A TREATISE

ON

HINDU LAW AND USAGE.

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CHAPTER III.

THE SOURCES OF HINDU LAW.

Custom.

§ 42. If I am right in supposing that the great body of existing law consists of ancient usages, more or less modified by Aryan or Brahmanical influence, it would follow that the mere fact that a custom was not in accordance with written law, that is, with the Brahmanical code, would be no reason whatever why it should not be binding upon those by whom it was shown to be observed. This is admitted in the strongest terms by the Brahmanical writers themselves. Manu says that "immemorial usage is transcendant law," and that "holy sages, well knowing that law is grounded on immemorial custom, embraced, as the root of all piety, good usages long established" (*a*). And he lays it down that "a king who knows the revealed law must enquire 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" (*b*): to which Kulluka Bhatta adds, as his gloss, "If they (that is, the laws) be not repugnant to the law of God," by which no doubt he means the text of the Vedas as interpreted by the Brahmans. But that Manu contemplated no such restriction is evident by what follows a little after the above passage. "What has been practised by good men and by virtuous Brahmans, if it be not inconsistent with the legal customs of provinces or districts, of classes or families, let him establish" (*c*). So Yajnavalkya says (*d*): "Of a newly-subjugated territory, the monarch shall preserve the social and religious usages, also the judicial system, and the state of classes, as they already obtained." And the Mitakshara

Custom binding.

(*a*) Manu, i., § 108, 110.

(*b*) Manu, viii., § 41. See, too, Vrihaspati, cited Vyavahara Mayukha, i., 1, § 13, and Vasishtha and other authorities, cited M. Müller, A. S. Lit., 50.

(*c*) Manu, viii., § 46. (*d*) Yajnavalkya, i., § 342.

quotes texts to the effect that even practices expressly inculcated by the sacred ordinances may become obsolete, and should be abandoned if opposed to public opinion (*e*).

Recognized by modern law

§ 43. The fullest effect is given to custom both by our Courts and by legislation. The Judicial Committee in the Ramnad case said: "Under the Hindu system of law, clear proof of usage will outweigh the written text of the law" (*f*). And all the recent Acts which provide for the administration of the law dictate a similar reference to usage, unless it is contrary to justice, equity or good conscience, or has been actually declared to be void (*g*).

Records of local customs.

§ 44. It is much to be regretted that so little has been done in the way of collecting authentic records of local customs. The belief that Brahmanism was the law of India was so much fostered by the pundits and judges, that it came to be admitted conventionally, even by those who knew better. The revenue authorities, who were in daily intercourse with the people, were aware that many rules which were held sacred in the Court, had never been heard of in the cottage. But their local knowledge appears rarely to have been made accessible to, or valued by, the judicial department. I have already mentioned, as an exception, Mr. Steele's collection of customs in force in the Deccan. In the Punjab and in Oudh most valuable records of village and tribal customs, relating to the succession to, and disposition of, land have been collected under the authority of the settlement officers, and these have been brought into relation with the judicial system by an enactment that the entries contained in them should be presumed to be true (*h*). Many most

(*e*) Mitakshara, i., 3, § 4. See V. N. Mandlik, Introduction, 43, 70. Raghunandana, i., 33.

(*f*) *Collector of Madura* v. *Mootoo Ramalinga*, 12 M. I. A., 436; S. C., 10 Suth. (P. C.), 17; S. C., 1 B. L. R. (P. C.), 1.

(*g*) See, as to Bombay, Bom. Reg. IV of 1827, s. 26; Act II of 1864, s. 15. As to Burmah, Act XVII of 1875, s. 5. Central Provinces, Act XX of 1875, s. 5. Madras, Act III of 1873, s. 16. Oudh, Act XVIII of 1876, s. 3. Punjab, Act XII of 1878, s. 1. See *Sundar* v. *Khuman Singh*, 1. All., 613.

(*h*) These records are known by the terms, Wajib-ul-arz (a written representation or petition) and Riwazi-i-am (common practice or custom). See Punjab

interesting peculiarities of Punjab law will be found in a book to which I shall frequently refer, which gives the substance of these customs, and of the decisions of the Chief Court of Lahore upon them, and in three volumes issued under the authority of the Punjab Government on the same subject (*i*). The special interest of these customs arises from the fact, already noticed (*k*), that Brahmanism seems never to have succeeded in the Punjab. Accordingly, when we find a particular usage common to the Punjab and to Sanskrit law, we may infer that there is nothing necessarily Brahmanical in its origin (*l*). Another work of the greatest interest, which I believe no previous writer has ever noticed, is the Thesawaleme, or description of the Customs of the Tamil inhabitants of Jaffna, on the Island of Ceylon. The collection was made in 1707, under the orders of the Dutch Government, and was then submitted to, and approved by, twelve Moodelliars, or leading natives and finally promulgated as an authoritative exposition of their usages (*m*). Now,

Thesawaleme.

Customs, 19; Act XXXIII of 1871, s. 61; XVII of 1876, s. 17. *Lekraj Kuar* v. *Mahpal Singh*, 7 I. A., 63; S. C., 5 Cal., 744; *Harbaj* v. *Gumani*, 2 All., 493; *Isri Singh* v. *Ganga*, *ib.*, 876; *Thakur Nitrpal Singh* v. *Jai Singh*, 23 I. A., 147; S. C., 19 All., 1; *Muhammad Imam* v. *Sardar Husain*, 25 I. A., 161; S. C., 26 Cal., 81. In the case of *Uman Parshad* v. *Gandharp Singh*, 14 I. A., 127; S. C., 15 Cal., 20, the Judicial Committee called attention to a practice which had grown up in Oudh of allowing the proprietor to enter his own views upon the Wajib-ul-arz, whereas it ought to be an official record of customs, arrived at by the inquiries of an impartial officer. See, too, *per curiam*, 12 All., 335, 15 All., p. 152. A Wajib-ul-arz, which has long stood on record, and been unquestioned by the parties who would be affected by it, is *primâ facie* evidence of custom, though not signed by any landholder in the village. *Rustam Ali* v. *Abbasi*, 13 All., 407.

(*i*) Notes on Customary Law as administered in the Courts of the Punjab, by Charles Boulnois, Esq., Judge of the Chief Court, and W. H. Rattigan, Esq., Lahore, 1876. I cite it shortly as Punjab Customs. Punjab Customary Law. Edited by C. L. Tupper, C.S., Calcutta, 1881.

(*k*) *Ante* § 8.

(*l*) Mr. C. L. Tupper says of the Punjab, "The Brahmans are not in the Punjab the depositories of Customary law. To ascertain it, we must go to the Tribal Council, if there be one, or to the elders of the tribe." It is not, I think, the custom which has modified the law. It is the Brahmanical law occasionally, and the Muhammedan law more often, which has modified the custom." Punjab Customary Law, II., 82, 86. Mr. Baden-Powell says "whatever early Aryan clans may have settled in the Punjab, they were non-Brahmanical." "In the Punjab clans there are no ancient Brahmanical monuments. The Hindu law of the books is unknown, and to this day local customs of various kinds, sometimes quite opposed to the later Hindu ideals, are in vogue." The Indian Village Community, 1896, 102.

(*m*) The edition which I possess was published in 1862, with the decisions of the English Court, by Mr. H. F. Mutukistna, who gave it to me.

we know that from the earliest time there has been a constant stream of emigration of Tamulians into Ceylon, formerly for conquest, and latterly for purposes of commerce. We also know that the influence of Brahmans, or even of Aryans, among the Dravidian races of the South has been of the very slightest, at all events until the English officials introduced their Brahman advisers *(n)*. The customs recorded in the Thesawaleme may, therefore, be taken as very strong evidence of the usages of the Tamil inhabitants of the South of India two or three centuries ago, at a time when it is certain that those usages could not be traced to the Sanskrit writers.

Pondicherry.

The suggestions derivable from the Thesawaleme may now be supplemented from information drawn from the records of the Pondicherry Courts. The early tribunals of this settlement, being gifted with a fortunate ignorance of Hindu law, had been in the habit of referring questions depending upon that law for the decision of the leaders of the caste, or of other persons supposed to possess a special knowledge of the laws or usages bearing on the case. This practice was formally recognised by a regulation of 1769, and in 1827 the Government established a Consultative Committee of Indian Jurisprudence to assist the administration and the tribunals in questions involving a knowledge of the Indian laws and usages. This committee consisted of nine Natives, selected with reference to their integrity and their knowledge of the laws, usages and customs, with a special preference for those whose fortunes guaranteed their independence. A great deal of most interesting information derived from these sources has lately been made available by the labours of Leon Sorg, Juge President du Tribunal de 1re Instance de Pondicherry *(o)*. Undoubted evidence of the condition of Hindu law at a very much earlier period may also be found in the usages of the Nambudri Brahmans on the West Coast in

Nambudri Brahmans.

(*n*) See *ante*, § 6.

(o) Introduction a l'Etude du Droit Hindou, Traité Theorique et Pratique du Droit Hindou, 1897, Avis du Comité Consultatif de Jurisprudence Indienne, 1896.

the Madras Presidency. The tradition is that they were introduced into Malabar as an organised community by king Parasurama, and the evidence tends to show that they must have been settled there about 1200 or 1500 years ago. As they took their place among a community, which was governed by a totally different system, it may safely be assumed that the form of Hindu law, which prevails among the Nambudries of the present day, is that which was universal among the Brahmans of Eastern India at the time of their emigration. Its archaic character exactly accords with such a conclusion *(p)*. Many very interesting customs still existing in Southern India will be found in the Madura Manual by Mr. Nelson ; the Malabar Manual by Mr. Logan ; the North Arcot Manual by Mr. Cox ; the South Canara Manual by Mr. Sturrock ; the Manual of the Administration of the Madras Presidency (1885) by Dr. Maclean, and in the Madras Census Report of 1871 by Dr. Cornish. The various reports contained in the census of 1891 also supply much valuable information of which I have made use in this edition. These show what rich materials are available, if they were only sought for.

Various applications of customary law.

§ 45. Questions of usage arise in four different ways in India : *First*, as regards races to whom the so-called Hindu law has never been applied ; for instance, the aboriginal Hill tribes, and those who follow the *Marumakatayem* law of Malabar, or the *Alya Santana* law of Canara. *Secondly*, as regards those who profess to follow the Hindu law generally ; but who do not admit its theological developments. *Thirdly*, as regards races who profess submission to it as a whole ; and, *fourthly*, as regards persons formerly bound by Hindu Law, but to whom it has become inapplicable.

Cases where religious principles are ignored.

§ 46. The first of the above cases, of course, does not come within the scope of this work at all. The law which

(p) *Vasudevan* v. *Secretary of State*, 11 Mad., 160, 181.

prevails upon the Malabar coast is, however, both so interesting in itself, and is so mixed up with, and bears so strongly upon Hindu Law proper, that I have discussed it at greater length in the present than in former editions. The distinction between the second and third classes is most important, as the deceptive similarity between the two is likely to lead to erroneous conclusions in cases where they really differ. For instance, in an old case in Calcutta, where a question of heirship to a Sikh was concerned, this question again turning upon the validity of a Sikh marriage, the Court laid it down generally that "the Sikhs, being a sect of Hindus, must be governed by Hindu Law" *(q)*. Numerous cases in the Punjab show that the law of the Sikhs differs materially from the Hindu law, in the very points, such as adoption and the like, in which the difference of religion might be expected to cause a difference of usage. Similar differences are found among the Jats (*r*), and even among the orthodox Hindus of the extreme north-west of India (*s*). So as regards the Jains, it is now well recognised that, though of Hindu origin, and generally adhering to ordinary Hindu law, that is the law of the three superior castes (*t*), they recognize no divine authority in the Vedas, and do not practise the *Shradhs*, or ceremony for the dead, which is the religious element in the Sanskrit law. Consequently, that the principles which arise out of this element do not bind them, and therefore, that their usages in many respects are completely different (*u*). I strongly suspect that

(*q*) *Juggomohun* v. *Saumcoomar*, 2 M. Dig., 43, *followed Bhagwankuar* v. *Jogendra Chandra*, 30 I. A., 249; S. C., 31 Cal., 11.

(*r*) The Jats (Sanskrit, Yadava) are the descendants of an aboriginal race. Manning's Ancient India, i., 66.

(*s*) See Punjab customs, *passim*. As to the effect of the introduction of the Punjab Code as creating a *lex loci*, see *Mulkah Do* v. *Mirza Jchan*, 10 M. I. A., 252; S. C., 2 Suth. (P. C.), 55.

(*t*) *Sheo Singh Rai* v. *Mt. Dakho*, 6 N.-W. P., 382; affd. 5 I. A., 87; S. C., 1 All., 688; *Ambabai* v. *Govind*, 23 Bom., 257.

(*u*) *Bhagvandas* v. *Rajmal*, 10 Bom. H. C., 241; see cases where such difference of usage was held not to be made out, *Lalla Mohabeer* v. *Mt. Kundun*, 8 Suth., 116; *affd. Sub nomine Doorga Prashad* v. *Mt. Kundun*, II. A., 55; S. C., 21 Suth., 214; S. C., 13 B. L. R., 235, *Bachebi* v. *Makhan*, 3 All., 55, *Mari Devamma* v. *Jinamma*, 10 Mysore, 384. The religion of the Jains is a compound of Buddhism and Brahmanism. Elphinstone History of India, 108, Dubois

most of the Dravidian tribes of Southern India come under the same head.

Dravidian usage.

§ 47. Southern India is, except perhaps in some few hill or jungle districts, entirely occupied by Dravidian tribes, who differ in race, origin, colour and language from the Aryans. Nothing can be stated with certainty as to the time when the Aryan first penetrated into the South. It was, probably, much before the Christian era. "As far as is actually known from direct evidence, the first Aryans, who settled permanently in the South, were hermits who, by civilising the people round about them, gradually opened a pathway for more effectual invasions" (*v*). They never colonised, or even conquered it. "Southern India has no other connection with the Aryan race than that it has, for many ages, been under the influence of Aryan, in other words, of Brahman, administrators." At the present day the Brahmans are only 3 per cent. of the Southern Indian population. They are practically the only Aryans. There may be a few Vaisyas, or Kshatriyas; but their number is inappreciable. None of the existing Sudras can be recognised as Aryans, and it is doubtful whether any Aryan Sudras ever came to Southern India. Those who are now called Sudras are simply that large class of the community who, not being of the twice-born classes, are still recognised by the Brahmans as being within the pale of caste, as distinguished from the mere outcastes (*w*). *Primâ facie* one would not expect that Brahman laws and usages would have been widely accepted by an alien race. The Jesuit Bouchet, who lived in Madura in the beginning of the 18th century, stated that the natives whom he knew had no writings embodying their laws, and were governed entirely by

Appx. I, p. 693. Mr. Fergusson remarks on the curious identity between the architecture of South Canara under Jain influence and that of Nepal, cited by Mr. Logan, Malabar Manual, I, 184. They revere the gods of the Hindu Pantheon, but reject the Vedas. Their supreme deity is Narainkar. Their Scriptures are the thirty-two sutras written by Mahavir. They neither reverence nor feed Brahmans. Census of 1891, Punjab Report, XIX, 181, 182.

(*v*) Man. Adm., Mad., I, 114. (*w*) *Ib.*, 33, 37, Sorg Int., 46.

immemorial usage (*x*). The Abbé Dubois writing in reference to Mysore and the Southern parts of the Madras Presidency in the beginning of this century, says that there are two or three Hindu works which contain rules and directions concerning the administration of justice both civil and criminal, and mentions as the best known of these the Dharma-Sastras, the Niti-Sastras, and the Manu-Sastras; but he remarks that these books are quite beyond the comprehension of the majority of Hindus, and that their disputes are settled by common-sense and by customs handed down from father to son (*y*). M. Leon Sorg states that the decisions of the Pondicherry Court in the last century show that the Tamil population was ignorant of the Sanskrit law books, and even of the Sanskrit terms, such as Brahma, or Asura marriage, Stridhan, Sapinda or Bandhu. Only two cases are to be found which were referred to the pundits of Conjeveram, and in these the parties were Brahmans (*z*). At the present day all classes, even the majority of the hill and forest races, who are Muhammedans, call themselves Hindus, and even offer a nominal allegiance to the Vedic deities; but the real worship of the greater number is offered to the village deities, whose priests are never Brahmans, and who are propitiated by blood-sacrifices which are repugnant to Brahmanical feeling. Demons, serpents and even plants are also the object of an adoration, which is as much intended to propitiate against evil as to procure good (*a*). As regards a principle which is at the root of much of the Brahman law, it is stated "Homage to remote ancestors is not a practice among the Dravidians, though observances are paid to relatives lately deceased with the intent that they may not return to do harm to the living. Hero-worship is unknown to the Dravidians. They do not act with any hope of reward, or any fear of punishment, which will

(*x*) Cited Sorg Int., 6.
(*y*) Dubois, 661—63. (*z*) Sorg Int., 9.
(*a*) Census of 1891, XIII, 56—60; N. Arcot Man., I, 186—189; Man. Adm., Mad., I, 70—84.

arise after death" (*b*). "Again, it is part of the Brahmanical doctrine that a man must have a son to save him from hell; but this belief obtains little currency among the generality of the people, and the strong tendency to marriage has little, if any, connection with religious sentiments" (*c*).

Disputed applicability of local law.

§ 48. As regards those who profess submission to the Hindu law as a whole, questions of usage arise, *first*, with a view to determine the particular principles of that law by which they should be governed; and, *secondly*, to determine the validity of any local, tribal, or amily exceptions to that law. *Primâ facie*, any Hindu residing in a particular province of India is held to be subject to the particular doctrines of Hindu law recognized in that province. He would be governed by the Dayâ Bhaga in Bengal; by the Vivada Chintamani in North Behar and Tirhut; by the Mayukha in Guzerat, and generally by the Mitakshara elsewhere (*d*). But this law is not merely a local law. It becomes the personal law, and a part of the *status* of every family which is governed by it. Consequently, where any such family migrates to another province, governed by another law, it carries its own law with it (*e*). For instance, a family migrating from a part of India, where the Mitakshara or the Mithila system prevailed, to Bengal, would not come under the Bengal law from the mere fact of its having taken Bengal as its domicil. And this rule would apply as much to matters of succession to land as to the purely personal relations of the members of the family. In this respect the rule seems an exception to the usual principles, that the *lex loci* governs matters relating to land, and that the law of the domicil governs personal

(*b*) Man. Adm., Mad., I, 71. (*c*) Census, 1891, XIII, 128.

(*d*) See *ante*, § 26–31. *Ram Das* v. *Chandra Dasia*, 20 Cal., 409. As to Assam and Orissa, which are supposed to be governed by Bengal law, and Ganjam by the law of Madras, see *ante*, § 11.

(*e*) *Ambabai* v. *Govind*, 23 Bom., 257; *Muilathi Anni* v. *Subbaraya*, 24 Mad., 650; *Parbati Kumari* v. *Jagadis Chunder*, 29 I. A., 82, S. C., 29 Cal., 423. This law will not necessarily be the law now prevailing in the domicil of origin, but that which did prevail there at the time of emigration. *Vasudevan* v. *Secretary of State*, 11 Mad., 157, 162.

relations. The reason is that in India there is no *lex loci*, every person being governed by the law of his personal status. The same rule as above would apply to any family which, by legal usage, had acquired any special custom of succession, or the like, peculiar to itself, though differing from that either of its original, or acquired, domicil (*f*).

Change of personal law.

§ 49. When such an original variance of law is once established, the presumption arises that it continues; and the *onus* of making out their contention lies upon those who assert that it has ceased by conformity to the law of the new domicil (*g*). But this presumption may be rebutted, by showing that the family has conformed in its religious or social usages to the locality in which it has settled; or that, while retaining its religious rites, it has acquiesced in a course of devolution of property, according to the common course of descent of property in that district, among persons of the same class (*h*).

Act of Government.

Of course the mere fact that, by the act of Government, a district, which is governed by one system of law is annexed to one which is governed by a different system, cannot raise any presumption that the inhabitants of either district have adopted the usages of the other (*i*).

Evidence of valid custom.

§ 50. The next question is as to the validity of customs differing from the general Hindu law, when practised by persons who admit that they are subject to that law. According to the view of customary law taken by Mr. Austin (*k*), a custom can never be considered binding until it has become a law by some act, legislative or judicial, of the sovereign power. Language pointing to the same view is to be found in one judgment of the

(*f*) *Rutcheputty* v. *Rajunder*, 2 M. I. A., 132; *Byjnath* v. *Kopilmon*, 24 Suth., 95, and *per curiam*, *Soorendronath* v. *Mt. Heeramonee*, 12 M. I. A., 91, *infra*, note (*g*); *Manik Chand* v. *Jagat Settani*. 17 Cal., 518.

(*g*) *Soorendronath* v. *Mt. Heeramonee*, 12 M. I. A., 81; S. C., 1 B. L. R. (P. C.), 26; S. C., 10 Suth. (P. C.), 35; *Obunnessurree* v. *Kishen*, 4 Wym., 226; *Sonatun* v. *Ruttun*, Suth. Sp., 95; *Pirthee Singh* v. *Mt. Sheo*, 8 Suth., 61.

(*h*) *Rajchunder* v. *Gooluchund*, 1 S. D., 43 (56); *Chundro* v. *Nobin Soondur*, 2 Suth., 197; *Rambromo* v. *Kaminee*, 6 Suth., 295; S. C., 3 Wym., 3; *Junaruddeen* v *Nobin Chunder*, Marsh., 232; *per curiam*, *Soorendronath* v. *Mt. Heeramonee*, 12 M. I. A., 96, *supra*, note (*g*).

(*i*) *Prithee Singh* v. *Court of Wards*, 23 Suth., 272.

(*k*) Austin, i., 148, ii., 229.

Madras High Court (*l*). But such a view cannot now be sustained. It is open to the obvious objection that, in the absence of legislation, no custom could ever be judicially recognized for the first time. A decision in its favour would assume that it was already binding. The sounder view appears to be that law and usage act, and re-act, upon each other. A belief in the propriety, or the imperative nature of a particular course of conduct, produces a uniformity of behaviour in following it; and a uniformity of behaviour in following a particular course of conduct produces a belief that it is imperative, or proper, to do so. When from either cause, or from both causes, a uniform and persistent usage has moulded the life, and regulated the dealings, of a particular class of the community, it becomes a custom, which is a part of their personal law. Such a custom deserves to be recognized and enforced by the Courts, unless it is injurious to the public interests, or is in conflict with any express law of the ruling power (*m*). Hence, where a special usage of succession was set up, the High Court of Madras said: "What the law requires before an alleged custom can receive the recognition of the Court, and so acquire legal force, is satisfactory proof of usage, so long and invariably acted upon in practice, as to show that it has, by common consent, been submitted to as the established governing rule of the particular family, class, or district of country; and the course of practice upon which the custom rests must not be left in doubt, but be proved with certainty" (*n*). This decision was affirmed on appeal, and

(*l*) *Narasammal* v. *Balaramacharlu*, 1 Mad. H. C., 424.

(*m*) See the subject discussed, *Khojah's case*, Perry, O. C., 110; *Howard* v. *Pestonji*, *ib.*, 535; *Tara Chand* v. *Reeb Ram*, 3 Mad. H. C., 56; *Bhau Nanaji* v. *Sundrabai*, 11 Bom. H. C., 249; *Mathura* v. *Esu*, 4 Bom., 545; Savigny, Droit Rom., i., 33—36, 165—175; Introduction to Punjab Customs. As to the effect of judicial decisions in evidencing a custom, see *Shembhu Nath* v. *Gayan Chand*, 16 All., 379.

(*n*) *Sivanananja* v. *Muttu Ramalinga*, 3 Mad. H. C., 75, 77; affirmed on appeal, *Sub nomine*, *Ramalakshmi* v. *Sivanantha*, *the Oorcad case*, 14 M. I. A., 570; S. C., 12 B. L. R., 396; S. C., 17 Suth., 553. Approved by the Bombay High Court, *Shidhojirav* v. *Naikojirav*, 10 Bom. H. C., 234. See also *Bhujangrav* v. *Malojirav*, 5 Bom. H. C. (A. C. J.), 161; *Chinnammal* v. *Varadarajulu*, 15 Mad., 307.

the Judicial Committee observed (*o*): "Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends." Accordingly, the Madras High Court, when directing an inquiry as to an alleged custom in the south of India that Brahmans should adopt their sister's sons, laid it down that: "I. 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; II. Evidence of acts of the kind; acquiescence in those acts; decisions of Courts, or even of panchayets, upholding such acts; the statements of experienced and competent persons of their belief that such acts were legal and valid, will all be admissible; but it is obvious that, although admissible, evidence of this latter kind will be of little weight if unsupported by actual examples of the usage asserted" (*p*). Finally, the custom set up must be definite, so that its application in any given instance may be clear and certain, and reasonable (*q*).

Onus of proof of custom.

§ 51. Where a tribe or family are admittedly governed by Hindu law, but assert the existence of a special custom in derogation of that law, the *onus* of course rests upon

(*o*) 14 M. I. A., 585. A long continued practice which appears to have originated from, and to be maintained by, a series of erroneous decisions cannot be supported as a custom, if the decisions themselves are ultimately reversed. The Pittapur case, 26 I. A., 83, *post* § 341.

(*p*) *Gopalayyan* v. *Raghupatiayyan*, 7 Mad. H. C., 250, 254. See too, *per Markby*, J., *Hiranath* v. *Baboo Ram*, 9. B. L. R., 294: S. C., 17 Suth., 316; *Collector of Madura* v. *Mootoo Ramalinga*, 12 M. I. A., 436; S. C., 10 Suth. (P. C.), 17; S. C., 1 B. L. R. (P. C.), 1 and *Hurpurshad* v. *Sheo Dyal*, 3 I. A., 285; S. C., 26 Suth., 55; *Vishnu* v. *Krishnan*, 7 Mad., 3; *Harnabh* v. *Mandil*, 27 Cal., 379.

(*q*) *Luchman* v. *Akbar*, 1 All., 440; *Lala* v. *Hira*, 2 All., 49.

those who assert the custom to make it out. For instance, a custom forbidding adoption, or barring inheritance by adoption, might be established, though, in a family otherwise subject to Hindu law, it would probably require very strong evidence to support it (*r*). But if the tribe or family had been originally non-Hindu, and only adopted Hindu usages in part, the *onus* would be shifted, and the burthen of proof would rest upon the side which alleged that any particular doctrine had become part of the personal law. A case of this sort arose in regard to the Baikantpur family, who were not originally Hindus, but who had in part, though not entirely, adopted Hindu customs. On a question of succession, when the estate was claimed by an adopted son, it was held by the Judicial Committee that the *onus* rested upon those who relied on the adoption to show that this was one of the Hindu customs which had been taken into the family law. If the family was generally governed by Hindu law the claimant might rely on that, and then the *onus* of proving a family custom would be on him who asserted it (*s*).

Custom cannot be created by agreement.

§ 52. It follows from the very nature of the case that a mere agreement among certain persons to adopt a particular rule cannot create a new custom binding on others, whatever its effect may be upon themselves (*t*). Nor can a family custom ever be binding where the family, or estate, to which it attaches is so modern as to preclude the very idea of immemorial usage (*u*). Nor does a custom, such as that of primogeniture, which has governed the devolution of an estate in the hands of a particular family, follow it into the hands of another family, by whom it may have been purchased. In other words, it does not run with the land (*v*).

(*r*) *Bishnath Singh* v. *Ram Churn Mujmodar*, S. D. of 1850, 20; *Patel Vandravan Jekison* v. *Manilal*, 16 Bom., 470.
(*s*) *Fanindra Deb* v. *Rajeswar*, 12 I. A., 72; S. C., 11 Cal., 463.
(*t*) *Per cur.*, *Myna Boyee* v. *Ootaram*, 8 M. I. A., 420; S. C., 2 Suth. (P. C.), 4; *Abraham* v. *Abraham*, 9 M. I. A., 242; S. C., 1 Suth. (P. C.), 1; *Sarupi* v. *Mukh Ram*, 2 N.-W. P., 227; *Bhaoni* v. *Maharaj Singh*, 3 All., 738.
(*u*) *Umrithnath* v. *Goureenath*, 13 M. I. A., 542, 549; S. C., 15 Suth. (P. C.), 10.
(*v*) *Gopal Dass* v. *Nurotum*, 7 S. D., 195 (230).

Continuity essential.

§ 53. Continuity is as essential to the validity of a custom as antiquity. In the cases of a widely-spread local custom, want of continuity would be evidence that it had never had a legal existence; but it is difficult to imagine that such a custom, once thoroughly established, should come to a sudden end. It is different, however, in the case of family usage, which is founded on the consent of a smaller number of persons. Therefore, where it appeared that the members of a family, interested in an estate in the nature of a Raj, had for twenty years dealt with it as joint family property, as if the ordinary laws of succession governed the descent, the Privy Council held that any impartible character which it had originally possessed, was determined. They said: "Their Lordships cannot find any principle, or authority, for holding that in point of law a manner of descent of an ordinary estate, depending solely on family usage, may not be discontinued, so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom which is the *lex loci* binding all persons within the local limits in which it prevails. It is of the essence of family usages that they should be certain, invariable, and continuous; and well established discontinuance must be held to destroy them. This would be so when the discontinuance has arisen from accidental causes; and the effect cannot be less when it has been intentionally brought about by the concurrent will of the family. It would lead to much confusion, and abundant litigation, if the law attempted to revive and give effect to usages of this kind after they had been clearly abandoned, and the abandonment had been, as in this case, long acted upon" (*w*).

May be discontinued.

Usage of single family.

§ 54. The above cases settle a question, as to which there was at first some doubt entertained, *viz.*, whether a particular family could have a usage differing from the law of the surrounding district applicable to similar per-

(*w*) *Rajkishen* v. *Ramjoy*, 1 Cal., 186; S. C., 19 Suth., 8. See, also, *per cur.*, *Abraham* v. *Abraham*, 9 M. I. A., 243; S. C., 1 Suth. (P. C.), 1.

sons (*x*). There is nothing to prevent proof of such a family usage. But in the case of a single family, and especially a family of no great importance, there will of course be very great difficulty in proving that the usage possesses the antiquity and continuousness, and arises from the sense of legal necessity as distinguished from conventional arrangement, that is required to make out a binding usage (*y*). Where the family is a very great one, whose records are capable of being verified for a number of generations, the difficulty disappears. In the case of the Tipperah Raj, usage has been repeatedly established by which the Raja nominates from amongst the members of his family the Jobraj (young sovereign) and the Bara Thakoor (chief lord), of whom the former succeeds to the Raj on a demise of the Raja, and the second takes the place of Jobraj (*z*). Also a custom in the Raj of Tirhoot, by which the Raja in possession abdicates during his lifetime, and assigns the Raj to his eldest son, or nearest male heir (*a*). Many of the cases of estates descending by primogeniture appear to rest on the nature of the estate itself, as being a sort of sovereignty, which from its constitution is impartible (*b*). But family custom alone will be sufficient, even if the estate is not of the nature of the Raj, provided it is made out (*c*). And where an impartible Raj has been confiscated by Government, and then granted out again, either to a stranger, or to a member of the same family, the presumption is that it

(*x*) See *Basvantrav* v. *Mantappa*, 1 Bom. H. C., Appx. 42 (2nd ed.); *per cur.*, *Tara Chand* v. *Reeb Ram*, 3 Mad. H. C., 58; *Madhavrav* v. *Balkrishna*, 4 Bom. H. C. (A. C. J.), 113.

(*y*) See the subject discussed, *Bhau Nanaji* v. *Sundrabai*, 11 Bom. H. C., 269; *Ismail* v. *Fidayat*, 3 All., 723.

(*z*) *Neelkisto Deb* v. *Beerchunder*, 12 M. I. A., 523; S. C., 12 Suth. (P. C.), 21; 8. C., 3 B. L. R. (P. C.), 13.

(*a*) *Gunesh* v. *Moheshur*, 6 M. I. A., 164, which see in the Court below, 7 S. D., 228 (271); see the *Pachete Raj*, *Gurundnarain* v. *Unund*, 6 S. D., 282 (354), *affd. sub nomine*, *Anund* v. *Dheraj*, 5 M. I. A., 82.

(*b*) There may, however, be a partible Raj See *Ghirdharee* v. *Koolahul*, 2 M. I. A., 344; S. C., 6 Suth. (P. C.), 1.

(*c*) *Rawut Urjun* v. *Rawut Ghunsiam*, 5 M. I. A., 169; *Chowdhry Chintamun* v. *Nowlukho*, 2 I. A., 263; S. C., 24 Suth., 255; *Yarlagadda Mallikarjuna* v. *Y. Durga*, 17 I. A., 134; S. C., 13 Mad., 406; *Thakur Nitopal Singh* v. *Jai Singh*, 23 I. A., 147; S. C., 19 All., 1; *Garurudhwaja* v. *Saparandhwaja*, 27 I. A., 238; S. C., 23 All. 37; *Lakshmipati* v. *Kandasami*, 16 Mad., 54.

has been granted with its incidents as a Raj, of which the most prominent are impartibility and descent by primogeniture (*d*). This presumption, however, will not prevail, when the mode of dealing with the Raj after its confiscation, and the mode of its re-grant are consistent with an intention that it should for the future possess the ordinary incidents of partibility (*e*).

Immoral usages.

§ 55. Customs which are immoral, or contrary to public policy, will neither be enforced, nor sanctioned (*f*). For instance, prostitution is not only recognized by Hindu usage and honoured in the class of dancing girls, but the relations between the prostitute and her paramour were regulated by law, just as any other species of contract (*g*). Even according to Hindu views, however, it is immoral, and entails degradation from caste (*h*). It is quite clear, therefore, that no English Court would look upon prostitution as a consideration that would support a contract; and it has been held that the English rule will also be enforced to the extent of defeating an action against a prostitute for lodgings, or the like, supplied to her for the express purpose of enabling her to carry on her trade (*i*). On the other hand, until the passing of the Penal Code in 1861, no aspect of prostitution was illegal; and the Courts recognised, and gave effect to the usages of that class as relating to rights of property, power of adoption, and special rules of inheritance *inter se* (*k*); the first element

(*d*) *Beer Pertab* v. *Maharajah Rajendar* (*Hunsapore* case), 12 M. I. A., 1; S. C., 9 Suth. (P. C.), 15; *Mutta Vadugnatha* v. *Dorasinga*, 8 I. A., 99; S. C., 3 Mad., 290; *Ram Nundun Singh* v. *Janki Koer*, 29 I. A., 178; S. C., 29 Cal., 828; *Muhammad Afzul Khan* v. *Ghulam Kasim*, 30 I. A., 190; S. C., 30 Cal., 843.

(*e*) *Venkata Narasimha* v. *Narayya* (*Nuzvid* case), 7 I. A., 38; S. C., 2 Mad., 128; *Mirangi Zamindar* v. *Satrucharla Ramabhadra*, 18 I. A., 45; S. C., 14 Mad., 237; the *Ramnad* case, 24 Mad., p. 626.

(*f*) Manu, viii., § 41; M. Müller, A. S. L., 5C. See statutes cited, *ante*, § 43, note (*g*).

(*g*) Dubois, 592; see Viv. Chint., 101.

(*h*) 2 W. MacN., 132; *Sivasungu* v. *Minal*, 12 Mad., 277; *Tara Naikin* v. *Nana Lakshman*, 14 Bom., 90; *Kamalam* v. *Sadagopa Sami*, 1 Mad., 356; *Muttukannu* v. *Paramasami*, 12 Mad., 214.

(*i*) *Goureenath Modhoomonee*, 18 Suth., 445; S. C., 9 B. L. R., appx. 37; see *Sutao* v. *Hureeram*, Bellasis 1.

(*k*) *Tara Munnee* v. *Mottee*, 7 S. D., 273 (325); *Shida* v. *Sunshidapa*, Morris, Pt. I., 137; *Venkatachalam* v. *Venkatasami*, Mad., Dec. 1856, p. 65; *Chalakonda* v. *Ratnachalam*, 2 Mad. H. C., 58; *Kamakshi* v. *Nagarathnam*, 5 Mad. H. C., 161; *Nanee Tara Naikin* v. *Allarakia*, 4 Bom., 573

of illegality was introduced by secs. 372 and 373 of the Penal Code, which made it a punishable offence to dispose of, or obtain possession of, a minor under sixteen for the purposes of prostitution. In 1876 the Madras High Court refused to recognise a right alleged by the dancing girls of a pagoda to exclude all new dancing girls, except such as were approved by themselves. The decision went upon general principles of morality, and upon the ground that the right alleged would countenance such a traffic in minors as was prohibited by the Penal Code (*l*). In the same year, however, the same Court held that a dancing girl, who had been dismissed from her office, because she had refused to recognise dancing girls introduced in violation of the right alleged in the previous case, had a good cause of action. The two cases were distinguished on the ground that, in the later case, it was alleged that the plaintiff's office was an hereditary one, with endowments and emoluments attached (*m*). In 1879 Mr. Justice West in a very elaborate judgment, decided that the adoption of a daughter by a dancing girl, though undoubtedly practised and recognised, was invalid on general grounds of morality and public policy. The ruling was absolutely unnecessary, as the suit was brought by the adopted daughter and it was found that there were natural daughters who would bar her claim (*n*). The grounds of the decision were disapproved by the Madras Courts in a case where the validity of such an adoption was raised and affirmed, and were certainly not adopted in their entirety in a later Bombay case, where the validity of an endowment, in favour of the dancing girls of a pagoda, was disputed (*o*). The Madras Court has now, by a series of decisions, adopted the rule laid down by Justice Muttusami Aiyar in 11 Mad., 492, which limits the illegality of adoptions to cases where they involve the

(*l*) *Chinna Ummaiyi* v. *Tegarai*, 1 Mad., 168.
(*m*) *Kamalam* v. *Sadagopa*, 1 Mad., 356.
(*n*) *Mathura Naikin* v. *Esu*, 4 Bom., 545.
(*o*) *Venku* v. *Mahalinga*, 11 Mad., 393; *Tara Naikin* v. *Nana*, 14 Bom., 90.

commission of an offence under the Penal Code. "We may set aside, or decline to enforce, a contract or disposition which has for its immediate object the prostitution during her minority, so as to leave her no choice of married life when she is over sixteen years." Where no such result is contemplated, the usages of the caste, if established, will be enforced (*p*). A very similar question came before the Privy Council where the rights of females adopted into what were called family brothels were discussed. The case arose between Muhammedans, and the Committee held that the customs proved were contrary to the policy of that community since, by the law of the Koran, intercourse with prostitutes is unlawful, prohibited, and punishable. The difference of the view taken by Hindus was glanced at, but did not call for consideration (*q*).

Marriage customs.

So it has been held in Bombay that caste customs authorising a woman to abandon her husband, and marry again without his consent, were void for immorality (*r*). And it was doubted whether a custom authorising her to marry again during the lifetime of her husband, and with his consent, would have been valid (*s*). In Madras, it has been held that there is nothing immoral in a custom by which divorce and re-marriage are permissible by mutual agreement, on repayment by one party to the other, of the expenses of the original marriage (*t*). Among the Nairs, as is well known, the marriage relation involves no obligation to chastity on the part of the woman, and gives no rights to the man. But here what the law recognizes is not a custom to break the marriage bond, but the fact

(*p*) *Ex parte Padmavati*, 5 Mad. H. C., 415; *Reg.* v. *Rammanna*, 12 Mad., 273; *Srinivasa* v. *Annasami*, 15 Mad., 323; *Kamalakshmi* v. *Ramasami*, 19 Mad., 127; *Sanjivi* v. *Jalajakshi*, 21 Mad., 229; *R.* v. *Jaila*, 6 Bom., 6 H. C. (C. C.), 60; *Manjamma* v. *Sheshgirirao*, 26 Bom., 491.

(*q*) *Ghasite* v. *Umrao Jan*, 20 I. A., 193; S. C., 21 Cal., 149.

(*r*) *R.* v. *Karsan*, 2 Bom. H. C., 124; see *R.* v. *Manohar*, 5 Bom. H. C. (C. C.), 17; *Uji* v. *Hathi*, 7 Bom. H. C. (A. C. J.), 133; *Narayan* v. *Laving*, 2 Bom., 140.

(*s*) *Khemkor* v. *Umiashankar*, 10 Bom. H. C., 381.

(*t*) *Sankaralingam Chetti* v. *Subban Chetty*, 17 Mad., 479.

that there is no marriage bond at all (*u*). In a case before the Privy Council, a custom was set up as existing on the West Coast of India, whereby the trustees of a religious institution were allowed to sell their trust. The Judicial Committee found that no such custom was made out, but intimated that in any case they would have held it to be invalid, as being opposed to public policy (*v*). An agreement to assist a Hindu for money to obtain a wife has also been held valid on the same ground (*w*). Public policy.

§ 56. The fourth class of cases mentioned before (§ 45) arises when circumstances occur which make the law, which has previously governed a family, no longer applicable. In one sense any new law, which is adopted for the governance of such a family, must be wanting, as regards that family, in the element of antiquity necessary to constitute a custom. On the other hand, the law itself which is adopted may be of immemorial character: the only question would be as to the power of the family to adopt it. We have already seen that a family migrating from one part of India to another may either retain the law of its origin, or adopt that of its domicil (*x*). The same rule applies to a family which has changed its *status*. If the new *status* carries with it an obligation to submit to a particular form of law, such form of law is binding upon it. If, however, it carries with it no such obligation, then the family is at liberty, either to retain so much of its old law as is consistent with its change of *status*, or to adopt the usages of any other class with which the new *status* allows it to associate itself. Change of family usage.

§ 57. Where a Hindu has become converted to Muhammedanism, he accepts a new mode of life, which is governed by a law recognized, and enforced, in India. It has been stated that the property, which he was possessed Conversion to Muhammedanism.

(*u*) See *Koraga* v. *Reg.*, 6 Mad., 374, *post* § § 100, 101.
(*v*) *Rajah Vurmah* v. *Ravi Vurmah*, 4 I. A., 76; S. C., 1 Mad., 235.
(*w*) *Vaithyanatham* v. *Gungarazu*, 17 Mad., 9, Act IX of 1872, s. 28.
(*x*) *Ante* § 48.

of at the time of his conversion, will devolve upon those who were entitled to it at that time, by the Hindu Law, but that the property, which he may subsequently acquire, will devolve according to Muhammedan law (*y*). The former proposition, however, must, I should think, be limited to cases where by the Hindu law his heirs had acquired an interest which he could not defeat. If he was able to disinherit any of his relations by alienation, or by will, it is difficult to see why he should not disinherit them by adopting a law which gave him a different line of heirs. The latter part of the proposition, however, has been affirmed by the Privy Council, in a case where it was contended that a family, which had been converted several generations back to Muhammedanism, was still governed by Hindu law. Their Lordships said: "This case is distinguishable from that of *Abraham* v. *Abraham* (*z*). There the parties were native Christians, not having, as such, any law of inheritance defined by statute; and, in the absence of one, this Committee applied the law by which, as the evidence proved, the particular family intended to be governed. But the written law of India has prescribed broadly that in questions of succession and inheritance, the Hindu law is to be applied to Hindus, and the Muhammedan law to Muhammedans; and in the judgment delivered by Lord Kingsdown in *Abraham* v. *Abraham*, p. 239, it is said that 'this rule must be understood to refer to Hindus and Muhammedans, not by birth merely but by religion also.' The two cases in W. H. Mac-Naghten's Principles of Hind. L., Vol. II., pp. 131, 132, which deal with the case of converts from the Hindu to the Muhammedan faith, and rule that the heirs according to Hindu law will take all the property which the deceased had at the time of his conversion, are also authorities for the proposition that his subsequently acquired property is to be governed by the Muhammedan law. Here there is

(*y*) 2 W. Mac N., 131, 132; *Jowala* v. *Dharam*, 10 M. I. A., 537.
(*z*) 9 M. I. A., 195; S. C., 1 Suth. (P. C.), 1.

nothing to show conclusively when or how the property was acquired by 'the great ancestor;' there was no conflict as in the cases just referred to, between Hindus and Muhammedans touching the succession to him. Whatever he had is admitted to have passed to his descendants, of whom all, like himself, were Muhammedans; and it seems to be contrary to principle that, as between them, the succession should be governed by any but Muhammedan law. Whether it is competent for a family converted from the Hindu to the Muhammedan faith to retain for several generations Hindu usages and customs, and by virtue of that retention to set up for itself a special and customary law of inheritance is a question which, so far as their Lordships are aware, has never been decided. It is not absolutely necessary for the determination of this appeal to decide that question in the negative, and their Lordships abstain from doing so. They must, however, observe that, to control the general law, if indeed the Muhammedan law admits of such control, much stronger proof of special usage would be required than has been given in this case" *(a)*.

Retention of Hindu usages.

§ 58. These remarks of the Judicial Committee were not necessary for the decision of the case before them, as they held that the plaintiff would equally have failed if the principles of Hindu law had been applied to his claim. Nor did they profess absolutely to decide that a convert to Muhammedanism might not still retain Hindu usages, and they partly rest their view against such retention of usage upon the ground that there was no decision upon the subject. The point, however, has been repeatedly decided the other way in Bombay, with regard to a sect called *Khojahs*. These are a class of persons who were originally Hindus, but who became converts to Muham-

(a) *Jowala* v. *Dharam*, 10 M. I. A., 511, 537. See *Hakim Khan* v. *Gool Khan* 8 Cal., 826, in which the Court, with much reason, doubted the decision in *Rupchund* v. *Latu Chowdhry*, 3 C. L. R., 97, where it was laid down as settled law that, with Muhammedans living in a Hindu country, the presumption of joint family and commensality arises. See next paragraph.

medanism about four hundred years ago, retaining, however, many Hindu usages, amongst others an order of succession opposed to that prescribed by the Koran. A similar sect named the *Memon Cutchees* had a similar history and usage. In 1847, the question was raised in the Supreme Court of Bombay, whether this order of succession could be supported, and Sir Erskine Perry, in an elaborate judgment, decided that it could. His decision has been followed in numerous cases in Bombay, both in the Supreme and High Court, and may be considered as thoroughly established *(b)*. It has, however, been held that these decisions did not establish that the Khojahs had adopted the entire Hindu family law, and that it could not be assumed, without sufficient evidence, that they were bound by the law of partition, so far as it allows a son to claim a share of the family property in his father's life-time *(c)*. Similar rulings have lately been given as regards the Suni Borahs of Guzerat, and the Molesalem Girasias of Broach, both of which tribes were originally Rajput Hindus converted to Muhammedanism *(d)*. In the former of these cases, *Ranade*, J., said "the principles laid down in these decisions may be thus stated: (1) that though the Muhammedan law generally governs converts to that faith from the Hindu religion, yet (2) a well-established custom of such converts following the Hindu law of inheritance would over-ride the general presumption; (3) that this custom should, however, be confined strictly to cases of succession and inheritance; (4) and that, if any particular usage, at variance with the general Hindu law applicable to these communities in matters of succession, be alleged to exist, the burthen of proof lie on the party

(*b*) *Khojah's case*, Perry, O. C., 110; *Gangbai* v. *Thavur*, 1 Bom. H. C., 71, 73; *Mulbai, in the Goods of*, 2 Bom. H. C., 292; *Rahimbai, in the Goods of*, 12 Bom. H. C., 294; *Rahimatbai* v. *Hirbai*, 3 Bom., 34; *Suddurtonnessa* v. *Majada*, Cal., 694; Haji Ismail's Will, 6 Bom., 452; *Ashabai* v. *Haji Tyeb*, 9 Bom., 115; *Abdul Cadur* v. *Turner, ibid.*, 158; *Mahomed Sidick* v. *Haji Ahmed*, 10 Bom., 1; *Re Haroon Mahomed*, 14 Bom., 19.

(*c*) *Ahmedboy* v. *Cassumbhoy*, 13 Bom., 534, over-ruling; S. C., 2 Bom., 280.

(*d*) *Bai Baiji* v. *Bai Santok*, 20 Bom., 53, at p. 57; *Fatesangji* v. *Rewar Harisangji*, 20 Bom., 181. In the latter the claim, which was affirmed, was by a son for maintenance.

alleging such special custom." But, although these cases may probably be taken as settling that an adherence to the religion of the Koran does not necessarily entail an adherence to its civil law, there may be cases in which religion and law are inseparable. In such a case the ruling of the Privy Council would be strictly in point, and would debar any one who had accepted the religion from relying on a custom opposed to the law. For instance, monogamy is an essential part of the law of Christianity. A Muhammedan, or Hindu convert to Christianity could not possibly marry a second wife after his conversion, during the life of his first, and, if he did so, the issue by such second marriage would certainly not be legitimate, any Hindu or Muhammedan usage to the contrary notwithstanding (*e*). His conversion would not invalidate marriages celebrated, or affect the legitimacy of issue born before that event. What its effect might be upon issue proceeding from a plurality of wives retained after he became a Christian would be a very interesting question, which has never arisen.

Case of the Abrahams.

§ 59. The second part of the rule above stated (*f*) is illustrated by the case of *Abraham* v. *Abraham* (*g*) referred to above. There it appeared that there were different classes of native Christians of Hindu origin. Some retained Hindu manners and usages, wholly or chiefly, while others, who were known as East Indians, and who are generally of mixed blood, conformed in all respects to European customs. The founder of the family in question was of pure Hindu blood, and belonged to a class of native Christians which retained native customs. But as he rose in the world and accumulated property, he assumed the dress and usages of Europeans. He married an East Indian wife, and was admitted into, and recognized as a

(*e*) See *Hyde* v. *Hyde*, L. R., 1 P. & D., 130; *Skinner* v. *Orde*, 14 M. I. A., 309, 324; S. C., 10 B. L. R., 125; S. C., 17 Suth., 77.

(*f*) *Ante* § 56.

(*g*) 9 M. I. A., 195; S. C., 1 Suth. (P. C.), 1. Native Christians are now governed by the Indian Succession Act. *Ponnusami* v. *Dorasami*, 2 Mad., 209. See *Sarkies* v. *Prosonomoyee*, 6 Cal., 794.

member of, the East Indian community. After his death the question arose whether his property was to be treated as the joint property of an undivided Hindu family, and governed by pure Hindu law; or if not, whether it was to be governed by a law of usage, similar to Hindu or to European law. The former proposition was at once rejected. Their Lordships said *(h)* "It is a question of parcenership and not of heirship. Heirship may be governed by the Hindu law, or by any other law to which the ancestor may be subject; but parcenership, understood in the sense in which their Lordships here use the term, as expressing the rights and obligations growing out of the *status* of an undivided family, is the creature of, and must be governed by, the Hindu law. Considering the case, then, with reference to parcenership, what is the position of a member of a Hindu family who has become a convert to Christianity? He becomes, as their Lordships apprehend, at once severed from the family and regarded by them as an outcast. The tie which bound the family together is, so far as he is concerned, not only loosened but dissolved. The obligations consequent upon, and connected with, the tie must, as it seems to their Lordships, be dissolved with it. Parcenership may be put an end to by a severance effected by partition; it must, as their Lordships think, equally be put an end to by severance which the Hindu law recognizes and creates. Their Lordships, therefore, are of opinion that, upon the conversion of a Hindu to Christianity, the Hindu law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound, as he has renounced his old religion; or, if he thinks fit, he may abide by the old law, notwithstanding he has renounced the old religion." Their Lordships then reviewed the facts, showing the different usages of different classes of Christians, and the evidence that

(*h*) 9 M. I. A., 237; S. C., 1 Suth. (P. C.), 5; *Jalbhai Ardeshir* v. *Louis Manoel*, 19 Bom., 680.

Abraham had, in fact, passed from one class into another, and proceeded to say (*i*): "That it is not competent to parties to create, as to property, any new law to regulate the succession to it *ab intestato*, their Lordships entertain no doubt; but that is not the question on which this case depends. The question is, whether, when there are different laws as to property applying to different classes, parties ought not to be considered to have adopted the law as to property, whether in respect of succession *ab intestato* or in other respects, of the class to which they belong. In this particular case the question is, whether the property was bound by the Hindu law of parcenership.' "The law has not, so far as their Lordships can see, prohibited a Christian convert from changing his class. The inconvenience resulting from a change of succession consequent on a change of class is no greater than that which often results from a change of domicil. The *argumentum ab inconvenienti* connot therefore be used against the legality of such a change. If such change takes place in fact, why should it be regarded as non-existing in law? Their Lordships are of opinion that it was competent for Matthew Abraham, though himself both by origin and actually in his youth a 'native Christian,' following the Hindu laws and customs on matters relating to property, to change his class of Christians, and become of the Christian class to which his wife belonged. His family was managed and lived in all respects like an East Indian family. In such a family the undivided family union, in the sense before mentioned, is unknown (*k*).

Illegitimate issue of European.

§ 60. On the same principle, where a European had illegitimate sons by two Hindu women, and they conformed in all respects to Hindu habits and usages, it was

(*i*) 9 M. I. A., 242, 244; S. C., 1 Suth. (P. C.), 6.

(*k*) A Hindu convert to Christianity may revert to Hinduism, and may as guardian of his infant son treat him as having also reverted, as for instance for the purpose of being given away in adoption. *Kusum Kumari* v. *Satya Rangan*, 30 Cal., 999.

held that they must for all purposes be treated as Hindus, and governed by Hindu law as such. "They were not an united Hindu family in the ordinary sense in which that term is used by the text writers on Hindu law; a family of which the father was in his lifetime the head, and the sons in a sense parceners in birth, by an inchoate, though alterable, title; but they were sons of a Christian father by different Hindu mothers, constituting themselves parceners in the enjoyment of their property, after the manner of a Hindu joint family" (*l*). And it was held that their rights of succession *inter se* and to their mother, must be judged by Hindu law, which recognized such rights, and not by English law, which denied them (*m*). On the other hand, the vast majority of the class known as East Indians, and referred to in the judgment in *Abraham* v. *Abraham*, have been the illegitimate sons of Europeans by natives or half-caste women, who, from being acknowledged and cared for by their fathers, have adopted European modes of life. These, as already stated, would be governed by European law.

(*l*) *Myna Boyee* v. *Ootaram*, 8 M. I. A., 400, 420; S. C., 2 Suth. (P. C.), 4.
(*m*) Same case, 2 Mad. H. C., 196.