R. 1903.

[2] *Kaka* v. *Labhchand* 106 P. R. 1906.

[3] *Mangtu* v. *Chuni Lal* 51 P. R. 1903.

[4] *Baroo* v. *Makhan* 61 P. R. 1903.

[5] *Wishen Das* v. *Thakur Das* 119 P.R. 1901

[6] See 62 P. R. 1888 ; 198 P.R. 1882.

husband and not made with the consent of the husband's kindred, it only confers on the adopted a right of succession to the widow's own private property which is within her disposing power.[1]

Essentials of a valid adoption.

The essential requirement for the validity of an adoption is that it should be made *public*. And this can be effected either by a formal declaration before the clansmen, or by a written declaration, or by a long course of treatment "evidencing an unequivocal intention to appoint the specified person as heir".[2] In a case where the adoptee lived and served the adopter for many years; was separated from his own brothers and had not taken a share of the land left by his natural father; had been treated by the adopter as his son and had performed the funeral obsequies of the adopter on his death: the Court held that under the circumstances the adoption was valid, though there was no ceremony at the time of the adoption.[3] In a recent case it was laid down that an unequivocal declaration of *intention*, coupled with previous and subsequent treatment, would be sufficient to prove valid adoption.[4] Similarly in another case it was held that if no ceremonies are essential and the adoption is not opposed to custom, a *declaration by deed*, when it is coupled with previous and subsequent treatment, is sufficient to establish adoption.[5] Where the adopter was alleged to have merely executed a deed making the adoptee his heir and reciting an adoption, and the *Riwaz-i-am* mentioned that in the absence of a document certifying the fact of adoption, it was contended that the performance of the marriage ceremony of the adopted should be taken as proof of adoption, and it was held that the *Riwaz-i-am* clearly indicated that any acknowledgment of the relation existing between the adoptive father and

[1] 15 P.R. 1881.

[2] See 51 P.R. 1881; 79 P.R. 1882; 9 P.R. 1898.

[3] *Lehna Singh* v. *Cheina* 111 P. R. 1868.

[4] *Girdhari Lal* v. *Dalla Mal*. 3 P. R. 1901.

[5] *Sohnun* v. *Ram Dial* 79 P. R. 1901.

son, made in the presence of witnesses, should be looked upon in a similar light.[1]

An adoption is not invalidated simply because publicity is not given to the fact, provided it is made in some unequivocal and customary manner.[2] It is not invalidated either by non-performance of ceremonies[3] or for want of sanction of the kindred of the deceased.[4] There is no restriction as to the age of the person to be adopted.[5] Unless there is a local custom to the contrary, the adoption of an adult is not invalid, merely by reason of the age of the person adopted.[6] In fact, the age is immaterial if the adoption is otherwise valid and proper.[7]

Who may be adopted.

As to the persons who may be adopted, it may be said that the degree of relationship of the person to be adopted is no bar to a valid adoption. Even a stranger may be adopted,[8] and there is no exclusion of an only son,[9] or of the son of a daughter, or of a sister.[10] The principle that the adopted son of a Hindu, especially among the three superior classes, must not be the son of one whom the adopter could not have married, such as the daughter's or sister's son, is nowhere so superseded by custom as in the Punjab. Amongst Hindu non-agriculturists the adoption of a daughter's or sister's son is a most prevalent practice and the *onus* lies on those who deny that such particular kind of adoption cannot be made.[11] But amongst the agriculturists, especially in the eastern districts of the Punjab, such adoption is now getting less frequent. It would seem now that unless such adoption is made with the consent of the agnates, it would be presumed to be invalid.[12] We may

[1] *Buta Singh* v. *Dial Singh* 67 P. R. 1902.
[2] 92 P. R. 1879.
[3] 111 P. R. 1868 ; 54 & 102 P R 1884.
[4] 3 P. R. 1860.
[5] *Bhuggut Singh* v. *Boodhoo* 51 P. R. 1867.
[6] 37 P. R. 1868.
[7] *Budh Singh* v. *Mula Singh* 18 P. L. R. 1905.
[8] 3 P. R. 1866.
[9] 35 P. R. 1874.
[10] 9 P.R. 1868; 24 & 83 P.R. 1867.
[11] 79 P. R. 1901.
[12] See 50 P. R. 1893 (F. B.).

mention here in passing that a similar custom of adopting a daughter's or sister's son is sanctioned by custom amongst the Jains, amongst the Brahmans in Southern India and also amongst the Bohra Brahmans in the North-Western Provinces.[1] In the Punjab such custom is prevalent among Brahmans, Khatris, Jats, Aroras, Bhattiyas, and also among Mahomedans, as we shall see later on. There are numerous decisions in support of the custom.[2]

Besides a daughter's or sister's son, the following persons may be adopted, *viz.*, grand nephew,[3] brother's son,[4] brother's daughter's son,[5] wife's brother,[6] wife's brother's son.[7] We have already noticed that an only son of a father can be adopted; so can the eldest son of a father. Such an adoption is not invalid on that account.[8] At times village custom requires that the nearest available cognate should be selected for adoption.[9]

Status of adopted son.

The effect of adoption by a Hindu widow, under an authority to adopt, is to render the adopted son heir to the deceased by adoption, and he succeeds to the estate as if he were his natural and legitimate son.[10] Under Customary Law an adopted son does not take an estate in the property of his adoptive father more limited than that which he takes in the property of his natural father, and there is

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[1] See Hindu Customs: Adoption. *Supra*. pp. 137, 162, 163.

[2] See, for instance, among—
Brahmans: 1227 of 1874; 149 of 1883; 79 P. R. 1901.
Khatris: 9 P. R. 1868; 64 & 162 of 1883; 12 P. R. 1893; 24 P. R. 1900; 3 P. R. 1901.
Jats: 172 P. R. 1883; 34 P. R. 1899; 69 P. R. 1905. Exceptions in regard to adoption of a daughter's son.—25 P. R. 1898; 18 P. R. 1899; 81 P. R. 1900
Aroras: 35 P. R. 1885.
Bhattiyas: 85 P. R. 1886.

[3] 96 P. R. 1883.

[4] 18 P. L.R. 1905.

[5] 27 P. R. 1884; 43 P. R. 1886 51 P. L. R. 1903.

[6] 125 P. R. 1880; 22 P. R. 1891.

[7] 35 P. R. 1882.

[8] See. 35 P. R. 1874; 43 P. R. 1879; 57 P. R. 1881; 43 & 75 P. R. 1886. *Exception* 33 P. R. 1872 amongst Gils of Ferozepur.

[9] See. 79 & 102 P. R. 1893. See also the provisions of *Riwaz-i-am* in 92 P. R. 1894 and 47 P. R. 1895. But see 114 P. R. 1889 and 38 P. R. 1890 *contra*.

[10] *Gopee Ram* v. *Buldeosahai* 91 P. R. 1866.

no distinction between the right to alienate the property acquired in either case.[1] He succeeds to all the rights and interests of his adoptive father on his death.[2] He only acquires a vested interest in them at the date of his adoption.[3] If after his adoption a natural son is born to his adoptive father, the adopted son will share equally with the natural son. On the death of an adopted son, who had succeeded to the estate of his deceased adoptive father, his (adopted son's) male issue succeed, and, in default of such issue, his widow takes his estate on the usual life-interest.[4] In the event of his dying childless and without leaving any widow, the estate passes to his own natural heirs if the estate consists of property over which his adoptive father had an absolute right of disposal, and to the male collaterals of the adopter's family if the estate consists of property over which his adoptive father had only a restricted power.[5] Among the Mahtons of the Jullundar district, when an adopted son predeceases his adoptive father, the sons of the former are entitled, on the latter's death, to succeed to his estate by custom.[6] In accordance with custom a transfer by a sonless father cannot be disputed by his subsequently adopted son.[7]

His right to succeed his adoptive father's collaterals.

In *Hursahai* v. *Bhawani Das*[8] it was doubted whether an adopted son inherits in his adoptive family collaterally as well as lineally. In this case the parties were Khatris. But in *Makhan Singh* v. *Dulo*[9] it was found that among the Chima Jats of the Daska Tahsil, in the district of Sialkote, an adopted son is entitled to succeed to his father's collaterals. Amongst Khatris, in the Umballa

[1] *Fatteh Singh* v. *Nehal Singh* 25 P. R. 1901.

[2] 108 P. R. 1879; 93 P. R. 1893.

[3] *Rambhat* v. *Lakshman* 5 Bom. 630. (1881).

[4] 9 P. R. 1880.

[5] 122 P. R. 1879; 9 P. R. 1880; 89 P. R 1885; 1235 of 1886 12 P. R 1892 (F. B); 72 P. R. 1893.

[6] *Chajju* v. *Dalipa* 51 P. R. 1906.

[7] *Ratna* v. *Golab Singh* 42 P.L. R. 1901.

[8] 9 P.R. 1868. See also 97 P.R. 1879; 14 P. R. 1884; 84 P. R. 1887; 18 P. R. 1889; 107 P. R. 1891.

[9] 4 P.R. 1906.

district, an adopted son succeeds in preference to the nephews of the adopter.[1]

In his natural family.

In *Bhuggut Singh* v. *Boodhoo* it was held that an adopted son cannot inherit from his natural parents.[2] Among the Jats of Paniput an adopted son is not entitled to succeed to his natural father and take a share in the latter's estate, when there is in existence another natural son and when the adopted son takes by inheritance the entire estate of his adoptive father.[3] It would seem from this latest decision that under certain circumstances an adopted son may succeed in his natural family. Regarding his right as against the collaterals of his natural father, the rule is clear and settled, *i.e.*, it is not adversely affected.[4]

Devolution of property on adoptee's death without issue.

Under the general principles of succession to ancestral land in a village community, as laid down in several Full Bench cases, on the death of an adopted son without leaving any male lineal descendants, the estate held by him as an adopted son would not pass to the collateral heirs of his natural family, but would at once revert to his adoptive father and then to the descendants of the latter.[5] As regards his self-acquired property it must be treated as if the adopted son had never been adopted; because a customary appointment as heir does not take the adopted son out of his natural family for all purposes, and it must therefore go to those who would have been the heirs of the acquirer had he not been adopted, *viz.*, to the members of his father's family.[6]

Can not relinquish his *status*.

The adoption being absolute and irrevocable an adopted son cannot relinquish his *status*.[7] He cannot be disinherited

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[1] 24 P.R. 1900.

[2] 51 P.R. 1867.

[3] *Mukh Ram* v. *Not Ram* 100 P.R. 1906.

[4] See 47 P. R. 1878 ; 43 P.R. 1879 ; 45 P.R. 1884 ; 42 P.R. 1886 ; and Tupper's Customary Law Vol. II, p. 157.

[5] See P.R. 1892 (F.B.) ; 12 P.R. 1892 (F.B.); F. 58 P.L.R. 1901 D.; *Gurditta* v. *Attar Singh* 117 P.R. 1906.

[6] *Punjab Singh* v. *Khazan Singh* 88 P.R. 1906.

[7] 17 P.R. 1878 ; *Narain Das* v. *Munshi Shaman* 1 P.L.R. 1906.

for mere misconduct or disobedience or neglect to support his adoptive father; nor can the latter subsequently revoke or repudiate the adoption once lawfully made.[1] In *Kanhaya Lal* v. *Nand Kishore* it was held that there is no valid custom under which a Kayasth of Rhotak can set aside adoption once made.[2]

ALIENATION.

In the Punjab the property that can be alienated by custom includes both ancestral and self-acquired property, immoveable as well as moveable. An owner of a self-acquired property, moveable or immoveable, has an absolute power of disposal of the same in any way he pleases.[3] Sons at times can, by custom, restrain the absolute power of alienation of the self-acquired property of their father.[4] By custom amongst Brahmans of Bupka, Tahsil Jagadri, a gift of immoveable acquired property to a daughter in the presence of collaterals is not permissible and such a gift will therefore be invalid.[5] A similar custom prevails amongst Puriwal Jats in Sialkote.[6] Under Customary Law, property acquired by the income of ancestral property is not regarded as ancestral property.[7]

An ancestral immoveable property is ordinarily inalienable. It can only be alienated by necessity, or with the consent of male descendants, or, in the case of a sonless proprietor, of his male collaterals. The inalienability is strictly maintained amongst Jats residing in the central districts of the Punjab. There is a body of decisions on the point and we only mention here one or two of the

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[1] 15 P.R. 1877 ; 17 P.R. 1878 ; 98 P.R. 1882 ; 9 P. R. 1893 ; 143 P.R. 1894.

[2] 7 P.L.R. 1901.

[3] 70 P. R. 1876 ; 10 and 120 P.R. 1893.

[4] 2 P. R. 1877 ; 17 P. R. 1886.

[5] 24 P.R. 1892.

[6] 17 P. R. 1893.

[7] 3. P.L.R. 1901 ; 4 P.R. 1900 ; 12 P. R. 1901 ; 50 P. R. 1902 ; 13 P.R. 1902.

latest cases.[1] In a suit by a father, in which he contested the alienation of ancestral land, the parties belonged to Sikh Jats of Amritsar district and, though they originally came from Rajputana, they were governed by the Customary Law of the Punjab. It was held that the restraint on the alienation by a father of ancestral land applied equally to alienation by him to ancestral houses, gardens and shops.[2] A recent Full Bench case has laid down that where a father has mortgaged ancestral property for a present advance of money and there is no proof that the money was taken for necessity, his son is entitled to a decree that the motgage *qua* mortgage shall not affect his rights, but when a decree has been obtained against the father, the son's rights in the ancestral property may also be attached and sold in execution thereof.[3] A Jat of the Nakodar Tahsil of the Jullundar district is not authorized by custom to alienate his ancestral land in favour of his grandson to the prejudice of his son.[4]

In the immense majority of cases custom has established the sound and reasonable principle that an alienation shall have finality when once made openly and in good faith by the alienor, and acquiesced in also, reasonably and in good faith, by those competent at the time to contest it, and it shall not be open to be contested by others who may later on come into a position which would, had they held it, have given them the right to challenge the alienation at the time. The right to make a permanent alienation good against all comers with the consent of the collaterals, which would be bad without that consent, is one of the commonest features of the Punjab custom. But when a reversionary interest is in question, a more remote reversioner is not

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[1] See 101 P. R. 1895 ; 75 P. R 1898 among others.

[2] *Ram Rakha Mal* v. *Balwant Singh* 58 P R. 1905.

[3] *Bahadur Singh* v. *Desraj* 53 P R. 1901 : s.c. 62, P. L. R. 1901 (F. B.). See also 152 P. R. 1888 ; 33 P. R 1892 ; 72 P. R. 1898.

[4] *Narain Singh* v. *Ishar Singh*, 31 P. L. R. 1902.

necessarily debarred from protecting his future interest by the fact that a nearer reversioner does not care to protect his, and without sufficient reason neglects to do so. Custom has not established a perpetual entail in Customary Law.[1]

Childless proprietor's power of alienation.

A childless proprietor has power to alienate his ancestral property.[2] The legality of every alienation by a male childless proprietor of one of the agricultural classes may be presumed until the contrary is proved. The Full Bench, in *Jowala* v. *Hira Singh*, held by a majority that in the absence of an instance or direct proof of a custom, a transfer of ancestral immoveable property by a childless male proprietor, who had no heirs existing at the time capable of challenging it, could not be contested by a son born or begotten by the proprietor after the transfer.[3] Amongst Mahtons of Hoshiarpur there is no custom prohibiting a childless proprietor from selling his interest in an estate otherwise than for necessity without the consent of his near collaterals.[4] By custom prevalent among Mair Manas of Jhilum district, a childless proprietor is not entitled to alienate, by gift or will, ancestral property to the prejudice of his agnates.[5] The Bhabras of the city of Rawulpindi are not governed by the custom prevailing among agriculturists precluding childless proprietors from alienating property without necessity.[6] Under customs prevailing in the village of Siwan, in the district of Karnal, a non-proprietor is entitled to transfer his house built upon land originally belonging to the proprietary body and occupied by his family for several generations.[7]

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[1] *Labhu* v. *Nihali*, 7 P. R. 1905 : s.c. 66 P. L. R. 1905.

[2] 9 and 53 P. R. 1899.

[3] 55 P. R. 1903 (F.B.). See *per* C. J. dissenting.

[4] 119 P. R. 1880.

[5] *Haidar Khan* v. *Jahan Khan*, 65 P. L. R. 1902.

[6] *Sohna Shah* v. *Dipa Shah*, 15 P. R. 1902. See *Labh Singh* v. *Gopi*, 15 P. R. 1902.

[7] *Badri* v. *Udro*, 73 P. R. 1903.

For services rendered.

Under Customary Law it is a well-known rule that a childless male proprietor can alienate in favour of his relations who have rendered him services in bringing his land under cultivation, or in managing it for him when he was himself incapable of so doing, as against other relations.[1] In *Punnu Khan* v. *Sandal Khan*,[2] it was observed that "the right of a childless male owner to appoint an heir is generally, if not universally, acknowledged, and it has been rightly treated as merely a form of gift. It is founded on consideration of equity and convenience; for the childless male owner ought to be allowed to make arrangements for his comforts and maintenance in his old age, and for a companion to help him in his daily affairs. He cannot be compelled to nurse his property for the benefit of his agnates irrespective of all personal considerations. If he can appoint an heir on these grounds, it is not unreasonable to expect that custom would allow him to make a gift where the donee is not actually adopted as a son or appointed heir, but is specially connected with the donor by being associated or helping in cultivation and rendering him service. Such a person holds a position very analogous to that of the adopted son or adopted heir." A gift by a childless Kabull to a near collateral with the consent of the near agnate relations was held to be valid.[3] Amongst Kang Jats of Garhshankar Tahsil, a gift by a sonless proprietor to one of his heirs who has been helping him was held valid by custom.[4] Among Dhat Jats of Hoshiarpur a gift by a childless proprietor in favour of one of his agnates, who is not his next heir, for services rendered to the donor, is not invalid.[5] Among the Thirwars of the same district a childless male owner can make a gift of his lands to one of his collaterals in preference

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[1] 116 P.R. 1886; 85 P.R. 1889; 116 P.R. 1894.

[2] 92 P.R. 1904.

[3] 72 P.R. 1900.

[4] 14 P.R. 1901.

[5] *Atma Singh* v. *Nandh Singh*, 61 P.R. 1901.

to his other collaterals in consideration of services rendered to him by the donee.[1]

In favour of daughters.

Gifts are frequently permitted by a sonless proprietor to a daughter whose *doli* has never left her father's house, or whose husband has resided with her father as a *khana-damad*, or, to a *khana-damad*. Similar gifts occasionally made to a sister or her issue have been held to be valid. In a case in point the Additional Commissioner of Amritsar found that the universal custom of the country was that gifts to daughters could only be made with the consent of the male collaterals.[2] In another case it was held that a gift to a daughter with the consent of the nearest heir was valid as against remote reversioners.[3] Among the Arians of Hoshiarpur a gift to a daughter of the ancestral property is held valid.[4] In another case a gift to a daughter in presence of collaterals was also held valid. In the district of Sialkote, amongst Ghuman Jats, a gift to a daughter and her son of self-acquired property and a part of ancestral property was valid.[5] A gift of ancestral property in favour of a daughter and her son among the Arians of Jullundar is valid.[6] Among the Arians of Jullundar a gift by a childless proprietor of his entire estate to his daughter's son is valid by custom, and there can be no distinction in principle between such a gift and the one made to a daughter's son.[7] But amongst the Arians of the Ludhiana district a father has no power to make a gift in favour of his daughter.[8] A custom permitting gifts to daughters and their issue cannot be extended so as to authorize a gift to a son-in-law.[9] A gift to a brother or nephew is often permitted.[10]

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[1] *Rajada* v. *Lehnu*, 96 P. R. 1906. See also *Boja* v. *Munshi*, 96 P. L. R. 1903.

[2] Reported in 1550 of 1876.

[3] 84 P. R. 1900.

[4] 82 P. R. 1900.

[5] 85 P. R. 1900.

[6] 14 P. R. 1903.

[7] 133 P. R 1906.

[8] 89 P. R. 1898; followed in 49 P. R. 1899.

[9] 137 P. R. 1879; 65 P. R. 1880; 43 P. R. 1883.

[10] 77 P. R. 1869; 71 P. R.

For pious purposes.

Gifts for pious or religious purposes to a small extent, but not when embracing the bulk of the donor's estate, are generally allowable. An alienation for the purpose of sinking a well by a sonless proprietor among Datt Brahmans of Gurdashpur was held to be valid by custom.[1]

Unequal distribution among heirs.

Among agriculturists in the Punjab the general rule is against unequal distribution of property amongst heirs. Yet a proprietor possesses, by Customary Law, powers to make a partial disposition of his property during his life-time. A father can give away a portion of his property to one of his sons to the prejudice of his other sons, either by the same or different wives.[2] Similarly there are instances where a gift of a portion of a man's estate to his brother's son and grandson in the presence of a brother and a nephew has been allowed.[3] But in all decisions in favour of unequal alienation there have been special circumstances, such as "services rendered by the alienee to the alienor, or remoteness, and non-residence, or the *onus* has been held discharged by proof of special custom."[4]

Possession necessary to complete a gift.

The primary rule of decision in a case of gift in the Punjab is a custom, and, according to it, possession is ordinarily necessary to complete a gift; and herein it differs from the Hindu law according to which, if the donor does all that he can to perfect his contemplated gift, he cannot be compelled to do more.[5] A gift to be valid, therefore, must ordinarily be followed by possession and must be free from undue influence.[6]

Female's power to alienate.

A female in possession of an immoveable property, acquired from her husband, father, grandfather, son or grandson, otherwise than as a free and absolute gift, cannot permanently alienate such property. But the property

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1880; 126 P. R. 1883; 113 P. R. 1891; 49 P. R. 1898.

[1] *Tara Singh* v. *Gopal Singh*, 26 P. R. 1905.

[2] 126 & 164 P. R. 1879; 15 & 18 P.R. 1880; 23 & 125 P.R. 1893.

[3] 101 P. R. 1892.

[4] *Amir* v. *Zebo*, 42 P.R. 1902.

[5] *Lila Kishen* v. *Hoa Ram*, 45 P. R. 1901.

[6] 22 P. R 1867; 34 P. R. 1891; 15 P. R. 1895.

which she acquires as an absolute gift she has every right to dispose of in any way she likes. She can always sell or mortgage any property in which she has either an absolute or life-interest. In the case of a widow claiming the power to give absolutely with the assent of reversioners, the *onus* of proof rests heavily on the person who seeks to maintain such an alienation contrary to the usual custom, which restricts the widow's power to alienate to the term of her life-tenure. The fact that certain nearer reversioners have assented to a gift by a widow in favour of a near reversioner does not bar the claim of a reversioner who is equally entitled.[1]

Reversioner to object to alienation.

The proper person to object to an alienation is the reversionary heir.[2] There is no definite rule that, up to a certain degree of propinquity alone, kinsmen have a right to impeach alienation of ancestral lands and, beyond that degree, they have not. In the absence of special facts it cannot be laid down as a general principle of Customary Law, or as a deduction from the decided cases, that an alienation by a childless proprietor in favour of an agnate of equal or nearer degree is valid. The only exception is where a gift is made to a collateral relation who has rendered services to the donor and there are strong equities in his favour.[3]

A sonless Mahton Rajput of the Jullundar district alienated his land and house by way of gift to his daughter's son with the consent of all the near collaterals. Certain distant reversioners brought a suit impugning the alienation. The defence was that the gift was good by custom, and that as the widow of the brother's grandson of the donor was alive, plaintiffs could not maintain the suit. It was found that in the class to which the parties belonged, a widow had a preferential right to succeed to

[1] *Thakur Singh* v. *Hira Singh*, 56 P. L. R. 1903.

[2] 24 P. R. 1877; 7 P. R. 1893.

[3] *Khazan Singh* v. *Relu*, 35 P.R. 1906.

any property of her husband's collaterals, just as her husband would have succeeded thereto, if alive. It was held, therefore, that the reversioners had no right to sue while the widow, having a right to succeed in preference to the plaintiffs who are distant reversioners, is alive.[1]

The next reversioner, however remote, is generally entitled to object to an alienation by a female.[2] Among Domra Jats of Dera Ismail Khan, only collaterals removed in the fourth degree from the deceased are entitled to object to an alienation made by his widow.[3] Among Bajwah Jats of Sialkote district, collaterals so distantly related as the eleventh degree from the common ancestor are not entitled, by custom, to object to an alienation by a childless proprietor.[4] Among Arians of Konwali *got* in Lahore, the sister and sister's son of a childless proprietor are competent to file a suit to set aside a mortgage as having been made without necessity by the widow of the deceased proprietor.[5] In *Sundar Singh* v. *Sain Ditta*, it was held that a suit for a declaration that an alienation of ancestral property by a sonless proprietor is of no effect against his collaterals (plaintiffs) was not barred by reason of the presence of female heirs of the proprietor. But until the death or re-marriage of the widow of the deceased proprietor, entitled to a life-estate, the collaterals are not entitled to claim possession from the alienee.[6] In the absence of any direct heirs the proprietary body in a village community may be shown to have a customary right to contest an alienation by one of their body.[7]

Acquiescence by reversioners.

Where reversioners acquiesce in an alienation by a sonless proprietor by express or tacit consent, they cannot

[1] *Khem Sing* v. *Biru*, 44 P. R. 1905.

[2] 11 P.R. 1888.

[3] *Dilwar* v. *Jatti*, 2 P. R. 1901.

[4] *Hardas Singh* v. *Buta*, 94 P. L. R. 1903.

[5] *Bhagan* v. *Taban*, 29 P. L. R. 1902; this case distinguished P.R. 174 of 1889.

[6] 29 P. R. 1903.

[7] 43 P. R. 1877; 78 P. R. 1888.

again question or impugn such alienation.[1] A childless proprietor was so crippled by rheumatism as to be hardly capable of moving about. In consideration of the personal services of the defendant, without which he could not have carried on the cultivation of his land and maintained himself, he made a gift of half of his land to the defendant. It was held that the plaintiff, a reversioner, was not entitled upon the death of the proprietor to challenge the validity of the gift, when the plaintiff had conducted himself in such a way as to lead the defendant to believe that he had no objection to the gift and had left him to act on that belief.[2]

Distinction between gift and will.

In *Bano* v. *Fateh Khan*, the majority of the Full Bench held that the distinction under the Punjab Customary Law between power of gift *inter vivos* and power of testation is a matter of degree and form only. Where power of gift is shown to exist an initial presumption arises that there is a co-extensive power of testation. The *dissentiente* Chief Judge held that under the Punjab Customary Law there is a marked distinction between the power of gift and the power of Will, and though the existence of a power of gift is a strong point in favour of the party asserting a power of Will, it is not sufficient to relieve him of the *onus* of proving the existence of the power of Will under the Customary Law.[3]

The power of transfer by Will among Sandhu Jats of Tarn Taran Tahsil of the Amritsar district is not co-extensive with the power of transfer *inter vivos*. So where a childless proprietor bequeathed by a Will his ancestral property to a person who rendered him services, and a nearer collateral of the deceased, who refused to serve the latter, sued to obtain the same property on the demise of the childless proprietor, the Court held that the legatee on whom the *onus* lay, had failed to show that he was

[1] *Natha Singh* v. *Bhugwan Das* 97 P. L. R. 1902 ; *Roda* v. *Harnam Singh*, 102 P. R. 1902 ; *Labhu* v. *Nihali*, 7 P. R. 1905.

[2] *Baja* v. *Munshi*, 96 P. L. R. 1903.

[3] 48 P. R. 1903 (F.B.).

entitled to take under a Will to the detriment of the collateral though the father refused to serve and the former did serve the deceased.[1] In *Hayat* v. *Hidayat*, an alienation by a childless male proprietor of his ancestral property by Will, in favour of his sister's son as against the rights of his nephew, was set aside.[2]

Marriage and Divorce.

A marriage to be binding amongst orthodox Hindus, both bride and bridegroom must not be within the prohibited degrees of consanguinity. As to what is, and what is not, a prohibited degree is a matter of practice or usage. For instance, according to modern practice a mother's brother's daughter, father's sister's daughter, or sister's daughter is not within the prohibited degree. Among Hindu agriculturists the bride and bridegroom must be of the same *got* and tribe.[3] No particular form of ceremony is necessary, even among higher castes, to constitute a marriage. In fact, it is not the ceremonies but the consent of the parties which constitutes marriage. In the case of a minor the proper consent of the parents or guardians is necessary.

As a general rule a Hindu marries a girl of his own caste; a Mahomedan will not generally marry a girl who belongs to a different religion. But it is not uncommon to find a Mahomedan of rank marrying a Rajput woman. Many instances of this sort of inter-marriage have taken place among the Mandal families of Karnal.[4] It is also well-known that many Rajputs and Sikh Sardars contract a form of marriage known as *chuddar andazi*[5] with Mahomedan women. In a case in Lahore in which

Chuddar Andazi.

[1] *Ishar Singh* v. *Lehna Singh*, 86 P. R. 1903 : S. C. 145 P. L. R. 1903.

[2] 40 P. L. R. 1905.

[3] Tupper's Customary Law Vol. II p. 120 ; Vol. IV p. 95 ; Vol. V p. 46.

[4] *Rustam Ali* v. *Asmat Ali* 13 P. R. 1875.

[5] Literally means throwing a sheet over.

a Mahomedan prostitute claimed to succeed as co-widow to the estate of a certain deceased Sikh chief on the strength of an alleged marriage by *chuddar andazi*, a large number of Sikh Sardars were examined and they all said that such a marriage was not sanctioned by usage. It is no doubt that many Hindu Sikh Rajahs and Sardars contracted *chuddar andazi* marriages with Mahomedan women. But that was not in pursuance of any prevailing usage but rather that such marriages were "as acts of sovereign will and pleasure which set all law and usage at defiance."[1] In *Jawala Singh* v. *Sukh Devi*[2] it was held that in the district of Hoshiarpur, a Jat Jagirdar could not legally marry a Brahman woman; and that if a ceremony, such as *chuddar andazi*, was gone through between the parties, it would not confer any rights of inheritance on the woman, as a lawful widow, to any property which the man might leave at his death, but that she would only be entitled to receive food and raiment as long as she continued to lead a chaste life. A marriage by *chuddar andazi* between a Brahman and a widow is not valid by custom.[3] The widow after such marriage is called a *dharel* wife. Among Khatris of Majetha in the Amritsar district, the children of a *dharel* mother do not succeed to the exclusion of a widow legitimately married.[4] In *Nathu* v. *Ram Das*[5] it was held that the children of a Khatri and Khatrani widow born after her re-marriage with him in the *chuddar andazi* form are not illegitimate as the marriage is valid and lawful.

Exchange marriage.

We have, already, referred to *paribarta* or exchange marriage as being prevalent in Bengal.[6] It is not uncommon in the Punjab. The custom owes its origin to the same state of the society among certain particular tribes or classes of people in the Punjab as in other parts of India,

[1] See *Musst Chand* v. *Raj Kaur*.
[2] 1233 of 1869.
[3] 5 P.R. 1893. *Lalchand* v. *Thakur Devi* 49 P. R. 1903.
[4] 21 P.R. 1893.
[5] 4 P. L. R. 1905; followed 49 P. R 1903.
[6] Vide *supra* p. 304.

viz., the paucity of girls of the same *gotra* and the desire to keep the property within the class or tribe or community. In a case where a number of Khatris, all of the same caste and community, arranged a number of marriages amongst themselves, none of which was shown to be *prima facie* unsuitable or undesirable and where there was nothing to show that the performance of one of the betrothal contracts was to be made dependent on the previous performance of the others, and the arrangements were made independently of each other, though at one and the same time, it was held that the betrothal contracts were not opposed to public policy and damages could be recovered on breach of them.[1] Such inter-marriage stands on a totally different footing and is not like a marriage where a girl is given away for a sum of money paid to her parents without any regard to the suitability of the marriage or the future happiness of the girl. Certainly, where the only consideration for the marriage of a girl is a sum of money to be paid for her, the contract of such a marriage would be void, being opposed to public policy.

Kurao marriage.

Widow re-marriage in the *kurao* form is prevalent in the Punjab and is regarded as a valid marriage. Such a marriage by a widow with the brother or some other male relative of her deceased husband requries no religious ceremonies, and confers all the rights of a valid marriage.[2] Amongst Brahmans and pure Rajputs, *kurao* marriage is reprobated and confers no rights of inheritance on the issue born of it.[3] Among some tribes widow

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[1] *Amir Chand* v. *Ram* 50 P.R. 1903.

[2] 38 P.R. 1879 (Hoshiarpur); 316 of 1879 (Sindhu Jats of Ludhiana); 26 P.R. 1880 ; 36 P.R 1881 (Bishnoi Jats of Hissor); 48 and 98 P.R. 1890 ; 54 P.R. 1900 (Kalhman Jats). See also Tupper's Customary Law, Vol. II. p. 95. Among certain classes a repudiated wife may marry again by the *Kurao* form. See 998 of 1871 ; 607 of 1886 (Sindhu Jats) ; 84 P. R. 1889 (Chimah Jats of Sialkote) : *Cf.* 88 of 1886 (Manhas Rajputs of Sialkote).

[3] 2 P. R. 1872 ; 22 P. R. 1873 ; 113 P. R. 1885 ; 57 P. R. 1893. But see 48 P. R. 1890. *contra*.

re-marriage is sanctioned by custom; *e.g.*, Sartora Rajputs of Kangra.[1]

A woman cannot marry a second husband while her first husband is alive, unless the first marriage is validly set aside.[2] Among Jats in the Punjab, a deserted wife or one who has been set aside by her husband can, by their custom, marry another man in the life-time of her first husband.[3]

Religious Institutions.

Ordinarily custom regulates succession to the management of religious institutions in the Punjab.[4] A successor is either elected or nominated. The mode of election or nomination is the same in the Punjab as in other parts of India.[5]

Mohunt.

The office of a *mohunt* is generally elective and not hereditary.[6] But a *mohunt* may nominate a successor subject to confirmation by the brotherhood.[7] It is not absolutely necessary that a *mohunt* should be appointed.[8] Both male and female are eligible for election to a *mohuntship*. When a woman is elected she may succeed to the *gadi* of a *mohunt*. In one instance it was found as a fact that the deceased *mohunt* of a religious institution in Delhi had nominated one of his female disciples as his successor, and she was accordingly allowed to succeed as *gadinashin*.[9] In this case several *Pants* of neighbouring shrines were examined and they one and all supported the title of the female disciple who brought this suit for *mohuntship*.

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[1] 98 P. R. 1890.

[2] 36 P. R. 1881; 72 P. R. 1892.

[3] *Chatar Singh* v. *Mano*, 998 of 1871.

[4] 32, 52 and 76 P. R. 1867.

[5] *Vide* Hindu Customs: Religious Endowments. *Supra* p. 231 *et seq.*

[6] *Babu Ganga Nath* v. *Rabel Nath*, 143 P. L. R. 1906.

[7] See 173, P. R. 1869; 4 P. R. 1870; 175 P. R. 1889; 105 P. R. 1892; 3 P.R. 1899.

[8] 76 P. R. 1867; 338 of 1868.

[9] *Munnia* v. *Jiwan Das*, 76 P. R. 1874.

A *mohunt*, as the head of a religious institution, is regarded as a trustee, and as such, any alienation by him, *prima facie*, would be considered as a breach of trust.[1] Except for necessary purposes, no property belonging to a religious institution can be permanently alienated.[2] By *necessary purposes* is ordinarily meant the expenses of keeping up religious worship, repairing the temples or other buildings connected with the institution, defending hostile litigious attacks and other like objects. In *Kashiram* v. *Bawa Tola*,[3] it was held that the power of the head of a religious institution is a limited one. He can only alienate for necessary purposes; but this alone is not sufficient. Not only must the debts be incurred for necessary purposes but it must also be shewn that such purposes could not be fulfilled except by contracting those debts, and that the ordinary income of the endowment was not available or was insufficient for them, and that the debts could not be discharged from the income. Persons who lend money to the heads of religious institutions are bound to enquire whether the occasion on which they advance money is such that the loan is justified by the state of the funds of the institution, and the purpose for which the loan is taken. It is not enough to show that the purposes for which loans were taken were necessary purposes. The lenders must satisfy themselves that there was a real necessity to contract the debt having regard to the income of the property of the institution.[4]

So long a *mohunt* retains his office he is presumed to have the sole management of the endowment.[5] In small institutions, however, where the number of disciples are few, they have an equal voice in the administration of the property.[6]

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[1] *Maharani Shibessuri Debia* v. *Mothooranath Acharjo*, 13 Moo. I. A. 270 (1869).

[2] 192 P. R. 1880; 39 P. R. 1882; 136 P. R. 1889.

[3] 3 P. R. 1902.

[4] *Gurmukh Singh* v. *Sundar Singh*, 45 P. R. 1903.

[5] 76 P. R. 1867.

[6] Ibid.

A *mohunt*, if he is found incompetent or if he in any way misconducts himself, may be expelled.[1] But before he can be removed, the misconduct or mismanagement alleged against him must be clearly proved; further, it must be also clearly shown that the alleged misconduct or mismanagement is of so serious a nature as to render the retention of the *mohunt* in question undesirable and detrimental to the interests of the shrine and its worshippers.[2] The *shebaits* or the trustees of an endowment may possess the right to sue in such a case.[3] But the right must be shewn to be exercisable by general or special custom.[4] In *Bhagwan Das* v. *Hardit Singh*,[5] the Subordinate Judge found that *mohunts* of a religious institution had misconducted themselves and mismanaged the institution to an extent justifying their removal. He accordingly ordered the removal of the *mohunts* from possession of the lands attached to the institution. The case was instituted by the representatives of the village and the villagers did not take any share in the management of the institution nor did they ever assert any right to control the succession of the *mohuntship*. On second appeal the Chief Court held that since the villagers had not established by evidence their customary right to interfere even if there was the clearest proof of gross misconduct, the suit must be dismissed. It, in fact, found that there was no sufficient proof of misconduct against the *mohunts*. The general principle on which cases of the kind should be determined has been laid down in several decisions of this court.[6]

Ascetics.

An ascetic or person entering into a religious order becomes dead to the world. He is ordinarily supposed to renounce the world and its affairs. All his rights in property

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[1] 81 P. R. 1869; 1197 of 1877; 1089 of 1881.

[2] *Ramkishen* v. *Chet Singh*, 13 P. L. R. 1906.

[3] 81 P. R. 1869; 2063 of 1880.

[4] 122 P. R. 1890.

[5] 52 P. L. R. 1905.

[6] 22 P. R. 1890; 3 P. R. 1899; 89 P. R. 1901.

become extinct and he cannot legally perform any purely worldly act. In *Teku* v. *Basti* it was held that the general custom of the sect was in accordance with the Hindu law, and that an ascetic could not renounce his religious order, nor perform such worldly act as the adoption of a son so as to constitute him his heir to property.[1] He cannot acquire a private property. All property acquired by individual members is looked upon as belonging to, and for the benefit of, the religious institution to which they are attached.[2] But the *majawars* of the shrine of Data Ganj Baksh at Lahore are permitted to have private property.[3]

Bairagees and some of the *Baidi* class[4] who are found in Amritsar and Gurdaspur are not ascetics at all. They carry on trade and belong to the *grihi* or house-holder class. They marry and beget children like other persons.[5] Certain *Udasi* sects in the Jullundar district[6] and *Dadupanth Fakirs* in the Ferozepur district[7] are not recognized as ascetics. Among the *gharbari gossains* of the Kangra Valley they marry and are succeeded by their widows.[8]

Chela. A *chela* ordinarily succeeds to the *gadi* of his deceased *guru*. In the absence of any *chela* of the last holder, the land reverts to the *mohant* of the superior *gadi* to which the institution concerned is subordinate.[9] Where a *chela* of the last incumbent alleged that he was entitled to succeed as a *chela*, and that installation to the *gadi* was not required by the custom of

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[1] 15 P. R. 1874. See also 7 P. R. 1892.

[2] *Tota Puri* v. *Padam Puri* 21 P. R. 1874.

[3] 38 P. R. 1883.

[4] For a short account of the origin and customs of these sects, see Col. Henry Court's translation of the *Sikhhian de Raj di Vikhia* pp. 106-114. See also Mr. Maclagan's Census Report for the Punjab 1891, Chap. IV for an exhaustive account of all religious sects in the Punjab. See 1887 of 1879, 713 of 1892, and 106 P R 1892 (for *Khankah*) and 143 P.L.R. 1906 (for *Jhuggi*) as religious institutions.

[5] 24 P.R. 1880; 29 P. R. 1881.

[6] 29 P. R. 1881.

[7] I 38 of 1881.

[8] 135 P.R. 1884.

[9] *Hari Devi* v. *Charan Das* 12 P. L. R. 1906.

the institution, the Court found that he had failed to show any custom enabling him to succeed irrespective of election or installation or nomination to the headship of the institution and that the mere fact of his being a *chela* of the last holder was not sufficient to support his claim.[1] The rule of succession from *guru* to *chela* cannot be altered to make the lands descendible to the heirs of the last holder of it, by his entering married life against the custom of the order.[2] The *chelas* are entitled to maintenance as long as they behave properly and observe a proper subordination to the head of the institution.[3]

PRE-EMPTION.

In the Punjab the right of pre-emption is based either on the provisions of the Act or on local custom.[4] In the *Wajib-ul-urz* of almost every village the right of pre-emption is recorded. It is exercised by co-sharers, at their option, on the sale of lands. It extends by statute to all sales of immoveable property, and to the foreclosure of rights to redeem such property. The right must be claimed by one who is himself a proprietor of the property by virtue of which the pre-emption is claimed.[5] A perpetual lease does not give rise to a right of pre-emption merely on the ground that it is tantamount to a sale. For the right of pre-emption as stated above arises in respect of sales of immoveable property and foreclosure of rights to redeem such property. It must be an out-and-out sale, though the sale may be under a decree or otherwise.[6] Local custom at times recognizes a claim to pre-emption in the case of mortgages, and where such custom is proved to exist, effect must be given to it.[7]

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[1] 143 P. L. R. 1906.
[2] 12 P. L. R 1906.
[3] 84 P. R. 1866.
[4] 8 P. R. 1893.
[5] *Beharee Ram* v. *Shoobhudra*, 9 W. R. 455 (1868).
[6] 43 P. R. 1892.
[7] 53 P. R. 1877; 10 P. R. 1887; 378 P. R. 1892; 11 P. R. 1901.

Depends on vicinage.

The right of pre-emption generally depends on vicinage, and whether the pre-emptor has a common wall, or is a partner with the vendor in a common right of way or other easement affecting both properties.[1] The nearest kinsman is generally entitled to the first offer of purchase;[2] but nearness of relationship by itself does not usually confer any superior right of pre-emption.[3] One co-parcener can claim no right of pre-emption as against another co-parcener.[4] Nor can one of two rival claimants possessing equal rights claim a moiety of the property sold. In such a case the claimant who first brings a suit to enforce his right is entitled to the whole property.[5] Under a custom prevailing in the village of Patni, in Dera Ghazi Khan, the collaterals of a vendor have a superior right of pre-emption to that of others who are equally co-sharers in the well to which the land sold belongs, but who are not themselves collaterals.[6] Where the entry in the *Wajib-ul-urz* records custom of pre-emption only in favour of *ek-jaddis*, the co-sharers in the village who are not *ek-jaddis* cannot succeed as against the vendor who owns no land in the village.[7] The proprietor of a *Dharmsala* may claim pre-emption.[8]

Presumption.

Right of pre-emption is presumed to exist in villages whether such right is recorded in the settlement record or not. It extends to the village site, to the houses built upon it, to all lands and shares of lands within the village boundary and to all transferable rights of occupancy. But there is no such presumption as to the existence of a

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[1] 1464 of 1875; 83 & 97 P. R. 1880; 33 P. R. 1885; 42 P. R. 1891; 199 P. R. 1889; 129 P. L. R. 905; 57 P. R. 1906; 17 P.R. 1903; 77 P. P. 1906.

[2] 121 P. R. 1879; 196 P. R.1889.

[3] 54 P. R. 1880; 113 P.R. 1881; 53 P. R. 1888; 37 P. R. 1906.

[4] *Lalla Nowbut Lall* v. *Lalla Jewan Lall* 4 Cal. 831 (F. B.). [1878].

[5] 102 P. R. 1881; 83 P. R. 1888.

[6] 73 P. R. 1901.

[7] 72 P. L R. 1906. The term *ek-jaddis* used in the pre-emption clause of a *Wajib-ul-urz* means persons descended from the ancestor who once held the land which is the subject of the sale, and not agnates only of the vendor.

[8] 100 P. R. 1885.

right of pre-emption in towns,[1] though such right has been shown to exist according to custom and recognized by Courts in numerous cases.[2] Where vicinage confers the right of pre-emption in respect of houses in a town, a plaintiff who asserts that his vicinage is of a superior kind to that of the defendant must prove his assertion.[3]

VILLAGE COMMON LAND.

The village common land is a plot of land in every village reserved for purposes of common pasture, for

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[1] *Vide* Act IV of 1872 as amended by Act XII of 1878.

[2] *For instance* :—

In Amritsar :—46 and 154 P. R 1882 ; 99 P. R. 1906 ; 140 P. R 1906 ;

In Delhi :—68 P. R. 1879 ; 64 P. R. 1887 ; 1392 of 1889 ; 75 P. L. R. 1906 ; 67 P. R 1906 ; 81 P. R. 1906.

In Ferozepur :—44 P.R. 1903

In Gujarat :—83 P. R 1880 ; 113 P. R. 1881 ; 13 P.R. 1890.

In Gujranwalla :—56 P. R 1885.

In Hissar :—90 P. R. 1901 (in respect of shops).

In Jullundar :—12 P. R. 1883 ; 33 P. R 1885 ; 53 P. R. 1888.

In Karnal :—129 P. L. R.1905.

In Lahore :— 1569 of 1879 ; 189 P. R. 1882 ; 48 P. R. 1888 ; 5 P. R. 1903.

In Ludhiana :—192 P.R. 1888; 38 P. R. 1906.

In Multan :—83 and 165 P. R. 1888 ; 57 P. R. 1906.

In Panipat 24 P. R 1887.

In Peshawar :—10 P. R. 1886 ; 29 P. R. 1888 ; 42 P. R 1903.

In Rohtak :—55 P. R 1880.

In Sialkote :—37 P. R. 1888.

In following sub-divisions of towns and cities pre-emption has not been found to prevail :—

Amritsar :—In *Kanak Mandi* Sub-Division (170 P. R. 1889).

Bhiwani :—(in the Hassar district) in *Bagh Dhaggan* (16 P. R. 1902); in *Thoola Norson. Panna Jaunpal* 71 P. R. 1902.

Delhi :—In the *city*, in respect of large *Katra* or Square comprising distinct shops (64 P. R. 1887).

Jagraon :—In *Mohulla Bhogi* (100 P. R. 1892).

Lahore :—In *Kucha Sathan* Sub-Eivision, in respect of mortgages. (72 P R 1886); in *Bazar Chauhatta Mufti Bakar* (83 P.R.1901); in *Mohulla Qazi Sadar-ud-din* including *Kucha Chabuk Sawaran* otherwise known as *Kucha Kakazian* (86 P. R. 1901) ; in *Mohulla Kakkazaian*, pre-emption by virtue of ownership of opposite house but separate from the one unsold (68 P. R. 1906).

Multan :—In *Mohulla Sultanganj* (170 P. R. 1889).

Mukerian :—(in the Hoshiarpur district) 70 P. R. 1902.

Sonepat :—In *Mohulla Mashad* 85 P. L. R. 1906.

[3] 17 P. R. 1903.

assembling of the people, for grazing cattle and for a possible extension of the village dwellings. It is always regarded as a common property of the original settlers, and their descendants. And occasionally also those who assisted the settlers in clearing the waste and bringing it under cultivation are recognized as having a share in it. Unless it is sanctioned by custom none of the proprietors have any power to alter the condition of the common land without the consent of all the co-sharers.[1] Any individual proprietor cannot plant or cut trees on the common land, nor can he sink a well, nor appropriate houses built for common purposes except with the consent of all the co-proprietors.[2] In the absence of custom, the will of the majority of a village community cannot prevail over that of the minority when the question is the disposal of the common property in such a way as to preclude all use of it by the owners.[3] A majority of the proprietors can demand partition of the common land.[4] When a common land has once been partitioned, a re-distribution of it cannot be demanded in the absence of a well-established custom or of an express agreement.[5]

Each proprietor has a right of property in his dwelling house in the village, entitling him to exclusive possession.[6] In villages the proprietory right in the *abadi* (*i. e.* inhabited village site) is, as a rule, vested in the proprietary body.[7] The mere possession of a vacant site in the *abadi* confers no absolute right in the possessor to dispose of the same to a non-proprietary resident.[8] A proprietor may be restrained by his co-sharers from appropriating a vacant site to his own exclusive use.[9] A non-proprietary resident cannot, in the absence of a well-established custom, dispose

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[1] 109 P. R. 1879 ; 73 P. R. 1882 ; 54 P. R. 1885 ; 54 and 70 P. R. 1886.

[2] 718 of 1869 ; 1117 of 1870; 74 P. R. 1888.

[3] 76 P. R. 1873 ; 78 P. R. 1877 ; 30 P. R. 1879 ; 7 P. R. 1885; 54 P. R. 1886.

[4] 8 P. R. 1868.

[5] Vide s. 125 Punjab Land Revenue Act 1887.

[6] 67 P. R. 1869.

[7] 822 of 1883.

[8] 24 P. R. 1878.

[9] 1038 of 1880 ; 937 of 1882.

of the site on which his house is built, or a right of residence in the house, without the consent of the proprietors of the village.[1]

In villages that have grown into towns or *qasbas*, such as Barsat, Panipat, and Karnal, the proprietor of the house is held to be the proprietor of the site on which it is built.[2] In such *qasbas* the right of occupation is usually transferable.[3]

On the death of a non-proprietor his direct male descendants, and, failing them, his widow, and, in the absence of his widow, his mother will succeed to his rights in the house occupied by him. His remote collaterals are excluded altogether.[4]

Rights of absent proprietor.

One very characteristic feature of the village system is that an absent proprietor can recover possession of his original holding on his return to the village by reimbursing the occupant of his land for the cost of improvement effected and for all losses incurred by him. The length of time he was dispossessed is immaterial. This is a very ancient custom and has been recognized by Courts of law.[5] This customary right, however, may be controlled by express agreement.[6] The heir or representative of the absentee-proprietor may also bring a suit to recover the holding at the death of the deceased absentee, provided the latter by his conduct has not shown his intention to abandon the holding.[7] Where the occupant of a holding by some overt act sets up an adverse title of his own, the absentee or his representative must sue to recover his rights within twelve

[1] 125 P. R. 1879 ; 53 P. R. 1881; 119 P. R. 1884 ; 40 P. R. 1886 ; 50 P. R. 1889 ; 99 P. R. 1892 ; 1197 of 1893 ; 48 and 62 P. R. 1899 ; 7 P. R. 1900.

[2] 48 P. R. 1881; 9 P. R. 1882 ; 87 P. R. 1884.

[3] 48 P. R 1884. See also 38 P.R. 1895 and other cases.

[4] 37 P. R. 1887 ; 71 P. R. 1889 ; 76 P. R. 1888.

[5] *Vide* 7 P. R. 1868 Revenue ; 153 of 1871 ; 1254 of 1877 ; Financial Commissioner's Letter, dated the 11th July, 1865, to the Judicial Commissioner, Punjab.

[6] 28 P. R. of 1876 ; 25 P. R. 1877 ; 981 of 1880.

[7] 33 P. R. 1878 ; 1223 of 1886 ; 833 of 1891 ; 109 P. R. 1892.

years from the date of such assertion.[1] An absentee relinquishing the ownership of the land cannot take advantage of an agreement in his favour.[2] An intention to relinquish is not manifested merely by absence, though long absence coupled with an entire severance from all concern with the land gives rise to such a presumption.[3]

Among Mahomedans.

Inheritance.

Among Mahomedans in the Punjab succession runs in the male line.[4] *Pugvand* and *Chundavand* rules of succession are also prevalent among them. The *pugvand* rule is the normal custom. It prevails in Peshawar;[5] amongst the Raiens of Jullundar,[6] the Awans of Shahpur,[7] the Sayads of Rohtak,[8] the Dogars of Ferozepore,[9] and the Pathans of Amritsar;[10] also among the Gunzals,[11] and the Sunghara Jats.[12] It is prevalent also among the Turkhelis, Turins, Dilazaks, Dhunds and Tanaolis in Hazara.[13] The Yusafzai Pathans in Rohtak are by custom governed by the *pugvand* and not by the *chundavand* rule.[14] The custom of descent prevailing among the Sheiks in the Umballa district is *pugvand*.[15] The *chundavand* rule largely prevails amongst the Sayads, Koreshis, and Pathans of the Shahpur district; the Utmanzais, Turks and Sayads in the Hazara district follow the same rule of succession.[16] The Mahomedan Chibbs of Gujarat,[17] and certain Mahomedan families in

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[1] 1177 of 1872; 47 and 78 P.R. 1175; 837 of 1875.
[2] 115 P. R. 1876; 38 P. R. 1878; 1794 of 1880; 109 P. R. 1892.
[3] 2095 of 1883, printed at p. 337 P. R. 1884; 84 P. R. 1888; 113 P. R. 1893.
[4] 29 P. R. 1868.
[5] 161 of 1867.
[6] 524 of 1868.
[7] 8 P.R. 1879.
[8] 82 P.R. 1887.
[9] 11 P. R. 1889.
[10] 35 P. R. 1889.
[11] 429 of 1871.
[12] 178 P.R. 1888.
[13] *Vide* Settlement Report p. 305.
[14] 29 P. R. 1905.
[15] 11P. R. 1905.
[16] *Vide* Hazara Settlement Report p. 305.
[17] 77 P. R. 1885.

Yusafzai,[1] are governed by the *chundavand* system of succession. A son cannot by custom enforce partition of ancestral immoveable property during his father's life-time.[2] The share of a son who predeceased his father descends to his son and the son of such son.[3]

Among agriculturists and non-agriculturists.

In a case where the parties belonged to the Pathans of Desa in the *chachh ilaqa* of the Rawulpindi district, the defendant pleaded that the whole property left by his father descended to him by a special family custom, the other sons being merely entitled to maintenance. But the custom was not proved. It was accordingly held that the parties being agriculturists of the Western Punjab, the ordinary rule of inheritance of equal succession of all the sons should prevail.[4] The Koreshis of the Gujranwalla city, who are non-agriculturists, are governed by Mahomedan law and not by custom.[5] Similarly the Jatoi Bilochs of the Muzaffarghur district are governed by Mahomedan law in the absence of proof of special custom in matters of succession.[6] Among the Chamar Jats of Multan, as no positive custom was proved regulating the rights of the parties in regard to inheritance, it was held that the Mahomedan law must govern them.[7]

Kashmiris of Lahore city.

Whether in matters of inheritance, the Mahomedan Kashmiris, belonging to the families resident in the Lahore city, and engaged in trade or manufacture therein, were governed by Mahomedan law or by custom formed the subject-matter of decision in a recent case. One party asserted that females inherit in accordance with Mahomedan law; the other party alleged that females are excluded by males according to custom. The Court held upon evidence, that the Kashmiri weavers and traders of the

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[1] 51 P. R. 1889.

[2] 1 P. R. 1867.

[3] 60 P.R. 1878, (Sayads of Rohtak); 80 P. R. 1882, (Pathans of Attock); 26 P.R. 1885, (Mahomedan Ranjha Jats of Bhera.)

[4] *Zarif Khan* v. *Amir Khan* 85 P. R. 1901.

[5] 92 P. R. 1901.

[6] 66 P.R. 1902.

[7] 117 P. R. 1901.

Lahore city are governed by Mahomedan law and not by custom.[1]

Daughters.

As a general rule, married daughters are excluded by collaterals, *e. g.*, among the Rajputs of Jullandar;[2] the Jats of Rawulpindi;[3] the Rajputs of Hoshiarpur[4] and so forth. But there are exceptions to this general rule. As for instance, amongst the Koreshis of Kasur, daughters exclude brothers and nephews;[5] among the Awans of Shahpur a right of succession in favour of unmarried daughters is recognized, but this right is liable to be divested after their marriage.[6] Among Mahomedans in Bunnoo, daughters succeed with sons.[7] In *Fatima* v. *Arjmand Ali*[8] it was held that in the matter of succession in the family to which the parties belonged, daughters succeeded in preference to collaterals according to the family custom. Among the Lodi Pathans of Jullundar they succeed to their father's estate by custom of the family. Where a daughter who has thus succeeded, upon her death, her daughter has a preferential claim by custom of the family and the tribe to succeed as against the collaterals of the father.[9]

Khana-damad.

By custom among the Bangial Jats of the Gujarat district a married daughter is entitled to succeed her father, a sonless proprietor, where he has settled that daughter and her husband in his house and on his land, with a view to their succeeding him as his heirs to the exclusion of his collaterals. It is not necessary that the resident son-in-law (*khana-damad*) must be the first husband of the daughter. The second husband also succeeds even if he happens to have been resident son-in-law in *his* first wife's family, her

[1] 54 P. R. 1906.
[2] 331 of 1866.
[3] 31 of 1867.
[4] 80 P. R. 1875.
[5] 801 of 1867.
[6] 81 P. R. 1879.
[7] 27 P. R. 1866.
[8] 41 P. R. 1901.
[9] 72 P. L. R. 902. There are numerous decisions of the Punjab Court shewing the exception to the general rule.

father-in-law having died before the second marriage. Delivery into possession before death by the father-in-law is not a necessary condition for succession of the resident son-in-law.[1] Among the Ghakkars of Jhelum, a sonless proprietor may give his ancestral land to his daughter or daughters and their husbands (*khana-damads*).[2]

Amongst the Gujars of the Rupar Tahasil, a sister excludes a mere co-proprietor of the same village, who is not an agnate.[3] Amongst the Moguls of Kharkhodah a sister and her issue exclude collateral descendants of deceased's grandfather.[4] Amongst the Sayads of Kharkhodah sister's sons are not excluded by male issue of the great-grandfather of the deceased brother. But they are excluded by male issue of the deceased brother.[5] Sisters.

Under Mahomedan law of inheritance a widow is entitled to a share of the property and not merely to a maintenance. But it may happen that the parties, though Mahomedans, may, by custom, follow Hindu law of inheritance, under which a widow, when there are sons, is entitled to a maintenance.[6] In another case,[7] the Chief Court reversing the decision of the lower Appellate Court and giving effect to the custom as recorded in the *Wajib-ul-urz* held that "if any one of the share-holders die without issue (*la-wuld*) his widow will have a life-interest provided she may not re-marry, but having got possession, she will not be entitled to give the property away to her father, brother or their relatives. On private necessity or for paying the Government demand she can transfer it by mortgage or sale." Thus it is clear, and in fact it is so, that the customary succession of a widow to widow's estate is the same among Mahomedans as among Hindus. Widows.

[1] 106 P. R. 1901. See the cases referred to therein.
[2] 74 P. L. R. 1902.
[3] 136 P. R. 1884.
[4] 71 P. R. 1892.
[5] 82 P. R. 1887.
[6] *Nadu* v. *Hafizan*, 20 P.R. 1867.
[7] *Hijjoo* v. *Meer Mahomed*, 54 P. R. 1867.

Mahomedan widows, according to the general custom of the country inheriting lands from their husband are entitled only to a life-interest, without power of alienation, except for necessity.[1]

Childless widows have only a life-interest in their husbands' lands and houses in Ludhiana,[2] in Jhelum ;[3] in Jullundar ;[4] in Multan ;[5] in Hoshiarpur.[6] Amongst a tribe known as the Chohan Rajputs in Rawulpindi, a childless widow cannot lay claim to any definite share of her husband's lands in the presence of sons by another wife, but that she is only entitled to maintenance as of right. She is, however, entitled to have a definite portion of her husband's property allotted to her for her maintenance, and such portion may, in particular cases, be equal to that allotted to a son.[7]

Among the Majawars of Multan the widow takes only a life-interest in the property of her deceased husband and is not competent to give it away as a gift to the prejudice of the rights of reversionary heirs.[8] Among the Khankhel Swalhis in the Hazara district a widow can claim only maintenance and has no right to life-estate in her husband's property.[9]

In the absence of any well-established custom to the contrary, a Mahomedan widow who succeeds, either as legatee or heir, to her deceased husband's property succeeds as absolute owner and not merely on life-tenure.[10] Among the Khojas of Kussoor, according to custom, the entire property of a man who dies without sons, devolves on

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[1] See 5 P. R. 1868 (Shahabad town); 87 P.R., 1868 (Multan); 938 of 1868 (Umballa) ; 8 P. R. 1874 (Pathans in Gargaon) ; 102 P. R. 1901 (Gardezi Sayads, in Multan) ; 553 of 1869 (in Peshawar).

[2] 300 of 1870.

[3] 950 of 1870.

[4] 53 P. R. 1872.

[5] 87 P. R. 1868.

[6] 583 of 1867, 774 of 1871 and 787 of 1872.

[7] *Sher Khan* v. *Bivi*, 30 P. R. 1905.

[8] 136 P. L. R. 1905.

[9] 62 P. L. R. 1903.

[10] *Ranee* v. *Gholam Ghous*, 3 P. R. 1867.

the widow in full proprietorship, to the exclusion of sisters and their heirs.[1]

Adoption.

As we have already said that the custom of adoption is not confined to Hindus only. It also obtains among Mahomedans of the Punjab. A sonless proprietor, in the central and eastern parts of the Punjab, may appoint one kinsman to succeed him as heir.[2]

Son of an adopted son.

Special custom might exist in certain locality prohibiting a son of an adopted son from succeeding in his natural family but the reason that would induce an adopted son to give up his rights in his natural family as against his own brothers would not apply, or, at all events, not with the same force, where it is a question of his succeeding collaterals. Thus in a case in which the parties were the Moguls of Pind Dadan Knan Tahasil, a claim of a son of an adopted son against his natural uncle's estate was allowed.[3]

Alienation.

Though the claim of a son to have his rights of succession preserved within just limits is considered paramount, a father's power to dispose of his property in his life-time in a village community is not unfrequently exercised. In the absence of any local custom to the contrary, a Mahomedan can, in his life-time, give away the whole of his property.[4] In *Rukum Din* v. *Gujri*[5] it was held that a Mahomedan Jat in the Amritsar district, could sell his share of land to an outsider according to the terms of the village *Wajib-ul-urz*, with the consent of his co-sharers and that

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[1] *Begum* v. *Hijanee*, 27 P. R 1868.

[2] See, for instance, 58 P. R. 1879, among Mahomedan Raiens of Jullundar; 120 P.R. 1881, Rawulpindi; 109 P. R. 1882, Mahomedans of Mahr caste; 178 P. R. 1883, Jats of Hazra tribe in Sialkote; 173 P. R. 1883, Rajputs in Nawashahr; 98 P. R. 1883, Ghori Pathans of Sialkote. But see *contra* 90 P. R. 1880. Daudzai Pathans of Kaithal; 40 P.R. 1891. Rajputs of Umballa; Man's Rajputs of Ludhiana. 79 P.R. 1893. Arains of Gujarat. 70 P. R. 1901. Kathana Gujars of Jhelum.

[3] *Ghelo* v. *Haider*, 59 P. R. 1906.

[4] *Hajee* v. *Ghazee* 102 P. R. 1866.

[5] 576 of 1870

such transfer could not be contested after his death by his son or widow.

A gift by a proprietor to a relative is valid and can be contested by the proprietary body only on the ground of custom or the constitution of the village as evidenced by the *Wajib-ul-urz*.[1] But if a proprietor makes a gift or sells his share to an outsider, he would be restrained from doing so by the male collaterals of the proprietor.[2] Though in large number of cases bequests to daughters' and sisters' sons have been held to be valid, yet in many instances the nephews and other male kindred of the donor have a customary right to intervene and cause the bequests or gift to be cancelled.[3]

Gift to a daughter and daughter's son by a childless proprietor.

A gift to a daughter and her son by a childless proprietor is not opposed to local custom. As a matter of fact Courts have held such gifts to be valid in number of cases.[4] Among the Awans of Shahpur, according to custom, the right of testation exists and a transfer of property by gift in favour of daughter's sons without the assent of agnates is held to be valid.[5] Among the Ghakkars in Jhelum a sonless proprietor may give his ancestral land to his daughter or daughters and their husband.[6] Among the Janjuhas of the Jhelum district, a childless male proprietor can validly make a gift of his ancestral property in favour of his daughters and sons-in-law without objection on the part of his brothers and nephews.[7] Custom among the Awans of the Jhelum district fully recognizes the power of male proprietor to make a gift to a daughter's son, who has rendered him service, even in the presence of the son and that the collaterals have no right to question the gift so

[1] 43 P. R 1877.

[2] 41 of 1874 ; 156 of 1875 ; 62 P. R. 1876.

[3] 39 P. R. 1876 ; 873 of 1876.

[4] See, for instance, 1091 of 1866 ; 198 of 1868 ; 270 of 1873 ; 1 P. R. 1883 ; 93 P. R. 1885 ; 92 P. R. 1888 ; 50 P. R. 1894. 71 P. R. 1898 ; 92 P. R. 1898 ; 98 P. R. 1898.

[5] 26 P. R. 1901.

[6] 53 P. R. 1902.

[7] 85 P. R. 1904.

made.[1] Among the Sohani Pathans, in Gurdaspur, a sonless proprietor has the power to make a gift of ancestral estate to his daughter in the presence of his brother.[2] A gift by a sonless Gujar, in the district of Ludhiana, to his daughter's sons without consent of the male collaterals is valid.[3] A gift to a *khana-damad*, to be effective, must be made to an actual *khana-damad* and not to a mere intended one. So where a sonless proprietor, among the Waraich Jats of Gujarat, made a deed of gift in favour of his grand-daughters and stated therein that he intended to make their husbands *khana-damads*, it was held that the said gift was, by custom, invalid. Mere assertion in the deed by the donor that he intended to make the husbands *khana-damads* at a future date was not enough to entitle the donees to succeed as against the reversioners.[4]

Among the Banda Rajputs of the Ludhiana city, according to custom, gifts of ancestral property to daughters in the presence of near male collaterals are prohibited. But such prohibition does not extend to self-acquired property.[5] There is no special custom among the Hatars of Shahpur, by which a Hatar can make a valid gift of ancestral property to his son-in-law to the prejudice of his sons. It should be noted that the institution of *khana-damad* is not recognized in the Shahpur district.[6] According to custom prevailing among the Naru Rajputs, in the Amballa district, collaterals of a childless male proprietor succeed to ancestral land left by him in preference to his daughters.[7]

In a case where the donor died three days after making the gift in favour of his daughters and did not give the donees possession of the property, subject of the gift, and the donees were not under his guardianship at the time of

[1] *Khuda Yar* v. *Fatte* 8 P. R. 1906.

[2] *Amir Khan* v. *Ruri* 14 P. R. 1906.

[3] *Nizam* v. *Gauhara* 17 P. R. 1906.

[4] *Ghulam Mahomed* v. *Gauhran* 28 P.R. 1905.

[5] 12 P.R. 1901.

[6] 14 P.L.R. 1902.

[7] 36 P. R. 1905.

making the gift, it was held that according to custom the donees not being entitled to succession to any part of the property in dispute and the gift not being accompanied or followed by possession, the gift was invalid.[1]

To a sister and sister's son.

A gift of ancestral property to sister's son among the Sheik Jiwanas of the Shahpur district to the exclusion of his heirs-at-law is valid.[2] But among the Dogars of Ferozepur, a gift of ancestral property by a childless male proprietor in favour of his sister's husband in lieu of services was held to be invalid by custom. It was observed that his services otherwise sufficiently compensated, were not the services of a *khana-damad* or the filial services of a step-son. It cannot, therefore, be validated on the ground that the proprietor being crippled stood in need of help in managing his lands, and the donees assisted him.[3] In *Hayat* v. *Hidayat*[4] the defendant failed to prove that the childless male proprietor was competent to alienate his ancestral property by will in favour of his sister's son as against the rights of his nephew. Similarly in *Ilahia* v. *Qasim* it was not substantiated that among the Arains of Jullundar a childless male proprietor could alienate his ancestral property to his sister or sister's son to the exclusion of his collaterals.[5] The will of a Jat proprietor in favour of his sister's son is valid by custom.[6]

To a brother or nephew.

A gift to a brother or nephew is often permitted.[7] Among the Gujaros in the Jhelum district a gift by a sonless proprietor to a nephew, son of one brother, and a grand-nephew, grandson of another brother, in consideration of services rendered by the donees to the donor, was valid according to custom.[8]

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[1] 44 P.R. 1902 : S.C. 36 P. L. R. 1902.

[2] *Sher* v. *Alam Sher* 94 P.R. 1905.

[3] 55 P.L.R. 1905.

[4] 40 P.L.R. 1905.

[5] 24 P. R. 1905.

[6] 12 P.R 1877.

[7] 43 P. R. 1884, (Mahomedan Jats of Gujarat); 39 P. R. 1886, (Koreshis of Jhang).

[8] *Nur Hussain* v. *Ali Sher* 33 P.R. 1905.

Male proprietor's power to alienate

The rule restricting the right of a male proprietor to alienate ancestral land in the presence of sons is even more universal in customary law than that of limiting the power of alienation of childless male owners to the prejudice of agnates. He cannot make a gift of his ancestral property to his son-in-law to the prejudice of his sons.[1] In the Awan tribe of Shahpur, a father has no power to distribute his ancestral property among his sons unequally and disinherit a lawful son.[2] But in *Habibulla* v. *Habibulla*,[3] it was found that custom authorized a proprietor to make an unequal distribution of his property among his sons by gift or otherwise. The Chief Court said that the principle which should be applicable to such cases was that whilst one son may be preferred at the pleasure of the father, he must not be unduly preferred so as practically to disinherit his brethren.

A childless proprietor or his widow has no power by custom to make a gift of ancestral property in favour of one of the collaterals of the proprietor without the consent of others.[4] By custom prevalent among the Mair Manas of the Jhelum district, a childless proprietor is not entitled to alienate, by gift or will, ancestral property to the prejudice of his agnates.[5] But in *Punnu Khan* v. *Sandal Khan*[6] it was found that by custom prevailing among the Naru Jats of the Jullundar district a childless male proprietor has power to make a gift of his ancestral land at pleasure in favour of one of his agnatic heirs to the prejudice of others, if there is a special connection between him and the donee, such as association with, and service by, the latter, and grounds of like nature.

Widow's power to alienate.

Among the Mahomedan Rajputs in the district of Hoshiarpur, the widow in possession can, by local custom,

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[1] *Sharaf* v. *Jowala* 114 P. L. R. 1902.

[2] *Meher Khan* v. *Karam Ilahi* 13 P.R. 1902.

[3] 62 P. R. 1903.

[4] 70 P.R. 1901.

[5] 50 P R. 1902.

[6] 92 P.R 1904.

make gifts to resident son-in-law.[1] In the same district a gift by a Mahomedan widow in favour of a relative of her deceased husband was held to be valid.[2] A gift by a widow to a nephew of the deceased husband, who lived with the latter from his infancy, and had been recognized as an adopted son was upheld by the Chief Court observing that it did not accept the proposition absolutely that a Mahomedan widow of Gujarat could make a gift for a period longer than her own life.[3] In another case from the same district a gift to a daughter and son-in-law in accordance with the provisions of the village *Wajib-ul-urz* was upheld by the Chief Court.[4]

A mortgage by a Mahomedan widow, in the Jullundar district, was upheld on the ground that custom sanctioned the exercise of such a power without reference to the question of actual necessity.[5]

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[1] 268 of 1873.
[2] 1371 of 1873.
[3] 1082 of 1871.
[4] 1306 of 1872.
[5] 884 of 1869.

CHAPTER XIII.

TENANCY CUSTOMS.

The Rent Law Commissioners in their report stated: "The mode of proving custom is not very well understood in this country, and, unfortunately, notwithstanding a *dictum* of Sir Barnes Peacock to the contrary,[1] an idea got to prevail that Act X had superseded all customs, and was intended to do away with all agricultural rights, except those specially mentioned and provided for in the Act. We believe there are many local customs in this as well as in every other country, well-understood by the people, recognized by the landlords, and susceptible of proof in the Courts of justice, and we think it very desirable to make it clearly understood that the Bill is not intended to interfere with any of these, unless they have been expressly rescinded by, or are clearly inconsistent with, its provisions."[2] The provisions of section 183 of the Bengal Tenancy Act are based on the above views of the Rent Law Commissioners. Under this section "custom, usage or customary right" will prevail over the provisions of the Bengal Tenancy Act, provided the custom, usage or customary right is not inconsistent with them, or is not expressly or impliedly modified or abolished by any other section of the Act.

The framers of the Bengal Tenancy Act have not defined the terms "usage" and "local usage" or explained within what period they may be established. A usage may grow up and be formed, (comparatively speaking) in a much shorter period than a custom which must be in existence from time immemorial in order to be recognized.

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[1] Vide *Thakurani Dasi* v. *Bisheshar Mookerjee* B. L. R. 202 p. 326 (F. B.) [1865] : s. c. 3 W. R. 29 ; See Act X of 1859.

[2] *Vide* Rent Law Commissioner's Report, p. 12.

In *Edward Dalgliesh* v. *Sheikh Guzaffar Hossein*,[1] their Lordships said: "We feel bound to say there is a great difference between a 'custom' and a 'usage,' and that clearly the latter may be established in a much less period of time than a custom of the transferability of occupancy holdings. We are not prepared to say how long a period must elapse before such a usage can grow up, but we may say that, seeing that more than 12 years have elapsed since the passing of the Tenancy Act, we do not think the Subordinate Judge is right in saying that no new usage can have grown up since that time." From these observations it would seem that the word 'usage' in section 183 of the Bengal Tenancy Act may include what the people have been for a few years past in the habit of doing in a particular place. It may be that this particular habit is only of a very recent origin, or it may be one which has existed for a long time. If it be one regularly and ordinarily practised by the inhabitants of the place where the tenure exists, there would be 'usage' within the meaning of that section.

The 'usage' to which sections 178 and 183 refer is not restricted to usage existing at the time of the passing of the Act but includes usage which may have subsequently grown up.[2]

Non-agricultural lands: their transferability before T. P. Act.

Previous to the passing of the Transfer of Property Act,[3] non-agricultural lands might or might not have been assignable; and if evidence was given that such tenures were, by the custom of the country, transferable, Courts would allow their transfer.[4] Now, under section 108 cl. *f* of the said Act there can be no question about the transferability of lands not used for agricultural purpose.[5]

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[1] 23 Cal. 425 (1896); s. c. 3 C. W. N. 21 (1898).

[2] Ibid.

[3] Act IV of 1882.

[4] *Beni Madhub Banerjee* v. *Jai Krishna Mookerjee* 7 B. L. R. 152 (1868).

[5] *Hari Nath Karmakar* v. *Raj Chunder Karmakar* 2 C. W. N. 122 (1897).

Transferability of occupancy holdings.

To establish that occupancy holdings are transferable in accordance with local usage, it is necessary to adduce evidence of purchase or transfer by persons other than the landlords made with the knowledge, but without the consent, of the latter, and to which no objection was made by the latter.[1] It is not enough to prove that several cases of transfer of such holdings have actually taken place.[2] The mere finding of a Court that tenants do transfer their rights of occupancy without the landlord's consent does not in itself establish a usage affecting the right of the landlord to accept, or to refuse to consent to, such transfer.[3] Where there is a custom to the effect that the transfer of occupancy rights is not valid except on payment of certain fees or *nazarana* to the landlord, evidence of payment of such fees is necessary for the validity of the transaction.[4]

A transfer of occupancy holding cannot be justified by local usage which is still growing up. The usage should have fructuated into maturity and a long period of time must elapse before a custom of transferability of occupancy holding can grow up.[5] Where the usage of transferability of occupancy holdings is proved to have been growing up in *putties* other than that of the plaintiff-landlord, the latter can retard the growth of the usage in his *putti*, which is a separate estate, by refusing to acknowledge the validity of transfer in his *putti*.[6] The transfer of a portion of an occupancy holding is contrary to the spirit, if not to the letter, of section 88, of the Bengal Tenancy Act, and the existence of a custom in a particular place by which

[1] *Dalgleish* v. *Sheik Guzuffer Hossein*, 3 C. W. N. 21 (1898); *Ramhari Singh* v. *Jubber Ali Meah* 6 C.W.N. 861 (1902). See also *Ibid* 181; *Jagun Prasad* v. *Posun Sahoo*, 8 C. W. N. 172 (1903).

[2] *Ramhari Singh* v. *Jubber Ali Meah* 9 C. W. N. 861 (1902).

[3] *Radhakishore Manikya* v. *Ananda Pria*, 8 C.W.N. 235 (1903).

[4] *Sibosundari Ghose* v. *Raj Mohun Guho* 8 C. W. N. 214 (1903); *Radhakishore Manikya* v. *Ananda Pria*, Ibid. 235.

[5] *Ramhari Singh* v. *Jubber Ali Miah*, 6 C.W.N. 861 (1902); *Jagan Prasad* v. *Posan Sahu*, 8 C. W. N. 172 (1903)

[6] *Jagun Proshad* v. *Posun Sahoo* 8 C.W.N. 172 (1903).

such a holding is transferable is immaterial and gives no right of transference as against the landlord.[1]

Whatever might have been the law on the subject, now under section 183, illustration (1) a transfer of right of occupancy, in accordance with usage, is valid even without the consent of the landlord. In these cases it would be necessary either to prove the existence of the usage on the landlord's estate, or that it is so prevalent in the neighbourhood that it can reasonably be presumed to exist in that estate.[2]

Non-occupancy holding : its heritability.

A Full Bench of the Calcutta High Court, by a majority, has laid down that the right of a non-occupancy *raiyat* has not been made hereditable by the Bengal Tenancy Act, but if such right was hereditable at the time of the passing of that Act, it has not been taken away by it. Geidt J., in this case, held that apart from custom or contract, the right of a non-occupancy *raiyat* was not heritable.[3]

Incidents of occupancy rights : cutting trees.

The property in trees growing on land is, by the general law, vested in the proprietor of the land, subject to any custom to the contrary. Under section 23 of the Bengal Tenancy Act, a *raiyat* with a right of occupancy may cut down trees on his land without his landlord's consent unless there be a custom to the contrary, of which it is for the landlord to give evidence. The *onus* is on the landlord to show that a tenant with occupancy right is debarred from cutting down the trees on the land, and not on the tenant to prove a custom giving him a right to do so. The right to appropriate them when cut down, however, is a different question.[4]

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[1] *Kuldip Singh* v. *Gillanders Arbuthnot*, 26 Cal. 615 (1899). See also *Tirthanund Thakoor* v. *Mutty Lall Misser* 3 Cal. 774 (1878).

[2] *Palakdhari Rai* v. *Manners* 23 Cal. 179 (1895).

[3] *Lakhan Narain Das* v. *Jainath Panday* 34 Cal. 516 (1907); s.c. 11 C.W.N. 626.

[4] *Nafar ChunderPal Chowdhuri* v. *Ram Lal Pal* 22 Cal. 742 (1894). *Samsar Khan* v. *Lochin Dass* 23 Cal. 854 (1896).

In the case of *Nafar Chunder Ghose* v. *Nand Lal Gossyamy*[1] it was found that by the custom of some zemindari, the zemindar was entitled to recover only one-fourth share of the value of the trees cut down by *raiyats*, when the *raiyats* had them cut down without his consent or permission. A different rule prevails with regard to the fallen wood of self-sown trees in the N.-W. Provinces. Under the rulings of the Allahabad High Court, a zemindar claiming a right to the fallen wood of such trees must prove some custom or contract, by which he is entitled to such wood, there being no general rule in India to the effect that there is a right in the landlord or a right in the tenant by general custom to the fallen wood or self-sown trees.[2] Where occupancy *raiyats* are by the custom of the zemindari entitled, after obtaining the permission of the village *barua* (headman) to cut down and appropriate *agacha* (valueless) trees for fuel, the zemindar cannot succeed in a suit for damages for cutting the *agacha*, unless he can show what the custom is.[3]

Saleability of occupancy holding in execution of decree.

When an application is made to execute a decree for money by the attachment and sale of an occupancy holding, the judgment-debtor (*i.e.* the occupancy-tenant) is entitled, under section 244 of the Civil Procedure Code (Act XIV of 1882) to raise the question as to whether the holding is saleable according to custom or usage, and to have that question determined by the Court executing the decree.[4]

Holders of joint undivided estate and a *raiyat*.

A *raiyat* admitted to possession by only some of the share-holders of a joint undivided estate may be ejected by the others as a trespasser unless there is some local custom to the contrary.[5]

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[1] 22 Cal. 751 note (1894).

[2] *Nathan* v. *Kamla Kuar* 13 All. 571 (1891); see also *Badam* v. *Ganga Dei* 29 All. 484 (1907).

[3] *Samsar Khan* v. *Lochin Dass* 23 Cal. 854 (1896).

[4] *Majed Hossein* v. *Raghubeer Chowdhry* 27 Cal. 187 (1899).

[5] *Goneshram Singh* v. *Ranjit Singh* 1 Wyman, Part II, 2 (1865).

Payment of *putnee*-rent.

It is contrary to the usage of the country for a *putnee-dar*, to pay his rent by monthly *kists* without a special agreement for that purpose.[1]

Gorabundi tenure : its transferability.

In *Mohunt Chaturbhuj Bharti* v. *Janki Prasad Singh* where a purchaser of *gorabundi* tenure from its former holder claimed to be entitled to the possession of the lands comprising the tenure, it was held that the claimant must prove that such lands were transferable and the *onus* lay upon him.[2]

Mokurari istemrari.

The words *mokurari istemrari* do not in their lexicographical sense primarily imply any heritable character in the grant, as the term *mourasi* does; but they imply permanency from which, in a secondary sense, such heritable character might be inferred, it being always doubtful whether they mean permanent during the life-time of the grantee or permanent as regards hereditary character. These words do not *per se* convey an estate of inheritance but such an estate can be created without the addition of any other words, the circumstances under which the lease was granted and the subsequent conduct of the parties being capable of showing the intention with sufficient certainty to enable the Court to hold that the grant was perpetual. The rule is perfectly general and is not subject to the qualification that it is by local custom the meaning of the term is restricted.[3]

Removal of buildings during continuance of lease.

According to the usages and customs of the country, buildings and other such improvements made on land do not, by the mere accident of their attachment to the soil, become the property of the owner of the soil. It has accordingly been laid down as a general rule that, the person who makes the improvement, if he is not a mere trespasser, but is in possession under any *bonâ fide* title or claim of title,

[1] *Joykissen Mookerjee* v. *Jankee Nath Mookerjee* 17 W. R. 471 (1872).

[2] 4 C.L.R. 298 (1879).

[3] *Narsingh Dyal Sahu* v. *Ram Narain Singh* 30 Cal. 883 p. 892 (1903).

is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil, the option of taking the building, or allowing the removal of the material remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess.[1]

In *Parbutty Bewah* v. *Woomatara Dabee*, the plaintiff who rented certain land of the defendant in Calcutta and at the time of renting such land purchased from the out-going tenant, with the knowledge of the defendant, two tiled huts which were then standing thereon, contended in a suit of ejectment that "it had been the practice in Calcutta for tenants to remove such tiled huts as those of the plaintiff, erected upon the land let to such tenants, and such huts were by such practice treated as the property of the tenants, who, by such practice, were in the habit of disposing of them without the consent of their landlord." The High Court held that according to the practice stated and proved by the plaintiff, he was entitled, before giving up possession of the land, to pull down and remove the tiled huts.[2] Both under the Hindu and Mahomedan law, (as well as under the common law of India), a tenant who erects a building on land let to him can only remove the building and cannot claim compensation for it on eviction by the landlord.[3]

Abadi; buildings.

According to the general custom of the N.-W. Provinces, a person, agriculturist or agricultural tenant, who is allowed by a zemindar to build a house for his

[1] In the matter of petition of *Thakoor Chunder* B. L. R. Supp, Vol. 595 at 598 (1868); *Ismail Khan Mahomed* v. *Jaigun Bibi*, 27 Cal. 570 p. 586 (1900); *Ismai Kani* v. *Nazar Ali*, 27 Mad. 211 (1903).

[2] 14 B. L. R. 201 (1874). See also *Dayalchand Laha* v. *Bhoyrubnath Kettry*, Coryton 117 (1864).

[3] *Ismai Kani* v. *Nazar Ali*, 27 Mad. 211 (1903).

occupation in the *abadi*, obtains, if there is no special contract to the contrary, a mere right to use that house for himself and his family so long as he maintains the house, that is, prevents it falling down, and so long as he does not abandon the house by leaving the village. As such occupier of a house in the *abadi* occupying under the zemindar, he has, unless he has obtained by special grant from the zemindar an interest which he can sell, no interest which he can sell by private sale or which can be sold in execution of a decree against him, except his interest in the timber, roofing and wood-work of the house.[1] But if there are circumstances which amount to an acquiescence on the part of the zemindar, then he, the zemindar, cannot compel the tenant to remove the building nor can he himself claim the same.[2]

It is undoubtedly the rule in the N.-W. Provinces that a tenant is given a room or house in the *abadi* to live in during the existence of his tenancy; and such a tenant cannot be ejected from the room or house during the continuance of his tenancy.[3] Apart from any custom recorded in the *Wajib-ul-urz* forbidding a tenant to transfer the site of a house occupied by him in the *abadi*, a tenant has not, in the absence of a special custom or contract giving him such a right, any right to transfer the site of his house in the *abadi*.[4]

Digging wells.

Any rule which prohibits a tenant from improving his holding is one which, on grounds of public policy, Courts are bound to restrain within its strictest limits. Thus where a zemindar insists on his right to prohibit the construction of *kucha* wells, he should be required to prove that the right claimed by him customarily exists in the

[1] *Sri Girdharji Maharaj* v. *Chote Lal* 20 All. 248 (1898); dissented from by Aikman, J., in *Rajnarain Mitter* v. *Budh Sen*, 27 All. 338 (1904).

[2] *Raj Narain Mitter* v. *Budh Sen*, 27 All 338 (1904).

[3] *Nazir Hasan* v. *Shibba*, 27 All. 81 (1904).

[4] *Bhajan Lal* v. *Muhammad Abdus Samad Khan* 27 All. 556 (1905).

estate.[1] A tenant with a right of occupancy, who failed to show that he had a right by custom or otherwise, to construct a well without his landlord's permission is not justified in constructing one and thereby infringing his landlord's rights on the plea that he built it for the use of himself and other residents of the village.[2] Where tenants from year to year, with permission of the landlord, sank wells in the land demised, they are not entitled, under the Hindu law, to any compensation therefor from the landlord after the determination of the tenancy.[3] Where a cultivator is in the habit of digging wells to irrigate his field, described as irrigated *chahee*, and, from the practice which had arisen under the old proprietor, the consent of the zemindar had not been thought necessary, the cultivator is entitled to insist upon his old right until by a new contract the old terms of his holding are superseded.[4]

Occupancy rights in Madras.

In Madras *raiyats* with rights of occupancy possess in their lands a heritable and alienable interest of a permanent character, but not the sole interest. The landlord is interested in maintaining the saleability of the holding and, in protecting such interest, he is entitled to restrain fruit-bearing trees,[5] but the landlord cannot recover damages from tenants having *kudivaram* right in perpetuity, for cutting down *babul* trees.[6] A *raiyat* holding lands in a zemindari on a permanent tenure, would, as regards land on which a money assessment is paid, be *primâ facie* entitled exclusively to the trees thereon. Where the crops are shared between the *raiyat* and zemindar, they will be jointly interested in such trees, but such presumptions may be rebutted by proof of usage or con-

[1] *Shev Churn* v. *Ramjeethun*, 3 N. W. P. H. C. R. 282 (1871).

[2] *Skinner* v. *Mahtab*, 4 N. W. P. H. C. R. 160 (1872).

[3] *Venkatavaragappa* v. *Thirumalai*, 10 Mad. 112 (1886).

[4] *Mamomed Fyz-ood-deen* v. *Imrut*, 3 Agra H. C. R. 285 (1868).

[5] *Bodda Goddeppa* v. *Vizianagram*, 30 Mad. 155 (1906).

[6] *Narayana Ayyangar* v. *Orr*, 26 Mad. 252 (1902).

tract to the contrary.[1] In the absence of local customs, tenants are not entitled to convert land under cultivation into a mangoe grove. Tenants from year to year are not at liberty to change the usual course of husbandry without the consent of the landlord.[2]

Mirasidars in Madras.

In Madras a custom that some only of the *mirasidars* of a village should bind the co-owners of the village lands is valid.[3] It can by no means be laid down as a uniform rule that *mirasidars* are entitled to dues from cultivators holding lands within the area of the *mirasi* estate under *pattas* from the Government. To avoid injunction, where the right is denied, there should be an inquiry whether by custom it prevails on the estate, or if there are not sufficient instances on the estate to afford grounds for decision, on similar estate in the neighbourhood. There has been no law depriving *mirasidars* of any privilege they may have customarily enjoyed.[4]

Whatever right of permanent tenancy a tenant may, by prescription, acquire as against an *inamdar*, or a *khet*, it would be contrary to the custom of the country and to the nature of the *mirasi* tenure to hold that he could acquire such a right as a *mirasidar*.[5]

Right of occupancy in Assam.

Pikes: their rights and privileges.

The customary law of Assam about the rights and privileges of the *pikes* under the old Government as it appears from the report of Major Jenkins, dated the 13th November, 1849, is that "under the ancient Government of the country, the *pike* system prevailed in Assam; that the *pikes* had lands assigned to them in lieu of service; that, latterly, they had generally to serve for one-third of the year, or, such as were not field-labourers, had to give so much cloth or gold or other article which they were

[1] *Kakarla Abbayya* v. *Raja Venkata*, 29 Mad. 24 (1904).

[2] *Lakshmana* v. *Ramchundra*, 10 Mad. 351 (1887).

[3] *Anandayyar* v. *Divarajayyan*, 2 Mad. H. C. R. 17 (1864)

[4] *Sakkaji Rau* v. *Latchmana*, 2 Mad. 149 (1880); *Shivantha* v. *Nattu Ranga*, 26 Mad. 371 (1902).

[5] *Norajan Visaji* v. *Lakshuman*, 10 Bom. H. C. R. 324 (1873).

employed to produce; that besides the lands granted in lieu of service, the *pikes* were allowed to hold the village-barri-lands without limitation as to extent and free of all direct imposts; that these lands descended from father to son, divisible amongst the children according to the custom of the country; that they could give the lands away by 'gifts or will, or by mortgage but all the *pikes* throughout the country paid a capitation tax in lieu of, or as equivalent to, a rent for these lands;' that when personal service was not required from a *pike*, he paid certain rent; that in consequence of the exemption of slaves from taxation, and the 'plague of poll tax,' and personal service, many *pikes* were content to call themselves slaves, and concealed themselves amongst the families of slaves who could protect them; and this resulted in extensive cancelment of *pikes*; and that Mr. Scott, who held the office of Commissioner under the British Government, instituted inquiry, and the result was that a very large number of persons were restored to the rank of *pikes*. The report further states that "the *raiyats* are now considered to have full proprietary rights in all their lands of all descriptions, and the *pikes* are no longer liable to arbitrary interference of any Revenue Officer and no *raiyat* could be dispossessed of any portion of his land except by the regular process of the civil court. They can, of course, sell any portion of their lands, for, though the Government withheld from yielding to them a proprietary right in the *pike* land, yet the *raiyat* can dispose of his right of occupancy. The Government have foregone their right to interfere and no other authority has any power."

"The estates in Assam of all descriptions and sizes, are, more or less, freehold and held subject to the only one condition of paying the Government tax on the land, and all the occupants are with little exception free-holders."

The tenants of *lakhrajdars* are "to all intents, free-holders also, for they were transferred by the Government

of the country with their lands, and all that the Government surrendered was the right to the services of the *pikes*. The lands they occupy are as much their own as if they were held under Government and they are not restrained from throwing up these lands and leaving the *lakhrajdars* whenever they choose, but the abandoned lands would belong to the *lakhrajdars*, or, if sold to other *raiyats*, those would have to pay rent to the *lakhrajdars*."[1]

Zabita-batta.

A claim by a zemindar against his farmer for a sum of money alleged to have been realized by the latter from the tenantry under the head of *zabita-batta* or customary levy of an excess of half anna in the rupee, and stipulated to be payable to the zemindar, is illegal and cannot be maintained.[2]

Russum.

A suit for *russum* (a proprietary due), not claimed as rent, nor under a contract, but by custom payable by cultivators in occupation of the land, either as proprietors or *raiyats*, is not of a nature triable by a Small Cause Court.[3]

Bhagdari tenure in Broach.

The custom, in Broach district, of male first cousins succeeding to property held on the *bhagdari* tenure, in preference to daughters or sisters, will, under Bombay Regulation IV of 1827, section 26, take precedence of the Mahomedan law.[4]

Bombay Revenue Survey Act I of 1865 : usage.

Before the passing of the Bombay Revenue Survey Act[5] by usage having the force of law, Government was unable to eject an ordinary tenant of land so long as the latter was willing to pay the reasonable assessment upon the land occupied by him. This usage might be limited or varied by special contract.[6]

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[1] *Dinobandhu Surma* v. *Badia Koch*, 15 Cal. 100, 102, 103 (1887).

[2] *Radha Mohun Serma Chowdry* v. *Gunga Pershad Chuckerbuttee*, 7 S. D. Sel Rep. 142 (166) [1843].

[3] *Ebrahim Saib* v. *Nagasmai Gurukal* 3 Mad. 9 (1881).

[4] *Bai Kheda* v. *Dasu Sale*, 5 Bom. H. C. R. A. C. J. 123 (1868) ; see *Supra* pp. 265, 404.

[5] Act I of 1865.

[6] *Dulia Kasam* v. *Abramji Sale* 8 Bom. H. C. R. A. C. J. 11 (1870).

Managing *khot*.

In the absence of evidence of custom rendering the act of one sharer in a *khotship*, (which act involved the sacrifice of important rights) binding upon his co-sharers, a managing *khot* has, without the assent of his co-sharers, no power to give up rights which belong to them as well as himself.[1]

Birt zemindari.

The words *birt zemindari* import the transfer of merely a sale of proprietary right under the Oudh Estates Act I of 1869.[2]

Alluvial accretions: rent.

The words "justly liable" in section 4 cl. (1) of Regulation XI of 1825 indicate an intention on the part of the Legislature that the rent payable for an alluvial increment shall be settled with reference to the circumstances of each particular case, regard being had to the agreement between the parties in respect of the original tenure, where there is such an agreement, and where there is no such agreement, to any usage proved to be applicable to such tenure.[3]

A custom that if a tenant ceased to pay rent for land which was submerged, when it appeared the zemindar was entitled to possession, the tenant's right abating, is opposed to the provision of section 34 (b) of the N.-W. P. Rent Act XII of 1888, and is therefore not a valid custom.[4]

Ascetic's right of occupancy.

Although the High Court has under the Hindu law admitted the right of a disciple to succeed to the effects of an ascetic, it may be a question whether the Court does not go beyond the law when it permits a disciple to succeed to the property of an ascetic who leaves a large or any property which, if he conformed to the spirit of his religion, he could not have acquired. But however

[1] *Collector of Ratnagiri* v. *Vyankatrav*, 8 Bom. H. C. R. A. C. J. 1 (1871).

[2] *Gauri Shanker* v. *Maharaja of Bulrampur*, 4 Cal. 839 p. 853: s. c. 4 Shome (Notes) 1.

[3] *Golam Ali Chowdhry* v. *Kali Krishna Thakoor* 8 C. L. R. 517 (1881)

[4] *Kupil Rai* v. *Radha Prasad Singh* 5 All. 260 (1883).

this may be, a tenant right of occupancy is on a different footing from property which is exclusively the estate of a deceased ascetic; and the principles which govern the hereditary right of succession to a tenant right of occupancy are such as an ascetic, if he conform to the spirit of his religion, cannot carry out.[1]

Auction sale of *raiyat's* right.

An auction purchaser of a *raiyat's* right and interest in his house in a village could not acquire more title than could have been transferred by private sale. It is necessary in such cases to inquire whether according to the village custom the *raiyat* was competent to alienate the house with its site without the permission of the zemindar.[2]

Korarce raiyat.

Long continued family possession constitutes a *korarce raiyat* in Goalparah.[3]

Adimaya-vana in Malabar.

In case of *adimayavana* tenure, the land is made over in perpetuity to the grantee either immediately as a mark of favour or on condition of certain services being performed. The terms *adina* and *kudima* mean a slave or one subject to the landlord, the grant being generally made to such persons. The land bestowed as a mark of favour can never be resumed but where it is granted as remuneration for certain services to be performed, the non-performance of such services involving the necessity for having them discharged by others, will give the landlord power to recover the land.[4]

Pasture-land.

According to the ancient law and custom of this country a portion of the land of every village is kept apart from the use of the villagers as pasture ground. It is common pasturage of their cattle. But as soon as any portion of the land is made culturable, it becomes a part of the *raiyati* lands of the village. There is seldom a village in Bengal which has not a large piece of

[1] *Sooruj Komar Pershad* v. *Mahadeo Dutt* 5 N W. P. H. C. R. 50 (1873).

[2] *Shib Lall* v. *Lochun Singh* 3 Ag. (Rev. Ap.) 7 (1868).

[3] *Alukhee Dasee* 1 Sevestre 347 (1856).

[4] *Theyyan Nair* v. *Zamorin of Calicut* 27 Mad. 202 (1903).

land attached to it for the grazing of the cattle of the village.[1]

Donabundee. Agorëbuttaë.

Under *dona bundee* system there is a cursory survey or a partial measurement of a field or weighment of the crop, to ascertain the value of the crop and the amount of the assessment. Under *agorëbuttaë* system there is a division of the crop immediately after reaping between the cultivator and the Government, the latter taking half the produce in kind. The division of the crop is in predetermined proportions between landlord and tenant. The term literally means a watching and sharing; each party keeping a watch over the fields, so that none of the crops may be fraudulently made away with.[2]

Ghatwali tenure.

The Bengal Tenancy Act does not expressly lay down any rule of law with respect to acquisition of either occupancy or non-occupancy right in land held by Ghatwals as service tenures. Section 181 of the Act lays down that nothing in it shall affect any incident of a Ghatwali or other service tenure. The growth of such rights would seem to be inconsistent with the nature of service tenures, but a custom or local usage might grow up in any local area as to recognition of occupancy rights and such a custom might be binding on successive Ghatwals.[3]

Mul-raiyat & Mustogir in Sonthal Pargunnah: their rights.

A *mul-raiyat* is a village headman or settlement holder whose rights are in their entirety transferable, saleable and attachable. These rights are, (i) to enjoy rent-free *man*-land *i.e.* service land, if any, of the village official; (ii) to collect commission on rents from landlords and *raiyats*; (iii) to enjoy his *nij-jote* land at the same rates of rent as apply to other *raiyats*, or to lease them out on settlement rates, in which latter event, they cease to be *nij-jote* lands, and (iv) to assess at half rates all waste

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[1] *Sheik Milan* v. *Mohemed Ali* 10 C.W.N 434 (1903). See also Manu, Ch VIII. 231.

[2] Reg. II of 1795 of the Bengal Code. *Chhutterdharee Mahaton* v. *Poorunder Mahaton* 8 Sevestre, Part IV 23 (1866).

[3] *Mohes Majhi* v. *Ban Krishna Mandal* 1 C.L.J. 138 (1904).

and jungle lands reclaimed by the *raiyats* or to enjoy rent-free what he himself reclaims. It is well settled that the privilege which the *mul-raiyat* possesses of transferring his tenure must be exercised in respect of the whole tenure at the same time *i.e.*, if he chooses to transfer his tenure, he must alienate the whole of his rights in the village including his right of managing the village and collecting the rent as also his right to the land in his possession. He cannot split up the tenure, so as to part with a portion and retain the remainder.

The rights of a *mustagir* headman are (i) to reclaim and cultivate the waste lands in the village without paying rent, or to settle such lands at half rates with the other *raiyats* (the half rates going into the headman's own pocket); (ii) to hold at his option in his own possession or to settle with others, the *jotes* of absconded *raiyat*; and (iii) to receive a fixed commission on the rent collections from the *raiyats* and an equal sum from the Ghatwal or zemindar, the headman's *nij-jote* lands being assessed with rent like the other lands of the village. It is therefore not quite accurate to say that the right of the *mustagir* is absolutely restricted to the collection of rent from ordinary *raiyats*.[1]

[1] *Darbari Panjiara* v. *Beni Rai* 2 C.L.J. 77 (1905).

CHAPTER XIV.

TRADE CUSTOMS.

Customs and usages of trade are customs prevailing in particular trade or business[1]. Such customs or usages may not only annex terms to a contract which is not inconsistent with them but may also control the interpretation of a contract which is complete in itself but which contains terms used in a technical sense.[2]

Lex mercatoria.

The *lex mercatoria,* although adopted as part of the Common Law of England, is not part of the law by which transactions are governed in those parts of India, into which the common law of England has not been introduced.[3] Thus the law of merchant is not applicable to banking transactions in the muffasil.[4] Sir Barnes Peacock, C. J., said :—"Some question has arisen as to the law applicable to this case, and whether the Court is to determine the rights of the parties by the *lex loci rei sitæ,* or by the English law. It will be unnecessary for the Court to determine that difficult question, as the only law in the muffasil which would regulate a case like this, consists in those principles of equity, justice and good conscience according to which, by Regulation VII of 1830, the muffasil Courts are bound to decide. If that equity, justice and good conscience are the same as the law of England, common law and equity united, it is unnecessary to decide whether we are to administer English law or the principles of Regulation VII of 1830."[5]

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[1] *Goodwin* v. *Roberts* L. R. 10 Ex. 76, 337 (1875).

[2] Sweet's Law Lex *tit.* "Custom"

[3] *Pigou* v. *Ramkishen* 2 Sevestre 619 (1863). See observations of Cockburn C.J., *re* law merchant in *Goodwin* v. *Roberts* L.R. 10 Ex. p. 346.

[4] *Syed Ali* v. *Gopal Doss* 13 W.R. 420 (1870).

[5] *Per* Peacock C. J., in *Chooneelal Canoria* v. *Southey* 2 Boulnois 65 at p. 71.

Requisites of a valid trade custom.

It can be taken as settled and well-established rule that the legal requisites of a valid trade custom are that it should be certain, invariable, reasonable and lastly, the circumstances of the case must be such as to render it fair and reasonable to presume that the party whom it is sought to affect by the custom had knowledge of it as affecting the particular agreement made by him, and that he made the agreement with reference to it.[1] It must be so notorious that every body in the trade enters into a contract with that usage as an implied term. It must have quite as much certainty as the written contract itself,[2] and must be so universally acquiesced in that every body in the particular trade knows it or "might know it if he took the pains to enquire."[3]

Mercantile customs : limit of of control by law.

Customs of trade, as distinguished from other customs, are generally courses of business invented or relied upon in order to modify or evade some application which has been laid down by the courts, of some rule of law to business and which application has seemed irksome to some merchants. And when some such course of business is proved to exist in fact, and the binding effect of it is disputed, the question of law seems to be, whether it is in accordance with fundamental principles of right and wrong. A stranger to a locality or trade or market, is not held to be bound by the custom of such locality, trade or market, because he knows the custom, but because he has elected to enter into transactions in a locality, trade or market wherein all who are not strangers do know and act upon such custom. When considerable number of men of business carry on one side of a particular business, they are apt to set up a custom which acts very much in favour of their side of business. So long as they do not infringe some fundamental

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[1] *Price* v. *Brown* 14 Mad 420, 423 (1891).

[2] *Per* Sir Geo. Jessel M.R. in *Nelson* v. *Dahl* 12 Ch. D. 568 (1879).

[3] *Volkart Bros.* v. *Vettivelu Nadan* 11 Mad. 459 (1888); *Juggomohun Ghose* v. *Manickchand* 7 M. I. A. 263 p. 282 (1859); *Mackenzie Lyall* v. *Chamroo Singh* 16 Cal. 702 (1889).

principle of right and wrong, they may establish such a custom but if on dispute before a legal forum, it is found that they are endeavouring to enforce such rule of conduct which is so entirely in favour of their side that it is fundamentally unjust to the other side, the Courts have always determined that such a custom, if sought to be enforced against a person in fact ignorant of it, is unreasonable, contrary to law and void. When a custom relied on is so inconsistent with the nature of the contract to which it is sought to be applied as that it would change its nature altogether or as to change its intrinsic character it is unjust as against the party against whom it is set up and so it is void; but if it would not, then the custom will be allowed to prevail."[1]

Hundis are chiefly of two descriptions *viz.*, *shah-jog*, or payable to bearer, and *nam-jog* or payable to the party named in the bill or his order. There are particular formulas for these bills, both as regards phraseology and the mode of attaching signatures and superscriptions. These forms are well-known to Indian commercial people and should be scrupulously observed. A *nam-jog* bill may or may not be accompanied by a descriptive roll of the party in whose favour it is granted. It may be payable at sight or after a certain date, specified in the bill, or fixed by custom of trade. When payable at sight it is termed "durshuni." It may be cashed with or without security, but when there is a descriptive roll, or when the identity of the holder or payee be known security is not usually required. A *shah-jog* bill is considered payable to any respectable person, who may present it to be cashed. It is payable only after a certain period of usance specified or implied. It is usually cashed on the same condition with regard to security as *nam-jog* bills. Bills of either kind can be endorsed or transferred unless the *nam-jog* bill be accompanied by a descriptive

Hundis

[1] *Robinson* v. *Mollett* L.R. 7 H. L. 802 at pp. 817-18 (1875).

roll, in which latter case a transfer would be inoperative.[1] A *shah-jog hundi* is only payable to a respectable holder and is not equivalent to a *hundi* payable to bearer.[2] It is not a rule of Hindu law or customary that every one who tenders or presents a *hundi*, for acceptance or payment even though he obtained it by fraud should be treated as a *shah-jog*.[3]

Distinction between *shah-joe hundi* and bill of exchange.

Shah-jog hundis differ from bills of exchange in one very material circumstance, amongst others, that as a general rule, the acceptance of the drawee is not written across them, so as thereby to give them an additional degree of mercantile credit and to that extent make it just to impose an additional degree of liability on the acceptor; but, as a rule, the particulars are only entered in the drawee's books. It may be added also as a general rule, that *hundis* are very frequently not presented for acceptance before they are presented for payment—before, that is, they are either due or overdue.[4]

Shah-jog hundi.

The meaning of *hundis* made payable to *shah* or "respectable holder" and the usage in regard to such documents among the Indian merchants in Bombay were very fully considered in *Davlatram Shriram* v. *Bulakidas Khemchand*[5] which came up before Sir Joseph Arnold in 1869, and as section 1 of the Negotiable Instruments Act[6] states that nothing in the Act contained affects any local usage relating to any instrument in an oriental language, unless such usages are excluded by any words in the body of the instrument which indicate an intention that the legal relations of the parties thereto shall be governed by that

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[1] Macpherson on the Law of Contracts in Courts of India not established by Royal Charter. See *Pigon* v. *Ram Kishen* 2 Sevestre 619 at p. 621 (1863).

[2] *Bhuputram* v. *Hari Prio Coach* 5 C.W.N. 313 (1900). *Lalla Mal* v. *Kesho Das* 26 All. 493 (1904).

[3] *Bhuputram* v. *Hari Prio Coach* 5 C.W.N. 313 (1900).

[4] *Davlatram Shriram* v. *Bulakidas Khemchand* 6 Bom. H. C. P. O.C.J. 24 (1869).

[5] Ibid. p 26.

[6] Act XXVI of 1881.

Act, and where no such words are to be found in the *hundi* in question, the usage proved as well as the decision in that case still hold good in the Bombay Presidency.[1]

Cashing of *shah-jog hundi*.

The general process of cashing *shah-jog hundis* is as follows:—The *shah* or person, who has bought or holds the *hundi*, and whose name must always be endorsed on it before it is presented, sends one of his men to the shop of the drawee, whose *killadar*, after referring to the particulars of advices relating to the *hundi*, which have in due course been previously entered in the *chitti nond* or bill-book, and finding it correspond therewith, thereupon enters in the journal the particulars of the *hundi*, *viz.*, its amount, date, due date, name of *shah*, the person tendering it for acceptance, and whose name is always endorsed on the *hundi*. He then returns the *hundi* to the servant of the *shah*, who takes it back to the *shah's* shop. If the day of presentment be the exact due date, the amount is paid on that very day if the *hundi* is overdue when presented it is generally paid the next day, the reason assigned being that, unless presented on the actual due date, when, of course, its presentation is expected and provided for, the *munim* or principal of the firm may not be present, or there may not be sufficient cash in the hands of the *killadar* to meet the amount. Payment is made by sending the amount by a servant of the drawee to the shop of the *shah*. On receiving the amount, the *killadar* of the *shah* writes an acknowledgment in full on the back of the *hundi* and sends it back to the shop of the drawee by the servant who brought it thence.[2] According to mercantile usage amongst Hindus where a *shah-jog hundi* is paid at maturity by the drawee to the *shah* or holder of the *hundi*, and such *hundi* afterwards turns out to be forged, the *shah*, though a *bonâ fide* holder for value, is bound to repay to the drawee the amount of such *hundi* with interest from the date of payment

[1] *Ganesdas Ramnarayan* v. *Luchmi Narayan* 18 Bom 570 p. 577 (1894).

[2] *Daolatram* v. *Bulakidas* 6 Bom. H. C. R, O. C J. 24 (1869).

provided the drawee has been guilty of no laches in discovering the forgery and communicating the fact of such forgery to the *shah*. The *shah*, however, releives himself from such liability by producing the actual forger.[1] The drawee, in cases of *shah-jog hundi* is bound by custom of Hindu merchants to make enquiries as to the person who presented the *hundi* to him for payment.[2]

Endorsement on *shah-jog hundi*.

There is no rule of Hindu law, customary or otherwise, which would have the effect of making the word *shah-jog* mean payable to bearer, quite independently of the endorsements; nor is there any principle of mercantile expediency, having the force of law or otherwise, which would be served by disregarding the direction of the endorser, and treating a specially endorsed and especially accepted *hundi* as if it were an English negotiable instrument made payable to bearer, and, as such, part of the currency of the country.[3]

N. I. Act and custom.

The Negotiable Instruments Act, in the absence of local usage to the contrary, applies to *hundis*.[4] But no custom can override the terms of a contract as set forth in a *hundi*, nor can a custom, if it is irrational, absurd, and contrary to the principles of equity, be sustained in a Court of justice.[5]

Hundi payable *on* arrival or at sight: its time of presentation.

A *hundi* drawn in Calcutta upon a firm at Jeypore and made payable on arrival at that place was presented after 25 days of its arrival there. It was held that apart from any local usage, by the general law, there was no specific time within which a *hundi* payable at sight or payable on

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[1] *Dalatram* v. *Bulakidas* 6 Bom. H.C.R., O.C.J. 24 p. 31 (1869).

[2] *Ganesdas Ramnarayan* v. *Lachmi Narayan* 18 Bom. 570 p. 579 (1894). See also *Bhuputram* v. *Hari Prio Coach* 5 C.W.N. 313 (1900); *Lalla Mal* v. *Kesho Das* 26 All. 493 (1904); See s. 10 Negotiable Instruments Act

[3] *Thakoordass* v. *Futteh Mall* 16 W.R. O. A. 3 p. 15. (1871): s.c. 7 B.L.R. 275 p. 304.

[4] *Krishna Shet* v. *Hari Valji* 20 Bom 488 (1895).

[5] *Indur Chander Dugar* v. *Luchmee Bibee* 7 B.L.R. 682(1871): s.c. 15 W.R 501.

arrival at a particular place is to be presented and that it was presented within a reasonable time.[1]

Drawer and agent: usage in Dacca.

If the drawer of a bill does not, on the face of it, show that he drew the bill as agent, he cannot set up as a defence that he drew the bill as an agent.[2] In Dacca according to a mercantile usage prevalent there, *gomastas* or agents can draw *hundis* on their principals without disclosing the fact in the *hundi* and, on proof of such agency, the drawer is not liable. Thus, in the case of *Hari Mohan Bysak* v. *Krishna Mohan Bysak*[3] where all the parties to the *hundi* lived in Dacca, the drawers of a *hundi* in favour of the plaintiff were held not liable, on proof that they were the *gomastas* of the acceptor and had no interest in the *hundi* and, according to custom in Dacca where the *hundi* was drawn and accepted, agents are not liable, although the agency does not appear on the *hundi*.

A person who receives a bill for a particular purpose must apply the same accordingly; and neither he nor any third person "knowing the facts" can, by afterwards receiving the amount, detain the same from the principal.[4] "If goods or bills are deposited for a specific object and the bailee will not perform the object, he must return them. The property of the bailor is not divested or transferred until the object is performed."[5] In *Rajroopram* v. *Buddoo* the question whether a *hundi* made payable "to order" was, according to Hindu law and custom of the Indian merchants negotiable without a written endorsement by the payee, was raised but not discussed.[6]

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[1] *Mutty Lal* v. *Chogenmull* 11 Cal. 344 (1885); *Gopal Das* v. *Seeta Ram* 3 Agra 268 (1868).

[2] *Pigou* v *Ramkishen* 2 W. R. 301 (1865).

[3] 9 B. L. R. App. 1 (1872): 17 W. R. 442. See also *Pigou* v. *Ramkishen* 2 W. R. 301.

[4] *Lloyd* v. *Howard* 15 Q. B. 995 (1850). *Rajroopram* v. *Buddoo* 1 Hyde 155 (1862): 1 Ind. Jur. 93.

[5] *Buchanan* v. *Findlay* 9 B and C 738 p. 749 (1829) *per* Lord Tenterden *C.J.*; *Key* v. *Flint* 8 Taunt. 21 (1817).

[6] 1 Hyde 155 (1862): 1 Ind. Jur. 93.

Interest on *hundis*.

Where *hundis* upon which a suit was brought were silent as to interest, but it was proved that according to the custom of the district the parties had entered into a collateral agreement embodied in written documents that *hundis* should bear interest at 30 per cent. per annum, it was held by the Privy Council that section 80 of the Negotiable Instruments Act, being an enabling section, was no bar to the recovery of the interest stipulated.[1]

Notice by acceptor to endorsee.

It is not a custom among *shroffs* to make inquiry of the acceptor of a *hundi* before discounting it, and to abstain from discounting it if the acceptor should recommend the person by whom the inquiry is made not to discount. But it is usual to make such inquiries. A mere notice by the acceptor not to discount, does not affect his liability to a person who takes a *hundi bonâ fide* and for valuable consideration after such notice.[2]

Notice of dishonour.

In the absence of any local usage to the contrary, it is just and equitable that the doctrine of notice of dishonour propounded in the Negotiable Instruments Act should be applied to a *hundi* in the vernacular, the "reasonable time" within which notice is to be given being determined according to the circumstances of the case.[3]

Notice by return of post.

Though the English law of prompt "notice by return of post" does not apply to the *hundis* drawn by natives of India and the drawee and indorser are Indians, yet before holding the endorser or the drawer responsible for the consideration of a *hundi* dishonoured by the drawee some reasonable notice is essentially necessary to be given to the party who may be asked to pay. What notice and in what manner that notice is required to be served should be determined by the custom of the district where the case arises.[4] A reasonable, not immediate, notice of dishonour

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[1] *Goswami Sri Ghanashiam* v. *Ram Narain* 11 C.W.N. 105 (1906).

[2] *Khosal Chand* v. *Luchmee Chand*, Bourke 151 (1865).

[3] *Moti Lal* v. *Moti Lal* 6 All. 78 (1882).

[4] *Radha Govinda Shaha* v. *Chundernath Shaha* 6 W.R. 301 (1866) : s.c. 3 Wyman 6.

is all that the *hundi* law requires.[1] In *Megraj Jagannath* v. *Gokaldas Mathuradas*, the question as to whether there was a custom that on a fraudulent detention of the *hundi* by any of the parties to it, each endorser was bound to give a *peth i. e.* duplicate of the *hundi*, to his immediate indorsee, was raised but not decided upon.[2]

Peth.

According to the usage of *shroffs* when a *hundi* has been lost or stolen, the rightful holder may obtain from the drawer a *peth* or duplicate, and on presentation thereof to the drawee, has a right to payment of the amount, the original not having been already presented and paid, which of course, in the case of a *hundi* payable to *shah* may occur. But there is no customary right to payment on a duplicate when a person to whom a *hundi* has been sold and endorsed, has failed being indebted to the person from whom he had obtained such *hundi*.[3]

Bombay *shroffs'* practice.

The practice followed by *shroffs* when a *hundi* has been sent down to Bombay for collection and payment is refused, the amount having been already credited to the sender, is that, in general, the *hundi* is returned to the sender, a debit entry against him being at the same time made; but if the banker to whom the *hundi* has been sent for collection does not return it, or make a debit entry against the sender, but allow the amount to remain credit, then he can consider himself a holder for a value.[4]

Moorshidabad usage.

According to the usage of native bankers at Moorshidabad, interest is claimable on *hundis* drawn at 111 days sight.[5]

Bushire practice.

The local usage at Bushire is to present the *hundi* for payment at the Bank and for the acceptor to call at the Bank at due date and effect settlement.[6]

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[1] *Megraj Jagannath* v. *Gokaldas Mathuradas* 7 Bom. H.C.R. 137 p. 142 (1868); *Gopal Dass* v. *Seeta Ram* 3 Agra 268 (1868).

[2] 7 Bom. H C.R. 137 (1868).

[3] *Sugan Chand Shivdas* v. *Mul Chand Joharimal* 12 Bom. H.C.R. 113 p. 118 (1872), on appeal 1 Bom. 23 at 43 (1875).

[4] *Sugan Chand* v. *Malchand* 12 Bom. H.C R. 113 p. 128 (1875).

[5] *Dhunpath Singh Doogur* v. *Maharaja Jagput Indur* 4 W.R. 85 (1865) : s.c. 1 Wyman 28.

[6] *Imperial Bank of Persia* v. *Futteh Chand Khubchand* 21 Bom.

When English law applies to *hundis*.

When the analogy between *hundis* and bills of exchange is complete, and there is no proof of any special usage, it is right to apply the English law to them.[1] Thus, where a bill was made in Calcutta, in the English language, and in ordinary English form, and no special usage was proved, it was held that the English law was applicable to the case.[2]

Wagering contract: interest.

Before the passing of the Act XXI of 1848, where a usage had been established, by which interest was paid upon a wagering contract (opium sale), the Court should allow interest on the principle sum recovered in an action.[3] But neither by the English nor by the Hindu law, (unless there be a mercantile usage) can interest be imported into a contract which contains no stipulation to that effect. Thus in an action for a contract known as *tejee-mundee chitlees*, (opium wager contracts,) before the passing of the Act XXI of 1848, which prohibited such gambling contracts, the plaintiff claimed interest on the sum recovered. But the Privy Council held that as there was no stipulation as to interest in the contract or satisfactory evidence of mercantile usage at Calcutta to import interest into the contract, the interest claimed could not be allowed.[4]

Tuticorin usage: cotton trade.

According to mercantile usage in the cotton trade in Tuticorin, where a dealer delivers cotton to the owner of a cotton-press, not in pursuance of any special contract, the property in the cotton vests in the owner of the cotton-press, who is bound to give the merchant in exchange of cotton of like quantity and quality. Such a transaction is not a sale but an agreement for exchange; and therefore

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294 (1896). cf. ss. 70, 71, 137 Neg. Ins. Act of 1881.

[1] *Amritram* v. *Damodar Das*. An unreported case referred to in 2 Hyde 259 p. 261.

[2] *Sumboonauth Ghose* v. *Jaddoonauth Chatterjee*, 2 Hyde. 259 (1864) S.C. 1 Coryton 88.

[3] *Juggomohun Ghose* v. *Manickchand* 7 Moo. I. A. 263 (1859).

[4] *Juggomohan Ghose* v. *Kaisreechand* 9 Moo. I A 256 (1862) : S C. 1 Sevestre 629 and 7 Sevestre 629. See also *Sahajram* v. *Chaeeton Dass* I Tay and Bell 230 (1850). *Doohebdas* v. *Ramlall* 1 Tay and Bell 253 note. (1850).

when the cotton thus delivered is accidentally destroyed by fire, the loss falls on the owner of the press.[1]

Cotton *sutta* in Bombay.

A person entered into a contract to deliver certain quantities of cotton, and, having failed, sought to have the price of the amount not delivered fixed at the ordinary market rate. It was found, however, that the transaction, though purporting to be an ordinary contract was in reality of the nature of speculations on the rise and fall of the cotton market and dealt with goods which had no real existence in the market; also, that in such transactions it was customary for the prices to be settled by a skilled committee of merchants engaged in similar transactions. In this case the committee settled a higher rate than that actually prevailed in the market. The Court held that in the absence of proof of fraud either in the inception or in the proceedings of the committee, the decision of the committee is binding on the parties. In order to take part in such speculations in cotton in Bombay, a Bombay merchant is required to employ, as his agent, one of the *khamgaon shroffs* in whose hands, the dealings are and to submit to the conditions governing the trade such as it was.[2]

Badnee contract.

A *badnee* contract in Furruckabad is a mere wager on the market price goods in a certain date at a certain place. No actual interchange of cash and goods is contemplated in it. Such being its nature, it is illegal and cannot be enforced at law.[3]

Usage of Mangrole : Marine insurance.

The "usage of Mangrole" appears to have originated in the necessities of the petty commerce carried on for ages in the Indian sea, by means of small open-decked vessels in which the venturers were both so numerous and

[1] *Volkart Bros* v. *Vettivelu Nadan*, 11 Mad 459 (1888).

[2] *Pestonji Jehangirji* v. *The firm of Jaisingdas Hansaraj* 8 C. W. N. 57 (P. C.) [1903].

[3] *Krishna* v. *Hushnak* No. 11 P. R. 1866 ; *Chandan* v. *Ajudhiah Pershad* S. D. N. W. P. R. March 1861 : *Ramkaran* v. *Zahira* No. 101 P. R. 1868 ; *Rangi Lal* v. *Ajudia Pershad* 31 July 1874.

individually of so small an amount, that either commerce would have been checked by the absence of insurance or some inexpensive mode must have been adopted by common consent of insurers and under-writers, by which insured losses could be recovered from the latter. The Indian merchants at each port of resort appear to have constituted themselves and to have been received by each other, as agents, for the purpose of looking after their respective interests in sea-risks, whether as shippers or as under-writers. The mutual interest of those merchants to act with good faith towards each other, and the exigencies of commerce reasonably led to such a confidence being placed in the integrity of all acts under their personal cognizance and control, as to allow of their certificate being to that extent received as binding upon both under-writers and insurers. Those acts appear to be the statement of the goods saved and bought into harbour, the undamaged value at the port of distress of the goods appearing on the manifest the *bonâ fides* of the sale and amount of proceeds of the sea-damaged goods and the calculation of percentage loss, but the reason of the usage does not require that it should be carried any further.[1]

In the case of a policy of insurance expressed to be "according to the usage of Mangrole" the certificate of the *mahajans* at the port of distress or sale, if accompanied by the manifest of the shipment and the account sales is regarded as sufficient evidence of an average loss and of account of such loss, though the under-writer may answer a claim supported on such evidence by showing fraud on the part of the shippers, the master of the vessel or the *mahajans*. If the under-writer cannot establish a case of actual fraud, he will be bound to pay an average loss according to the certificate of the *mahajans*, supported by the ship's manifest and account-sales at the port of distress.

[1] *Ransordas Bhoghalv. Kesrising Mohanlal* 1 Bom. H, C. R. O. C. J. 229 p. 231 (1863).

Where usage alleged was that the *mahajan's* certificate is deemed to be conclusive evidence against the under-writer without the production of manifest and account sales, and that upon proof of the certificate alone and of the policy the owner is entitled to recover his average loss, the Court declined to give effect to it, being an unreasonable usage.[1]

Insufficiency of package: bill of lading

The defendants, carriers between Hongkong and Bombay, by a condition annexed to their bill of lading, stipulated that they should not be responsible for damages to goods arising from insufficiency of package. The plaintiff shipped certain goods in the defendant's steamer in packages which, though in fact insufficient, were packages of the kind ordinarily used for the conveyance of such goods from Hongkong to Bombay. On their being landed in Bombay it was found that packages were more or less broken, and that the contents were in some instances injured, and had to a small extent escaped from the packages. In an action brought to recover damages in respect of such injury it was held that evidence of mercantile usage or custom would be admissible to show that the words *insufficiency of package* should not be taken in their ordinary sense, but as meaning insufficient according to a special custom of the China trade.[2]

In another case[3] where a condition annexed to defendant's bill of lading was that they should not be responsible for "leakage or breakage or other consequences arising from the insufficiency of the address or package," and where packages shipped were proved to be insufficient, it was held that under a bill of lading in the above form, the *onus* of proving that the packages were insufficient and that the injury which they had sustained was the consequence of such insufficiency lay upon the defendants, but when the result of the evidence on both sides was to leave

[1] *Ransordas* v. *Kesrising* 1 Bom. O.C.J. 169 p. 179 (1867).
H. C. R. O C. J. 229 (1863).
[2] *P. & O. S. N. Co.* v. *Manikji Nasorvanji Padsha*, 4 Bom. H.C.R. 69
[3] *P. & O. S. N. Co.* v. *Somaji Vishram* 5 Bom. H. C. R. O. C. J. 113 (1868).

it in doubt whether the injury was caused by negligence, or was the consequence of the insufficiency of the packages, the plaintiff was not entitled to recover damages.

Method of examining jute bales and of ascertaining damages.

In order to find whether the average of a whole consignment of jute is below the guaranteed standard of quality, it is sufficient if only a small sample taken from different portions of the bulk examined to form a judgment as to what the bulk is. It is not usual to examine the whole consignment for that purpose.[1] In a suit for damages for breach of warranty as to the quality of jute supplied, the method of ascertaining damages is established and recognized in the trade. The buyer is entitled to two annas per maund for a deficiency of 5 per cent. of "hessian warp." (In the case of *Boisogomoff* v. *Nahapiet* 6 annas per maund were allowed.) And it is not necessary for the buyer to show how he has dealt with the jute delivered to him, and whether he has suffered any and what loss by reason of the jute being not up to the warranted standard.[2]

Common carriers.

The custom of common carriers, which is a "custom of trade" within the meaning of section 1 of the Indian Contract Act,[3] is not affected by its provisions. The Contract Act is not intended to invalidate all customs or usages which are not in accordance with the general rules which it enacts, or to prevent private persons from entering into contracts which are inconsistent with those rules.[4]

Trade name.

Where a custom for sons to carry on business with the name of their father prefixed to their own, to distinguish their own name from other similar names in the country, is set up, it must be strictly proved.[5]

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[1] *J. Boisogomoff* v. *Nahapiet Jute Co.* 29 Cal. 323 (1902) s. c. 6 C. W. N. 495.

[2] Ibid.

[3] Act IX of 1872.

[4] *Moothora Kant Shaw* v. *I. G. S. N. Co.* 10 Cal. 166 p. 185 (1883).

[5] *Missrulall* v. *Ramnarain*, 1 Coryton, 63 (1864).

CHAPTER XV.

AGENCY CUSTOMS.

General rule.

It is a general rule, that if a person sells goods, supposing, at the time of the contract, that he is dealing with a principal, but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal, subject however, to this qualification *viz.*, that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if at the time of the sale the seller knows, not only that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and, notwithstanding all that knowledge, chooses to make the agent his debtor dealing with him and him alone, then the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other. There may be another case, and that is, where a British merchant is buying for a foreigner. According to the universal understanding of merchants and of all persons in trade, the credit is there considered to be given to the British buyer and not to the foreigner.[1] There is no particular custom or usage in Calcutta, qualifying the mercantile law of England as between principal and factor.[2]

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[1] *Thomson* v. *Davenport* 9 B and C 78 at 86 (1829,; 8 c. Smith's L. C. (11th Edn.) Vol. II. 379 p. 385 ; *Price* v. *Walker* L. R. 5 Ex. 173 p. 175 (1870).

[2] *Murtunjoy Chuckerbutty* v. *Cockrane* 10 Moo. I. A. 229 p. 242 (1865).

Nyanuggur *arath.*

There is a custom at Nyanuggur, (under the Judicial Commissioner of Ajmere), according to which a merchant coming from any other district is only allowed to trade in the name and upon that credit of a Nyanuggur firm. The actual dealings are effected by the stranger himself or by his broker, but in each transaction the name of a Nyanuggur merchant is given and his name is entered as the principal in the transaction. Credit is given to him and the final settlement of the transaction is effected with him. He is known as the *arath* or agent. At the conclusion of such transaction a memorandum of it is sent to the *arath* by the person who makes use of his credit. The memorandum is known by the term "panri." If in respect of any transaction the stranger does not deliver "panri" to the *arath* or agent, the *arath* is still responsible for payment to any vendor or third party and the *arath* can sue the stranger who used his name for the recovery of any amount paid by him to the vendor.[1]

Agent authorized to collect *hundis.*

An agent, who is authorized to collect *hundis*, and who after acceptance by the drawee gives credit to his principal for the amount, is, by the usage of the *shroffs*, entitled, on the *hundi* being dishonoured by the drawee, to treat himself as a holder for value.[2]

Kucha-pucca bidding by agent.

An agent at an auction sale made a bid for certain goods, which was not accepted at the time by the auctioneer, but was referred to the owners of the goods for approval and sanction, the agent agreeing to such reference. The conditions of sale contained no clause providing for such procedure. The auctioneers before receiving any intimation from the owners of the goods received a letter from the principals of the agent bidding at the sale, repudiating the contracts on the ground that the agent had no authority to bid for the goods on their

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[1] *Samur Mull* v. *Choga Lall* 6 I. A. 238 p. 242 (1879): S. C. 5 Cal. 421: 4 Shome (Notes) 28.

[2] *Mulchand Joharimal* v. *Suganchand Shirdas* 1 Bom. 23 (1875).

behalf. In a suit by the auctioneers for recovering the loss on re-sale of the goods, they set up a usage of trade, whereby it was alleged that the bidder at such a sale was not at liberty to withdraw his bid until a reasonable time had been allowed for the auctioneers to refer the bid to the owner of the goods. The only evidence given on the point was that of an assistant of the plaintiff's firm who said that "such an agreement had never been repudiated." The Court held that the conditions of sale containing no clause to the effect of the usage claimed, and there being no sufficient evidence that the usage was so universal as to become part of the contract by operation of law, there was no contract between the parties, and therefore no suit would lie.[1]

Banians.

The relation of a *banian* to his employers varies much according to the particular agreement between them, and the practice of the particular house of business. His functions are not always those of a factor, and even where some of his functions are of that nature, there are so many differences between the character of a *banian* and the character of a factor that it would be neither safe nor logical to assert that the rights, and, particularly, the right of lien of a *banian*, must be co-extensive, with that of a factor. Upon goods consigned to merchants here by foreign principals, the *banian* can acquire no lien, beyond his employer's interest in those goods, except in a transaction which falls strictly within the protection of the Factor's Act. To hold otherwise would be to hold that usage could give a lien on the principal's goods, for the general balance due to the *banian* from the factors, whatever might be the state of their account with those principals; that there may be, by operation of law, a lien more extensive than any which the law would permit the parties to give by express contract.[2] When purchases are made by a *banian*

[1] *Mackenzie Lyall & Co.* v. *Chumroo Sing* 16 Cal. 702 (1889).

[2] *Shibchander Mullick* v. *Bischoff* 1 Boul 344 p. 350 (1858).

on the general account of a European firm, credit, according to general custom, is understood to be given to him, unless there is an express contract by or on behalf of the European firm, to be responsible for the price.[1] There is by no means that uniformity in the relations of *banians* with their employers in Calcutta which would justify the Court in assuming that such relations are regulated by known usages of trade.[2] A *banian* often, if not generally, advances money to the firm in which he is employed; he gives security. If he sells the goods of the firm he is a sort of *del credere* agent, guaranteeing the payment of the price by the bazar dealers or other purchasers to his principal, and as to purchases he is the direct purchaser in the bazar. "The convenience of all parties has led to a custom of trade, by which credit is given to such persons making small purchases for their masters in the ordinary, well-understood course of their employment and business. But, if they were employed to make large purchases of merchandize, or to enter into contracts not within the usual scope of the authority of persons of such character I know of no custom of trade in the bazar which would justify the court in applying any other than the ordinary rules of law to the case."[3]

Bill-brokerage.

In *Moran* v. *Ashburner*,[4] M & Co. who were known to act sometimes as brokers and also to have other functions, bought a bill of A & Co. as declared agents, entrusted with the funds of a principal in England. They claimed brokerage on the purchase of the bill of exchange, which

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[1] *Pallyram* v. *William Paterson* 2 Boul 203 (1859); *Grant v. Juggbundo Shaw* 2 Hyde 301 (1863); *Sheikh Faizulla* v. *Ramkamal Mitter* 2B.L R. O.C. 7 (1868)

[2] *Gobindchunder Sein* v. *Ryan* 2 Boul. 8 (1859); on appeal 15 Moo. I.A. 230 (1861); *Gouger v. Abhoy Chunder* 2 Boul 22 (1859).

[3] *Grant v. Juggobundo Shaw* 2 Hyde 301 p 309 *per* Norman C. J. (1863); See also *Pallyram* v. *William Paterson* 2 Boul. 203 (1859), *Gobindchander Sein* v. *Ryan* 2 Boul. 8 p. 11 (1859); on appeal 15 Moo. I.A. 230 (1861); *Sheikh Faizulla* v. *Ramkamal Mitter* 2 B.L.R, 7 (1868).

[4] 1 Boul. 480 (1858)

was for several thousands of pounds. It was held that on such a transaction, if a brokerage can be claimable against the seller of the bill, it should be made the subject of a distinct stipulation between the parties It should be noted that in this case it was found that M & Co. were general and produce brokers, and that they had acted as bill-brokers in transaction connected with sales of produce and in remitting funds in their hands. Their claim to bill-brokerage in certain cases, similar to the present had been acknowledged by banks and mercantile houses and had never before been denied. The payment of such brokerage was acknowledged as customary in Calcutta by many merchants, some of whom justified it as rightly payable in respect of the known character of the plaintiffs as brokers and others of whom based it on special custom and others on anomalous circumstances arising out of the combination of agency and brokerage business in certain firms in Calcutta. A majority of merchants deemed this case a fit one for the claim of brokerage. But there was no evidence of established universal custom even in Calcutta; on the contrary, the right claimed by the plaintiff was denied by merchants of experience. The Court said: "It appears to us that if, on any such transaction, brokerage can be claimable against the seller of the bills, it should be made the subject of a distinct stipulation, and of a clear understanding between the parties. To hold otherwise would be to force upon him as brokers persons whom he never intended to recognize in that capacity, whose offices he never means to use in the transaction, and with whom he dealt, at arms length, as the principal settling the price of the bills and thus to raise a liability which by no contract, express or implied, he undertook. The general principles, which define the character, regulate the functions and determine the rights of brokers, seem to be clearly against the claim. Nor can we hold that any exception founded on special or local custom or otherwise has been established."

Stock exchange broker.

A person who employs a broker on the stock exchange impliedly gives him authority to act in accordance with the rules there established, though such principal may himself be ignorant of the rules.[1] The meaning of this rule is that in such cases the client agrees with his broker that the dealings between them are to be carried on under the rules of the stock exchange so far as they are applicable to outsiders and not under the rules that are applicable only to the domestic forum of the stock exchange.[2] There is no established usage under which the client of a broker on the stock exchange who has become a defaulter, and whose transactions have been closed at prices fixed by the Official Assignee, can claim the right to close at the price so fixed a transaction entered into for him by the broker with another member of the stock exchange.[3]

It is a familiar rule that a principal, who employs an agent to purchase goods for him in a particular market is to be taken to be cognizant of, and is bound by, the rules which regulate dealings therein; and the agent is entitled to be indemnified by his principal for all he does in accordance with those rules. Thus where a broker entered into a contract for a customer, which was not completed by transfer before the presentation of a petition for winding up the company, and who was according to the rules and regulations of the stock exchange was compelled to pay the price of the shares to the person from whom he bought, it was held that the broker was entitled to recover back from his principal the money so paid.[4]

Pakka Adat in Bombay: its incidents.

Up-country constituents, being unacquainted with Bombay *shroffs* and merchants, do not deal with them, but deal with well-known Bombay firms, who, on that

[1] *Sutton* v. *Tatham*, 10 A. & E. 27 (1839).

[2] *Levitt* v. *Hamblet*, 2 K. B. 53 (1901).

[3] Ibid.

[4] *Whitehead* v. *Izod*, L. R. 2 C. P. 228 p. 239 (1867); *Bayley* v. *Wilkins*, 18 L. J. C. P. 273 (1849); *Setth Samur Mull* v. *Chuga Lall*, 5 Cal. 421 (1879): s.c. 6 I. A. 238.

account, are known as *pakka adatias*. The following are the incidents of the *pakka adat* system :—

(i) A *pakka adatia* can allocate any upcountry constituent's order to himself without the knowledge, consent, or permission of the constituent. This may be called the right of allocation in the first instance.

(ii) A *pakka adatia* receives an order to buy or sell. Accordingly, he enters into a contract with a Bombay merchant. Subsequently, but before the due date, the *pakka adatia* enters into a cross contract with the same merchant on his own (the *pakka adatia's*) account, and either squares the original contract or keeps the two contracts open till due date. He is entitled to do that and yet keep the order of the first constituent open till the due date so as to hold the said constituent bound on that date to deliver or take delivery as the case may be.

(iii) In such cases, instead of entering into the cross-contract on his own account, the *pakka adatia* can enter into it on behalf of another constituent. The same result follows.[1]

When a *pakka adatia* receives a second order from his constituent to enter into a cross-contract and cover his first order against due date, the *pakka adatia* is not bound to carry out the second order in case owing to loss of credit he is unable to do so and all that he is bound to do is to inform the constituent accordingly so as to enable the latter to put through his order through some other *pakka adatia*.[2] In a subsequent case where there was no suggestion of the usage of *pakka adat* in the pleadings or the issues, nor was there any evidence to prove it, the Court observed that the view expressed in *Kanji Derji* v. *Bhugwandas Narotamdas*[3] had no application, as the usage proved therein

[1] *Kanji Derji* v. *Bhugvandas, Narotamdas* 7 Bom. L. R. 57 p. 65 (1904); See also 29 Bom. 291 p. 293 footnote.

[2] Ibid 71.

[3] 7 Bom. L. R. 57.

involved a material departure from the ordinary relations between a principal and his agent, and the learned Judge's view was based on evidence as adduced before him for the purpose of that case. But "obviously the finding in that case cannot be claimed as establishing a usage of which we ought in this suit to take judicial notice."[1]

A *pakka adatia* has no authority to pledge the credit of his up-country constituent to the Bombay merchant; and no contractual privity is established between the up-country constituent and the Bombay merchant. The up-country constituent has no indefeasible right to the contract (if any) made by the *pakka adatia* on receipt of the order, but the *pakka adatia* may enter into cross-contracts with the Bombay merchant either on his account or on account of another constituent and thereby for practical purposes cancel the same. The *pakka adatia* is under no obligation to substitute a fresh contract to meet the order of his first constituent.[2]

Vendor and Purchaser.

According to the custom of trade in Bombay, when a merchant requests or authorizies a firm to order and to buy and send goods to him from Europe at a fixed price net, free godown including duty, or free Bombay Harbour, and no rate of remuneration is specifically mentioned, the firm is not bound to account for the price at which the goods were sold to the firm by the manufacturer. It does not make any difference that the firm receives commission or trade discount from the manufacturer, either with or without the knowledge of the merchant.[3]

A custom which allows a broker to deviate from his instructions is unreasonable since it would deprive a principal of all security and leave him at the mercy of his agent, and the Courts of law will not enforce it.[4] When a

[1] *Chandulal Suklal* v. *Sidhruthrai Soojanrai* 29 Bom. 291 p. 299 (1905).

[2] *Bhugwandas Narotamdas* v. *Kanji*, 30 Bom. 205 (1905), on appeal from judgment reported in 7 Bom. L. R. 57.

[3] *Paul Beier* v. *Chotalal Javerdas* 30 Bom. 17 p. 23 (1904).

[4] *Arlapa Nayat* v. *Narsi Kesharji* 8 Bom. H.C.R. (A.C.J.) 19 (1871).

custom is inconsistent with the terms of a written agreement, evidence of such custom is inadmissible.[1] To be admissible in evidence a custom must not be inconsistent with the provisions of the Indian Contract Act.[2]

Bought and sold notes.

When merchants enter into contracts which are evidenced by bought and sold notes, it is customary, at Calcutta, to deliver bought note to the buyer and the sold note to the seller. It may be true, that merchants dealing *inter se* are not bound by any customary mode of contracting, and that they may adopt another and a different mode of contracting, if they think fit; but the presumption is strongly in favour of the custom, and any alleged deviation therefrom must be strictly proved.[3] In a recent case, the Privy Council has practically held in conformity with the more recent English case-law on the subject, that bought and sold notes do not constitute a contract of sale but are mere evidence which may be looked to for the purpose of ascertaining whether there was a contract and what the terms of the contract were.[4]

Agent's commission.

There is no local custom of merchants in Calcutta justifying a charge of commission by an agent for a sale unless he actually effects the sale.[5] The custom of corn-factors in England is to sell under a *del credere* commission and when so selling not to mention the purchaser.[6]

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[1] *Pike* v. *Ongley* 18 Q.B.D. 708 (1887); *Barrow* v. *Dyster* 13 Q.B.D 635 (1884); *Smith* v. *Ludha Ghella Damodar* 17 Bom 129 (1892); *Volkart* v. *Vottiveillu* 11 Mad. 495 (1888).

[2] *Madhab Chunder Poramanick* v. *Raj Coomar Doss* 14 B.L.R. 76 (1874).

[3] *Cowie* v. *Remfry* 3 Moo. I.A. 448 pp. 462, 463, (1846). This case has not been followed by the Privy Council in recent cases. See *Durga Prasad Sureka* v. *Bhajan Lal Lohia* 8 C. W. N. 489 (P. C.) [1904]. See Woodroffe's Evidence (4th Edn.) p. 463 notes on s. 91 Evidence Act. Article in C. W. N. Vol. VIII notes p. cexxx.

[4] *Durga Prasad Sureka* v. *Bhajan Lal Lohia* 31 I. A. 122 (1904): s. c. 31 Cal. 614: s. c 8 C.W. N. 489. See also *Tamvaco* v. *Skinner* 2 Ind. Jur. N. S. 221 (1867), *Mackinnon* v. *Shibchunder Seal* Bourke 354 (1865).

[5] *Morell* v. *Cockerell* 1 Fulton 209 (1835).

[6] *Hastie* v. *Conturier* 9 Ex. 102 (1853).

CHAPTER XVI.

ILLEGAL AND IMMORAL CUSTOMS.

Customs which are illegal, immoral or contrary to public policy will neither be enforced nor sanctioned. Manu says:—"A king who knows the revealed law must inquire into the particular laws of classes, the laws or usages of districts, the customs of traders and the rules of certain families, and establish their peculiar laws, if *they be not repugnant* to the law of God."[1] So Courts of justice have invariably set their face against customs which are contrary to law, morality, reason or public policy. We propose to note here some of these customs.

A woman marrying during the life-time of her first husband.

The custom of the Talapda kole caste that a woman should be permitted to leave the husband to whom she has been first married, and to contract a second marriage known as *natra* with another man in his life-time and without his consent, is held to be an illegal custom, being entirely opposed to the spirit of the Hindu law, as no woman can marry during the life-time of her husband.[2] This decision was cited in another case where the accused was charged with adultery and pleaded a *natra* marriage in accordance with the custom of his caste, but was convicted of adultery. On appeal, however, Couch C. J., set aside the conviction.[3]

Both the cases were criminal. The High Court in remitting the first case directed to the Sessions Judge to take evidence in reference to certain questions framed by their Lordships and then to return his findings on them to the High Court. The Sessions Judge found upon evidence of the heads of the Talapda caste that such

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[1] Manu VIII. S. 41; Ordinances of Manu, Govt. Publn. p. 194.

[2] *Reg* v. *Karsan Goja*; *Reg* v. *Bai Rupa* 2 Bom. H. C. R. 124 (1864).

[3] 5 Bom. H. C. R. (c. c.) 17 (1868).

custom as pleaded by the accused did exist among the caste. That is to say, in the Talapda caste a woman can leave her first husband and contract a second marriage with another man in the life-time of her first husband and without his consent. The permission of the caste is not necessary as a preliminary to such a contract of second marriage. The permission is sometimes given or withheld subsequently to the contract *i. e.*, on the complaint of the first husband. But if she restores to him any property she might have acquired by her first marriage, she does not lose her position in the caste. The learned Judges, however, were of opinion that such caste-custom, even if proved to exist, was invalid as "being entirely opposed to the spirit of the Hindu law."

Apart from law, such custom is certainly reprehensible on social as well as moral grounds. If it is allowed, then the doctrine of polyandry, which is abhorrent to nearly every religious system, will be admitted to prevail among the Hindus. The Talapda caste, though occuping an inferior position in the gradation of castes, are certainly Hindus. The matrimonial bond will have no force at all if it is held that a wife would be at liberty at any momentto leave her husband and without any formalities whatever. "The intercourse of the sexes, even among the lowest caste in which such a state of society is allowed, will reduce its members to the level of the beasts. Therefore on grounds of social purity and public morality such customs must be discontinued and vetoed by the Courts of law."

In the second case where the conviction of the accused for adultery was set aside by Couch C. J., on appeal, the woman was given an option by a civil court decree either to go back to her first husband or to pay him money as damages. She did not return to her first husband but paid him the money. Then she married the accused. The High Court said that, under the circumstances, it could not be held that the accused and the woman did not believe that the latter was at liberty to marry, she having paid damages

to her first husband in pursuance of the civil court decree. Therefore, the setting aside of the conviction in this case had nothing to do with the approval or disapproval of the custom of *natra* marriage. The point, however, was settled in a subsequent case which was a suit for restitution of conjugal right, and where the defendant pleaded a *natra* marriage, caste custom, and payment of money. The Court, held that, even if the custom was proved, it was an immoral custom.[1] In another case the Bombay High Court laid down that Courts of law would not recognize the authority of a caste to declare a marriage void or to give permission to a woman to re-marry. *Bonâ fide* belief that the consent of the caste made the second marriage valid does not constitute a defence to a charge of bigamy.[2] But the Madras High Court in a recent case has held that there is nothing immoral in a caste-custom by which divorce and re-marriage are permissible on mutual agreement, one party paying the other the expenses of the latter's original marriage, known as *parisam*.[3]

Marriage contract for a consideration, if against public policy.

According to Manu the best form of marriage is that in which the father makes a *gift* of his "daughter clothed and bedecked" to a suitable man. The learned sage said that it was sinful for any father to receive gratuity, however small, for giving his daughter in marriage.[4] Yet, the practice of taking a price of the bride by her parents was at one time very common. The *asura* form of marriage, which is still prevalent in some parts of India is nothing short of a sale of the bride.[5] For, in this form of marriage "the bridegroom having given as much wealth as he can afford to the father and paternal kinsmen and the damsel herself, takes her voluntarily as his bride." This form of marriage, as the name implies, obtainted among the *asuras* or the aboriginal tribes in India. The

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

[2] *Sankaralingam Chetti* v. *Subban Chetti* 17 Mad. 479 (1894).

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

[4] Vide Manu Pock III. 2-54.

[5] Vide Manu III. p. 31.

practice of buying a wife by money or by service rendered to the future father-in-law still exists among the Kukis of Cachar,[1] the Lapchas of Darjeeling ;[2] among the Santals[3] and other non-Aryans.[4]

The origin of the custom of paying to the father some value, either by money or by service rendered, for the hand of his daughter may be traced to the natural justice of making good to the father for the loss of services of his daughter. For, we cannot forget that in the early days of our society, every member of a family, whether a man or a woman, a boy or a girl, was of immense service and value to the family.[5]

The system of taking *pon, palu* or *hoonda* seems to have been based on the *quid proquid* principle It is a sort of pecuniary consideration made to the bride's father to have his consent to the marriage of his daughter with the bridegroom. Many a marriage contract has been made on the basis of such money consideration and any breach of terms has often been fruitful source of litigation between the contracting parties. There is a body of decisions bearing upon the subject. As we are concerned to ascertain under what circumstances such *pon* or pecuniary consideration will offend public policy or morality and when not, we cannot but examine all of them. But our task has been simplified by a recent decision of the Calcutta High Court where one of the learned Judges, after very carefully considering and reviewing all these authorities, has deduced the following rules[6] :—

(1) An agreement to remunerate or reward a third person in consideration of negotiating a marriage is contrary to public policy and cannot be enforced.[7]

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[1] (1) S. A. B. Vol. II p. 386.
[2] S. A.B. Vol. X. p. 51.
[3] S. A. B. Vol. XIV. p. p. 315, 316.
[4] S. A. B. Vol. I. p. 320 and 328.
[5] *Vide* Spencer's Sociology p. 655 ; Mayne's. Early History of Institutions p. 324.
[6] *Baksi Das* v. *Nadu Das* 1 C. L. J. 261 p. 266 (1905).
[7] *Vaithyanatham* v. *Ganzarazu*

(2) An agreement to pay money to the parents or guardian of a bride or bridegroom, in consideration of their consenting to the betrothal, is not necessarily immoral or opposed to public policy. Where the parents of the bride are not seeking her welfare, but give her to a husband otherwise ineligible, in consideration of a benefit secured to themselves, the agreement by which such benefit is secured is opposed to public policy, and ought not to be enforced.[1]

(3) Where an agreement to pay money to the parents or guardian of a bride or bridegroom, in consideration of their consenting to the betrothal, is under the circumstances of the case neither immoral nor opposed to public policy, it will be enforced, and damages also will be awarded for breach of it.[2]

(4) A suit will lie to recover the value of ornaments or presents given to an intended bride or bridegroom in the event of the marriage contract being broken.[3]

(5) Although a Court may not enforce an agreement to pay money to the parents or guardian of an intended bride or bridegroom on the ground that the agreement is opposed to the public policy, yet a suit is maintainable for the recovery of any sum actually paid, pursuant to the agreement, if the contract is broken and the marriage does not take place.[4]

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17 Mad. 9 (1893); *Pitamber Ratansi* v. *Jagjiban Hausraj* 13 Bom. 131 note (1884); *Dulari* v. *Vallabdas Pragji* 13 Bom. 126 (1888).

[1] *Visvanathan* v. *Saminathan* 13 Mad. 83 (1889); *Baldeo Sahai* v. *Jumna Kunwar* 23 All. 495 (1901); *Dholidas Ishwar* v. *Fulchand Chaggan* 22 Bom. 658 (1897). See also Banerjee on *Marriage and Stridhun* p. 78; Norton's *Leading cases on Hindu Law*, Vol. I. p. 5; Steele *on Hindu castes* p. 129.

[2] *Umed Kika* v. *Nogindas Narotamdas* 7 Bom. H. C. R. O.C.J. 122 (1870); *Mulji Thackersey* v. *Gomti* 11 Bom. 412 (1887); *Lallun Monee Dossee* v. *Nobin Mohun Singh* 25 W. R. 32 (1875).

[3] *Umed Kika* v. *Nogindas Narotamdas* 7 Bom. H. C. R. O C J. 122 (1870); *Rambhat* v. *Timmayya* 16 Bom. 673 (1892).

[4] *Juggessur Chakerbati* v. *Panchcowrie Chakerbati* 14 W. R. 154 (1870): s. c. 5 B. L.R. 395; *Ramchand Sen* v. *Adaito Sen* 10 Cal. 1054 (1884).

(6) If one of the contracting parties alleges that the agreement is opposed to public policy, it is for him to set out and prove those special circumstances which will invalidate the contract.[1]

Purchase of a bride not *malum in se*.

In Bombay *palu* is regarded as a kind of rudimentary marriage settlement. It is a present of money to the bride herself. Hence the giving of *palu* is not considered as contrary to public policy.[2] In the Punjab the purchase of a bride where she is not regarded as a slave, and the practice of making payments to the parents on marriage, have been established by usage of the community, and are not *malum in se*; and although according to the law of the land a suit between the bridegroom and the father of the bride would not lie, there is nothing to prevent a third party from recovering in a law suit money advanced by him to the bridegroom for the purpose.[3]

Public policy.

Where a public officer enters into a contract which is unenforceable as being opposed to public policy, persons deriving title through him are in no better position than himself. So where a public officer makes a *benami* purchase of some land which he is prohibited to do, his representatives will be debarred from claiming the benefit of such purchase.[4] A contract entered into by Hindus living in Assam by which it was agreed that upon happening of a certain event, a marriage was to become null and void, was held as contrary to public policy.[5]

Assignment of the right of management of a pagoda.

An assignment by the *urallers* or managers of a pagoda of the *urima* rights or right of management thereof is beyond the legal competence of the *urallers* both under the common law of India and the usage of the foundation. The assignment being of a trusteeship for the pecuniary

[1] *Visvanathan* v. *Saminathan* 13 Mad. 83 (1889).

[2] *Jaikisundas Gopaldas* v. *Harkissundas Hullochandas* 2 Bom. 9 (1876).

[3] *Shah Gool* v. *Ikram* 88 P. R. 1867.

[4] *Sheo Narain* v. *Mata Prasad* 27 All. 73 (1904).

[5] *Sitaram* v. *Musst. Aheeree Heerahnee* 11 B. L. R. 129 (1873)

advantage of the trustee could not be validated by any proof of custom.[1] Similarly the sale of a religious office to a person not in the line of heirs, though otherwise qualified for the performance of the duties of the office, is illegal.[2] So also a transfer of the office of *pujari*, which is hereditary in the family, by one undivided brother to another cannot be held to be valid.[3] A priestly office with emolument attached to it is inalienable and would be contrary to public policy to allow offices like this to be transferred either by private sale or by sale in execution of a decree.[4] The right of an *archaka* (priest) to perform the duties of his office and to receive emoluments attached to the performance of those duties being intimately connected with and essential to the religious worship is not legally the subject of sale.[5]

Prenuptial agreement by a husband.

In the case of *Mon Mohini Jomadai* alias *Mohini Debi* v. *Rai Basanta Kumar Singha*[6] the question was whether a Hindu wife can refuse to go and live with her husband at his own house, relying upon certain agreement made before marriages between their parents, whereby the husband bound himself to live permanently and unconditionally at his mother-in-law's house and not to take his wife either to his own house or elsewhere from her mother's house. The wife set up a further defence that it was against the custom of the family for the daughter of the Rajah to go and live in the house of her husband. But the custom was not established. Their Lordships decided the question on the basis of the Hindu law and

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[2] *Raja Vurmah Valia* v. *Ravi Vurmah Mutha* 4 I. A. 76 (1876) : s. c. 1 Mad. 235.

[1] *Kuppa Gurukal* v. *Dora Sami Gurukal* 6 Mad. 76 (1882).

[3] *Narayana* v. *Ranga* 15 Mad. 183 (1891). See also No. 106 P. R. 1892.

[4] *Srimati Mallika Dasi* v. *Ratanmani Chuckarvati* 1 C. W. N. 493 (1895).

[5] *Narasimma Thatha Acharya* v. *Anantha Bhatta* 4 Mad. 391 (1881). See also *Vencatarayar* v. *Srinivasa Ayyanagar* 7 Mad. H. C. R. 32 (1872) ; *Rajah of Cherakal* v. *Mootha Rajah* 7 Mad. H. C. R. 210. (1873)

[6] 5 C W. N. 673 (1901).

usage and after very carefully considering the various texts on the legal aspects of a Hindu marriage on the conjugal relation and duties of the married parties and on the marital rights of a Hindu husband, held that such agreement was unquestionably opposed to public policy as "it permanently controls the rights of the husband as conferred upon him by the Hindu law, as soon as the marriage is effected."

Dancing girls.

Dancing girls in the Deccan form a distinct caste and are numerous. It is well known that these women practise prostitution within certain local limits and earn their livelihood thereby. It may not be the sole means of their livelihood. For they are also professional dancers and singers, and this profession of dancing and singing is quite an honest means of living. And much property is often acquired in this way by these dancing women. But inasmuch as they also live by prostitution, it cannot be denied that a portion, at least, of their gains is derived from immoral sources. Therefore, the question is whether a claim by a prostitute adoptive mother for recovery of certain jewels and other articles belonging to her prostitute adopted daughter and grand-daughter on the ground that they are part of the gains of science is bad by reason of public policy or immorality. It has been held that as prostitution is strictly in accordance with the Hindu law and custom and as, though not numerous, but, uniform precedents have recognized rights of property between the prostitute and her offspring, the question must be decided by the Hindu law.[1]

Dedicating minor girls.

Dedication of a minor girl under the age of 16 years to the service of a Hindu temple, by the performance of the *shej*[2] ceremony where it was shown that it was

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[1] *Chalakonda Alasani* v. *Chalakonda Ratnachalam* 2 Mad H.C.R. 56 p. 75 (1864)

[2] The *shej* ceremony is described to be "a kind of marriage ceremony in the Bhavin caste, whereby the girl becomes devoted for life to the temple in which the ceremony is performed. This custom is confined to the Malwan

almost invariably the case that the girls so dedicated led a life of prostitution, was a disposing of such minor, knowing it to be likely that she would be used for the purpose of prostitution within the meaning of section 372 of the Indian Penal Code.[1]

Certain *deva dasis* or dancing girls attached to a temple claimed for themselves the exclusive rights to introduce dancing girls into the temple, and took exception to the authority of the *dharmakarta* of the temple to dedicate girls to the services of the temple without the consent of the existing body of dancing girls attached to the pagoda. It was claimed on their behalf that they were a necessary part of the religious ceremonies. The Court in dismissing the appeal observed thus:—"What the plaintiffs seek is that they should be declared to have by custom a veto upon the introduction of any new *deva dasi*. In other words, they claim to have acquired by custom a monopoly in their profession of *deva dasi*. We cannot shut our eyes to what is the main purpose of this profession as it is perfectly notorious that it is prostitution and the gains from that source. If the religious services, which the *deva dasis* have to attend, or in which they are required to join, be anything more than a mere veil to cover the real and substantial occupation of their lives, it is still impossible to regard their religious services as disconnected from the other inevitable

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Taluka, and Sawantwari and Goa territories. It is thus described by one of the eye-witnesses:—'A *khangera*, or knife is put on the ground before the idol, and the girl who is to undergo the ceremony puts a garland on the knife; her mother then puts rice on the girl's forehead, and the officiating priest then weds the girl to the knife, just as if he were to unite her to a boy in marriage, by reciting the *mantras*, while a curtain is held between the girl and the knife.' The girl thus becomes a Bhavin, and dedicated to the service of the temple, and cannot marry again, and subsists generally by prostitution after attaining maturity"—*Jaila Bhavin* 6 Bom. H.C.R. 60.

[1] *Jaili Bhavin*, 6 Bom. H.C.R. (C. C.) 60 (1869). Re *Padmavati*, 5 Bom. H.C.R. 415 (1870).

pursuit of their profession as *deva dasis*." Then their Lordships further observed that even assuming that the evidence in the case had established the custom and that the custom in some respects fulfils the requisites of a valid custom, still it is clear that if the Court made the declaration as prayed for, it would be recognizing "an immoral custom—a custom, that is, for an association of women to enjoy a monopoly of the gains of prostitution, a right, which on the score of morality alone, no Court could countenance."[1]

This case was distinguished in another case reported in the same volume of the Madras Law Reports.[2] There the suit was brought by a dancing girl to establish her right to the *mirasi* of dancing girls in a certain pagoda and to be put in possession of the said *mirasi* with the honours and perquisites attached thereto as set forth in schedules to the plaint annexed. The District Munsiff, finding that the claim had been established, decreed for plaintiff; but on appeal by the 1st defendant, the District Judge dismissed the suit on the authority of the decision in the case of *Chinna Ummayi*. On second appeal the Madras High Court held that this case was distinguishable from the case of *Chinna Ummayi* "in that there was no allegation in that case of any endowment attached to the office. Here it would seem from the plaint schedule various honours, and more or less valuable sources of income are alleged to be appurtenant to the hereditary office. We think the question of the existence of such an hereditary office with endowments or emoluments attached to it ought to be inquired into, as that would materially affect the question of whether plaintiff has sustained injury by the interference of the defendant." So the decree was reversed and the case was remanded for investigation on this point.[3]

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

[2] *Kamalam* v. *Sadagopa Sami*, 1 Mad. 356 (1878).

[3] For further cases see under Hindu Customs: Adoption and Inheritance. *Supra*.

Unreasonable customs.

A custom may be said to be unreasonable when it is deemed "unfair and unrighteous" by right-minded men. Consequently whenever a custom seemed to have been unreasonable, the Court refused to recognize it. Thus, when a right to fish in certain *bhils* was based on a custom according to which, as alleged, "all the inhabitants of the Zemindari had the right of fishing," in them it was held that such a custom was *unreasonable* and as such could not be treated as valid.[1] Similarly a custom which enables a man, after having granted a lease, by simply resorting to a dodge, to deprive the lessee of the entire benefit of his lease, should not be recognized. In the case of *C. R. De Souza* v. *Pestanji Dhanjibhai*[2] a Mahomedan leased to the defendant a house at Zanzibar to be held by the latter as long as he pleased at a fixed annual rent. In the lease the lessor expressly agreed never to remove the lessee. The plaintiff, subsequently, with full knowledge of such lease, purchased the same house from the defendant's lessor, and, as such purchaser, sued to eject the defendant. It was alleged that according to the Mahomedan law and custom of Zanzibar, the defendant's tenancy determined upon the sale by the landlord. Assuming that the alleged custom existed, should it be recognized as valid? Their Lordships were of opinion that it should not be, and observed: "It seems to us most unreasonable, as enabling a man, after having granted a lease, at his mere pleasure, by simply resorting to a dodge, to deprive the lessee of the entire benefit of his lease, and that, not only in the absence of any such power reserved, but in the face of an express stipulation not to remove the tenant, and irrespective of the stipulated duration of the lease, and also without the least compensation to the lessee. A custom so unreasonable, even if proved, cannot be regarded as having the force of law."

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[1] *Luchmeeput Singh* v. *Sadaulla Nushyo*, 9 Cal. 698 (1882) : s.c. 12 C. L. R. 382.

[2] 8 Bom. 408 (1884).

Commercial custom.

A commercial custom among buyers and sellers of cotton at Kumpta in Bombay was alleged in a case[1] to the effect that a broker acting for a distant principal is allowed to deviate from his instructions if the state of the market appear to render it desirable. Evidence was given to the effect that a broker, under such circumstances, may use his discretion, unless the principal expressly tells him that he will not be bound by any contract which is not in accordance with his instructions; and that even in that case the principal is bound by the contract, though he may recover damages from the agent. Their Lordship said: "Even if such evidence were sufficient to establish the existence of a custom, it would be impossible to hold such a custom to be a reasonable custom, since it would deprive a principal of all security and leave him at the mercy of his agent."

Contracts, the stipulations of which are *bonâ fide* and not immoral or contrary to public policy, the Courts are bound to give effect to, although the conditions to be carried out appear to be harsh and stringent.[2]

Landlord and prostitute tenant.

A landlord, letting a house to a prostitute for the purpose of her calling, cannot recover rent for the same. The principle which governs the English cases are applicable to this country.[3]

Illegal cess.

A cess leviable in accordance with village custom which is not recorded under the general or special sanction of the local Government cannot under section 66 of Act XIX of 1873 be enforced in a civil court.[4] A demand on *raiyat* of an undefined cess under the name of *russoon kuzza* or Kazee's fees in addition to rent held

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[1] *Ariapa Nayak* v. *Narsi Keshavji & Co.*, 8 Bom. H. C. R. (A. C. J.) 19 (1871). See also *Ireland* v. *Livingston*, 5 C. L. R. 516.

[2] *Chowbey Hurbuns Lall* v. *Ghusa*, 12 S. D. Decis N. W. P. Sel. cases) 270 (1861).

[3] *Goureenath Mookerjee* v. *Modhoomonee Peshakar*, 18 W. R. 445 (1872).

[4] *Lala* v. *Hera Singh*, 2 All. 49 (1878).

illegal, though tenant admitted previous payment and did not object to paying it in future. The Courts cannot give an award on a claim in itself illegal.[1]

A contract by which a tenant as between himself and his landlord undertakes to pay the whole road cess is not illegal. Road cess is not an *abwab* within the meaning of section 74 of the Bengal Tenancy Act.[2] Section 74 of the Bengal Tenancy Act made all impositions, upon all classes of tenants, including a permanent tenure holder, in excess of the specified rent, illegal. Under section 2 cl. (4) of the Bengal Tenancy Act the landlord cannot now recover the *abwabs* which he could not recover under the old law.[3]

Immoral customs among Mahomedan Kanchans.

Among Mahomedan Kanchans practices relating to their holding and inheritance of property having an immoral tendency were not recognizable as customs. To recognize practices tending to promote prostitution, which the Mahomedan law reprobates and prohibits absolutely, would be contrary to the policy of that law. We have already referred to the Kanchans while dealing with Mahomedan customs.[4] Speaking of them the Privy Council observed :—"It appears that each family or community live a *cœnobitical, quasi-corporate,* life in what the learned Judges call the family brothels. All the members, including males, are entitled to food and raiment from the business, the males living a life of idleness at the expense of the females. There is no such thing as separate or individual succession upon death. All the members succeed jointly. No division or partition is allowed, for that would break up the establishments, and the witnesses say that the lamp should be kept burning in the house. A member of a family brothel who leaves it does so with only her

[1] *Luckhee Debbea Chowdrain* v. *Sheik Ahta*, 8 S. D. Decis. 552 (1852); see also *Kaleepershad Dey*, 4 Sevestre 255 (1856).

[2] *Ashutosh Dhur* v. *Amir Mollah*, 3 C. L. J. 337 (1906).

[3] *Aparna Charan Ghose* v. *Karam Ali*, 4 C. L. J. 527 (1906).

[4] Vide *supra* p. 404.

clothes on her back and nothing more. The body is recruited by adoption. A girl is brought in as the adopted daughter of a female member of the institution, and the girl thus adopted is regarded as having ceased to belong to her own family."[1]

As to these customs being prevalent among the Kanchans there seems to be no doubt. But since they aim at the continuance of prostitution as a family-business, they have a distinctly immoral tendency and should not be enforced in Courts of justice. The Privy Council observed: "It seems to their Lordships impossible to say that such customs as are proved in this case to exist among the Kanchans are not contrary to the policy of the great religious community to which the courts have found that all the parties belong."[2]

Where property left by a female kanchani, deceased, was claimed by her legitimate kindred, it was held that an 'adoption' so called in conformity with the customs, of the tribe, had not operated to separate her from the family in which she was born. The mode in which her property had been acquired was not the subject of the present question, which was only concerned with the right of personal succession to it; and that property was held to be distributable according to the rules of the Mahomedan law governing inheritance.[3] The Mahomedan law does not recognize a right of inheritance to property left by a procuress in favour of her slave girls.[4]

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[1] *Ghasiti* v. *Umrao Jan*, 21 Cal. 149 p. 154 (P. C.) [1893]

[2] Ibid 156.

[3] *Ghasiti* v. *Umrao Jan*, 21 Cal. 149 (P. C.) (1893).

[4] *Bunnoo* v. *Ghoolshan*, 2 S. D. Decis (N. W. P.) 503 [1857].

CHAPTER XVII.

MISCELLANY.

Under this head we propose to note some customs which could not very well be included in the foregoing.

Drift timber.

Timbers claimed by a land-owner as having been washed on to his estate by a river is not unclaimed property within the meaning of section 25 and the following sections of Act V. of 1861. It is not necessary for the plaintiff to produce documentary evidence in support of the right or some decree or decision of competent authority establishing the custom. Lords of Manors are allowed to establish rights to wrecks, &c., by long continued and adverse assertion of and enjoyment under such claim.[1] According to the customary usage in the North Konkun all drift timber recovered before it reached the Khambolee bunder was to be given up to the owner on payment by him of the expense of securing it and the *tiazee* or a third, as Government duty, and all timber floating to the sea became the property of the Government.[2]

Manorial right.

A zemindar claimed the value of half the produce of two fruit trees, standing on the cultivated land held by a *raiyat* on the ground of the custom of the district. A Full Bench decided that where the right claimed to be enforced is not recorded, it is not one which can be maintained with reference to the general custom, but must be proved to have been exercised against the person who disputes it within the period of limitation.[3] In another case the zemindars claimed a declaration of their ancient right as against all the tenants of a certain

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[1] *Chutter Lall Singh* v. *The Government* 9 W. R. 97 (1868).

[2] *Khanoo Raoot Kulerkoer* v. *Dhunbajee Kan* 2 Borr. 301 p. 306 (1823).

[3] *Phalloo Kooaree* v. *Musst. Imman Bandar Begum* 7 S.D.A. (N. W. P.) Part II. 671 [1864].

village to appropriate all trees of a spontaneous growth, the fruits of other trees planted by the tenants; also to receive as manorial tribute a certain number of ploughs annually and a certain offering of poppy seed and other farm-produce on the occasion of the marriage of persons of the lower caste of tenants, with a further right to levy a certain proportion of the sugarcane manufactories and fields in the village. The Court held that where a custom regarding several cesses was alleged, the existence of the custom regarding each cess should be tried as a separate issue; that parol evidence as to the existence of such customs should be tested by ascertaining the grounds of the witness' opinion.[1] Where the zemindars of a village sued an occupancy tenant for a declaration of their right to maintain a custom which was thus recorded in the *Wajib-ul-urz*: "when necessary one or two bighas out of the tenants' lands are taken with their consent (*ba khushi*) for sowing indigo;" a Full Bench of the Allahabad High Court held that the word '*khushi*' indicated that the land was only to be taken with the occupancy tenant's consent.[2]

Fishing in the sea.

The right of the public to fish in the sea, whether it and its subjacent soil be or be not vested in the Crown, is common and is not the subject of property. That right may, in certain portions of the sea, be regulated by local custom.[3]

Customary easement.

An easement is a right existing in a particular individual in respect of his land, whilst custom is a usage attached to a locality. Though a customary right belongs to no individual in particular, yet it is capable of being enjoyed by all those who for the time being own land in the locality to which the right attaches. The distinction between custom and easement is explained in *Mounsey* v. *Ismay*,[4] and the rule of law is that if a custom is shown to

[1] *Lachman Rai* v. *Akbar Khan* 1 All. 440 (1877).

[2] *Sheobaran* v. *Bhairo Prasad* 7 All. 880 (F. B.) [1885].

[3] *Baban Mayacha* v. *Nagu Shravucha* 2 Bom. 19. (1876).

[4] 3 H. and C. 486 (1865).

exist under which individuals of a class may obtain independent rights in respect of their land which would be easements if acquired by grant or prescription, those rights are nevertheless easements, though acquired by reason of the custom.[1] A custom is the source of easement and an easement is a distinct right in itself. It ripens into a right by uninterrupted user.[2] A customary easement must be reasonable and certain[3] but an easement which is not a customary right need not be reasonable.[4]

Dhardhoora.

The custom of *dhardhoora* applies to lands thrown up or formed by fluvial action either in one year or in the course of a number of years. Whether it is equally applicable to *chukee* formations or tracts of land severed by a sudden change in the course of a river and yet preserving their identity of site and surface after the severance must be determined by proof of the extent of the custom.[5]

Customary right of privacy.

In India where the *purda* system prevails both among Hindus and Mahomedans, the custom of privacy is quite reasonable and the Courts of law should not hesitate to give recognition to it if properly and satisfactorily established. This question was exhaustively threshed out by the Allahabad High Court in *Gokhal Prasad* v. *Radho*.[6] The Chief Justice, Sir John Edge, considered various cases bearing upon the subject and decided by different High Courts. The summary of conclusion which his Lordship arrived at was as follows:—The

[1] *Orr* v. *Raman Chetti* 18 Mad. 320 p. 325 (1895).

[2] *Anaji Dattushet* v. *Morushet Bapushet* 2 Bom. H. C. R. 354 (1865); *Mohon Lall Jechand* v. *Amratlal Bechardas* 3 Bom. 174 (1878); *Kalu Khabir* v. *Jan Meah* 29 Cal. 100 p. 108 (1902).

[3] *Kuar Sen* v. *Mamman* 17 All. 87 (1895); *Orr* v. *Raman Chetti* 18 Mad. 320 (1895).

[4] *Budhu Mandal* v. *Maliat Mandal* 30 Cal. 1077 (1903).

[5] *Musst. Ranee Katiyanee* v. *Sheikh Mahomed Shurf-ood-deen* 3 N. W. P. (Ag.) 189 (1868). See also *Naseer-ud-deen Ahmed* v. *Musst. Oomedee* ibid 1 (1868). *Sibt Ali* v. *Munir-ud-deen* 6 All. 479 (1884).

[6] 10 All. 358 (1888).

decisions of the Calcutta High Court[1] are conflicting; but an inference may be drawn from some of those decisions "that where a custom of privacy has been clearly proved, any substantial interference with it would be an actionable wrong, provided of course that such interference was not by the consent or acquiescence of the party complaining." The Madras High Court in *Komathi* v. *Gurunada Pillai*[2] held, on the basis of English law, that invasion of privacy is not an actionable wrong. The High Court at Bombay has clearly recognized and given effect to the custom in Gujarat by which a right of privacy is enjoyed where the custom prevails.[3] In another case[4] it expressed its unwillingness to extend the custom prevailing in Gujarat to Dharwar as the evidence in support of the alleged custom was too vague. But it would seem that if by evidence of most satisfactory nature such custom is proved to exist elsewhere than Gujarat the Court would recognize it. The Bombay Court refused to follow the decision of the Madras High Court mentioned above, "in a matter of this kind which is governed by the usage of the district which has been frequently declared. The usage is not altogether singular, as a similar custom is recognized by the law of France."[5] The Chief Court of the Punjab has acknowledged that a custom of privacy can exist and can be enforced.

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[1] Vide *Sreenath Dutt* v. *Nund Kishore Bose* 5 W. R. 208 (1866); *Mahomed Abdur Rahim* v. *Birju Sahu* 5 B. L. R. 676: s. c. 14 W. R. 103 (1870). *Sheikh Golam Ali* v. *Kazi Mahomed Zohur Alum* 6 B. L. R. App. 76 (1871); *Kalee Pershad Shaha* v. *Ram Pershad Shaha* 18 W. R. 14 (1872); *Gibbon* v. *Abdur Rahman* 3 B. L. R. A C.J. 411 (1869).

[2] 3 Mad. H. C. R. 141 (1866).

[3] Vide *Manishankar Hargovan* v. *Triham Narsi* 5 Bom. H.C.R. (A.C J.) 42 (1867); *Kuvarji Premchand* v. *Bai Javer* 6 Bom. H C.R. (A C J.) 143 (1869); *Keshav Harakha* v. *Gunpat Hirachand* 8 Bom. H. C. R. (A. C. J.) 87 (1871).

[4] *Shrinivas Udpirav* v. *The District Magistrate of Dharwar* 9 Bom. H. C. R. (A. C. J.) 266 (1872).

[5] *Kamathi* v. *Gurunada* 3 Mad. H. C. R 141.

Then as regards the Allahabad High Court his Lordship examined every case on the point from the time of the Sudder Dewany Adawlut up to 1886 and was "of opinion that such a right of privacy exists, and has existed in these Provinces, apparently by usage, or, to use another word, by custom, and that substantial interference with such a right of privacy where it exists, if the interference be without the consent of the owner of the dominant tenement, affords such owner a good cause of action."[1] This decision was followed in a subsequent case and it was held there that the customary right of privacy which prevails, in various parts of the North-Western Provinces is a right which attaches to property and is not dependent on the religion of the owner thereof.[2]

The Madras High Court in *Sayyad Azuf* v. *Ameerubibi*[3] followed their own ruling as laid down in *Komathi* v. *Gurunada Pillai*[4] and declined to follow the Allahabad rulings.

The High Court at Calcutta had occasion to advert to this point in a recent case. There their Lordships pointed out that there was a great difference between the law on the subject of privacy, as prevailing in the North-Western Provinces and as prevailing in Bengal. "According to the rulings of this Court, there is in Bengal no inherent right to privacy and it has been laid down in several cases that such a right can arise in this Province, if it can arise at all, only by express local usage, by grant, or by special permission."[5]

Palas. Certain idols were founded and for many years their worship was maintained by the various families descended from the original founders, each of these families in rotation being entitled to the custody of the idols and to a *pala* or turn of worship. It was asserted that by the custom of the family the idol could not be removed from

[1] *Vide* 10 All. 358 p. 387.

[2] *Abdul Rahman* v. *D. Emile*, 16 All. 69 (1893).

[3] 18 Mad. 163 (1894).

[4] 3 Mad. H.C.R. 141.

[5] See *Sree Narain Chowdhry* v. *Jadoo Nath Chowdhry* 5 C. W. N. 147 p. 149 (1900).

Calcutta, but must be kept in the house in Calcutta of the person who for the time had the *pala*. So when a member of the family, on his *pala* commencing, proposed to remove the idols out of Calcutta, other members brought a suit for declaration of the above family custom. They offered in evidence a deed containing a recital of the custom alleged and a covenant to do nothing contrary to it. It, however, appeared that the defendant was not a party to the deed which was executed by "a considerable majority of the family." Thereupon, the court held that though the deed was admissible as evidence, the custom as against the defendant must be proved *aliunde*.[1] In *Ramanathan Chetti* v. *Muru Gappa Chetti*[2] it was held that unbroken usage for a period of nineteen years is conclusive evidence of a family arrangement as to *palas* or turns of worship to which the Court was bound to give effect.

A village custom.

The immemorial custom of the village Kanari Rajapuram in Negapatam, was that on the expiration of every nine years the village lands should be redistributed among the co-owners. The Court held that this custom is perfectly good.[3]

Al aulad.

In a deed of gift of the nature known as *khairat bishanprit*, made to a Brahman by the proprietor of a Chota Nagpore Raj, it was provided that the grantee and his *al-aulad* were to possess and enjoy the property, but the deed contained no words importing a right of alienation. It was held that, although the words *al-aulad* etymologically include female as well as male descendants, yet according to a custom proved to have prevailed at the time of the grant and subsequently in that part of the country, the words must be interpreted to mean lineal male descendants only.[4]

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[1] *Haronath Mullick and others* v. *Nittanund Mullick* 10 B.L.R. (O.S.) 263 (1873).

[2] 10 C.W.N. 825 (P.C.) [1906].

[3] *Anandayyan* v. *Devarajayyan* 2 Mad. H.C.R. 17 (1864). See also *Ibid* p. 5, note (*a*). See also *Venkatasami Nayakkan* v. *Subba Rau* 2 Mad. H. C. R. 1 (1864).

[4] *Perkash Lal* v. *Rameshwar Nath Singh* 31 Cal. 561 (1904). See also 6. S D. Sel. Rep. 133 (1836) which was followed.

Custom of French India: change of domicile.

According to the custom of French India, the widow of a divided Hindu, who has no male decendants, takes all his property absolutely as if it were *stridhanam*. By her migrating to British territory and acquiring a British Indian domicile, the character of her estate is not changed. If she does not adopt the system of law prevalent among Hindus in British India, the customary law of French India will adhere to her, and the property inherited by her from her husband will be subject to the same customary law.[1]

We shall conclude this chapter by noting now two customs which are only of historical interest, indicative of the state of the country and community at the time when they prevailed.

Pugla and Puggee.

The tracing of the *pugla i.e.*, the 'trace' or footsteps, was a very useful measure in the days when the organization of Police to protect property of the subjects from the inroads of robbers and thieves was unknown. In a case, commonly known as the *puggee* case, the headman of a village claimed from the headman of a neighbouring village remuneration in consequence of thieves flying from the latter village into which the thieves were traced by the former. His claim was based on the custom of the country which was as follows:—When any robbery takes place and the robbers escape, the man who is robbed is at once to give information to the village *puggee i. e.*, the tracer of footsteps. The *puggee* traces the footsteps of the robbers in his village and traces them up to the boundary of another village. He then makes over the 'trace' to the headman of the latter. This headman is not regarded to have discharged his duty until he had traced the footsteps into another village. If no footsteps are traced within his vallage after certain distance he is liable to make good the loss sustained in the theft, for allowing thieves to escape through his village and not being able to catch them.[2]

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[1] *Milathi Anni* v. *Subbaraya Mudaliar* 24 Mad. 350 (1901).

[2] See *Ram Singh Guj Singh* v. *Ubhe Singh Guj Singh* 2 Borr. 388 (1822).

Toda garas huq was originally a toll or tax levied upon the village communities. As distinguished from the legally acquired and regularly descended *garas*, usually called *wanta*, it was in fact a sum paid to a powerful neighbour or turbulent inhabitant of the village as the price of forbearance, protection, or assistance. It was neither more nor less than a species of blackmail exacted by freebooters from the villagers. Regarding this *huq* a district Judge said: "These yearly payments were at first collected by the *garasias* direct from villages, and when necessary by force; after the commencement of British rule it became customary for them to obtain permission of some Government officer, and to give security that no violence should be resorted to before proceeding to levy the *huq*; and, lastly, they consented to forego their privilege of making the collections themselves, and receive the amount from the Treasury, and ever since 1811 they have received the payments from the Government Treasury." In *Umedsangji* v. *The Collector of Surat*, which was a suit to establish right against the Collector of Surat to receive annually and for ever a *toda garas huq* from a certain village, payable from the Government Treasury, the Court held that, whatever might be the right of the Government as to the collection *toda garas* from villagers, where it did collect *toda garas* it was bound to pay over the amount so collected to the original *garasia* or his representatives if the *huq* is a perpetual one.[1]

Toda garas huq.

[1] 7 Bom. H.C.R. A.C.J. 50 (1870).

CHAPTER XVIII.

PROOF OF CUSTOMS.

As customs, when pleaded, are mostly at variance with the general law, Hindu or Mahomedan, they should be strictly proved;[1] for, the general presumption is that law prevails and the allegation of custom is against such general presumption. Hence, whoever sets up any custom has to discharge the *onus* of proving it, with all its requisites, to the satisfaction of the Court in a most clear and unambiguous manner The Privy Council has in numerous instances laid down that inasmuch as "the legal title to recognition" of a special custom depends on its antiquity, certainty and uniformity, the Courts must be assured of these conditions by means of "clear and unambiguous evidence."[2] In cases of the aboriginal tribes, however, there is no general presumption that they are governed by the prevailing law. Consequently if they want to support their right to do anything, *e.g.*, to adopt a son, they must prove that by *custom* they have such a right.[3] As a custom to have the force of law must be shown to have existed from time immemorial, it cannot be established by a few instances or by instances of recent date.[4]

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[1] *Hurpurshad* v. *Sheo Dayal* 3 I.A. 285; *Beni Madhub Banerjee* v *Jai Krishna Mukerjee* 7 B.L.R. 152.

[2] *Rama Lakshmi Amal* v. *Sivanantha Perumul Sethurayar*, 14 Moore's I.A. 570; *Hurpurshad* v. *Sheo Dayal* 3 I.A. 285. See also *Chinnamal* v. *Varadarajula*, 15 Mad. 307.

[3] See *Fanindra Dev Raikat* v. *Rajeswar* 11 Cal 463; *Bhugrandas Tajmal* v. *Rajmal* alias *Hiralal Luchimandas*, 10 Bom. H.C R. 241.

[4] *Kakarla* v. *Venkata Papayya* 29 Mad. 24 (1905); see also *Chinnamal* v. *Varadarajula*, 15 Mad. 307 (1892).

Kind of evidence.

In proof of custom limiting or varying well-known rules of law, the kind of evidence that ought to be regarded as conclusive is the evidence showing that the right claimed by custom was more or less contested, and the contest abandoned by some one who, if the custom had not existed, would have been entitled; or showing that generally in the district the custom was followed to the exclusion of persons who, if it had not been for the custom, would presumably have enforced their right under the general law. Evidence which is as consistent with there being a custom as with there being no custom at all is not evidence of a custom modifying or varying the general law.[1]

The evidence should be such as to prove the uniformity and continuity of the usage, and the conviction of those following it, that they were acting in accordance with law and this conviction must be inferred from the evidence.[2] It must show that the alleged custom has the characteristic of a genuine custom *viz.*, that it is consciously accepted as having the force of law, and is not a mere practice more or less common.[3] The most cogent evidence of custom is not that which is afforded by the expression of opinion as to the existence but by enumeration of instances in which the alleged custom has been acted upon, and by the proof afforded by judicial or revenue records or private accounts and receipts that the custom has been enforced.[4] The acts required for the establishment of customary law ought to be plural, uniform and constant. They may be judicial decisions, but these are not indispensable for its establishment.[5] A general custom is not proved by the statements of two individuals or by giving evidence of

[1] *Ramanand* v. *Surgiani* 16 All. 221 (1894). See also *Varma Valia* v. *Ravi Burma Kunhy Kutty*, 4 I.A. 76 : 1 Mad. 235.

[2] *Gopalayyan* v. *Raghupatiayyan* 7 Mad. H.C.R. 250.

[3] *Mirabivi* v. *Vellayanma* 8 Mad. 464 (1885).

[4] *Lachman Rai* v. *Akbar Khan* 1 All. 440 (1887).

[5] *Turachand* v. *Rub Ram* 3 Mad. H.C.R. 50 (1866).

two instances when the alleged custom was observed.[1] Evidence of acts, acquiescence in those acts, their publicity, decision of courts, or even of punchayets upholding such acts, the statements of experienced and competent persons, of their belief that such acts were legal and valid will be admissible; but although admissible the evidence of this latter kind will be of little weight if unsupported by actual examples of the usage asserted.[2] It is not necessary to give documentary evidence in proof of a custom or a usage.[3] But it must be proved by clear and unambiguous evidence.[4] And we need not repeat that when a custom is proved to exist it supersedes the general law.[5]

Judicial decisions.

Though judicial decisions are not necessary for the establishment of a custom, yet they are certainly the most satisfactory evidence of it. Instances of an enforcement of a custom are good evidence but a final decree of a Court of justice based on the custom is conclusive. Decrees on suits in which one party alleged a certain custom and the other denied it, are admissible as evidence of custom in a subsequent suit. If they are not in suits between the same parties, they are not conclusive, but they are excellent evidence to show that the right was asserted at the place by other persons and was recognized by the lawfully constituted legal tribunals.[6]

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[1] *Prabhoo Das* v. *Sheonath* 2 Rev. Jud. and Pol. Jour. 148 (1864).

[2] *Gopalayyan* v. *Raghupatiayyan* 7 Mad. H.C.R. 250. *Vide* s. 18 Evidence Act.

[3] *Jeykishore* v. *Thakoordass* 3 Agra 75 (1868).

[4] *Ramlakshmi Ammal* v. *Sivananantha* 14 Moo. I.A. 570 (1872): 12 B.L.R. 396: 17 W.R. 553; *Neelkisto* v. *Beerchunder* 12 Moo. I.A. 523 (1869): 3 B.L.R. 13: 12 W.R. 21 (P. C.) *Sundaralingasami* v. *Ramasami* 26 I.A. 55 (1899): 22 Mad. 515; *Buktyar Shah* v. *Dhojomoni* 2 C. L. J. 20 (1905); *Baidyanand Singh* v. *Rudranand Singh* 5 S. D. Decis. 198 (1832); *Bishnath* v. *Ram Churn* 6 S. D. Decis. 20 (1850); *Ramchurn* v. *Bishoo Nath* 12 S.D. Decis. 399 (1856); *Koernarain* v. *Dhorinidhur Roy* 14 S.D. Decis. 1132 (1858); 7 Mad. 3 (1883); 29 Mad. 24 (1904).

[5] *Neelkisto* v. *Beerchunder* 12 Moo. I.A. 523 (1869).

[6] *Gurdayal* v. *Jhandi Mal* 10 All. 585 (1888); *Nalla Thambi* v. *Nalla Kumara* 7 Mad., H.C.R. 306 (1873); *Madhub* v. *Tomee Bewah*

Where a custom alleged to be followed by any particular class of people, is in dispute, judicial decisions in which such custom has been recognized as the custom of the class in question are good evidence of the existence of such custom.[1] But a letter of the Collector containing a summary of the settlements by zemindars for information of the Board of Revenue in a dispute as to the right of inheritance to a zemindari in the same district is not admissible as evidence.[2]

Village *Wajib-ul-urz.*

The *Wajib-ul-urz*[3] literally means a written representation or petition. It consists of village administration papers made in pursuance of Regulation VII. of 1822, regularly entered and kept in the office of the Collector, and authenticated by the signatures of the officers who made them.[4] These papers are admissible in evidence under section 35, of the Indian Evidence Act, in order to prove a family custom of inheritance; or under section 48, as the record of opinions as to the existence of such custom by persons likely to know of it. Such records are not invalidated in Oudh, because made and kept by the settlement officers subordinate to the Collector himself, as required by the Regulation.[5] A Full Bench of the Allahabad High Court has ruled that a *Wajib-ul-urz*, prepared and attested according to law, is *primâ facie* evidence of the custom stated therein but not conclusive. The presumption of the custom may be rebutted by any one disputing it.[6]

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7 W. R. 210 (1867); *Jiamtullah* v. *Pir Buksh* 15 Cal. 233 (1887).

[1] *Shimbhu Nath* v. *Gyan Chand* 16 All. 379 (1894). See also the cases cited in *Harnath Pershad* v. *Mandil Das* 27 Cal. 379, pp. 386, 389 (1899).

[2] *Ramalaksmi* v. *Sivanantha* 14 Moo. I.A. 570 (1872).

[3] There is another document similar to the *Wazib-ul-urz* known as the *Riwaj-i-am* which contains the customs of the tribes. *Vide* Tupper's Punj. Customary Law, Vol. I. p. 148.

[4] *Rani Lekraj Kuar* v. *Babu Mahpal Singh* 7 I.A. 62 : 5 Cal. 754.

[5] Ibid. See also *Musst. Lali* v. *Murlidhur* 10 C.W.N. 730 (P.C.): 3 C.L.J. 594.

[6] *Isri Singh* v. *Ganga* 2 All. 876; *Muhammad Hasan* 8 All. 434; *Ram Sarup* v. *Sital Prasad*, 26 All. 549. *Bhaoni* v. *Maharaj*

A *Wajib-u'l-urz* ought not to be entered on the record as a mere expression of the views of the proprietor of an estate; it should be entered as an official record of local custom.[1] An entry in a *Wajib-ul urz*, which a person has verified, cannot by reason of such verification be regarded as his will or as a document of testamentary character by him. A rule of succession laid down therein cannot bind his estate after his death.[2] A *Wajib-ul-urz* is always admissible in evidence being an official village record; but its weight may be very slight or may be considerable according to circumstances.[3]

Court's duty.

The party who asserts, or relies on a special custom, has on him the *onus* to prove the same by ample and satisfactory evidence No Court ought to find as established any custom unless it is perfectly satisfied with the evidence adduced in support of the alleged custom, which, it should be remembered, will have the effect, if established, of varying or superseding the general rules of law.[4] Before affirming the existence of customs, it is particularly incumbent on the Courts to try the existence of the custom regarding each case as a separate issue and to test the evidence. In case of parol evidence given generally as to the existence of a custom the Court should ascertain on what grounds the opinion of each witness is based.[5]

Singh, 3 All. 733; *Ramchand* v. *Zohur Ali* 1 Agra 134.

[1] *Uma Parshad* v *Gondharp Singh*, 14 I.A. 127. See Oudh Land Revenue Act (XVII. of 1876) ss 16 and 17 about settlement records. Also see Punjab Land Revenue Act XVII. of 1887. s. 31 for Records-of right.

[2] *Sahadra* v. *Gonesh Parshad*, 10 C.W.N. 249 (P.C.) See also *Musst. Lali* v. *Murlidhur*, 10 C.W.N. 730 (P.C.)

[3] *Muhammad Imam Ali* v. *Husain Khan*, 2 C.W.N. 737 (P.C.) (1898).

[4] *Lallah Mohabeer Prosad* v. *Musst. Kundun Koowar* Sevestre Part IV. p. 423 (1867). *Ramalinga* v. *Perianayagum* 1 I.A. 209 (1874); *Narayan Babaji* v. *Nana Manohar* 7 Bom. H.C.R. 153 (1870); *Chhatradhari* v. *Saraswati* 22 Cal. 156 (1894); *Desai Ramchhoddas* v. *Rawal Nathubhai* 21 Bom. 110 (1895).

[5] *Lachman Rai* v. *Akbar Khan* 1 All. 440 (1877)

Of family customs.

To become a *kulachar* or family custom, the usage in question must have been prevalent in the family during a long succession of ancestors.[1] It must have become a distinct tradition in the family—a tradition which would supply the place of ancient example of the application of the usage. To establish a *kulachar* one must at least show one of two things—either a clear, distinct, and positive tradition in the family that the *kulachar* exists, or a long series of instances of anomalous inheritance from which the *kulachar* may be inferred. Where a family usage is set up against the ordinary law of inheritance, it is necessary to show that the usage alleged is ancient, continuous and invariable and that fact must be proved by clear and positive proof.[2] The evidence must clearly show that the family custom has been submitted to as legally binding, and not as a mere arrangement by mutual consent for peace or convenience.[3]

Special family custom must be alleged in the pleadings, otherwise a Court will not be bound to call for evidence of such fact. It must be alleged and proved with distinctness and certainty.[4] In a suit by a Hindu widow for possession and declaration of title, it was held that the defendant could not be allowed to come in and urge for the first time in appeal that by a family custom or *kulachar* females were excluded from inheriting.[5]

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[1] *Sumrun Singh* v. *Khedun Singh* 2 Beng. Sel. Rep. 116 (147) [1874].

[2] *Heeranath Kooer* v. *Burm Narain* 17 W.R. 316 p. 326 (1872): 9 B.L.R. 294. *Ramchunder* v. *Bishonath* 12 S D. Decis. 399 (1856); *Koernarain* v. *Dharanidhur Roy* 14 S.D. Decis 1132 (1858). *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* 14 Moo I.A. 570 (1872).

[3] *Bhau Nanaji* v. *Sundra Bai* 11 Bom. H.C.R. 249 (1874).

[4] *Modee Kaikhoosarow* v. *Coverbhau* 6 Moo. I.A. 448; 4 W.R. 94 (P.C.) [1856]; *Serumah Umah* v. *Palathan Vital Marya* 15 W. R. 47 (P. C.) [1871].

[5] *Tekait Doorga Pershad Singh* v. *Musst. Doorga Koonwaree* 13 W.R. 10: 9 B.L.R. 306 *n* (1870). For *res judicata*, see *Tekait Doorga Pershad* v. *Tekaitni Doorga Koonwari* 3 C L.R. 31 (P.C.) [1873]: s.c. in H.C. 20 W.R. 154.

A family custom cannot be established by one instance.[1] Where in support of a family custom, only four instances, at most, were adduced and those of a comparatively modern date, the Court held that the custom was not proved.[2] The unbroken usage for a period of nineteen years is conclusive evidence of a family arrangement to which the Court is bound to give effect, if the arrangement is a proper arrangement and is one which the Court would have sanctioned if its authority had been invoked.[3]

In proving an ancient family usage, the statements of deceased members of the family are relevant facts and section 49, of the Evidence Act, is applicable to such cases.[4] When the Court has to form an opinion as to the usages of any family, the opinions of persons having special means of knowledge thereon are also relevant under that section. By section 60 of the same Act, if oral evidence refers to an opinion or to grounds on which such opinion is held, it must be the evidence of the person who holds that opinion on those grounds. It is admissible evidence for a living witness to state his opinion on the existence of a family custom and to state as the grounds of that opinion information derived from deceased persons and the weight of the evidence would depend on the position and character of the witness and of the persons on whose statements he has found his opinion. But it must be the expression of independent opinion based on hearsay and not mere repetition of hearsay.[5]

Where the members of a family, though affected to be Hindus, were not governed by Hindu law, but had retained, and were governed by family customs which, as regards some matters, were at variance with that law, the

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[1] *Sarabjit* v. *Indrajit* 27 All. 203 (1904).

[2] *Chandika Buksh* v. *Muna Kumar* 29 I.A. 70 (1901) : s.c. 24 All. 273 : s.c. 6 C.W.N. 425.

[3] *Ramanathan* v. *Murugoppa* 10 C.W.N 825 (P.C.) [1906].

[4] *Fanindra* v. *Rajeswar* 12 I.A. 72 (1885): 11 Cal 463.

[5] *Garuradhwaja* v. *Superundhwaja* 27 I.A. 238 (1900) : s.c. 23 All. 37 ; s.c. 5 C.W.N. 33.

onus probandi that the Hindu custom of succession by adoption had been introduced into the family lay on those who alleged the custom; whereas if the family had been subject to Hindu law the *onus* would have lain on those who alleged its exclusion.[1] The *onus* of proving the custom excluding the females lies on the party who alleges it.[2] Where a party alleges discontinuance of certain family custom, the *onus* is upon him to prove the fact of discontinuance.[3]

Of local customs.

It is irregular to rely upon any book for proving a local custom without calling the attention of the parties to it, and hearing them as to whether the procedure prescribed therein is an incident of the usage.[4] When a certain right is stated to be founded on a local custom and evidence as to such a right is offered, but no issue is raised as to the custom and the judgments of the lower Courts do not discuss the matter with reference to the custom alleged the High Court, if it thinks it necessary, will remand the case for a direct and distinct finding upon the matter.[5]

Section 18 of the Indian Easements Act[6] leaves at large the question of law how a local custom may be established. As such a local custom, when set up, excludes or limits the operation of the general rule of law that a propreitor or other person lawfully in the possession of land, and whose rights are not controlled or limited expressly or impliedly by statute law, by grant or by contract, has an exclusive right to the use or enjoyment of his land for all purposes not injurious to the rights of his neighbours, it is necessary that those setting up such a custom should be put to strict proof of the custom alleged. A local

[1] *Fanindra Deb Raikat* v. *Rajeswar Dass* 12 I.A. 72 (1885): 11 Cal. 463.

[2] *Ramnundun* v. *Janki Koer* 29 Cal. 828 (1902).

[3] *Sarabjit* v. *Indrajit* 27 All. 203 (1904).

[4] *Vallabha* v. *Madusudanam* 12 Mad. 495 (1889).

[5] *Kakarla Abbayya* v. *Venkata Papayya Rao* 29 Mad. 24 (1905); *Lachman Rai* v. *Akbar Khan* 1 All. 440 (1877).

[6] Act V of 1882.

custom to have the effect of excluding or limiting the operation of the general rules of law must be reasonable and certain. A local custom as a general rule is proved by good evidence of a usage which has obtained the force of law within the particular district, city, *mohalla* or village, or at the particular place, in respect of the persons and things which it concerns. To establish a customary right to do acts which would otherwise be acts of trespass on the property of another, the enjoyment must have been as of right, and neither by violence, nor by stealth, nor by leave asked from time to time. To apply the English common law principle that a custom is not proved if it is shown not to have been immemorial would be to destroy many customary rights of modern growth in villages and other places. The statute law of India does not prescribe any period of enjoyment during which, in order to establish a local custom, it must be proved that a right claimed to have been enjoyed as by local custom was enjoyed.[1]

Of adoption.

The burden of proving a special custom, contrary to the general rules of Hindu law, amongst any member of the three regenerate classes, prevalent either in their caste or in a particular locality, lies upon him who avers the existence of that custom.[2] The Jains are Hindu dissenters and adoption amongst them in the Presidency of Bombay, is regulated by the ordinary Hindu law. And when any custom to the contrary is alleged, the burden of proving it is on the party averring the existing of custom.[3]

For the purpose of proving that by custom, and in the opinion of the Daivadnya caste, an adoption by an untonsured widow was invalid the following evidence was not allowed :—*viz.*, that there had been many instances of adoption in the caste, and in every such case the adopting mother had undergone tonsure and that there had been no

[1] *Kuar Sen* v. *Mamman* 17 All. 87 (1895).

[2] *Gopal Narhar* v. *Hanmant Gonesh* 3 Bom. 273 (1879).

[3] *Bhagvandas* v. *Rajmal* 10 Bom. H.C.R. 241 (1873) ; *Sheo Singh* v. *Dakho* 5 I.A. 87 (1878); S.C. 1 All. 688.

instance the other way; that the caste was divided in opinion as to the validity of the adoption but that at a meeting of the caste it was declared by a large majority that the adoption was invalid. The reason for disallowing the evidence was that it would merely prove what the Court, in the absence of evidence to the contrary, would assume to be the case. That is to say, the widows of the Daivadnya caste usually and invariably followed Hindu law which ordains that widows shall shave their heads, and the opinion of the caste people, even if expressed by a majority at a caste meeting, ought not to affect the judgment of the Court, as it is not binding upon it.[1] Section 32 of the Evidence Act is not applicable to a case where the evidence is required to prove a fact in issue and not merely a relevant fact. Thus a statement signed by several witnesses to the effect that a widow cannot adopt, according to the custom of her caste, without the express authority of her husband, is not admissible to prove such a custom under section 32 (4) of the Evidence Act.[2] A caste custom prohibiting widows from adopting, unless established by very clear proof that the conscience of the members of the caste had come to regard it as forbidden, will not be given effect to by the civil Court.[3]

Of impartibility.

The custom of impartibility must be proved in each case by the party alleging it.[4] In order to control the operation of the ordinary Hindu law of succession, the custom of impartibility, where alleged, must be proved strictly. Proof of the mere fact that an estate has not been partitioned for six or seven generations is not sufficient to render it impartible, and, hence, that fact alone does not deprive the members of the family to which it

[1] *Ravji Vinayakrav* v. *Lakshmibai* 11. Bom. 381 (1887).

[2] *Vandravan* v. *Manilal* 15 Bom. 565 (1890).

[3] Ibid.

[4] *Zemindar of Merangi* v. *Satrucharla* 18 I.A. 45 (1890); *Ghirdharee* v. *Koolahul* 2 Moo. I. A. 344 (1840); 6 W. R. 1 (P.C.).

jointly belongs of their right to partition.[1] The fact of the formation of several estates by the partition of one entire estate implies such a connection between the different estates, that the evidence of a custom in one of them would be admissible in support of a similar custom in the others.[2] Where a zemindari is granted by a *sunnad*, the *onus* is on the zemindar to prove that his zemindari was impartible.[3] *Deshghat vatan* or property held as appertaining to the office of *desai* is not to be assumed *primâ facie* to be impartible. The burden of proving impartibility lies upon the *desai*, and on his failing to prove a special tenure, or a family or district or local custom to that effect, the ordinary law of succession applies.[4]

The omission of words of inheritance in a *sunnad*, dated in 1743, granted by the then ruling power, which confirmed a previous grant, not in evidence, of the land being held in *ghatwali*, is not sufficient proof, *per se*, that such grant was not hereditary, when evidence of long and uninterrupted usage shows that the lands have descended from father to son as *ghatwali* for more than a hundred years. Before the British rule in India it was customary where the tenure was in fact hereditary and passed as hereditary from father to son, to take out a new *sunnad* from the ruling power on each descent.[5]

Of primogeniture.

The custom of primogeniture must be proved by those who allege its existence.[6] The question as to whether an estate is subject to the ordinary Hindu law of succession or descends according to the rule of primogeniture must be decided in each case according to the evidence given in

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[1] *Durryao Singh* v. *Dari Singh* 13 B.L.R. 165 (1873).

[2] *Rup Singh* v. *Rani Baisni* 11 I. A. 149 (1884) : s.c. 7 All 1.

[3] *Zemindar of Merangi* v. *Sri Rajah Satrucharla Ramabhodra Razu* 18 I.A. 45 (1891).

[4] *Adrishappha* v. *Gurushidappa* 7 I.A. 162 (1880) : s.c. 4 Bom. 494 : s.c. 7 C.L.R. 1.

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

[6] *Muhammad Ismail* v. *Fidayat-un-nissa* 3 All. 723 p. 729 (1881) ; *Goruradhwaja* v. *Superundhwaja* 27 I.A. 238 (1900) : s.c. 23 All. 37 : s. c. 5 C.W. N. 33.

it.[1] The rule of primogeniture has been held to prevail where the estate descended entire to the exclusion of other sons for eight[2] or fourteen[3] generations, or for a period of eighty years.[4]

Where the custom of primogeniture is set up in two ways *viz.* (i) as the custom of the district; (ii) as the custom of the family; and there was nothing to show any local custom except a Collector's letter with respect to a custom extending to all the zemindars throughout the district, while the Court below said that it was perfectly notorious that no such custom was in existence within that district; and of the family custom there was no sufficient allegation: the Privy Council held that the custom of primogeniture, as the local or family custom, had not been proved.[5]

The custom of lineal primogeniture may be proved by—

(i) Oral evidence showing that it is well understood in the family and in families belonging to the same group that no descendant of a younger branch can take until all the elder branches are exhausted, though no witness is able to point out any actual instance in which the rule has been followed or departed from.

(ii) Decrees relating to disputes in families belonging to the same group, in which it was decided that the rule of succession was lineal primogeniture, which although not binding on the parties to the suit, show the prevalence of the custom among families having a common origin and settled in the same part of the country.

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[1] *Yarlagadda Mallikarjuna* v. *Yarlagadda Durga* 17 I. A. 134 (1890). *Zemindar of Merangi* v. *Satrucharla* 18 I. A. 45 (1891); *Jatnath* v. *Lokenath* 19 W.R. 239 (1873).

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

[3] *Gunesh Dutt* v. *Moheshur Singh* 6 Moo I.A. 164 (1885).

[4] *Gururadhwaja* v. *Superundhwaja* 27 I.A. 238 (1900): s.c. 23 All. 37.

[5] *Umrit Nath Chowdhry* v. *Gauri Nath Chowdhry* 13 Moo. I.A. 542 (1870): s. c. 6 B.L.R. 232 : 15 W.R. 10 (P C.)

(iii) Evidence of precedence conferred, or marked by the titles of honour given to the sons of the reigning Rajah in order of seniority, a precedence which would naturally be attached to the lines of descent traced from them.[1]

When all the lines of evidence in a case of primogeniture converge upon the same point and perhaps no one of them would, if standing alone, be conclusive, but, taken as a whole, they are conclusive, the converging evidence is regarded as sufficient proof of the alleged custom.[2]

Of religious endowments.

The constitution and rules of religious brotherhoods attached to Hindu temples are by no means uniform in their character, and the important principle to be observed by the Courts is to ascertain, if that be possible, the special law and usages governing the particular community whose affairs became the subject of litigation and to be guided by them.[4] The only law as to the *mohunts* and their office, functions, and duties, is to be found in custom and practice, which are to be proved by testimony.[4] A person claiming a right to succeed as *mohunt* has to establish that right by satisfactory evidence. He cannot derive any advantage from the weakness of his opponents title.[5] Where from the absence of direct evidence of the nature of a Hindu religious foundation, and the rights and duties and powers of the trustees, it becomes necessary to refer to usage, the custom to be proved must be one which regulates the particular institution.[6] Any one claiming a customary right to grant confirmation of the election of a *mohunt* must prove the custom. An acknowledgment,

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[1] *Mohesh Chunder Dhal* v. *Satrughan Dhal* 29 I.A. 62 (1902): 29 Cal. 343.

[2] *Nitr Pal Singh* v. *Jai Pal Singh* 23 I.A. 147 (1846): 19 All. 1.

[4] *Ramalinga Setupati* v. *Perianayagum Pillai* 1 I.A. 209 (1874).

[5] *Greedharee Doss* v. *Nundo Kishore Dass* 11 Moo. I.A. 405 (1867).

[6] *Basdeo* v. *Gharib Das* 13 All. 256 (1890).

[10] *Rajah Varmah Valia* v. *Ravi Varma Kunbi Kutty* 4 I. A. 76. (1876) s.c. 1 Mad. 235.

taken in troubled times from the guardian of an infant *mohunt*, of a zemindar's customary right to control and remove the *mohunt*, is entitled to little, if any, weight as evidence of the custom.[1] If the custom set up is one to sanction not merely the transfer of a *mohuntship*, but the sale of a trusteeship, for the pecuniary advantage of the trustee such an assignment cannot be validated by any proof of custom.[2]

Of inheritance : Jains.

Where ancestral property has apparently descended in the ordinary way according to Hindu law first to the son and thence to the mother, it lies on those who aver that it is confined to the direct descendants of the original donee, to prove their case and show by some custom that that was the proper construction of the grant.[3] Although ordinary Hindu law, in the absence of special customs, has usually been applied to persons of the Jain sect in Bombay, yet the Jains possess the privilege of being governed by their own peculiar laws and customs when the same are by sufficient evidence capable of being ascertained and defined and are not open to objection on grounds of public policy or otherwise.[4] The customs of the Jains where they are relied upon must be proved by evidence, as other special customs and usages varying the general law should be proved. In the absence of satisfactory evidence, the ordinary law must prevail. The mere fact that a person is a Jain is not enough to establish the conclusion that the ordinary law did not apply to him or her.[5] Judicial decisions recognizing the existence of a disputed custom amongst the Jains of one place are very relevant as evidence of the existence of

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[1] *Ramalinga Setupati* v. *Perianayagum Pillai* 1 I. A. 209 (1874).

[2] *Rajah Vurmah Valia* v. *Ravi Vurmah Kunhy Kutty* 4 I.A. 76 (1876): 1 Mad. 235.

[3] *Mohendra Singh* v. *Jokha Singh* 19 W.R. 211 (1873).

[4] *Sheo Singh* v. *Dakho* 5 I. A. 87 (1878) s.c. 1 All. 688.

[5] *Chotay Lall* v. *Chunnoo Lall* 6 I.A. 15 (1878); s.c. 4 Cal. 744: 3 C.L.R. 465 ; *Sheo Singh* v. *Dakho* 5 I. A. 87 (1878) ; *Harnabh Pershad* v. *Mandil Dass* 27 Cal. 379 (1899).

the same custom amongst the Jains of another place, unless it is shown that the customs are different, oral evidence of the same kind is equally admissible.[1]

Of marriages.

The family custom as to inter-marriage, being matter of family history, may be proved by declarations made by the members of the family.[2] Under section 48 of the Indian Evidence Act, opinion of persons who would be likely to know the existence of any custom, subject of inquiry, is relevant and admissible.[3]

Of maintenance grants.

A grant of maintenance to a junior member of a joint Hindu family is *primâ facie* for the life of the grantee. Therefore, where a family or territorial custom at variance with the general characteristic of such maintenance grants is alleged, that custom must be established by clear and unambiguous evidence.[4]

Of Mahomedan customs.

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.[5] Where a special custom of the Khoja community at variance with the rules of Hindu law of inheritance is alleged, the burden of proving the alleged custom rests upon the party alleging it.[6] Merely opinion of the leading members of the Khoja community will not prove a custom of inheritance among the Khoja Mahomedans at variance with the rules of Hindu law; instances must be cited in which the alleged custom has been observed and followed.[7]

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[1] *Shimbhu Nath* v. *Gayan Chand* 16 All. 379 (1894.)

[2] *Nagendra Narain* v. *Raghoo Nath Narain* W. R. (1864) 20.

[3] *Dalglish* v. *Guzuffer Hossein* 23 Cal. 427: 3 C.W.N. 21 (1896).

[4] *Tituram* v. *Cohen* 1 C. L J. 517 (1901).

[5] *Bai Baiji* v. *Bai Santok* 20 Bom. 53 (1894).

[6] *Rahimat Bai* v. *Hirbai* 3 Bom. 34 (1877).

[7] Ibid.

Of tenancy customs.

The finding of a Court on the existence of the usage under which the right of occupancy is transferable, should not be mainly based on irrelevant matters. Section 13 of the Evidence Act shows the character of the evidence by which a right or custom may be proved.[1] In deciding on the evidence of a custom or usage under which a *raiyat* is entitled to transfer an occupancy holding, regard should be had to section 48 of the Indian Evidence Act. A judgment of the High Court as to the transferability of similar tenures in an adjoining village of the same pergunnah is admissible evidence of such usage under section 42 of the Evidence Act.[2] In a certain case the lower appellate Court in deciding the question whether an occupancy holding was transferable or not found as follows: "There is abundant evidence on the record to show that such lands are actually sold in the locality and the *kobalas* filed in this case support the fact." The High Court held that this did not amount to a finding of local usage[3]. In order to establish 'usage' it is not necessary to prove its existence for any length of time. The statements of persons in a position to know of the existence of a custom or usage in the locality are admissible as evidence under section 48 of the Indian Evidence Act.[4]

The words 'established usage' in section 53 of the Bengal Tenancy Act of 1885, do not refer to a practice previously prevailing between the landlord and his tenant, but to the established usage of the pergunnah in which the holding is situate.[5]

In an inquiry as to whether tenures of a certain class are transferable according to local customs, it is sufficient if there be credible evidence of the existence and antiquity

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[1] *Palakdhari* v. *Manners* 23 Cal. 179 p. 184 (1895).

[2] *Dalgleish* v. *Guzaffer Hossein* 23 Cal. 427 (1896); *Sariatullah* v. *Ban Nath* 26 Cal. 184 (1898).

[3] *Dino Nath* v. *Nobin* 6 C.W.N. 181 (1900).

[4] *Seriatullah* v. *Ban Nath* 26 Cal. 184 (1898).

[5] *Hira Lal* v. *Mathura* 15 Cal. 714 (1888).

of the custom, and none to the contrary. There is no necessity for the witnesses to fix any particular time from which such tenures became transferable.[1] In order to make a right of *raiyati jumma*, which is no higher than a right of occupancy, transferable, it must be shown that it is so transferable according to the custom of that part of the country in which the tenure is situated.[2] In a suit for ejectment the burden is on the tenant to prove that the tenure is permanent. In Bengal the tenant is not bound to prove a special local custom to make out that the tenure was permanent.[3]

Of mercantile usages.

To establish a mercantile usage, it is not necessary that the evidence of instances in support of it should be marked by *antiquity*, because the usage may be still in course of growth. It will be enough if from the evidence the usage appears to be well-known and acquiesced in.[4] Sometimes, if there be a doubt about the custom, it may be fit and proper to take the opinion of merchants thereupon. But that is only where the law remains doubtful. But even there the custom must be proved by facts, not by opinion only.[5] "The established usage of dealing in the mercantile world should be held in high respect; the very existence of such usage shows that in practice it has been found useful and beneficial; the presumption is in its favour and no departure from it is to be inferred from doubtful circumstances and especially not from circumstances which in the opinion of mercantile men generally would not be conceived to produce any such consequences."[6] In *Kirchner* v. *Venus*[7] the Privy Council observed that when

[1] *Joy Kishen* v. *Doorga Narain* 11 W. R. 348 (1869).

[2] *Unnopoorna* v. *Ooma Churn* 18 W.R. 55 (1872).

[3] *Nilratan* v. *Ismail Khan* 8 C.W.N. 895 (1904).

[4] *Juggomohun Ghose* v. *Manick Chand* 7 Moo. I. A. 263 at p. 282 (1859) : S. C. 4 W. R. (P.C.) 8, See also *Kanji* v. *Bhugvandas* 7 Bom. L. R. 57 (1904).

[5] *Cunningham* v. *Fonblanque* 6 C. and P. 44 (1833); *Lewis* v. *Marshall* 7 M. and G. 729 (1844).

[6] *Cowie* v. *Remfry* 3 Moo. I.A. 448, 465 (1846).

[7] 12 Moo. P. C. 361 (1859).

evidence of the usage of a particular place is admitted to add or in any manner affect the construction of a written contract it is admitted on the ground that the parties who made the contract are both cognizant of the usage and must be presumed to have made their agreement with reference to it, and no such presumption can arise when one of the parties is ignorant of the usage.

Evidence of usage has been admitted in cases of contracts relating to transactions of commerce, trade, farming or other business—for the purpose of defining what would otherwise be indefinite, or to import a peculiar term, or to explain what was obscure, or to ascertain what was equivocal, or to annex particulars and incidents which, although not mentioned in the contracts, were connected with them, or with the relations growing out of them; and the evidence in such cases is admitted, with the view of giving effect, as far as can be done, to the presumed intention of the parties.[1]

The question whether evidence of custom which alters the meaning of a written contract can be given to contradict the plain meaning of certain words of a written contract was raised in the case of *Heilgers & Co.* v. *Jadub Lall Shaw*,[2] but it was not necessary to decide the point as there was nothing in that case amounting to evidence of custom to show that a different meaning should be put on the words from the natural one. In *Morris* v. *Panchananda*,[3] however, it was held that oral evidence of a custom to vary a written contract was not admissible. A custom cannot affect the express terms of a written contract.[4] The Sudder Dewany Adawlut of Bengal laid down that in the interpretation of contracts the law and custom of the place of the contract must govern in all cases in

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[1] Phillipps and Arnold on the Law of Evidence Vol. II 415, 10 Edn. cited by Lord Campbell in *Humfrey* v. *Dale* 7 E. and B. 273 (1857) : s. c. 27 L. J. Q. B. 390 on appeal.

[2] 16 Cal. 417 (1889).

[3] 5 Mad. H.C.R. 135 (1870).

[4] *Indur Chandra* v. *Lachmi* 7 B. L. R. 682 (1871). *Volkart Bros.* v. *Vettivelu* 11 Mad. 459 (1888).

which the language is not directly expressive of the actual intention of the parties.[1] Under section 92, proviso (5) of the Indian Evidence Act, evidence of alleged custom or usage is not admissible to explain or vary the natural and ordinary meaning of the words in the contracts.[2] The words "usage of trade" are to be understood as referring to a particular usage to be established by evidence and perfectly distinct from that general custom of merchants, which is the universal established law of the land, which is to be collected from decisions, legal principles and analogies, and not from evidence *in pois*.[3] A custom of usage of trade must in all respects be consistent with law[4] and it should not be repugnant to, or inconsistent with, the express terms of the contract made between the parties.[5] Where evidence of custom of trade is offered not to vary but simply to explain the terms of the contract, it is admissible on the principle on which evidence of usage of particular trade is admitted.[6] Where the evidence of custom contradicts the term of a written document, it is inadmissible.[7] It should be noted that the construction of a contract, unless there be something peculiar to the words by the reason of the custom of the trade to which the contract relates is for the Court *i.e.*, as distinct from the jury.[8]

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[1] *Ramneedhee Lahoree* v. *Gopee Kishen Gosain* 13 S. D. Decis. Part 1. 1132 (1855).

[2] *Smith* v. *Ludha Ghella* 17 Bom. 129 (1892); *Alexander* v. *Davis* 2 Times L. R. 142 (1885); *Motion* v. *Michaud* 8 Times L R 253 (1892); *Joyuson* v. *Hurt* 10 C.W.N. c.c xxvi. (1905).

[3] 1 Smith's L. C. (9 Edn.) 581.

[4] Indian Contract Act s. 1. *Meyer* v. *Dresser* 16 C.B N.S. 646 p. 660 (1864).

Volkart Bros. v. *Vittivelu* 11 Mad. 461 (1888); *Smith* v. *Ludha* 17 Bom. 129 (1892).

[6] *Humfrey* v. *Dale* 7 E. and B. 266 (1857); *Fleet* v. *Mourton* L. R. 7 Q B. 126 (1871).

[7] *Pike* v. *Ongley* 18 Q. B. D. 708 (1887); *Barrow* v. *Dyster* 13 Q.B.D. 635 (1884); *Smith* v. *Ludha Ghella* 17 Bom. 129 (1892); *Volkart* v. *Vettivelu* 11 Mad. 459 (1888).

[8] *Bowes* v. *Shand* 2 Aps Cas. 455 (1877); *Smith* v. *Ludha Ghella* 17 Bom. 129 (1892).

GENERAL INDEX.