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.

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[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.

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The case (*a*) was remanded by the High Court for the trial by the lower court of the two issues stated in the judgment of the court. The following is an extract from the judgment of Mr. Ránade, bearing on the second issue :—

"I now proceed to the investigation of the second point laid down in the remand order. If Purshotam Chimnáji was separated from the plaintiff, as a matter of course it follows that his daughter is his sole heir after Ramábái's death, now that the adoption of the first defendant has been set aside. Against this claim of the daughter, the plaintiffs set up a family custom, by which Purshotam and Ramábái dying without any issue or adopted son to succeed as heir, Purshotam's share lapsed to his separated kinsman, the plaintiff, and his daughter has no right to succeed to his father's share. The question is put rather too broadly in the order of remand. The question there is, 'whether, according to the custom of the country, the defendant Sundrábái, as a female, is excluded from inheriting the said property in dispute.' Now, the plaintiffs do not contend for such a broad principle of exclusion. They do not urge that there is any *custom of the country* which excludes *female heirs generally* from succeeding to such property. They plead a *family custom*, and that this family custom does not exclude *all* female heirs as such, but only *daughters*, female heirs of a different *gotra*. It is admitted by the plaintiffs that the wife, mother, or daughter-in-law of a separated Utpát succeed, on his death, to his share. Ramábái's own enjoyment for twenty years was of this sort, and so was Anpurnábái's before she adopted Purshotam. Every witness on the plaintiff's side, as well as on the defendant's, admitted that female heirs, as such, succeed, and are not excluded. The Utpát families number in all about fifty or sixty in Pandharpur, and at present there are six or seven female sharers in these *vritti*, who regularly receive their shares of the offerings, like any of the male members. Two of these female sharers, Girjábái, No. 266, and Várubái, No. 267, were examined on behalf of the defendant; and as the fact was not dis-

(*a*) See. 7 Bom. H. C. Rep. A. C. J. 153.

puted by any of the plaintiff's witnesses, the point may be said to be established that the property in dispute is not of a sort from which, by any custom of the country, female heirs, as such, are excluded. The Utpát *vritti*, as stated before, consists of the offerings before Rakhmini Devi and Rádhiká Devi, and the gifts of *yajmáns* who come to worship at the two shrines. The manner in which the fifty or sixty Utpát families manage to divide the *vritti*, is thus described by the witnesses on both sides, and this evidence removes the slight objection which otherwise might have been urged against female *purohits* or priests. The proceeds of the offerings have been farmed for the last four or five years from month to month, and the farmer, who is an Utpát himself, pays down the auction price on the last day of the month preceding that for which the farm is given. The farmer has regular lists made of all the sharers, and the ready cash, which he pays for the privilege of the farm, is divided by him among the sharers, according to their shares. None but the farmer Utpát actually officiates at the temples, except when any particular *yajmán* brings his own Utpát. Female sharers, like the male ones, have only to go to the temple on the thirtieth day of the native month, and take the portion of the cash which falls to their shares. On this point the witnesses on both sides give the same description. With regard to the second question, therefore, two points may be said to be admitted on both sides: 1st, that there is *no custom of the country* excluding female heirs from the succession; and 2ndly, that the property in dispute is not of a sort to which female sharers cannot succeed, and that female heirs, belonging to the *gotra* of the Utpáts, do succeed. The real point of contention between the parties relates to the much narrower question, whether female heirs belonging to a different *gotra*—daughters, &c.—are or are not excluded from succession to this property, not by the custom of the country, for none such is alleged, but by the usage of the Utpát families.

"There are thus two points to be considered, first, whether the evidence in this case is sufficient to establish

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such a family usage; and secondly, whether such a family usage, repugnant to the general religious law of the parties, can be upheld.

"Upon the first of these two points, the general effect of the evidence upon my mind is, that such a family usage, excluding female heirs of a different *gotra* from succession, has obtained in these Utpát families for a long period—for so long a period as the witnesses on both sides can testify from their recollection. The defendant's witnesses, one and all, admitted that, up to the moment of this suit, there has been not a single instance in which the daughter has succeeded as heir to her Utpát father's share, or has obtained her father's share by gift or will from him. The question itself, it seems, has not been raised before, so quietly has the usage been acquiesced in. * * *

"How far such a family usage, repugnant to the general religious law of the parties, can be upheld, is the next question to which I shall now address myself.

"Custom or usage occupies a prominent place in Hindu law. Manu lays it down 'that the scriptures (or the Vedas), the codes of law (or smritis), approved usage, and in indifferent cases self-satisfaction, the wise have declared are the quadruple description of the juridical system': Chap. 2, v. 12. 'Thus have holy sages, well knowing that law is grounded on immemorial custom, embraced good usage as the root of all piety (Dharm)': Achara, Chap. 1, v. 110: immemorial custom is transcendant law approved in the sacred scripture and in the codes of divine legislators. Let every man diligently observe immemorial custom: (Achara) Chap. 1, v. 108.

"More particularly, regarding the different varieties of custom, the same institute lays it down in Chap. 8, v. 46, 'what has been practised by good men and virtuous Brahmins, if it be not inconsistent with the legal customs of provinces or districts, or classes or families, let him (the king) establish.' 'All these titles of law promulgated by Manu, and (occasionally) the customs of different countries, different tribes, and different families, are described in this

code': Chap. 1, v. 118. The Yájnyavalkya institutes inculcate the same regard for the customs and usages of districts, classes, and families. Bribáspati says: 'Rules of the country, caste, or people, derived and preserved from ancient times, should still be preserved in the same way, lest people rise in rebellion.' He makes no mention of family usage. From this review, it will be seen that the Hindu law-givers regarded custom, which was immemorial, good or approved, and not repugnant to the scriptures and the institutes (for usage only occupies a third place in the enumeration of the sources of law), as having the force of law *ipso facto*, and that it did not require any judicial or legislative recognition to give it validity. The binding force of customary law has been discussed at length, and all the conflicting authorities on the subject examined in the *Khojah and Memon succession cases* (*b*), as also by the Madras High Court in *Tara Chand* v. *Reeb Ram* (*c*). In the *Khojah and Memon cases* the custom was a class or caste custom, and it was held that when such a custom has been shown to have existed from time whereof the memory of man runneth not to the contrary, and is not injurious to public interests, and does not conflict with the express written law of the ruling power, such a custom is entitled to the sanction of English courts of law, though it may be inconsistent with the dictates of the general religious law of the parties.' In the other case decided by the Madras High Court, the alleged custom was a family usage, and it was ruled that (1) though according to one school of modern jurists, for the establishment of a customary law applicable to a whole community, or a large section of it, the acts of individuals belonging to that community and illustrative of the custom must be plural, uniform, and constant, and performed with the consciousness that they spring from a legal necessity, and the custom, moreover, must not be unreasonable, (2) yet as customary law, antagonistic to the general law, can never be established by the evidence of a single family confessedly subject to that general law. The Privy Council has incidentally observed

(*b*) Perry's Or. Ca. 110. (*c*) 3 Mad. H. C. Rep. 50.

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that there does not exist in any person the power of making laws of inheritance for themselves.

"It will be seen from these quotations, that while in the case of class customs there are jurists who allow them a validity independent of judicial recognition, there is no school of jurists who recognise the power of the members of a single family, and inferentially of any number of families springing from the same source, to make a law of inheritance for themselves repugnant to the general religious law to which they are admittedly subject. It is very necessary to bear this distinction in mind between local or class customs and family usage, between *Deshāchār* and *Kulāchār*. In this presidency, this same distinction has received both a legislative and judicial recognition. Regulation IV. of 1827, Section 26, lays down that statute and regulation law must govern civil courts; when there is no statute or regulation law, the old custom of the country, in which the suit is brought, should be followed; and if there is neither statute law, nor custom of the country, then the religious law of the defendant ought to be followed in the decision of civil suits. It will be seen from this that it is the old *custom of the country* that is enjoined as a guide. English municipal law, by some historical accident, limits customs to a particular locality only. Sir Erskine Perry, in the *Khojáhs' case*, has remarked that this peculiarly municipal rule of English law (which explains the peculiar wording of the section quoted before), can have no application in India, where customs are seldom local, and are always personal ones or caste customs. Customs generally, therefore, may be divided into two classes, local or caste, or trade customs, and family customs or usages; and it will be seen, from a review of all the decided cases on the subject, that while the courts have been generally in favour of upholding the local or caste customs, even when opposed to the general religious law of the parties, they have shown a general disinclination to sanction a merely family usage which was inconsistent with the religious law of the parties. The institutes of Hindu law mention all the three kinds of customs—district

class, or family custom together—and place them much in the same rank as third in the order of the sources of law. It may reasonably be gathered from the texts that while orthodox Hindu tribunals would certainly not have upheld local or class customs opposed to the general religious law of the parties, at the same time they would have made no distinction between the usages of families and caste or local customs. But from the authorities it is plain that such a distinction has been made all along in British courts of justice, and in civil courts governed by the Regulations, as will be seen more at length from the cases cited below. The following, among others, may be cited as examples of local custom upheld, though inconsistent with the religious institutes or law of the parties. In the Broach and other Gujarát Districts, *wakf* property, which is inalienable by Muhammadan law, may be, by the custom of the district, alienated : 1 Borr., Case 27; 1 Bom. H. C. Rep. 36. In the same districts, and more especially on the other side of India, the right of pre-emption, which is based on Muhammadan law, is allowed and enforced, by custom, as between Hindus also : S. D. A Rep. 1848-50, p. 30. The law which forbids an encroachment on the privacy of a neighbour's house is based on Muhammadan law, and has been recognised, in many cases as applicable to Hindus also in particular cities of Gujarát.

"In 2 Borr., p. 38, Case No. 7, it was held that, though by the Muhammadan law there is no distinction between *watan* and other effects, the succession of an illegitimate son to a *watan* was disallowed as being opposed to the custom of the country (North Konkan). These instances may suffice to show how the courts favour local customs, even when opposed to the law of the parties. The next class of customs, caste customs—if not unreasonable or immoral—are equally favoured. The *Khojah and Memon cases,* above cited at length, furnish the best examples of this class of cases. The decision in these cases was again upheld in a late case decided by the High Court of Bombay, and reported in 2 Bom. H. C. Rep. 276. Although, in Hindu law, the

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right of divorce is marital only by the usage of particular castes, second marriage, without sufficient justification, or ill-treatment by the husband, may entitle the first wife to claim a divorce: 1 Borr., Case 22; 2 Borr., p. 524; and excommunication of the husband, for taking a second wife in marriage without consent of the first, was upheld by all the courts: 1 Borr., p. 398. In the earlier reports, there are many more such cases relating to the law of marriage, divorce, and other relations of personal status, where the caste law has been allowed to override the institutes. Of course, when any usage is plainly unreasonable or immoral, the courts have set it aside, notwithstanding that the Hindu institutes or custom sanctioned it. The Hindu law and usage both recognise the prostitute caste, but no suit lies in our courts for the wages of prostitution. The right of divorce at the pleasure of the wife claimed by the Talfide Koli caste was held to be invalid, though sanctioned by custom, as being opposed to the spirit of the Hindu law: 2 Bom. H. C. Rep. 276; 7 *ibid.* 133; 5 *ibid.* 17.

"These instances may suffice to show how the law favours caste customs, even when inconsistent with the religious law of the parties, if they are not clearly unreasonable or immoral.

"To come now to cases relating to family usages or customs, it has been held that evidence of the acts of a single family cannot establish a valid custom: 4 Bom. H. C. Rep. 113, A. C. J. A custom of primogeniture in the case of a petty Hindu family cannot be supported: 1 Bom. H. C. Rep. Appx. xlii.

"In that case the defence was that partition of the *watan* was not allowed in the family. It was held, however, that as this was not a usage of the country, but a family usage only, it could not be upheld, as being contrary to the general religious law of the Hindus. In 8 Harrington 273, a similar defence was negatived on the same ground. In 5 Moore's Ind. App. 169, 6 Moore's Ind. App. 164, it has been held that though general law may be controlled by usage, if shown to have existed for a long series of years, any petty

family cannot be permitted to set up a law for itself so as to set aside the general law.

"Such being the course of decisions on the subject of family customary law, the point for inquiry immediately before me is, whether the family usage set up in this case falls under the first class of cases or under the second, whether this usage should be upheld or disallowed.

"In this case the alleged usage is not strictly the usage of one family. It relates to about fifty or sixty sub-families, all sprung up from one common ancestor. In the case of *Turu Chand* v. *Reeb Ram*, the alleged usage was shown to have partially obtained through three generations of the common family, or rather of the several families who traced their origin from Mr. Hughes. The fifty or sixty Utpát families all acknowledge their common relationship, and the number of sub-families is a matter of mere accident. I do not think the number of these sub-families, in any way, converts the alleged usage into a usage of a class or a caste. The Utpáts cannot intermarry among themselves, and they observe mourning for one another, at least members of each of the four great divisions among them do observe mourning. The Utpáts cannot, therefore, be looked upon as a caste or class by themselves. They do not themselves set up any such pretension. There have been only two sorts of cases of *kuláchár*, or family usage recognised by the courts of law in some cases decided on the other side of India. The first class of cases are hardly exceptions from the general rule, that family customs ought not to be recognised when inconsistent with the religious law of the parties. The family custom in these cases only indicates the particular school of law which should govern the family. It has been held in 8 Calc. W. Rep. 261 Civ. Rul. that Hindu families are ordinarily governed by the law of their origin and not by the law of their domicile. In the case of a Mitákshará country family coming to reside in Bengal, the presumption is that they follow the Mitákshará law as their *kuláchár* till it is shown that they have adopted the Bengal law (of Achar and Vijaràhar). Many cases of this sort have been

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decided by the Bengal Courts on this principle. The other class of cases relates to the alleged usage of primogeniture in the succession of large *zemindáries*. These decisions proceed on the ground that the estate is, by family tradition and usage, of the impartible sort of what Hindu law recognises as *Ráj*. No *kuláchár* of the sort set up in the case excluding female heirs, not as females but as members of a different *gotra*, has been judicially recognised. On the contrary, there are numerous decisions where a similar usage has been negatived. In the case of the Ghotwal tenure in Bengal, reported in Calc. W. Rep. (1864), p. 39, Civ. Rul., a double *kuláchár* was set up, first, that by family custom the property descended to the eldest son, to the exclusion of other members, and 2ndly, that on failure of direct male heirs, it went to the nearest male kinsman, to the exclusion of all females. The first part of the family usage was found proved, and was accordingly upheld. The second part, though proved by some instances, was disallowed. One of the grounds on which the incapacity of female Ghotwals was sought to be supported, rested on their presumed inability to perform the personal services required of Ghotwals. It was held in that case that a female Ghotwal might succeed as heir, as personal service was not required of Ghotwals, whose ordinary duties were of a sort which might be performed by a deputy duly appointed. In our own presidency, a similar defence was set up against the claim of female heirs to succeed to the *Muzumdári watan*, and it was disallowed by all the courts. The law, as clearly laid down in 5 Bom. H. C. Rep. 202, A. C. J., recognises the right of females to hold *Muzumdári watan*, males being appointed by them to perform the services. In this case, the son of the daughter of a deceased *Muzumdár* claimed to represent him, and the Government raised the defence that female heirs could not succeed to the *watan*. It was there determined that there is nothing in the nature of the *watan*, or in the relationship of the holder to the state, which renders the succession of females impossible. In this presidency, females are entitled to succeed to hereditary district and village offices. In an early case, reported in the Reports of Selected

Cases, p. 122, the daughter's claim to succeed to the *Desáigiri* land of her father was supported, and a plea similar to the one raised in this case was disallowed. In another case, 9 Harrington, p. 425, a similar plea of family usage was set up for the defence, that the male kinsmen of the deceased who died without male issue succeeded to the property in preference to his daughter. It was held in that case by the late Sadar Court that 'the Shastra rule was the converse of this, and that the witnesses could not establish a custom contrary to the Shastra rule.' In 3 Bom. H. C. Rep. 75, A. C. J. a separated brother's widow sued for her husband's share in the *Varshásan* which was granted to the family for the performance of the worship of a certain idol. The widow's suit was allowed, as separation and performance of service in rotation by the husband's branch of the family was proved. It is true, in this case, the question of the competence of a female to perform the worship was reserved to be decided in another suit. In the present case, as stated before, this question does not arise. There are already female sharers in numbers who receive the proceeds of their shares, and the only question is whether the daughter ought to rank along with other female heirs whose claims are allowed. The property at present in dispute consists of the offerings before the idols and the proceeds of the *Purohitam* service to *yajmáns* who came to Pandharpur. Now, it has been ruled 'that hereditary priestly offices descend on failure of males through females.' The daughter's sons were admitted as heirs in this case: 6 Bom. H. C. Rep. 250, A. C. J. The privilege of administering *purohitam* to pilgrims coming to Rámeshvar is admitted to be capable of alienation and delegation, as was decided in the case before the Privy Council, reported in 2 Calc. W. Rep. (P. C.) 21. Taking the whole of these cases together, I think the inference is irresistible that the alleged family usage cannot be sustained in this case. There is nothing in the nature of this property that should allow its descent like any other property to the heirs of the same *gotra* as recognized by law, and prevent it from being inherited by other legal heirs by reason of their belonging to a different *gotra*. It has been shown before that similar

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defences, raised on similar grounds, to the claims of daughters to succeed to *ghotwal* tenures, to the *Desáigiri* and *Muzumdari watans* and to the *Varshasáns* of priests, have been disallowed by the law courts, and I do not see that there is any peculiarity in this case which justifies me in recognising such a departure from the usual rules of the Hindu law of descent. Pleas of expediency are, of course, not such as the law courts can well recognise. But even on grounds of expediency, the question is debatable, and, on the other hand, I am certain that there is little equity in letting the daughters, many of whom in every family are unmarried or widowed, to starve from want, because they have the misfortune to lose their father. The daughter's claims upon the father's affection and estate in natural equity are certainly much stronger than those of remote kinsmen. The tacit arrangement, which had certainly for some time obtained in these Utpát families to the prejudice of the claims of the daughters, has never received judicial recognition. The daughter's right of succession, though distinctly recognised by Hindu law, has been looked upon with little favour by the people of this part of the country, and the student of the early reports will be struck with the painful struggle which female claimants had to make against all manner of pleas and defences, in spite of which this claim has now during the last fifty years obtained a general judicial recognition. In 4 Mad. H. C. Rep. 345, there is a case reported, in which the members of an undivided family, at the time of partition, agreed among themselves that the property of any one of the members or their heirs, who had no natural or adopted son, or any other issue, should not be sold or transferred as a gift, but should, on his death, be divided by the other sharers.' It was held, in a suit brought by one of these sharers to set aside a sale made by a member who died without issue, that 'an estate could not be made subject to a condition which is repugnant to any of its ordinary legal incidents, such as the power of disposition, and that such legal incident cannot be taken away by agreement.' The family arrangement, which I hold to have obtained in the present case, can have no more legal validity than this agreement of the co-sharers.

This tacit pact of the Utpáts cannot divest the estate of its legal incident—succession by the daughter after the widow—under the general canons of inheritance as laid down in all the institutes. To recapitulate what has been said on this part of the subject. Inasmuch as (1) family usage to be recognised as valid must be not repugnant to the scriptures and the institutes of law, which this is shown to be; (2) that while the Regulation enjoins only the enforcement of the old customs of the country, and by necessary inference, of castes or classes, even when inconsistent with the religious law of the parties, the present usage is not a local custom or class or caste custom, and as such, does not come under the protecting section of the Regulation; (3) that the general drift of all the authorities on the binding force of customary law is to recognise local or caste customs, but to disallow any mere family usage as to inheritance, if repugnant to the general law; (4) that there have been express decisions, in which the rights of daughters to succeed to hereditary service *watans* and offices have been upheld, and pleas of family usage, similar to those raised in this case, have been negatived; (5) that there is nothing in the nature of the property or the duties required of an Utpát, which would exclude daughters at the same time that the right of succession was allowed to the widow and the daughter-in-law; (6) that the arrangement, by which daughters are excluded, has not obtained a judicial recognition, (7) and that no such arrangement can be allowed to deprive property of its ordinary legal incidents, and, among others, the succession of the daughter after the widow; (8) that on grounds of expediency and natural equity, the daughter's claim to succeed to her father's estate ought to be upheld in preference to the separated kinsmen of the father; (9) and that no person can be allowed to set up arbitrary laws of inheritance for themselves repugnant to the general religious law to which they are admittedly subject.

"On these grounds and on the authority of the cases cited before, I hold, on the second point, that Sundrábái, notwithstanding that she is a female heir of a different *gotra*,

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has a right to succeed, under the general law of inheritance, to her separated father's property, and the alleged usage to contrary, though proved to have obtained in these Utpát families, cannot be upheld."

The appeal was argued before WESTROPP, C.J., and WEST, J.

Rávˇ Sáheb V. N. Mandlik for the appellant.

Shántárám Náráyan for the respondent.

The authorities cited and the arguments used by the pleaders on both sides fully appear from the following judgment of the High Court delivered by

WEST, J.:—This case, the previous proceedings in which are fully reported at 7 Bom., H. C. Rep. 153, A. C. J., was remanded for retrial upon the following issues, viz.:—

(1.) Whether, as regards the property in dispute, Purshotam Chimnáji (father of the defendant Sundrábái) was divided from the original plaintiffs.

(2.) Whether, according to the custom of the country, the defendant, Sundrábái, as a female, is excluded from inheriting the said property in dispute or any part thereof.

On the former of these issues, the Subordinate Judge, Mr. Ránade, has found that Purshotam was divided in interest from the plaintiffs. His judgment on this point has hardly been questioned. It rests on a very careful analysis of the evidence, and we see no reason for arriving at a different conclusion on this part of the case.

On the second issue, the Subordinate Judge has found that the evidence points "to a generally received family usage, by which, while female heirs of the same *gotra* are admitted to share, the daughters as belonging to a different *gotra* are excluded from succession." He concludes, therefore, that "the plaintiffs have made out their allegation of the existence of such usage in the Utpát families, by which, Sundrábái, as a daughter, would be excluded from succeeding to Purshotam's share." This finding, if relevant, should strictly have been decisive. Either evidence should not have

been taken of the family or class custom upom which the plaintiffs relied as having established a special rule of inheritance, by which they sought to benefit, because such a custom could not be the basis of a legal right, or else, being taken, because the custom would constitute a law, the decision should have been in accordance with its result. Probably, the Subordinate Judge wished to put on record the materials upon which a decision in appeal might be founded in the event of this Court's taking a different view from his own of the legal questions to which he proceeds to address himself, and he has certainly spared no pains to make his investigation thorough and effectual. The evidence given by the several witnesses has been minutely analysed in the arguments before us, but though it is not altogether one-sided, we are satisfied that, upon the whole, there is a great preponderance of testimony in favour of the view taken by the court below. The usage of the family or tribe of Utpáts has excluded daughters, who, by marriage, had entered another 'gotra,' from inheritance to their father's property. This usage is attested by a considerable number of witnesses, and is traced back so far as living memory goes without any apparent break in its uniform observance. The evidence shows also that a similar usage "obtains," as the Subordinate Judge says, "among the other priestly families in attendance upon the service of the shrine of Vithobá at Pandharpur and of the Devi Rukhmini and other temples," several of which families he specifies.

Notwithstanding, however, the satisfactory proof of the existence of the usage in point of actual practice amongst the Utpáts and amongst other tribes similarly situated, the Subordinate Judge has found that the usage having, as he conjectures, originated in a "sort of pact between themselves" (the Utpát families) has no force as a law binding on any person who may choose to discard the custom. His arguments on this subject require a careful consideration. He puts the matter before himself thus, "how far such a family usage repugnant to the general religious law of the

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parties can be upheld, is the next question to which I shall now address myself." The question put by this Court was whether, according to the custom of the country, the defendant, Sundrábái, was excluded from inheritance, and there was a want of accuracy in identifying the custom of the country with the general religious law of the parties, unless that custom gave effect to the general religious law as a customary law. If it did give effect to it, then the question was, not whether a family usage repugnant to the general religious law could be upheld, but whether the usage was indeed repugnant to that religious law. The way in which the Subordinate Judge has stated the case begs the question on this, which is the most important point in the inquiry.

Manu, who, as Vrihaspati declares, "is pre-eminent and the touch-stone of all Smritis" (see Muir's S. Texts, vol. 3, p. 181), says (Ch. VIII., pl. 41)—"A king.....must inquire into the particular laws of classes, the laws of districts, the customs of traders, and the rules of certain families and establish their peculiar laws." To this Kulluka Bhat has added the gloss whence Sir W. Jones extracted the condition "if they be not repugnant to the law of God." Yájnavalkya (B. I. pl. 342) gives a similar injunction and the Vyavahára Mayukha (Ch. I., plac. 13) quotes from Brihaspati—"Let all rules of each country, caste, and family that have been observed from ancient times be still observed in the same way." The Subordinate Judge has remarked on this passage—"He makes no mention of family usage"—which is an obvious mistake, and the reason why family customs are allowed so important a place in the constitution of the Hindu law of inheritance is sufficiently evident when we bear in mind the intimate connexion between the celebration of the family sacrifices and the ownership of the family property which is found subsisting in the earliest times. By many of the sages indeed this connexion was made the basis of a theory of the spiritual origin of proprietary rights which Vijnáneshvar combats in the Mitákshará, but the mere possibility of which shows the closeness of the relation which

gave rise to it. The ancient law, looking on the family estate as furnishing a permanent means for the sustenance of the members and for the continuance of the traditional sacrifices, treated its wanton alienation as a kind of sacrilege; while in the hands of the family, to whose sacra it was in a manner dedicated, its devolution was regulated by the peculiar character of those sacra and of the religious notions connected with them. The sense of the rather obscure passage, Manu, Ch. VIII., pl. 42, appears to be that a wide severance in customs between subjects is yet consistent while they adhere conscientiously and uniformly to their own recognized usages with a community of mutual affection and national feeling, which, as plac. 41 says, imposes on the sovereign the necessity of recognizing and protecting each such usage. The gloss of Kulluka "provided they be not repugnant to the law of God" points to a subject largely discussed by the commentators, that of the relative weight and authority of the different component elements of the Hindu law. The Vedas, all agreed to regard as inspired and infallible; the Smritis were to be venerated according to the antiquity and the character of their supposed authors; the opinions of the learned were to receive high consideration where not repugnant to the Vedas or Smritis. But infallible as the Vedas were, and highly venerated as were the Smritis, contradictions appeared in their precepts which embarrassed the devout, and which, for practical purposes, it was absolutely necessary in some way to reconcile. Hence the precepts of Yájnavalkya and Bhrihaspati that, where texts differ, reason must prevail, and that a decision must not be grounded solely on the letter of the Codes (Col. Dig. B. II., Ch. IV., pl. 17, Bk. V., pl. 57, Com.; Vyav. May. Ch. 1, pl. 12). Even in Manu's time, it had become evident that different views might be taken of what the law prescribed. At Ch. XII., pl. 106, he says—"He and he only is acquainted with duty who investigates the injunctions of the Rishis and the precepts of the Smritis by reasonings which do not contradict the Veda," a condition on which Kulluka

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too insists in his commentary on the first Chapter of Manu's Institutes. Thus it became recognized as time ran on and new exigencies arose that "the reason of the law has more authority in judicial proceedings than the letter of express ordinances" (Col. Dig. B. II., Ch. IV., pl. 15, Com.) This reason, however, must always, in theory at least, be subordinate to the sacred writings, and ground itself directly or indirectly on those rules of the Vedas, which all Hindus regard as in an especial sense the laws of God.

Beside the different interpretations of the law which were embodied in the theories of scholars, and concurrently with their development, there grew up a great variety of customs and usages which, as they obtained amongst people who all professed their submission to the law of the Vedas, were recognized by the Hindu lawyers as embodying the interpretation placed by the class or family upon the precepts of their scriptures. In many instances, particular usages were referred to particular texts, which lent them at least a *primâ facie* support; and in the gradual adaptation of the legal system to the actual needs of society, the principle became recognized which Yájnavalkya (II. 21) expresses thus—"If two texts be opposed, *usage* is of force for their construction." And as, in the theoretical systems of the lawyers, a considerable latitude was allowed, so long as a general adherence to the doctrines of the Vedas was observed or professed, so in estimating the claims of a custom to recognition, a general congruity with the Vedic system was considered enough to make an ancient and uniform usage binding as law. In the Sutras of Gautama, it is said (Adhy. XI., Sutra 20) that "in the cases where the customs of countries, classes, and families are not expressly founded upon a passage of the Veda, they are notwithstanding to be observed if they are not clearly against the principles of the sacred writings, such as would be, for instance, marrying the daughter of a maternal uncle" (Max Müller, H. A. S. L. 53). This enables us to understand what Kulluka meant when he added to Manu's text giving the authority of law to class and

family customs the gloss "provided they be not repugnant to the law of God." The licence of custom follows the analogy of the licence of interpretation and theorizing. Jagannátha in Colebrooke's Digest (Bk. I., pl. 50, Com.) has some remarks on this subject which, though in their English dress rather uncouthly expressed, yet state the principle on which Hindu lawyers place the recognition of a custom as law with perfect correctness. Their substance is this—

"The use of the law is to prevent the introduction of "multifarious practices at the will of the present generation, "but where the texts or their constructions differ, usage "settles the rule; and a practice divergent in some measure "from particular ordinances, but not irreconcilable with the "ancient legislation, may receive recognition on the ground "of its mere congruity with the legal system. Where, there-"fore, such a practice cannot be got rid of, it may be re-"cognized, though one strictly conformable to the ordinary "law is to be preferred."

It appears to have been held in the case at 2 Calc. W. R. 80 C. R. that those interested in the maintenance of a special custom of descent may waive it and that then the ordinary law will prevail for the future. So also, the Privy Council in the case of *Sorrendronáth* v. *Heerámonee* say (*d*) that a family custom is capable of being destroyed by disuse where a legal origin and continuance had given it efficacy as to both ancestral and acquired possessions.

When Manu, therefore, says that the usages of localities, classes, and families are to be upheld, he does not probably mean to make the validity of custom depend on its strict conformity to recognized general law. This would at least be quite inconsistent with what, according to Sir W. Jones, he says in Bk. I., pl. 108, 110, that law itself "is grounded on immemorial custom" and that "immemorial custom is transcendant law." When Kulluka adds the proviso that the usage must "not be repugnant to the law of God," he means repugnant to the fundamental rules of the Vedas and

(*d*) 12 Moore I. A. 281, see p. 291; see also 9 Moore I. A. pp. 242 and 243.

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of Manu so as to be incapable of uniting with them in a harmonious system. This theory of customary law differs no doubt very widely in some respects from that which has been recently developed by the labours of European jurists, but if we adopt Savigny's notion of the customary law growing up by imperceptible modifications in the consciousness or predominant feelings of the community, that legal consciousness amongst the Hindus has accepted the law of the Vedas and the Smritis as a general rule of civil conduct, but accepted it with a recognition of the validity of class and family customs as an integral part of that law. If an established custom diverges from the ancient law, it yet stands, supposing it presents the requisite characteristics, on precisely the same footing in a temporal Court as the general law to which it forms an exception. Each rests on uniform immemorial usage *as* law. The Council of Shastris, whose replies are given at 2 Borr., 102, expressly ground their opinions as to a widow's power of adoption on local custom, which they admit to be opposed to the Shastras. This may be somewhat inconsistent with the approved way of regarding this subject, but it agrees with the principle involved in the Mitákshará, Ch. I., Sec. III., pl. 4, 7, and it shows that custom had here become an embodiment of the general conviction which superseded the ancient law, recognized in other respects by the same custom of the people. Conformably to this, the Privy Council say in *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (*e*) :—"The duty, therefore, of a European Judge, who is to administer Hindu law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities as to ascertain whether it has been received by the particular school which governs the district with which he has then to deal and has there been sanctioned by usage. For, under the Hindu system of law, clear proof of usage will outweigh the written text of the law." There is no trace here of the doctrine glanced at by the Subordinate Judge that a custom cannot become

(*e*) 12 Moore I. A. 397, see p. 436.

legally obligatory until it has been made so by a judgment which, when it was passed, could not be law. Custom adopts the ancient law, modifies it, or rejects and supersedes it. Its authority in each case is the same, and if it receives into itself that part of the ancient law which gives force to family customs, those customs thus gain validity as part of the larger customary law in which they are embraced.

The Subordinate Judge admits, after considering the subject at some length, that a Hindu tribunal "would have made no distinction between the usages of families and caste or local customs." "But from the authorities," he continues, "it is plain that such a distinction has been made all along in British Courts of Justice and in Civil Courts governed by the Regulations." This distinction was strongly pressed on the Court by Mr. Shántárám also on behalf of the respondent; but if, as the Subordinate Judge says, it does not rest on anything in the Hindu law itself, it would require a uniform course of decisions expressly on the point to establish it as a principle to be recognized as grafted for ever upon that law. Of those cited by the Subordinate Judge, *Rawat Urjun Sing* v. *Rawat Ghunsiam Sing* (*f*) does not in any way support his argument. The Honourable Pemberton Leigh, in delivering judgment, says: "The only question in the case is one of the family custom and usage," which it was adjudged had established a law of primogeniture for the parties before the Court. The case of *Baboo Gunesh Dutt* v. *Maharaja Moheshur Singh* (*g*) is to precisely the same effect so far as it bears on the present inquiry. The property in dispute was one of the class regarded as a *ráj*, and the judgment says (p. 187) "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 has been shown that usage has prevailed for a very long series of years, be controlled unless there be positive law to the contrary." From these cases, it is clear that family usage

(*f*) 5 Moore I. A. 169. (*g*) 6 Moore I. A. 164.

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may control the ordinary law in the case of families having large possessions; it is not said that such usage is to be of non-effect in other cases, and the Hindu law makes no distinction between large estates and small. Whether the customary law of the district did so or not was a part of the question that the Subordinate Judge had to try.

Of the cases decided by this Court, the earliest cited is that at 1 Bom. H. C. Rep. App. 42. The head-note of this case supports the judgment of the court below, but it is to be observed that the family custom averred by the defendant was held not proved. "The witnesses," it is said (at p. 45), "are not able to show that even this practice (of non-partition) has been general or of any long continuance." Further on (p. 47) the judgment refers to those in the Privy Council already discussed, and says that probably the "same law would unhesitatingly be applied to some classes of Thakurs and Chiefs in this Presidency, among whom, by settled custom, the principality descends indivisible to the eldest son." That is, a recognized custom constitutes the law of the class. "But it would be a dangerous doctrine," Newton, J., proceeds, "that any petty family is at liberty to make a law for itself, and thus to set aside the general law of the country," and then it is adjudged that "no custom having the force of law..... has been made out to except the property in dispute from the general rules of inheritance of the Hindu law." The effect of this, bearing in mind the facts that had to be dealt with, is that a custom of a petty family, not shown to have been uniformly observed or of long continuance, will not constitute a law for that family. But precisely the same thing may be said of any family whatever. It was said in *Myna Boyee's case* (*h*): "The parties could not, by their agreement, give new rights of succession to themselves or their heirs unknown to the law," and in the more recent case of *Umrithnáth Chowdhry* v. *Goureenáth Chowdhry* (*i*), Lord Justice James says, that a family custom of inheritance "is a thing that cannot be predicated of a simple and single

(*h*) 8 Moore I. A. 400. (*i*) 13 Moore I. A. 542. See p. 549.

estate, the title to which dates from comparatively a short period of time back." The attributes of antiquity and uniformity of usage in a plurality of instances must needs be wanting in such cases. It is very hard to show that the usage has been submitted to in a single family from a sense of legal necessity rather than by way of conventional arrangement. The custom must, in theory at least, be of an origin as ancient as the law itself to which it constitutes an exception. The courts will, from uniform modern usage, presume an indefinitely ancient usage of the like kind, in the absence of circumstances leading to a contrary inference, as in the cases of *Shepherd* v. *Payne* (*j*) and *Lord Waterpark* v. *Fennell* (*k*); and this agrees in effect with what Savigny (System, Sections 28, 29) says on the same subject, but no such presumption can be made where the practice is traced to a recent agreement. The power of a family to make a new law for itself is nowhere recognized, but an ancient custom is held to have always been the law or to have had a legal origin, when this is possible.

The remaining case relied on by the Subordinate Judge was that of *Mádhavráv* v. *Bálkrishná* (*l*). This case rests on that of *Tara Chand* v. *Reeb Ram* (*m*), following which, the Judges say: "We consider that no evidence of the acts of a single family repugnant or antagonistic to the general law will establish a valid custom or usage which can be enforced by a Court of Justice." Now, if this dictum is to be taken in its broadest sense, there can be no such thing as family custom as a source of law—what the Subordinate Judge says of its standing on the same level as local and caste custom in the Hindu system is made of non-effect. But looking to the report of the Madras case, we find that the family was descended from the illegitimate children of a European by a Hindu woman. It was of recent origin. The acts of such a family could not make a customary law for it according to the tests laid down by the Privy Council. It was not pretended, so

(*j*) 31 L. J. 297 C. P.; S. C. 12 C. B. N. S. 414.
(*k*) 5 Jur. N.S. 1135; S. C. 7 Ho. of Lds. 650. (*l*) 4 Bom. H. C.R. 113 A.C.J.
(*m*) 3 Mad. H. C. R. 50.

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far as appears, that the special family rule relied on was at all reconcilable in principle with Manu or the Vedas. It could make no difference in such a case whether the alleged customary law "was antagonistic to the general law": it was not and could not be a customary law at all. The Bombay case applies the principle to what may have been very different circumstances, but here, as there, it may have been the case, or may have seemed to the learned Judges, that the alleged family custom was of recent origin. If the only objection to the alleged custom of primogeniture was its repugnancy to the general law, the case would, in our opinion, fall under the principles we have already discussed. Those principles have been upheld in a long series of decisions by Her Majesty's Privy Council, and do not any longer admit of serious controversy. In a good many cases, the question of family custom has been mixed up with that of the supposed impartible character of a *ráj* or principality, and this has perhaps led to some little confusion in particular instances, but a careful examination of the cases will show that the special law of descent has usually been put by the Privy Council, as in the case of *Neelkisto Deb* v. *Beerchunder Thakoor* (*n*), on the ground of ancient family custom whether the property was a *ráj* or not. There are other cases, like that of *Ghirdharee Sing* v. *Koolahul Sing* (*o*), in which the fact that the estate was a *ráj* was held not to involve the consequence that it was indivisible under a special law of inheritance applicable to that species of property; and generally it may be said that it is the family custom of descent, which, for juridical purposes, gives the property the character of a *ráj*, and not anything in the estate itself, which determines the rights of pretenders to it. In a case at 7 Bengal S. D. A. Rep. 195, it was ruled that on a property which had descended in one family, according to a rule of primogeniture, undivided, passing to another family in which no special rule prevailed, it became partible according to the ordinary law. Thus viewed, all the numerous cases of pro-

(*n*) 12 Moore I. A. 523. (*o*) 2 Moore I. A. 344.

perty, regarded as impartible because "partaking of the nature of a ráj," are instances of the effect which the highest court has given to family customs diverging from and, therefore, in a sense "repugnant or antagonistic to the general law." "The prevalence in any part of India of a special course of descent in a family, differing from the ordinary course of descent, in that place, of the property of people of that class or race, stands on the footing of usage or custom of the family" (Privy Council at 12 M. I. A. 91), and this is sufficient to cover all the cases.

It seems highly probable that in the earliest form of the Hindu law, women were generally excluded from inheritance. Such texts, as Manu, IX., 185, 187, point strongly in this direction, and a general incapacity qualified by special privileges is the leading doctrine of Bandhayana and his followers (1 W. & B. 318). Apastambha does not mention even widows amongst a man's heirs (Apast. II., 6, 14); and though he mentions a daughter as capable of inheriting in default of other heirs, he assigns to her the last place in the line so as to save an escheat to the crown (*ibid*). But as a wife, who had assisted in kindling the sacred domestic fire, became inseparably connected with the corresponding sacrificial rites (Apast. II., 5, 11), a way was thus opened for her acquisition of the right of inheritance on failure of the sons who should have continued the family sacra. This stage of progress was not reached without vehement contests, as may be seen from the elaborate discussions and artificial reasonings in the Mitákshará, Ch. 2, S. 1, and the Vyav. Mayukha, Ch. 4, S. 8, although the passage of Manu quoted by Vijnáneshwara (Ch. 2, S. 1, pl. 6) should seem to leave but little room for doubt as to the widow's right, if it were not for passages of an opposite tendency, some of which are immediately afterwards cited (*ibid*, pl. 7). There can be no reasonable doubt that the appointment of a widow to raise up off-spring to her husband, was once a living institution amongst the Hindus, although, by Manu's time, it had already become disreputable in the higher castes; and, by

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many of the ancient writers, her right of succession was connected with her appointment or her intention to provide a son for her deceased husband, so that the celebration of the all-essential sacra might never fail.

It was through the influence of the same set of ideas that the right of the daughter became generally established. Manu (Ch. IX., 105) preserves evidence of a once prevailing rule of primogeniture shared by the Hindus with the other Aryan nations. This was succeeded by the law of equal partition amongst the sons (Mit., Ch. I., S. 3), probably through the interest felt by the priestly depositaries of the law in an increase of sacrifices. The daughter, at first excluded by her sex, came in as a possible mother of a son capable through an artificial extension of the primeval rule of continuing the family sacrifices. Then she became capable of appointment herself (Mit., Ch. I., XI., pl. 3, and notes), and as the whole doctrine of appointment grew abhorrent to the people as they advanced in cultivation, she was admitted by the Benares school in her own right (Mit., Ch. II., S. II.); while the Bengal school still excludes her except as a mother or possible mother of male issue. But a remnant of the older state of things is preserved in the Mitákshará rule also "Let the daughter inherit *if unmarried.*" Even down to the time of Vijnáneshwar, no ground could be found on which to base the independent right of a *married* daughter except a forced analogy drawn from the succession to a woman's peculiar property (*ib.*, pl. 4). The passing of the property to the support of foreign sacra in another *gotra* was abhorrent to the early theory of the law; the unmarried daughter might be disposed of so as to perpetuate the sacra of her own ancestors. Such a set of ideas, strange as it seems to us, lay at the very foundation of the ancient societies. Amongst the Jews, besides the law of appointment to raise up issue, there was a rule that a daughter becoming sole heiress must marry within her own tribe. The Solonian legislation, itself a mitigation of the sterner and more logical laws of an earlier time, still excluded a daughter from suc-

cession, providing in her favour, when she was an only child, that the agnate, who took the property, should also take her to wife. Even our own law is not free from what may some day be deemed an unnatural preference of males to females as successors to property.

In the first Section of Ch. II. of the Mitákshará already referred to, there is an elaborate refutation (pl. 15 ss) of the doctrine that "Riches being ordained for sacrifices should be allotted to those who perform religious duties" to the exclusion of women. Vijnáneshwara admits the authority of the texts, but he says (pl. 24) that if the word sacrifices be extended to include religious acts in general, then, to the performance of some of these, women are competent, and then he states and answers the question "How then are the passages (establishing the connexion between sacrifices and succession) to be understood?" "Wealth," he says, "which was obtained for the express purpose of furnishing the means for sacrifices, must be appropriated exclusively to that use even by sons and other successors." The possessions of priestly families handed down from the past in perpetual connexion with the duty or the right of officiating in particular temples and more especially the proceeds of the offerings of the worshippers would naturally come to be looked on as originally devoted to this express purpose. A prescriptive right would attach itself to the line of persons capable of celebrating the prescribed ceremonies. Although, therefore, wealth in general be constituted, as Vijnáneshwara insists, by popular recognition without special reference to its function of sustaining sacrifices, yet it is consistent with principles which he accepts that the estate of such families as those of the Utpáts should be kept together by rules of succession of a special kind providing against their severance from the proper functions of the tribe. Amongst a sacerdotal class, the importance of the rites they celebrated would naturally be highly esteemed, and would lead to an adoption of those rules, by which temporal benefits should attend religious superiority, rather than a mere connexion by blood

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with a previous holder of property when that connexion had been superseded by a new birth in another tribe.

It might be expected, seeing how the doctrine of the daughter's capacity to inherit has been introduced, that there would be considerable diversities in admitting or denying it by the customs of different castes and classes, even amongst those generally professing submission to the same *shastras*. In Borradaile's caste rules, while the place assigned to the daughter by the Mitákshará is generally recognized, instances will be found in several places in which she is postponed to divided brothers and their sons, or even to remoter *sapindas* of her father. Examples will be found at pages 163, 180, 234, 298, 397, 500, 588, 684, and 783, of the volume in the Court's Library. In one or two of these, a distinction is drawn between fixed and moveable property. At p. 638 is a case of custom excluding a daughter from succession to ancestral property while admitting her right to that which was acquired by her father. In the statement of caste customs at p. 397 ss, the particular customs of five or six families as to inheritance are set forth as varying from the ordinary law of the caste. In two Gour families, it is said (p. 400), "the right of inheritance solely to the Jajman Vritti pertains after the widow's death to the paternal relatives" to the exclusion of the daughter. Here we have an instance of the connexion of property with a sacred office giving rise to a special law of inheritance in the families enjoying it similar to that in the Achárya case at p. 56 of the Madras Sadar Reports for 1862.

It cannot, we think, be said, regard being had to the considerations on which we have dwelt, that the special rule of inheritance, proved to exist in this case, is so repugnant to the fundamental principles of the Hindu law that recognition should be refused to it according to the test that would be applied by Hindu lawyers. The examples, to which we have referred, show that it is not opposed to any universal popular conviction. It is ancient and uniform in the reasonable acceptation of those terms, and so far as the evidence

shows, it may well have had a legal origin and is certainly not traced back to any mere mistake, the correction of which would change the legal conviction based on it. It is not unreasonable, according to the ideas of the Hindu community, which, as we have seen, are liberal in recognizing family laws, nor is it opposed to any public interest, which should lead the courts to refuse it recognition. There is a certain amount of administrative inconvenience arising from diversities of law in a community, and this is greater when the variation belongs to a family rather than a locality; but that inconvenience is not a good reason for refusing recognition to a branch of the Hindu law clearly embraced within the customary law of the country. The greatest care, as has been said in an earlier stage of this case, must be exercised in accepting an alleged custom as proved. When it is a family custom, the testimony must show clearly that it has been submitted to as legally binding, not as a mere arrangement by mutual assent for peace or convenience. But when, as in the present case, the usage is proved and found to extend also to a considerable class of families holding temple offices similar to those held by the Utpáts, we cannot refuse to recognize that usage. By it, as the Subordinate Judge has found, Sundrábái, as a daughter, "is excluded from succeeding to Purshotam's share," which must, by preference, go to the brothers of Purshotam and their representative, the appellant Bháu Nánáji. We, therefore, reverse the Subordinate Judge's decree, and award the property claimed to the appellant.

The parties severally to bear their own costs.

Decree reversed.