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October 51.

[APPELLATE CIVIL JURISDICTION.]

Regular Appeal No. 11 *of* 1870.

BHAGVA'NDA'S TEJMAL .....*Appellant.*

RA'JMAL *alias* HIRA'LA'L LACHIMANDA'S.*Respondent.*

Hindu Law—Adoption among the Jains—Custom—Usage.

A. B., a member of the community of *Jainas* of Márvádi origin, who form part of the inhabitants of Ahmadnagar in the Deccan, died without leaving natural born issue and without adopting any child. His wife, who survived him, resolved, shortly before her death, on adopting the son of *C. D.*, a brother of *A. B.*, but did not live to carry her intention into effect. After her death, *C. D.* and *E. F.*, (another brother of *A. B.*) with the assent of the Pánch or senior members of their community, went through a ceremony of giving the boy in adoption to the deceased *A. B.* and his deceased wife, and an instrument of agreement wholly founded upon that adoption, was executed by *E. F.* to *C. D.*, and affected to deal with the property moveable and immoveable of *A. B.*

Held that the adoption was invalid and that the instrument of agreement fell together with it.

Quaere whether such an instrument, being unregistered, and dealing with immoveable property above the value of Rs. 100, was not, upon that ground alone, invalid.

Adoption among *Jainas* is, in the Presidency of Bombay, regulated by the ordinary Hindu law, as is their succession to property generally, notwithstanding their divergence from Hindus in matters of religion; and Hindu law does not allow any one but the widow to act vicariously for the man to whom the son is to be affiliated; the widow is a delegate either with express or implied authority, and cannot extend that authority to another person, so as to enable him to adopt a son to her husband after her decease; not only a giving but an acceptance by the man, or his wife, or widow, manifested by some overt act, being necessary to constitute an adoption by Hindu law.

When amongst Hindus (and *Jainas* are Hindu dissenters) some custom different from the normal Hindu Law and usage of the country in which the property is located, and the parties resident, is alleged to exist, the burden of establishing its antiquity and invariability is placed on the party averring its existence, and it should be proved by clear and unambiguous evidence above suspicion.

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THIS was an appeal from the decision of Krishnáji Víshnu, First Class Subordinate Judge of Ahmadnagar, in Original Suit No. 255 of 1869, and was argued on the 16th of July 1873 before WESTROPP, C.J., and NANABHAI HARIDAS, J.

The facts are sufficiently stated in the judgment.

Branson and *Shivshankar* for the appellant :—The alleged custom is not judicially recognized. No instance of it of more than 22 years' standing has been proved. Only four instances have been attempted to be proved. This is not sufficient : *Táyumána* v. *Perumál (x)*, *Narasammál* v. *Balarámáchárlu (a)*, *Kojahs and Memons' Case (b)*, *Tara Chand* v. *Reeb Ram (c)*, *Mádharáv Ráchavendra* v. *Bálkrisna (d)*, Reg. IV. of 1827, Sec. 26 ; *Lalla Mohabeer* v. *Mussamut Kundun (e)*. *Jainas* are subject to Hindu law.

Special Appeal No. 645 of 1866 as to adoption *(ee)*. This adoption was invalid by Hindu law, the adoptive father and mother being both dead at the time of the ceremony.

Bhairavnáth Mangesh, contra :—Though *Jainas* do not perform the *Srádddha* ceremony, they adopt to perpetuate their names. The taking in adoption may be performed vicariously : See Mr. Ellis's opinion in 2 Stra. H. L. 93, 94. The appellant is estopped from disputing the adoption by Exhibit No. 36 : *Singamma* v. *Ramanuja Charlu (f)*, *Rupchand Hindúmul* v. *Rakhmúbái (g)*. Though Exhibit No. 36 is unregistered, it is admissible to prove the adoption : *Lachmipat Sing Dugar* v. *Mirza Khairat Ali (h.)*

It does not need a stamp : *Ráje V. A. Nimbálkar* v. *Jayavantráv M. Ranadive (i)*, *Sangáppá Ningáppá* v. *Basáppá Parápppá (j)*. It is sufficiently stamped. Special Appeal No. 218 of 1870 as to custom.

(*x*) 1 Mad. H. C. Rep. 51 (*a*) Ibid. 420, 425.

(*b*) Perry's Or. Ca. 110 *et seq.*

(*c*) 3 Mad. H. C. Rep. 50. (*d*) 4 Bom. H. C. Rep. A.C.J. 113,

(*ee*) See note (*d*) at the end of this case.

(*e*) 8 Calc. W. Rep. Civ. R. 116. (*f*) 1 Norton, L. C., 73. 87.

(*g*) 8 Bom. H. C. Rep. A.C.J., 114.

(*h*) 12 Calc. W. Rep., F. B. 11. S. C. 4 Beng. L. R., 18 F. B.

(*i*) 4 Bom H. C. Rep., A. C. J., 191. (*j*) 7 Ibid. 2.

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Branson in reply:—Supposing Exhibit No. 36 to be admissible to prove the adoption, it only proves an invalid adoption. It deals, too, with immoveables of higher value than Rs. 100, and therefore is not admissible and is invalid, not being registered.

Cur. adv. vult.

WESTROPP, C.J.:—This suit was instituted by the plaintiff, Rájmal, against his natural father Ganeshdás, and uncle Bhagvándás, the present appellant. These parties are Márvádis professing the *Jaina* religion and are resident at Ahmadnagar.

Tejmal had three sons, who survived him—of these Lachimandás was the eldest. He died in 1867, without issue, but leaving a widow, Hirábái, who survived him and died in September 1868. The two other sons of Tejmal were the defendants, Ganeshdás and Bhagvándás.

Lachimandás seems to have had some intention of adopting a son, but died without carrying it into effect.

Hirábái, his widow, was, for some time previously to her death, desirous of adopting a son on behalf of her deceased husband. Having made one or two unsuccessful efforts to obtain such a son, she seems, when in her last illness, to have resolved on adopting her husband's nephew, the plaintiff Rájmal, the eldest son of the defendant Ganeshdás, who agreed to give Rájmal to her, but she died without effecting her purpose.

A funeral feast (Diwas), of two days' duration, was given by Ganeshdás and Bhagvándás in honor of Hirábái to the caste about a fortnight after her death, on the second day of which feast, Ganeshdás, Bhagvándás and two other persons appear to have given, with certain ceremonies, the plaintiff Rájmal (then an adult) as adopted son to his deceased uncle Lachimandás and aunt Hirábái.

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On the same day, the following document (Exhibit No. 36) dated Shake 1790, Ashvin Shudhya 9th, or 25th September 1868, was executed by Bhagvándás.

"From Bhagvándás Tejmal Márvádi, resident of Ahmadnagar.

To Chiranjiv Rájeshri Rájmal *alias* Hirálál valad Lachimandás Bohuru Márvádi, resident of Ahmadnagar.

1. The reason of this acknowledgment in writing is that my elder brother named Lachimandás Tejmal lived and died at Ahmadnagar. His wife Hirábái survived him, but died subsequently on Bhádrapad Vadya 8th, Shake 1790. She, the widow Hirábái, when on the point of her death, had desired to take a son in adoption, but there was hardly time to do this at the time of her demise.

2. I, Bhagvándás, and Ganeshdás Tejmal are the legal heirs of the deceased Lachimandás Tejmal and of his widow, Hirábái. In compliance with the dying request of the widow Hirábái, the 'Panch', that is, the members of our caste, have met and resolved to perpetuate the name of the deceased Lachimandás.

3. Hence, agreeably to the resolution of the 'Panch,' it is settled that the *khan* of the shop, situated in Surjikha market at Ahmadnagar, belonging to the share of the deceased Lachimandás, is given with its upper story to Ganeshdás in exchange for the middle *khan* belonging to the share of Ganeshdás which is made over to me. That the property in the house of Lachimandás, the deceased, consisting of gold and silver, cloth, utensils of brass, copper, &c., and iron, &c., be given to us, that is (to Ganeshdas and Bhagvándás).

4. And all the rest of the property of the deceased Lachimandás and Hirábái, consisting of debts, bonds, documents, whether within or without the city of Ahmadnagar, such as Jeoor, Muthpimpree, and other villages, standing in the name of the deceased Lachimandás and Hirábái, are given to you (Rájmal), who are hereby constituted as the

proprietor thereof. I, Bhagvándás, forego all claim to the property mentioned in this 4th paragraph, and you (Rajmál) have no claim to the property mentioned in the above 3rd paragraph.

5. In pursuance of the opinion of 'the Panch', and in accordance with the desire of the deceased Hirábái, you are given in adoption to the deceased Lachimandás to perpetuate his name. You shall therefore conduct yourself accordingly and manage your affairs.

6. That the house in the city of Ahmadnagar, called Kirpes Vádá, is made over to you by me, Ghaneshdás, and the 'Panch.' You make use of it as your own property. The deceased Lachimandás has left me and Ganeshdás as his heirs. I have therefore applied to the District Judge for a certificate of heirship. Now that you are given in adoption to perpetuate his (the deceased Lachimandás's) name, I, in consequence, cancel my above application previously made for a certificate of the deceased's (Hirábái's) heirship. You should now make an application in your name for a certificate. To this I have no objection whatsoever. This acknowledgment is given in writing by me.

(Signed) Bhagvándás Tejmal Bohuru Márvádi,
Resident of Ahmadnagar.

I agree to what is written above.

Signed by seven witnesses in their own handwriting.

Signed by the writer Náro Narhar Deshmukh and Deshpánde Kulkarni of the Ahmadnagar Havelli."

That document bore an eight rupee stamp, but was not registered.

The present suit was brought by Rájmal to establish his sole right to the property, moveable and immoveable, of Lachimandás and Hirábái as their adopted son. The plaint stated that the District Judge, notwithstanding the adoption, had granted (under Bombay Regulation VIII. of 1827, Secs.

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2 and 3) to the defendants, Ganeshdás and Bhagvándás, a certificate of their heirship to Lachimandás. The plaintiff also alleged and relied upon a custom of the *Jaina* Márvádi caste, as well in Marwar, as in Ahmadnagar, of adoption in cases where both the adoptive father and his wife have died before the adoption took place.

The defendant, Ganeshdás, the natural father of the plaintiff, in his written statement admitted the giving in adoption by himself and Bhagvándás in accordance with the desire of Hirábái, and stated that 4,000 rupees' worth of jewels and ornaments belonging to Lachimandás and Hirábái had been equally divided between himself and Bhagvándás, and that, if the latter would return his moiety to the plaintiff, he (Ganeshdás) would return his moiety also, and said that he offered no obstruction to the plaintiff's claim.

Bhagvándás, in his written statement, said that by Hindu law the adoption was invalid, Lachimandás and Hirábái having both died before the ceremony took place, and he alleged that he and Ganeshdás were the heirs of Lachimandás, and had accordingly, as such, obtained the certificate of heirship already mentioned. He admitted the division of the 4,000 rupees' worth of jewels and ornaments between himself and Ganeshdás, and he objected to Exhibit 36 as being insufficiently stamped and unregistered.

The Subordinate Judge held the custom and the fact of the adoption to be proved, and the Exhibit No. 36 to be sufficiently stamped,* and not to require registration. Accordingly, he made his decree in favour of the plaintiff with costs against Bhagvándás.

The defendant Bhagvándás has preferred a regular appeal against that decision to this Court. There are twenty-two points contained in the memorandum of appeal. The points, as argued before us, were, however, substantially as follows :—

(*) Vide 4 Bom. H. C. Rep. 191. Ed.

1. That the alleged custom was not satisfactorily proved, and had never been judicially recognized.

2. That it was invalid, and contrary to the Hindu Law which governed the case.

3. That Exhibit 36, being unstamped and unregistered, was improperly admitted in evidence for any purpose.

4. That, even if properly in evidence, it was executed without consideration and did not bind the defendant, Bhagvándás.

5. That it had never been, and was not intended to be, carried into effect by any of the parties to it.

Mr. Mountstuart Elphinstone, after describing the Brahmanical and prevailing religion of Hindustan, the worship of the Triad—Brahma, Vishnu and Siva—and the minor Hindu deities (*a*), says: "There are two other religions, which, although distinct from that of the Hindus, appear to belong to the same stock, and which seem to have shared with it in the veneration of the people of India before the introduction of an entirely foreign faith by the Mohamedans. These are the religions of the Baudhas (or worshippers of Budha) and the Jains. They both resemble the Brahman doctrines in their character of quietism, in their tenderness of animal life, and in the belief of repeated transmigrations of various hells for the purification of the wicked, and heavens for the solace of the good. The great object of all three is the ultimate attainment of a state of perfect apathy, which, in our eyes, seems little different from annihilation; and the means, employed in all, are the practice of mortification and of abstraction from the cares and feelings of humanity. The differences from the Hindu belief are no less striking than the points of resemblance, and are most so in the religion of the Baudhas" (*b*). After describing that religion, he proceeds to say of the *Jainas*: "The Jains hold an intermediate place between the followers of Budha and Brahma. They agree with the Baudhas in denying the

(*a*) Chapter IV. History of India, 4th Ed., pp. 85-103. (*b*) Ibid 103.

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existence, or, at least, the activity and providence of God; in believing the eternity of matter; in the worship of deified saints; in their scrupulous care of animal life, and all the precautions, which it leads to; in their having no hereditary priesthood; in disclaiming the divine authority of the Vedas; and *in having no sacrifices and no respect for fire.* They agree with the Baudhas also in considering a state of passive abstraction as supreme felicity and in all the doctrines which they hold in common with the Hindus. They agree with the Hindus in other points, such as division of caste. This exists in full force in the south and west of India, and can only be said to be dormant in the north-east; for, though the Jains there do not acknowledge the four classes of the Hindus, yet a Jain converted to the Hindu religion takes his place in one of the castes; from which he must all along have retained the proofs of his descent; and the Jains themselves have numerous divisions of their own, the members of which are as strict in avoiding intermarriages and other intercourse as the four classes of the Hindus. Though they reject the scriptural character of the Vedas, they allow them great authority in all points not at variance with their religion. The principal objections to them are drawn from the bloody sacrifices which they enjoin, and the loss of animal life which burnt offerings are liable (though undesignedly) to occasion. They admit the whole of the Hindu gods and worship them, though they consider them as entirely subordinate to their own saints, who are therefore the proper objects of adoration. Besides these points common to the Brahmans or Baudhas, they hold some opinions peculiar to themselves. The chief objects of their worship are a limited number of saints, who have raised themselves by austerities to a superiority over the gods, and who exactly resemble those of Baudha in appearance and general character, but are entirely distinct from them in their names and individual histories. They are called Tirtankeras; there are twenty-four for the present age, but twenty-four also for the past, and twenty-four for the future. Those most worshipped are in some places Rishoba;

the first of the present Tirtankeras, but everywhere Parasnath (*c*) and Mahavira [sometimes called Vardhaman (*d*) or Sramana] the twenty-third and twenty-fourth of the number. As all but the two last bear a fabulous character in their dimensions and length of life, it has been conjectured, with great appearance of truth, that these two are the real founders of the religion. All remain alike in the usual state of apathetic beatitude, and take no share in the Government of the world. Some changes are made by the *Jainas* in the rank and circumstances of the Hindu gods. They give no preference to the greater gods of the Hindus; and they have increased the number of gods, and added to the absurdities of the system: thus they have sixty-four Indras, and twenty-two Devis. They have no veneration for relics and no monastic establishments. Their priests are called *Jatis* (Yatis); they are of all castes, and their dress, though distinguishable from that of the Brahmans, bears some resemblance to it," &c., &c. (*e*). At page 112, Mr. Elphinstone says: "The *Jainas* appear to have originated in the sixth, or seventh, century of our era; to have become conspicuous in the eighth or ninth century; got to the highest prosperity in the eleventh, and declined after the twelfth. Their principal seats seem to have been in the Southern parts of the Peninsula, and in Gujerat and the West of Hindustan." [*Ex. Gr.* Mewar and Marwar, apparently the cradle of the sect (*f.*)]. "They seem never to have had much success in the provinces on the Ganges. They appear to have undergone several persecutions by the Brahmans, in the South of India at least. The *Jains* are still very numerous, especially in Gujerat, the Rajput country, and Canara; they are generally an opulent

(*c*) Alias Parswa, Paraswanatha, Colebrooke 9 Asiatic Researches 309.

(*d*) 9 Asiatic Researches 310, 311, (Colebrooke), and 1 H. H. Wilson's works by Rost 292.

(*e*) Ibid, pp. 107, 108.

(*f*) 1. H. H. Wilson's Works by Dr. Rost—pp. 346, 344.

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and mercantile class; many of them are bankers, and possess a large proportion of the commercial wealth of India."

Mr. Elphinstone's account of the *Jaina* sect is mainly taken from the late Mr. Erskine's description of it in Vol. III. of the Bombay Transactions; but other authorities are also relied upon.

As to the same sect, much information has been collected by the late Colonel Mackenzie in the 9th Vol. of the Asiatic Researches, pp. 244 to 278; together with some particulars extracted from a journal kept by Dr. Buchanan during his travels in Canara pp. 279 to 286—but Dr. Buchanan subsequently published an account of his travels in that province. and in Mysore and Malabar, which, as to his views, may be consulted with more advantage (*g*) than the extract.

In the same Volume of the Asiatic Researches is a most valuable essay by Mr. Colebrooke on the sect of the *Jainas* (*h*).

At page 288 he says :—

"It appears from the concurrent result of all the inquiries which have been made that the *Jainas* constitute a sect of *Hindus*, differing, indeed, from the rest, in some very important tenets; but following, in other respects, a similar practice, and maintaining like opinions and observances.

"The essential character of the *Hindu* institutions is the distribution of the people into four great tribes. This is considered by themselves to be the marked point, which separates them from *Mlech'has* or Barbarians. The *Jainas*, it is found, admit the same division into four tribes, and perform like religious ceremonies termed *Sanscaras*, from the birth of a male to his marriage. They observe similar fasts, and practice, still more strictly, the received maxims for refraining from injury to any sentient being. They appear to

(*g*) See especially Volume II. pp. 253 *et. seq.*, 488 *et. seq.* 2nd Edition published at Madras in 1870. There are other references to *Jainas* in the Index.

(*h*) pp. 287 to 322.

recognize, as subordinate deities, some, if not all, of the gods of the prevailing sects; but do not worship, in particular, the five principal gods of those sects; or any one of them by preference; nor address prayers, or perform sacrifice, to the sun, or to fire: and they differ from the rest of the *Hindus*, in assigning the highest place to certain deified saints, who, according to their creed, have successively become superior gods. Another point, in which they materially disagree, is the rejection of the *Vedas*, the divine authority of which they deny: condemning, at the same time, the practice of sacrifices, and the other ceremonies, which the followers of the *Vedas* perform, to obtain specific promised consequences, in this world, or in the next."

At page 291 Mr. Colebrooke continues: "Major (Col.) Mackenzie's information confirms that, which I had also received, concerning the distribution of these sectaries into clergy and laity.* In Hindustan the *Jainas* are usually called Syauras; but distinguish themselves into *Sravacas* and *Yatis*. The laity (termed Sravaca) includes persons of various tribes, as indeed is the case with Hindus of other sects: but on this side of India, the *Jainas* are mostly of the *Vaisya* class (*i*). The orthodox Hindus have a secular as well as a regular clergy: a Brahmana, following the practice of officiating at the ceremonies of his religion, without quitting the order of a householder, may be considered as belonging to the secular clergy; one who follows a wordly profession (that of husbandry for example) appertains to the laity, and so do people of other tribes; but persons, who have passed into the several orders of devotion, may be reckoned to constitute the regular clergy. The *Jainas* have, in like manner, priests who have entered into an order of devotion; and also employ Brahmans at their ceremonies; and, for want of Brahmans of their own faith, they even have recourse to the se-

* See also the Dabistan, Vol. II., 211 to 213, 241.

(*i*) It includes eighty-four tribes: 9 Asiatic Researches 291, n; I. H. H. Wilson's works by Rost 345.

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cular clergy of the orthodox sect." That concluding remark is confirmed by the evidence given at both sides in this case, and by Professor H. H. Wilson, who says—"The reader in a *Jaina* temple is a *Yati*, or religious character; but the ministrant priest, the attendant on the images, the receiver of offerings, and conductor of all usual ceremonies is a Brahmana." He treats this fact as "a natural consequence of the doctrine and example of the *Tirthankaras* who performed no rites, either vicariously, or for themselves, and gave no instruction for their observance." He regards it as showing that their faith "was a departure from established practices, the observance of which was held by the *Jaina* teachers to be a matter of indifference, and which none of any credit would consent to regulate;" and that "the laity were, therefore, left to their former priesthood, as far as outward ceremonies were concerned" (*j*).

At pages 251 252, of Vol. 9, Asiatic Researches, Colonel Mackenzie writes thus:—

"When a man dies, they burn the corpse, and throw the ashes into water; the rich cast the ashes into rivers. They never perform other obsequies, as their law says 'the spirit is separate or distinct from the body, which is composed of five elements; when, therefore, the corpse is burnt, the several parts which composed it return to their former state: consequently, to the deceased, no ceremony is due.' After death, as nothing of him remains, therefore they omit to perform the monthly and annual ceremonies, which other *Hindus* observe on this occasion; and they give these reasons in vindication—'A man should feed himself with the best food, while he lives in this world, as his body never returns after it is burnt.'

"They further say that the foolish people of other tribes, being deficient in sacred knowledge, spend money in vain, on

(*j*) H. H. Wilson's works by Rost, Vol, I., page 319, and see pp. 317, 342.

account of deceased relations: for how can a dead man feel satisfaction in ceremonies, and in the feeding of others? 'Even a lamp no longer gives light by pouring more oil into it, after its flame is once extinguished.' Therefore it is vain to make feasts and ceremonies for the dead; and if it be wished to please relations, it is best to do so while they are yet living; 'what a man drinketh, giveth, and eateth in this world is of advantage to him, but he carrieth nothing with him at his end.'"

The Abbé Dubois, in his work on the manners, &c., of the people of India (*k*), says of the *Jainas* :—

"They have no Tithi or days appointed for celebrating the memory of the dead, which is one of the most prominent institutions among the Brahmins. With the Jainas the dead are forgotten almost as soon as they are buried; and in three days after the funeral there is no further mention of them."(*l*.)

The complete absence of any *Srádddha* (or *paksha*) ceremonies is also spoken of by many of the witnesses in this case, as characteristic of the *Márvádi Jainas*, to which sect belong the present litigants.

An elaborate account of the *Jaina* sect is contained in the 1st Vol. of Professor H. H. Wilson's works recently edited by Dr. Reinhold Rost (*m*). The late Professor's views coincide with those of the other authors on the points with respect to which I have quoted from them. None of those authors say aught to countenance the existence of any difference in the law of succession amongst the *Jaina* sect and that of the orthodox Hindus.

The only instance in which I have discovered any hint of such a difference is in Colonel Tod's Rajasthan, Vol. II., p. 145 (*n*), where speaking of Marwar and the success of the *Jainas* resident there in commerce, he says :—"The wealth, acquired

(*k*) 2nd Ed. Madras p. 404.

(*l*) Acc. H. H. Wilson's works by Rost—Vol. 1, pp. 6 (n), 322.

(*m*) Essays, &c., on the religion of Hindus, Vol. 1, p. 276 *et seq*.

(*n*) 2nd Ed. Madras—See also Vol. 1, pp. 446 *et seq*, and 462, for further description of the *Jainas*.

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in foreign lands from the Sutlej to the ocean, returns chiefly to their native soil; but as neither primogeniture nor *Majorats* are sanctioned by the *Jaina* law-givers, an equal distribution takes place amongst all the sons, though the youngest (as amongst the Getes of Asia, and the Juts of Kent) receive often a double portion. This arises when the division takes place while the parent is living, being the portion set apart for his own support, which ultimately falls to the youngest, with whom he probably resides. It would be erroneous to say that this practice is extensive, though sufficient instances exist to show that it once was a principle." From this passage the proper inference would seem to be that, whatever may formerly have been the case, the practice, of which Colonel Tod thus writes in 1832, was then the exception and not the rule.

In 1833, *Máhá Rájá Govindnáth Ráy* v. *Gulál Chánd and others* (*o*) was decided by the Sudder Divani Adalut in Calcutta. The facts, now material in that case, are these: Utam Chand, a *Jaina* by sect, by a will in the form of a letter to Moti Chand, authorized his (Utam Chand's) wife to adopt a son for him, to be selected by Moti Chand; and Moti Chand was directed by the will to make over the estate (situated at Dinagepore) to the son who should be so adopted. Utam Chand died. Moti Chand also died without making any selection, and after the deaths of both of them, the widow of Utam Chund adopted Gulál Chand as son to her deceased husband. The Court of Murshidabad, in 1827 A.D., upheld the adoption, and so did the Sudder Divani Adalut after consulting its Pandit, who gave this exposition of the *Jaina Shástra*:

"The selection and adoption, by the widow, Mayakumari, of plaintiff (Gulál Chand) after the death of Moti Chand was legal; for under all circumstances a sonless widow may adopt a son, just as may her husband, *for the performance of rites*. The sanction of her husband or the direction of the Yatis or priests is not essential. An elder son may be adopted as a

(*o*) 5 S. D. Rep, 276.

son; and the age qualifying for adoption extends to the thirty-second year. For legal adoption, the essentials, specified in the authorities subjoined, are required." A long passage alleged to be from the *Gautama Prasna* was amongst the authorities; and in this the power of the adopting widow to depose the adopted son in case of misconduct was declared. The Sudder Divani Adalut consulted several other pandits (including *Jainas*) on the right of the widow to depose the adopted son, and on her right to alienate, notwithstanding the adoption, but received conflicting opinions. As already stated, it pronounced the adoption to be valid according to the *Jaina Shástra*, and evaded giving any opinion as to the legality of a deposition by a widow of a person adopted by her as son to her deceased husband, as it held that the widow in that case had, by a compromise entered into by her with the adopted son *pendente lite*, estopped herself from relying on an alleged previous deposition of him by her.

In a note to that case, the reporter, Mr. Sutherland, gives some texts of Vurdhamana cited from the *Gautama Prasna* by the Pandit first consulted by the Sudder Divani Adawlut in support of the validity of the adoption.

It is unnecessary for us now to say whether such an adoption as was made by the widow in that case would be valid according to the ordinary law administered to orthodox Hindus in this Presidency. (See *Purmanund* v. *Oomakunt*, 4 S. D. A. Rep., 318.) It would, however, be impossible, as we shall presently show, to accept, as a good reason for upholding it amongst *Jainas*, what the Pandit said as to "the performance of rites." It is unnecessary for us to say more as to the contention of the widow in that Bengal case in favour of a right to depose the adopted son*, and also to alienate the estate by compromise or otherwise, than that we are not to be understood as assenting to it. See *Náthája* v. *Hari* (*p*).

* Vide Marsh 317. 1 Borr. 75. 4 Moo. Ind. App. 1. Ed.

(*p*) 8 Bom. H. C. Rep., 67, A. C. J.

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Hitherto, so far as we can discover, none but ordinary Hindu law has been ever administered either in this Island or in this Presidency to persons of the *Jaina* sect. Mr. Steele, speaking of the members of that sect in Poona, remarks (*q*) that they say they have books different from the Brahmanical *Shástras* which are consulted by their *Gurus* on occasions of *penance*. That they seemed ignorant of the contents of their books, "and would appear to consult Brahmans on most disputed points," and again he says (*r*):—"The *Jainas* in Poona generally consult Brahmans in all disputed questions of law, but they stated that books exist of their own, different from those of the Brahmans or Dharmsastr. Such are the Poonyawachun, Ubhishek and others, sometimes consulted on occasions of penance enjoined by the Jain Oopadya."

We have consulted a well-known oriental scholar, the Rev. Dr. Wilson, who we believe to possess a knowledge of the castes of Western India and their literature and customs, as extensive as that of any other living person whom it would be easy to name, and he has, with his usual courtesy and earnestness, afforded to us his assistance. He informs us that he is not aware of any authority in the books of the *Jaina* community or amongst the Hindu writers which would tend to support the custom alleged by the plaintiff here. Dr. Wilson has been informed by a learned *Jati* of the *Jaina* community and his Brahman assistant that they do not know of any such authority, that adoption is of rare occurrence amongst the *Jainas* and when resorted to, is regulated by the ordinary Hindu law, as is their succession to property generally. The evidence also in this case itself shows that notwithstanding the *odium theologicum* which the books speak of as existing, or having existed between the *Jainas* and the orthodox Hindus, yet in many matters Brahman intervention is sought by *Jainas* for instance in marriage ceremonies, in ceremonies on the inauguration of a new house, &c. And the fact, shown by Colebrooke, Wilson, and others

(*q*) p. 29, 1st Ed. (*r*) p. 102, 1st Ed.

that *Jainas* derive their origin from Hindus and are only a branch of an older stock, accounts for their retaining the same laws of succession, notwithstanding their divergence in religion.

The recognition of the right of adoption amongst Hindus has been carried by the Courts of Justice in this Presidency at the least as far as it has been in any part of India, and farther than it has been in many parts (*s*). The Maratha school of Hindu law permits the widow to adopt a son on behalf of her husband without any express authority from him to that effect, provided he has neither said nor done anything which can be regarded as a prohibition to her or a refusal by himself when *in articulo mortis* to adopt (*t*). It has even been held here that the consent of the kinsmen of the husband is not essential to adoption by a widow, if the act be done in the *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive : *Rakhmabai* v. *Radhabai* (*u*). And see *Rupchand Hindumal* v. *Rakhmábái* (*v*) ; *Gopál* v. *Náro* (*w*).

But it has never been decided that anybody except the widow can act vicariously for the man to whom the son is to be affiliated. She is herself but a delegate, either with express or implied authority ; she cannot extend that authority to another person so as to enable him to adopt a son to her husband after her decease. She does not adopt for herself but for her husband (*x*). And there is not, to our knowledge, any judicial decision to the effect that her husband could

(*s*) 7 Bom. H. C. Rep., 171 A. C. J., Ibid Appendix xvii., xxiv. xxvi.

(*t*) 7 Bom. H. C. Rep. Appx. 1.

(*u*) 5 Bom. H. C. Rep. 181 A. C. J. That decision is under appeal to the Privy Council.

(*v*) 8 Bom. H. C. Rep., 114 A. C. J. (*w*) 7 Ibid Appendix xxiv.

(*x*) 1 Stra. 78. 79. 2 Ibid 88, 91, 94, 98. 2 Beng. L. R, 101, P. C. C Datt. Chand. S. 1 pl. 24. Suth. Syn. Head I, Notes V. and VI. 12 Moo. Ind. App. 350.

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authorize any person other than his widow to adopt on his behalf after his decease. In *Veerapermal Pillay* v. *Narrani Pillay* (*y*), Sir T. Strange said:—"I can find no authority for supposing that any but a widow can adopt after the death of her husband; and as to the idea of the executors themselves adopting, as was contended for, by virtue of the will, it is too preposterous to be entertained for a moment upon any principle of Hindu law." In Vol. I. of his treatise on H. L., p. 80, he, indeed, says "upon the Benares principle, it has been thought that an adoption by a *mother*, under an authority given her by her (dying) *son*, would be good." For this proposition he refers to a pandit's opinion given at p. 93 of the 2nd Vol. of his treatise on Hindu law, which was clearly wrong as remarked there by Mr. Colebrooke. Mr. Ellis seemed to think that if the son's widow were under age, he might authorize his mother to adopt, but Mr. Sutherland, who was much a better authority, especially on the subject of adoption, denied that the adoption by a mother for her deceased son would be valid—Ibid 94. In that case too, there would be only a single delegation; whereas in the present case a double delegation must be implied.

In 1867, the High Court at Calcutta held that *Jainas* are governed by the Hindu law of inheritance applicable in that part of the country in which the property is situate: *Lala Mohabeer Persad* v. *Mussamut Kundar Koover* (*z*). In that case the property was situate in Shahabad, a locality subject to the Mitákshará. It had been contended on the authority of an opinion of a pandit that, whether a sonless Hindu, being a *Jaina*, died divided or undivided from his brothers, his widow succeeded to his share, for which opinion the Pandit relied upon *Gautama Sanhita*. The Court (Peacock, C.J., and L. Jackson, J.,) held that view to be wrong, and adhered to the Mitákshará law, but being of opinion that the deceased had been separated from his brothers, permitted the widow to

(*y*) 1 Notes of Ca. at Mad. 103.
(*z*) 8 Cal. W. Rep. 116 Civc. Rul.

succeed to his share. Peacock, C.J., said :—"If the members of a particular sect of Hindus claim to be governed by a particular law, and not by the ordinary Hindu law applicable to the district generally, we think it is for them to prove clearly as a matter of fact by Pandits, or other persons acquainted with their usages, by what rules their rights of inheritance are regulated. It was for the respondent in this case, as it was in the Shiva Gunga case, to show (if her case depended upon it) that the property did not descend according to the usual course of Hindu law prevailing in the district (see 9 Moore's Indian Appeals 608)."

The term Hindu or Gentu, when used in Regulations, Acts, Statutes, and Charters in which Hindus or Gentus have been declared entitled to the benefit of their own law of succession and of contract, has been largely and liberally construed. See the remarks at pages 184, 185, 186, 5 Bom. High C. Rep. (*Lopes* v. *Lopes*), where Sir Edward Hyde East's evidence in 1830 before the House of Lords' committee is mentioned, in which he stated that Sikhs were treated as a sect of Hindus or Gentus, of which they were a dissenting branch. The authorities, already quoted, show that *Jainas* are regarded as a sect of Hindus. They are in fact much more akin to the Brahmanical Hindus than Sikhs can be deemed.

In the absence of express enactment, we are bound to follow "the usage of the country in which the suit arose; if none such appears, the law of the defendant, and, in the absence of specific law and usage, justice, equity, and good conscience alone :" Bombay Reg. IV. of 1827, Sec. 26.

Those words "the usage of the country in which the suit arose" should be liberally interpreted, and would comprise the ancient and clearly established usage of a tribe or caste, which, or some members of which, may have migrated from one part of India to another. They have been regarded as carrying their laws of succession and of marriage with them to their new domicile. See 12 Moo. Ind. App. 81, 91 (which was, however, a case in Bengal where the Regu-

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lations III. of 1793, Sec. 21, and VII. of 1832, Sec. 9, to some extent differ from the Bombay Regulation above quoted).

But when amongst Hindus (and *Jains* are Hindu Dissenters) some custom, different from the normal Hindu law of the country, in which the property is located, and the parties resident, is alleged to exist, the burden of proving the antiquity and invariability of the custom is placed on the party averring its existence.

In the case of *Ramalokhmi Ammal* v. *Sivanantha Perumal* (17 Calc. W. Rep. 553 Civ. R.), decided on the 20th April 1872, in the Privy Council, what is required to establish a special usage deviating from the ordinary law of succession was on the highest authority stated thus :—

"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."

We would also express our adherence to the following remarks made in *Nárayan Bábáji* v. *Nánú Manohar* (*a*) which was a suit between Hindus :—

"If any person shall aver a custom to the contrary" (of the general rule of Hindu law in this Presidency) "with respect to any particular kind of property, the burden of proof of such custom lies upon him, and ample and satisfactory evidence is necessary before the Court ought to admit, as established, any variation from the general rules of law regulating the devolution of property amongst Hindus. Were

the Court not to look with a jealous eye at attempts to establish local or caste customs in derogation of the general canons of descent amongst Hindus, the exceptions would soon become as frequent as the rule; and *Misera est servitus ubi jus vagum est.* However, if the evidence of an uninterrupted general custom be satisfactory and above suspicion, the Court is bound to give effect to the custom (*b*)."

Like doctrine to that contained in the two cases already mentioned will be found in Calc. W. R. 1864—21, 23, 41, Civ. R.; 15 Calc. W. R. 47 P. C.; 16 Ibid 179 Civ. R.; 5 Bom. H. C. R. 200 O. C. J.; 2 Bac. Ab. Tit. custom; 3 Mad. H. C. R. 77; *Shidhojiráv* v. *Náikojiráv,* (*supra*) p. 228; and see 1 Mad. H. C. Rep. 420, 425; 3 Ibid 50, 55.

In this country it is no uncommon experience to find the custom alleged to be that which for the moment it is convenient to those who assert its existence that it should then be. I have known the most conflicting customs to be from time to time asserted to exist in one and the same sect. In a contest in the Supreme Court between the two widows of a deceased inhabitant of Kattiawar, I recollect that a deviation from the general law of nature was, upon affidavit, sworn to exist in that country. The object of the allegation being to establish the legitimacy of a child born to one of the widows nearly twenty-two months after the death of the husband, the swearing on her part was that twenty-two months was an ordinary period of gestation in Kattiawar. We find it necessary to scrutinize evidence of usage closely, and especially to demand specified instances of the custom.

The authorities, to which we have referred, and which, well as the admission made by almost all of the witnesses to whose evidence our attention has been particularly invited on behalf of the plaintiff, Rájmal, establish that the *Jaina* sect

(*b*) Calc. W. Rep. 1864, 39.
Calc. W. Rep. from 1862 to 1864 F. B. 97.

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totally discards the *Srádddha* (or *paksha*) ceremonies and disbelieves in their efficacy and pays little regard to sacrifice. This circumstance is fatal to the existence, amongst that sect, of the principal reason which renders adoption almost indispensable to the more orthodox Hindus when they are sonless, "the future beatitude of" such "a Hindu depending, according to the prevalent belief, upon the performance of his obsequies, and payment of his debts, by a son, as the means of redeeming him from an instant state of suffering after death. The dread is of Put, a place of horror to which the manes of the childless are supposed to be doomed; there to be tormented with hunger and thirst for want of those oblations of food and libations of water, at prescribed periods, which it is the pious and indeed indispensable duty of a son (puttra) to offer." See 1 Stra. H. L. 73, 74, 91, 94, 127, 129; Manu Ch. IX. pl. 137, 138; 3 Jag. Dig. by Colebrooke Bk. V. Chap. IV., Sec XV., pl. cccl. to cccxiii. (*c*). In Jagannatha's commentary on pl. cccxi. (p. 296), he says: "It is declared in the Veda that heaven is not for him who leaves no male issue. It consequently appears that celestial bliss is attained through a son." We have seen that the *Jaina* sect does not believe in the Vedas. It is true that, amongst the orthodox Hindus, obsequies may, in default of a son, be performed by the widow, or brother, or other heirs of the deceased, but not, in their view, with the same benefit as by a son. That a son, therefore, of some description is to such a Hindu, in a spiritual sense, next to indispensable is abundantly certain: 1 Stra. H. L. 76, and see the text of Brihaspati, 3 Jag. Dig. Bk. V., Ch. VIII., S. 1, pl. cccxcix. and the commentary upon it. (Brihaspati himself, however, was of the Atheistical school. He attacked the Vedas and the Brahmans, and ridiculed the *Srádddha* as a mere contrivance of the Brahmans to gain a livelihood: 1 Wilson's Works by Rost p. 6.)

(*c*) And see Ibid Bk. V., Chap. IV., S. II., pl. CXCVIII., and Datt. Mim. S. 1, pl. 3 *et seq*; Datt. Chand. S. 1 pl. 3 d; Suth: Syn. Hea I.

No doubt, the celebrity or perpetuation of the name of the adopter is also mentioned as a motive for adoption: Datt. Mim. Sec. 1, pl. 9; Datt. Chand. Sec. I. pla. 3; 1 Stra. H. L. 91; and it is the only reason for the adoption in the present case given by the witnesses. But it is only a secondtary and worldly motive and carries with it none of the spiritual force of what Mr. Sutherland describes as "the primary reason for the affiliation of a son," namely, "the obligtory necessity of providing for the performance of the exequial rites, celebrated by a son for his deceased father, on which the salvation of a Hindu is supposed to depend."

There is then, in the case of *Jainas*, a stronger reason for not extending the right of adoption beyond that allowed by precedent and text law to Hindus at large than in the case of the orthodox believers in Hinduism. We should, therefore, not relax in favour of *Jainas* the strict scrutiny which evidence of a custom opposed to the ordinary law and usage of the country demands.

We proceed now to consider the evidence of the alleged custom in the present case.

There have been several witnesses examined on behalf of the plaintiff, who state that there is a custom amongst the *Márvádi Jainas*, both at Ahmadnagar and in Marwar, of adoption where both adoptive parents are dead. Some of them speak generally as to the custom, but, as already stated, it is to specified instances that a Court of justice pays most attention. And this is particularly so where, as here, not a single *Yati* or *pandit* or priest or other expert either in the lore of the *Jainas* or of the Brahmans has been called to prove this alleged custom. The witnesses are chiefly shop-keepers or cloth-sellers or *gumasthás*. There does not appear to be a man of learning amongst them. They *unâ voce* admit that they cannot point to any authority in the books of the *Jaina* sect which supports the alleged custom, nor do they pretend that it has ever been judicially recognized. There are, in the

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whole body of evidence to which our attention has been directed, only four specified instances of such adoption, and of these the most ancient is one which occurred about 22 years ago, and one of the four breaks down, inasmuch as the widow of the adoptive father was living when the adoption is alleged to have taken place.

The first instance mentioned in the evidence was where Jithmal Meghráj gave his son in adoption to Prithiráj Vaidya after his death, and after the death of his wife Chimábái. This instance occurred about $2\frac{1}{4}$ or more years ago, and is testified by witnesses Nos. 54, 55, 56, 60, 65, 69, 78, 83, 84, 85, 87, 88, 93.

The second alleged instance is that of Gangárám (or Kisands), who was given in adoption to Nathmal Chedan at Ahmadnagar, about five years ago, after Nathmal's death. But his widow was then living (60). That instance, therefore, fell short of the exigency of the alleged custom. It was testified by witnesses Nos. 55, 60, 94.

The third instance (also at Ahmadnagar) occurred 5 or 7 years ago. Gyanmal and his widow being then dead, Ratanmal the son of Kasturchand (brother of Gyanmal), was given to Gyanmal in adoption. It is testified by witnesses Nos. 55, 66, 92.

The fourth instance is that which is alleged to have occurred 22 years ago in Marwar, and is testified by the adopted son himself, a native doctor (No. 91).

Some of the witnesses for the defendant Bhagvándás deny the custom, but admit the instance of the adoption of Jithmal's son as son to Prithiráj.

There are then but three perfect instances established in proof, and of these, the most remote happened less than quarter of a century ago. It is impossible to regard such cases as proof of an ancient, still less of an immemorial, custom, unsupported, as they are, by a single text from any book of authority amongst the *Jainas* themselves or amongst the

Hindus at large, or by any *pándit, yati,* priest, or other expert.

For these reasons, we are of opinion that the plaintiff has failed to prove the existence of any such deviation from the Hindu law of this Presidency as he has asserted. The proceeding, which he says constituted an adoption, appears to us to have been a complete nullity, and not to be validated by the assent, although given, of the *Panch* of the caste, or of the senior members of it, in Ahmadnagar to the transaction. They had no power to establish any such custom, and could not clothe it with the antiquity which has not been proved, and which was essential to its legal existence. There must be not only a giving but an acceptance manifested by some overt act to constitute an adoption according to Hindu Law: 1 Str. H. L., 95; Manu, Ch. IX., pl. 168. Here there is said to have been a giving by the natural father, the uncle (defendant Bhagvándás), and two other persons, but to whom?—to two dead persons, the only two who could have adopted a son to the man. It has not been contended for the plaintiff that any person acted as their representative at the ceremony of the adoption, and as such accepted the plaintiff in adoption—not indeed that such vicarious acceptance would have been of any avail. There is not any good authority for saying that any person except the widow can accept a son on behalf of her husband *(d)*. There has not then been any valid, legal acceptance. We must decline to carry the law of adoption in this Presidency to a point beyond the farthest limit which it has already reached, and least of all should we do so for a sect of Hindus which does not believe in the spiritual necessity or advantage of adoption.

Exhibit 36, being part and parcel of the abortive attempt at adoption, must fall with it. It was not sued upon by the

(*d*) See Special Appeal 645 of 1866 (*Kenchawa* v *Ningúpa*) decided 22nd April 1867 by Warden and Gibbs, JJ., in which the following judgment was given:—

"In this case, the question for our decision is whether, under the circumstances deposed to, we can hold that Manápá did adopt the

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plaintiff, but was produced merely as evidence of the adoption in his case. That document is wholly founded on the adoption, which being itself a mere nullity, there remains no ground on which the document can stand, and the defendant Bhagvándás is not estopped by it, even if he had been specially sued upon it. Its consideration has failed. It does not appear to have been ever acted upon in any respect, and

special respondent, Ningáppá. The Munsif held that there was no adoption, and the District Judge has reversed this decree and decided that there was. It is admitted at the bar that the parties are not Brahmans, and therefore that all that is required to establish the adoption is a "gift and acceptance," and it is necessary to see whether there were such. The fact, as found, appears to be, that Manápá's wife died of cholera, and on the return from the funeral, Manápá was seized with it. Some conversation took place regarding the adoption of an heir, and Manápá asked Ningápá's father, Erápá, if he would give his son to him for adoption. Erápá assented and on Manápá being urged to go through the ceremony, he put it off until the morrow, when he died without doing any more in the matter.

It is argued by the pleader for Ningápá that this amounted to a gift and acceptance, and that the subsequent acts of all parties in making Ningápá light the funeral pile and perform the *sraddha*, show that the adoption was complete.

We had considerable difficulty in deciding this point, as certainly those acts of the family go far to show that Ningápà was considered as the adopted son; but after a very careful consideration of the facts, we are forced to the conclusion that the evidence does not show that a legal adoption was made. In England, a will may be written out, the witnesses may be in attendance, and the dying man may have the pen in his hand, but if he dies before putting it to the paper, it is no will; and deciding about the family estate of a Hindu, we have come to the conclusion that we must as carefully and strictly examine the evidence as to the completion of the act of adoption, as the Courts at home would the execution of a will. Being, therefore, unable to find a formal "gift and acceptance," or any overt act of Manápá's which can be taken in that light, being in fact unable to find more than a request and a consent which from Manápá's own acts were evidently not deemed sufficient by him, but required that something more should be done to complete the adoption, we come to the conclusion that we must reverse the decree of the District Judge and confirm that of the Munsif, with all costs on the special respondent."

the adoption was disputed by Bhagvándás very shortly after the ceremony, and after the execution of No, 36 (see No. 79, No. 89). Inasmuch too as it clearly purported to deal with immoveable property and was not registered, it was open to such objections as might be based on Sec. 17 and 49 of Act XX. of 1866, but as we think it falls with the adoption, and as it (Exhibit 36) has not been sued upon, there is not any necessity for our deciding as to the extent to which those objections might affect it.

We reverse the decree of the Subordinate Judge, but under the circumstances of the case, direct that the parties respectively shall bear their own costs of the suit and appeal.

Decree reversed.