untrue, he voluntarily incurs the risk of their being taken to be true against him. Here the accused had full opportunity to speak as they wished before the Magistrate. He has certified that their statements were voluntarily made. If the statements are not true, the prisoners themselves are to blame.

1874.

REG. v. JORAJ HASJI and others.

The Court then discussed the rest of the evidence, and confirmed the convictions, though it declined to confirm the sentence of death, and passed sentences of transportation for life.

[APPELLATE CRIMINAL JURISDICTION.]

REG. v. FATA' ADA'JI AND TWO OTHERS.

December 3.

Dying Declaration.

The declaration of a dying person, albeit made on solemn affirmation before a Magistrate, who was not, however, the committing Magistrate, and signed by him, is not admissible in evidence without legal proof that the deceased made such a declaration.

THE three accused were convicted of murder by W. H. Newnham, Session Judge of Ahmedabad. The first accused, Fatá, was sentenced to death, and the other two sentenced to transportation for life.

The facts of the case, in so far as they are material to the purposes of this report, are briefly as follows:—

The deceased Jothá, along with others, was sleeping near a cart laden with mangoes. On hearing a noise he awoke, and rousing his friends, pursued six men, who, it appeared, were making off with some of the fruit. Finding themselves hotly pursued, three of these men—who are the present applicants—turned to bay, and, as the prosecution alleges, the first accused, at the suggestion of the second, shot an arrow at the deceased, and the third accused, also at the suggestion of the second, ran towards him with a sword. On removal from the scene of the assault to Kapadvanj, the deceased is said to have made to a Second Class Magistrate, a declaration before his death, denouncing the accused as his assailants.

1874.

REG. v. FATA' ADA'JI and two others.

Upon the evidence in the case, which it is unnecessary to notice, including this dying declaration, the Session Judge based the conviction of the accused.

The appeal was heard by WEST and PINHEY, JJ.

Shántárám Náráyan, for the appellants, commented on the evidence to show its insufficiency.

Dhirajlál Mathurádás, Government Prosecutor, for the Crown. [*West, J.*—What evidence is there in the case to show that the statement recorded as No. 6, as the dying declaration of the deceased, was actually made by him?] There is none such. But it may be treated as a memorandum of evidence by a witness before an officer authorized by law to take such evidence. The statement is before a Magistrate on solemn affirmation, and may be admitted without proof under Section 80 of the Indian Evidence Act. [*West, J.*—The Magistrate was not the committing Magistrate, and the prisoners were not present, and had no opportunity of cross-examining the dying man.] Then this may be admitted under Section 32, clause 1 of that Act, as the statement of a deceased person, as to any of the circumstances of the transaction which led to his death. [But can you cite any authority to show that such a statement must be presumed to be genuine without evidence of its having really been made by the dying man?] No.

PER CURIAM:—The Government Prosecutor has not been able to produce any authority for the admission as evidence of the document recorded as No. 6, purporting to be the dying declaration of deceased Jethá without proof or solemn affirmation that the deceased actually made such a declaration. The law does not provide that the mere signature of a Magistrate shall be a sufficient authentication of such a document, and it is obviously desirable that the person who took the statement should be subject to cross-examination as to the dying man's state of mind when he made it, and as to other circumstances. We must, therefore, exclude

this document in considering the evidence in the case. But so excluding it we find that there remains sufficient evidence on record to sustain the conviction of the first and second prisoners.

1874.

REG. v. FATA' ADA'JI and two others.

[The Court then went into the evidence, and declining to confirm the sentence of death on the first prisoner, Fatá, sentenced him to transportation for life. It confirmed both the conviction and sentence on the second prisoner, and acquitted and discharged the third.]

Order accordingly.

[APPELLATE CIVIL JURISDICTION.]

Regular Appeal No. 50 *of* 1872.

October 10.

BHA'U NA'NA'JI UTPA'T.....*Plaintiff and Appellant.*
SUNDRA'BA'I, wife of DHONDU GOVIND.....*Defendant and Respondent.*

Family usage—Utpát families of Pandharpur—Succession—Hindu Law.

Among the members of the Utpát families of Pandharpur, in the Sholápur District, daughters are excluded from succession, by a long and uniform family usage.

Under Hindu law, a family usage or custom, when clearly proved, outweighs the written text of the law. But the greatest care must be exercised in accepting the alleged usage or custom as proved. When it is a family custom, the evidence must clearly show that it has been submitted to as legally binding, and not as a mere arrangement by mutual consent for peace or convenience.

Any special rule of inheritance proved to exist in a Hindu family, and which is ancient, uniform, and reasonable, and not repugnant to the fundamental principles of Hindu law, should not be refused recognition.

Origin and growth of the rights of inheritance of the widow and daughter by general Hindu Law, considered.

THIS was a regular appeal from the decision of Mahádev Govind Ránade, First Class Subordinate Judge at Poona.