1861.
MUHAMMAD YUSSUB v. SAYAD AHMED.

There is no doubt, therefore, that the plaintiff has sustained substantive pecuniary loss.

As, however, part of his aggregate income arose out of gratuities, the privation whereof gives no right of action, the preferable mode of estimating the damage he has sustained by privation of fees is to ascertain the amount of fees actually taken by the defendant, from the period of his intrusion in the office, down to the time at which the present action was commenced.

Having regard on this point to the evidence of Ibráhim Nekwáre, the Naib, who examined the defendant's books of accounts, it appears that the aggregate of the sums received by the defendant for fees within the period specified is Rs. 4,713, and this, in my opinion, ought to be the measure of the plaintiff's damages, together with all costs of the suit.

1865.
July 26.

Special Appeal No. 127 *of* 1865.

BASVANTRA'V KIDINGA'PPA' ..... *Appellant.*
MANTA'PPA' KIDINGA'PPA' ..... *Respondent.*

Primogeniture—Hindu Law—Custom—Family Custom—Descent of Ancestral Estate.

A custom in the case of a petty Hindu family that the family estate shall descend to the eldest son, the second and other sons being entitled to maintenance only, cannot be supported.

Semble, that a different rule would apply to such a custom prevailing among Thakurs and Chiefs of the Bombay Presidency.

THIS was a Special Appeal from the decision of F. H. Shaw, Acting District Judge of Dhárwár, in Appeal Suit No. 263 of 1862, confirming the decree of the Ṣadr Amín of Bágalkot.

The case was argued before FORBES and NEWTON, J.J.

Reid (with him *Fakirápá Lingápá* and *Dhirajlal Mathurádás*) for the appellant.

White (with him *Ganesh Hari Paṭvardhan* and *Nánábhái Haridás*) for the respondent.

The facts of the case sufficiently appear from the following judgment:—

NEWTON, J.:—This was an action by Basvantráv, who claimed as the second of the three sons of one Kidingáppá, to recover from his elder brother, Mantáppá, a third share of *inám* lands, assessed lands, and houses situated in several villages of the Hungund táluká and the district of Dhárwár, and estimated altogether, with some cash payments included in the plaint, at Rs. 567-8-0.

The defendant, Mantáppá answered that the plaintiff was a kinsman, and as such entitled, according to the custom of the family, to maintenance, but not entitled to any share in the lands and money payments or other property; that the plaintiff had received a house and some land in lieu of maintenance, and that this land having proved insufficient, an additional portion had been allotted to him; and that he had then, A.D. 1852, executed in favour of the defendant a deed of acquittance by which he relinquished all claim to the estate and other property; that partition had not been allowed in the family for several generations, the eldest member succeeding to the whole of the property and liabilities; that the whole of the property was not included in the suit, and that part of the claim had been undervalued, and that some of the lands and houses claimed were not in the possession of the defendant, but had been granted away to others by his ancestors.

The Ṣadr Amín of Bágalkot, who tried the original suit, laid down three issues on the questions whether the whole of the subject-matter was included in the plaint, and the claim rightly valued; a fourth as to the genuineness of the alleged deed of acquittance; a fifth whether the plaintiff's title was proved; and a sixth whether, if so, any grants made by the ancestors of the parties should be excluded from the property in which they might be entitled to share. He considered the suit rightly valued except with respect to some land at one village, which, relying on certain revenue records unproved and inadmissible as independent evidence, he considered to be *sarv inám*; but, holding the deed of acquittance proved, and the plaintiff's abandonment of his

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title to a share, if he ever possessed one, thus established, he decreed for the defendant, giving no judgment on the fifth and sixth issues, though evidence to the former of these was adduced and recorded.

In appeal the Acting Judge of Dhárwár confirmed the decision of the Ṣadr Amín, finding the evidence that the eldest member of the family gave only maintenance to the other members "stronger far than that called by Basvantáppá to prove the custom of division," and holding the defence of Mantáppá consequently to be a good one. The Judge also held that, if partition had been otherwise permissible, the plaintiff had, by executing the deed of release No. 10, which was found proved, lost all title to a share in the property claimed.

The case was heard in special appeal before the late Mr. Justice Forbes and myself, and the only points argued were those determined by the District Judge. The questions for our decision were, therefore, two—the first, whether any such custom as is alleged, in opposition to the general rule of *Hindú law*, has been established with respect to the property in dispute, by virtue of which the plaintiff is debarred from obtaining partition of it and limited to a right to be maintained; and the second, whether in case such custom having the force of law is not proved, the plaintiff has lost his right to demand partition of the family property, or of any portion of it, in consequence of the execution by him of the Exhibit No. 10.

With respect to the former point, it is not contested that the property is not ancestral, or that the parties are not brothers, or that the proper share of the plaintiff as one of three brothers would not be one-third of the undivided family property, if the ordinary law of inheritance among Hindús governed the case. The allegation of the defendant is that for many generations in the family to which the parties belong, the younger members have by custom received only a grant of land for their maintenance, and that they have no right to enforce partition of the *watan*. The law to be applied to the case is laid down in Sec. 26 of Reg. IV. of 1827, where it is enacted that "the law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose: if none such appears, the law of the defendant: and in

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the absence of specific law and usage, justice, equity, and good conscience alone." Admittedly there are no Acts or Regulations by which the question between the parties to this suit could be decided, and it must, therefore, be determined by the law of the defendant, unless precedence is to be given to any usage of the country in which the suit arose. Now it is to be remarked that the defendant does not plead the existence of any custom opposed to the Hindú law, and coming with any strictness within the description of a "usage of the country." He does not even allege any usage of a particular district or of a caste, but states a custom observed in his family, and attempts to support it by evidence which, if such a custom were a valid defence would not be legally sufficient for the purpose. There are five witnesses (64, 65, 66, 67, and 68), one of them the third brother, and two others relatives of the parties, who depose that partition has not been customary in the family of which the parties are members, and speak to a custom of allowing maintenance to the younger branches, or recent instances in which individual members have received maintenance, but they are not able to show that even this practice has been general or of any long continuance. Witness No. 65 and another, No. 69, also state that maintenance is allowed, instead of a share in the ancestral estate, in similar *watans* in other pargaṇás; and an exhibit, No. 21, is recorded to show that arbitrators in A.D. 1829, when the territory was not under the Regulations, decided against the claim of another member of the family to the whole *watan*, on the ground that it had been in the possession of the branch to which the parties in the present suit belong for upwards of a hundred years. The parol evidence is of a very defective and unsatisfactory character, and the arbitration award has been chiefly relied on. There is nothing to show that it was ever filed in any court, and it has been recorded unproved. The question then at issue appears to have been, whether the *watan* had descended from one Mantáppá to the then plaintiff through Mantáppá's posthumous son by a *pát* wife, or had been made over by the said Mantáppá to his brother, under whom the defendant in that case claimed. A decision of this question in favour of either party would not necessarily have affected the point now under consideration; for on the issues then raised it was not essential to an award of the whole property to either the plaintiff or the defendant in that suit that the *watan*

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should be held to be impartible, and to descend entire under all circumstances to the eldest male member, though the claim of each party was to the whole of the *watan*, and the whole was eventually awarded to the defendant. But such a judgment, even if it had been on the point at issue, and otherwise entitled to consideration, would have been far from conclusive on the question. The whole document, too, bears evidence of lawless times, and of an insecurity in the midst of which the best guarantee for the preservation of the property may have been its continuance as an undivided estate under the management of the senior member, against whom relatives entitled to share may, as is common in Hindú families, have found no cause to put forward any claim.

The award deals apparently with the entire *watan* and not with the eldership only. An award of the latter, had it stood alone, would not have given any support to such a title as is now put forward; for it is usual throughout the villages of this Presidency, where no such custom as that set up in the present case has been heard of, for the eldest member or the representative of the eldest branch of the chief family (the *pátil*) while sharing with other members, under the ordinary rules of the Hindú law, all lands attached to the office, yet, by right of his eldership, to claim and to be allowed various honours and precedences, and sometimes perquisites which are, or are treated as, indivisible. But if the award of 1829 afforded much stronger support than it does to the defence set up in this case, that under no circumstances can a brother claim from his brothers in this family a share in any of the family property, the Court would still have great cause for hesitating to admit it as sufficient ground for a decision for which it is believed that no precedent can be found in any similar case in the records of the courts of this Presidency. No case has been quoted in the defendant's favour, and the Court is not aware that such a case on this side of India could be referred to. In only one case, a case from the same district (Appeal No. 2 of 1861), *Swameraо S. Desaee* v. *Konher M. Desaee* (*a*) does such a defence appear to have been set up, and it was there held not to be established. No text indeed from the Hindú law-books has been adduced for the defendant's proposition, though in Manu, Ch. VIII. 41, the rules of certain families, as well as the particular laws of

(*a*) 8 Harrington 273.

classes, the laws or usages of districts, and the customs of tender traders, are mentioned as to be inquired into and respected, if not repugnant to the law of God. And effect has been given to this rule in cases within the Presidency of Bengal, and specially in two cases in which appeals were made to the Privy Council, and in both of which it is to be noticed that the subject-matter was a *ráj* or principality, and that it was shown to have descended undivided to the eldest male heir during several generations. The cases are those of *Rawut Urjun Sing and another* v. *Rawut Ghunsiam Sing* (*b*), and of *Baboo Gunesh Dutt Sing* v. *Maharaja Moheshur Sing* (*c*). In the latter of these cases their Lordships remark: "By the general law prevailing in this district, and indeed generally under the Hindú law, estates are divisible among the sons, when there are more than one son; they do not descend to the eldest son, but are divisible amongst all. With respect to a Ráj, as a Principality, the general rule is otherwise, and must be so. * * * Again, there is no doubt that the general law with respect to inheritance, as well as with respect to other matters, may, in the case of great families where it is shown that usage has prevailed for a very long series of years, be controlled, unless there be positive law to the contrary" (p. 187); and I apprehend that the same law would unhesitatingly be applied to some classes of Thákurs and Chiefs in this Presidency, among whom, by settled custom, the principality descends indivisible to the eldest son. But it would be a dangerous doctrine that any petty family—and in the case under consideration a third of the family property is valued for the purposes of the suit at little more than five hundred rupees—is at liberty to make a law for itself, and thus to set aside the general law of the country. On the first question, then, the Court decides against the defendant (the respondent), that no custom having the force of law and applicable to this case has been made out to except the property in dispute from the general rules of inheritance of the Hindú law.

With respect to the second question, the courts below have found the genuineness of the exhibit No. 10 established, and their judgment on this point is final. The purport of the document is that the plaintiff thereby abandons all title to the

(*b*) 5 Moo. Ind. App. 169.
(*c*) 6 Ibid. 164.

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share in the ancestral property which he now claims, and, so far as it is valid, it will be effective against him. Under the provisions of cl. 1, Sec. x. of Reg. XVIII. of 1827, it requires a stamp; and under cl. 2 of Sec. XII. of the same Regulation, as it is a writing not for a specific sum, it might have been executed on a stamp of the value of eight rupees, or, if written on a stamp of less value, may be made effective only up to the utmost sum covered by such stamp, under the rule contained in the previous clause of the same section. It was originally written on plain paper, and contains an agreement for subsequent stamping, which was permitted by Sec. 13 of the same Regulation. A stamp of two annas has since been impressed on it, and by this, under the clause previously referred to, and Appendix B to the same Regulation, the highest sum or value that can be secured is Rs. 64. To this extent only the exhibit No. 10 is valid, and to this extent, it operates to reduce the plaintiff's claim.

For these reasons the Court reverses the decree of the District Judge, and orders that the plaintiff, Basvantáppá, do recover the share of the *watans* claimed by him to the extent of Rs. 503-8-0, with costs in proportion. *

TAYLOR v. BROOKE.

Ship—Shipping Order—Words "Ready to receive Cargo."

The words "ready to receive cargo" inserted in a shipping order mean that the ship, on the day named in the shipping order, shall be ready to receive a full cargo, by whomsoever offered, and not merely ready to receive the *quantum* of cargo mentioned in the shipping order.

1864.
June 7.

THIS suit was brought by the master of the ship *Fleur-de-Lis* to recover Rs. 1,925 for damage sustained by him by reason of the defendants failing to ship 1,000 bales of cotton according to contract.

The contract was in the form of a shipping order, dated March 12th, 1863, and was granted to the defendant by the

*Note.—*Judgment was delivered orally by the late Mr. Justice Forbes in this case, and no written judgment was recorded. The grounds of the Court's decree were subsequently embodied in the above form by Mr. Justice Newton, to whom the Editor is indebted for the report.*