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APPELLATE CIVIL.

Under the Parsi Succession Act (XXI of 1865), widows and children rank before brothers or sisters.

We affirm the order of the District Judge with costs.

As to the right of Ardesir Bezanji's widow Dhanbai and his widow or divorced wife Gulbai and her son to any share or shares in the estate of Ardesir Bezanji, we do not give any opinion.

Order affirmed.

4 B. 537.

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4 B. 545.

[545] ORIGINAL CIVIL.

Before Mr. Justice West.

MATHURA NAIKIN, *Plaintiff v.* ESU NAIKIN AND OTHERS, *Defendants.** [22nd, 24th, and 25th June 1880.]

Naikins, adoption among—Inheritance—Partition, suit by daughter for—Custom—Usage as a source of law—Functions of Courts of Law and of the Legislature respectively in giving effect to usage—Judicial decisions giving effect to usage in India, when and how far to be followed.

The plaintiff and the defendants were naikins. The plaintiff, as the adopted daughter of the first defendant, sued to recover a share of the property in the hands of her adoptive mother which she (plaintiff) alleged to be family property.

Held, that adoption by naikins cannot be recognized by Courts of Law, and confers no right on the person adopted.

An adoption by a woman pre-supposes a husband to whom she adopts as her representative, and a naikin, while she remains a naikin, can have no husband.

Though daughters succeed to their mother's property, they cannot call for a partition during her life. That is a right peculiar to the son and grandson as joint owners by birth with the father of the ancestral estate.

Although the Courts in India are bound by charter to recognize the "usages of the Gentus," they are not limited to the sole sense of the word 'usage' which shuts out all amelioration. The practices of an abandoned class are, no doubt, a usage in the sense of a tolerably uniform series of acts, but they do not, therefore, spring from a consciousness of compulsion, but rather from mere habit, imitation and ignorance. Such usage is not a law, for over it presides the higher usage of the community at large from whose approval it must have derived any conceivable original validity, and in opposition to which it cannot subsist; and as the community comes to recognize certain principles as essential to the common welfare it will no longer lend its sanction to sectional practices at variance with the principles thus recognized. It is only according to the standards of the Hindu law that a usage has coercive force amongst Hindus; and what the Hindu law is, must, for the purposes of secular justice, depend on the general sense of the Hindu community.

Although at one time in India the existence of companies of temple women may have been thought not so repugnant to the essential principles of the Vedic Code as to prevent their recognition as a source of law for themselves, it is not so at present. The popular sentiment would now no longer give validity to a usage of adoption among prostitutes, which devotes children, while still infants, to a life of infamy. The whole constitution [546] of the class of courtesans would, it is certain, be now regarded by the great mass of the Hindu community as essentially vicious. The laws or rules by which such an association endeavours to make itself and its mischievous influence perpetual, would be deemed directly opposed to "the laws of God," and the usage itself, therefore, not as valid and coercive like a law, but as essentially invalid on account of its contradiction of the law. A contrary opinion, if shown to have been held and acted on in a time gone by, would unhesitatingly be referred to error, and a

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practice founded on error and misconception does not by repetition become a customary law.

A custom, in order, not to constitute it such, but to give it coercive effect in particular instances, needs the sanction of the sovereign power waiting on the judgment of a Court. It is the function of a Judge as a witness and as an expositor, to give a clear definition of the custom, usage, or rule as to which the opinion of the community has arrived at the requisite degree of maturity. It is the function of the State to enforce it when it is ascertained and pronounced upon by the Courts of law.

Judicial decisions by which customs in India have been recognized, are not to be regarded in precisely the same way as judicial decisions with reference to customs in England. In England what the Courts have definitely propounded becomes by that very process a part of the common law, that is, of the law deriving its force from the custom of the realm or of the whole community. But in India it is usage, as such, to which the Courts are commanded to give effect. A custom, however, may be adopted and abandoned and its recognition at a particular stage, by the Courts, as a usage, cannot prevent this action of the class or community. If the usage is variable at the will of the community it must be enforced in its slowly changing phases, or else the behest of the sovereign will eventually be defeated. As the mind of the community becomes enlightened, its legal convictions will change, and this will constitute a change in its common law as that law must from time to time be recognized and recorded in the Courts.

[Diss., 11 M. 393; F., 37 B. 116 (120) = 14 Bom. L.R. 1129 = 17 Ind Cas. 834; R., 12 B. 280 (308); 26 B. 491; 21 C. 149 (P.C.) = 52 P.R. 1893 = 17 Ind. Jur. 579 = 20 I.A. 193 = 6 Sar. P.C.J. 370; 19 M. 127; 17 Ind. Cas. 422 = 23 M.L.J. 493 = 12 M.L.T. 467 = (1912) M.W.N. 1138; L.B.R. (1872—1892) 225 (229); Rat. Unrep. Cr. Cas. 440; D., 14 B. 90 (92); 11 M. 258.]

IN this action the plaintiff sued, as the adopted daughter of the first defendant, to recover a share of the property in the hands of the first defendant which she (plaintiff) alleged to be family property.

The plaintiff alleged that, when only six months old, she had been adopted, according to the custom of the naikin caste, by the first defendant; that the *barsa* ceremony, which corresponds to the adoption ceremony in other castes, and all the subsequent ceremonies, *viz.*, the *sej* and *sohala* ceremonies, prescribed by the rule of the caste, had been duly performed; that she had then been admitted to the profession and into the caste of naikins by adoption; and that she had always been looked upon and [547] treated by the first defendant as her adopted daughter, and recognized as such by the other members of the caste. She had followed the profession of a naikin for several years, and had paid over all her earnings into the hands of her adoptive mother, the first defendant, with whom she had lived until some time prior to the bringing of this suit, when, in consequence of ill usage, she was obliged to leave the first defendant's house and reside elsewhere.

The plaintiff further stated that the "family property" comprised land and a house which had been inherited by the first defendant from her mother and aunt, who had held it jointly. She also alleged that this landed property of the family had received additions and improvements from time to time, which had been paid for out of her earnings as well as those of the other naikin members of the family.

The first defendant in her written statement admitted that the plaintiff had been adopted by her as alleged in the plaint, but she denied the plaintiff's right to a share in the family property, and contended that, if the ceremony of adoption had conferred any legal rights upon the plaintiff, such rights could not arise until after the death of the first defendant, and that under no circumstances could the plaintiff demand a partition of the first defendant's property. The other allegations, contained in

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the written statement, are not material. The first defendant had five sons and one daughter.

The issues raised at the hearing were:—(1) What rights, if any, in relation to property and partition of property, arise in the class of naikins between an adoptive mother and a daughter adopted, according to such ceremony as may have been performed in this case?

(2) Are such rights affected by the birth, subsequently to the adoption, of children to the adoptive mother, and how affected?

(3) Is the property in question in this suit subject to any, and what, rights of the plaintiff as against the defendants, regard being had to its character and mode of acquisition and the circumstances determined on issues (1) and (2)?

(4) To what relief, if any, is plaintiff entitled against the defendants, or any of them?

[548] *Russel* and *S. V. Dhurandhar*, for the plaintiff.—The rules relating to the shares and succession to the property of a naikin are the same as those laid down by Hindu law as to family property in general, except that, amongst naikins, the position of sons and daughters is reversed. An adopted daughter amongst naikins takes the same place and has the same rights as an adopted son has in other castes. The custom of adopting a daughter in the naikin caste, has always prevailed in India, and has been recognized. The profession of a naikin is not necessarily immoral. Singing and dancing are primarily the pursuits of a member of the caste, not prostitution: so that ss. 372 and 373 of the Indian Penal Code do not forbid such adoption. We have shown, by instances, that a custom of adopting daughters, exists among naikins. The defendant having admittedly adopted the plaintiff, should not now be allowed to question the legality of the act.

The Hon. *F.L. Latham* (Acting Advocate General) and *Farran*, for the defendants.—No custom of adoption has been proved. If it had been proved, it would be a question whether such a custom could be recognized by law. The law will not sanction a custom derogatory to marriage, and will not encourage adoption of this kind among naikins. The naikin caste is merely a corporation of superior prostitutes. The ceremonial of adoption into this caste is marriage to a dagger. Such adoption is opposed to public policy, and is prohibited by the Penal Code, ss. 372 and 373. It is nothing more than a qualification for prostitution. The plaintiff has not shown, by evidence of custom or otherwise, that she has the rights which a son has under the Mitakshara law. Beyond the mere giving and receiving in adoption, there is not a single attribute of sonship. A Hindu, who has a son, is incapable of adopting a son. Again, the plaintiff seems to have been the only child of her mother. Such a custom, as is here alleged, should be proved by numerous instances. In this case there was nothing but a consensual arrangement, which lasts so long only as the consensus exists. The relation of a naikin girl towards the head naikin, is that of a slave. All earnings go to her mistress.

The following authorities were referred to:—

Grady's Hindu law (Ed. 1868), p. 50; Strange's Manual of Hindu law, ss. 98, 99, 361; 1 Strange's Hindu Law, p. 80; *Chalakonda Alasani* v. *Chalakonda Ratnachalam* (1); *Reg.* v. **[549]** *Jaili Bhavia* (2); *Chinna Ummayi* v. *Tegarai Chetty* (3), *Kamalam* v. *Sadagopa Sami* (4); Steel's Law of

(1) 2 M. H. C. R. 56.
(2) 6 B.H.C.R. Cr. Ca. 60.
(3) 1 M. 168.
(4) *Ibid*, 356.

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Castes, pp. 180, 200 (Ed. 1868); Morley's Digest, Vol. II, 186; *Ibid*, p. 133; (East's Notes); Morris' Reports, Part I, p. 137; 2 Norton's Leading Cases, p. 545; Dattaka Mimansa, s. vii (Stoke's Hindu Law Books, p. 618); West and Buhler, p. 297; *Ibid*, 228; *Kamakshi* v. *Nagarathnam*(1); Mayne's Hindu Law (2nd ed.), paras. 51 and 164; 2 Norton's Leading Cases, 955; *Anandrav Ganpat* v. *Bapuji* (2).

WEST, J.—The parties in the present case belong to a class, called naikins, who, as dancers, singers and courtesans, perform in Bombay functions which recommend them highly to some portions of the native community. The taste for *nautches* is so widely spread in India, that women of a like description are found going through almost identical performances in every part of the country. The naikins, whose name is not significant of anything but an assumed superiority, say that their place of origin is in the province of Goa, and there is in that territory a place called Siroda, the accounts given of which support the probability, at least, of this story. The community of women at that place, rejecting marriage, succeeding to property solely in the female line, might very well throw out such an offshoot as the naikins of Bombay. The precise facts of the alleged descent, however, if worth ascertainment, have not, apparently, been ascertained. In Bombay the naikins recruit their class locally by female births and adoptions, or so-called adoptions. They are or were a tolerably opulent class, holding out, amongst a poor and weak population, the injurious example of a flagrant and prosperous immorality, if that title is to be given to a mode of life opposed to what mankind, in general, have learned to recognize as the highest conception of social progress and happiness.

Courtesans have, no doubt, been a recognized institution in India from very early times. It is plain, from the rules laid down by the Smritis as to substitutionary sons, that unchastity was, at the [550] time of their composition, a very common and a comparatively venial offence. Manu's Code indicates the influences under which it was composed, by exempting from any penalty the virgin who makes advances to a high-caste man (3). The case is contemplated (4) of men who make money by their wives' prostitution. Narada recognizes the class of courtesans, and allows intercourse with them as with slaves, who are not kept secluded(5). He exempts their ornaments from confiscation, as he does the instruments of musicians.(6) Yajnavalkya provides against cheating on either side by a double forfeiture, as in the case of other bargains(7). Without further proofs and illustrations it may be said that harlotry, albeit it deprived a well-born woman of her caste, was an occupation of which the Hindu law took cognizance; and has been deemed important enough in modern times to be made the subject of special rules in the Vyavahar Mayukha and the Vivada Chintamani.

The connexion of harlotry with the temple worship of the south of India has been noted by many observers, and has several times come under consideration by the Courts. In the case of *Kamakshi* v. *Nagarathnam*(1) a

(1) 5 M. H. C. R. 161.
(2) Not reported, but referred to in *Nanee Tara Naikin* v. *Allarakia Soomar*, *infra*. 4 B, p. 573. and see Grady's Hindu Law (ed. 1868) at p. 305.
(3) Manu, VIII, 364 (4) Manu, VIII, 362.
(5) Narada, Bk. II, ch. xii, pp. 78, 79; compare, however, Viv. Chi., 219.
(6) Vyav. Mayuk., ch. xxiii.
(7) II, 292. See Yajnavalkya, Roer and Montriou's translation (ed. 1859), p. 77, *sloka* 292; and see, also, to the same effect, Narada (Jolly's translation), Part II, ch. vi, *sl.* 18, p. 63.

dispute between a daughter of a deceased dancing girl and a sister—who had been co-owner, with the deceased, of an endowment attached to a pagoda—was decided in favour of the daughter. In such cases it was said "daughters must be regarded as sons, and held to take estates of inheritance from their mother, similarly to sons under the general law of inheritance." With these may be compared the case, in this Court, of *Nanee Tara Naikin* v. *Allarakia Soomar* (1), in which Sir R. Couch held that a bequest, by a naikin, to her daughters, involved a right of survivorship such as to exclude the daughter of a daughter deceased in favour of her aunt. The decree in that case declares the same result to follow from the Hindu law.

In the recent case of *Chinna Ummayi* v. *Tegarai Chetti*(2) the High Court of Madras refused to recognize the right of a set of [551] dancing girls of a temple to regulate the admission of others to the privileges they enjoyed, though a controlling corporate action seems to have been admitted in the case referred to in T.L. Strange's Manual of Hindu Law, art. 98; but in *Kamalam* v. *Sadagopa Sami*(3) the learned Judges seem to have thought that where there was an endowment to which the dancing girls were entitled, they might have a right to a veto on fresh admissions; and they directed an inquiry into the alleged fact of an hereditary office with emoluments attached to it.

The High Court of Madras in these cases did not ignore the immoral practices of the dancing women dedicated to the temples. These, as in the earlier case of *Chalakonda Alasani* v. *Chalakonda Ratnachelam*(4), must, it would seem, have been thought not to affect the right to property founded on a particular custom of the class, or, at least, not to exclude the possibility of such a customary law. And if the ancient established usage of the country is an index to the legal consciousness of the people, and is to be taken as the sole criterion for the existence or non-existence of a valid custom, there can be little doubt that the constitution of the temple guilds of female artists satisfies the test. It seems, indeed, to answer to some general, though morbid, tendency of the human character. The universal dedication of women to one day of promiscuous license, which Herodotus describes as a law of Babylon (5), is repeated by the Byblians several centuries later before the eyes of Lucian (6). It was connected with a mode of worship which has been generated in many places by the joint influence of sexual and religious emotion, and which made many ancient temples the chief centres of licentiousness. From Tyre, apparently, the worship of Astarte was conveyed to Corinth(7), where the temple of Aphrodite with its thousand devotees became the most celebrated home of wantonness. Herodotus was so accustomed to the employment of sacred precincts for what, to him, seemed impure uses, that he thinks it worthy of special record, that the Egyptians and the Greeks alone abstain from turning them to such purposes (8). The [552] sons of Eli copied, in their misconduct towards the female votaries who came to benefit by their ministrations, the practices of the neighbouring nations(9). The rigorous

(1) See *infra*, 4 B. 573. (2) 1 M. 168. (3) 1 M. 356.
(4) 2 M. H. C R. 56. (5) Bk. I, ch. 199.
(6) Vol. IX, p. 89 (ed. Bipont). The authorship of the work is doubtful, but it was evidently written by an eye-witness.
(7) See Creuzer, Religions de l' Antiquite. Trans. Guigniaut, Bk. VI, ch. v; Bk. IV, ch. iii.
(8) Book II, ch. 64. (9) 1st Samuel, ch. 2, v. 22.

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laws of the Jews against unchastity (1), are in evidence and source of their nobler type of character in comparison with the other peoples of Asia Minor, though their lapses into sensual idolatry are often recorded and lamented by the Prophets(2). All Syria was at times given up to orgiastic excesses, the infection of which could hardly be escaped by those who were exposed to it. From this region, more than from any other, corruption flowed in upon the Roman(3); and if Juvenal's authority may be accepted, the temple at Rome were the favourite haunts of debauchery(4).

In the face of such examples as these we must regard it not as a peculiar opprobrium of the Indian people, but merely as a mark of their showing a common tendency,—a deplorable tendency,—of human nature when in the authentic descriptions given by Buchanan (5) and Dubois (6) we find female superstition systematically made instrumental to the gratification of priestly lust. The revolting details given by the Abbe Dubois show humanity brought down by evil influences and debased imagination to the lowest conceivable level of degradation(7). The temple service of revelry and dissoluteness, which formed part of such a system, could not be said to be alien to the life and manners of the people (8). The [553] dedication of children, supposed to have been granted to their mothers' prayers, is mentioned as a common practice by the Mahomedan travellers in the ninth century(9). Tippoo and other Indian rulers, like the Romans,(10) levied a tax on prostitutes as followers of a profession(11). The funds appropriated to the support of such a system might be governed in their distribution and descent by rules accepted as compulsory, and satisfying the conditions of a customary law. So, indeed, might the other relations arising from its place in the scheme of society in which it stood. But, though from this point of view, the principle, apparently recognized by the High Court of Madras, might be justified, it would undoubtedly be desirable, as, indeed, that Court seems to have felt, to limit the application of the principle within as narrow bounds as would be consistent with sound jural theory. It would not do to say that the Courts,—that is, the Judges,—may in every case determine whether an institution is pernicious or not, and on that opinion extinguish or discountenance, or, on the other hand, uphold and aid it. The Mahomedan Judge could not, consistently with such a principle, adjudicate to the advantage of a Hindu idol temple, or the Christian Judge strive to free polygamy from its embarrassments. The decision must, in truth, be founded on an appreciation of the legal consciouness of the community; but when that

(1) Milman's Hist. of the Jews, I, 173.

(2) See Selden De J. Nat. et Gent., c. iv: 1 Kings, ch. xi, v. 5; 2 Kings, ch. 23; Jeremiah, ch. vii, v. 18; *Ibid.*, ch. xi, v. 13; Ezek., ch. vii, v. 13; Amos, ch. v, v. 26.

(3) Juv. Sat., III, 62. (4) Juv. Sat., IX, 24.

(5) Mysore, II, 267; III, 65, 95.

(6) "Description," &c., Conf. Ellis in 2 Str. H. L., p. 176; and Forbes' Oriental Memoirs, I, 62; II, 248.

(7) Descriptions, &c., 401, 413.

(8) The accomplishments and mischievous cleverness ascribed to the professional dancers in the eleventh century are amusingly illustrated in the "Adventures of Apaharvarma" in Mr. Jacob's translation of the "Dasakumarcharitam," where Kamamanjari appears with most of the accomplishments of an Athenian Hetaira playing her part in an Indian version of the tale of Vivien. Reference may be made also to the "Apsaras," in the same volume, as showing the looseness of the notions then prevalent on the subject of female purity.

(9) See Asiatic Researches, Vol. I, 167.

(10) Marquardt Rom; Staatsverwaltung, II, 230; Gibbon's Decline and Fall, ch. xvii; and Guizot's note.

(11) 1 Wilks, 205.

consciousness is unsettled and fluctuating, its nobler may properly be chosen in preference to its baser elements as those which are to predominate.

A step thus taken, is not irrevocable; it may be retraced, if that proves necessary; but, in general, it will express the sentiment of the people, should the people reflect on their sentiment, at the moment when the judgment is given; and the popular conviction of jural rights at that moment is at least as valid as at any previous moment of the people's moral and legal development.

In the Presidency of Bombay, questions relating to the endowments of Hindu temples arise every day for decision. It was at one time a duty of the Collector of a zilla to see that such endowments [554] were honestly appropriated, or that the duties to the Hindu community, with which their enjoyment was meant to be accompanied, were properly performed(1). This law was practically abrogated by the withdrawal of the Government from all connexion with Hindu religious institutions. It was wholly repealed by Bombay Act VII of 1863; and the general impression is, that these measures have led to a great deal of fraud, against which the law for many years afforded no effectual protection (2). Guilds of dancing girls attached to temples, though they are to be found in this Presidency as at Jejuri near Poona, are but few and poor. They have hardly come before the principal Courts. But a class of dancers, under the name of naikins, was recognized in the Deccan in the earlier period of the British rule there (3). It had its peculiar habits, as essentially dissolute as those of the same class in Bombay, and its peculiar laws of family and of succession, which the popular consciousness of those days seems certainly to have recognized. The class was replenished by purchases of female children taken thus in a kind of adoption by the buyers. The earnings of the younger naikin belonged wholly to the elder one. The junior was not free to renounce association with her senior. A daughter by birth succeeded in preference to a son, but a son in preference to a daughter by adoption. The mere progress of civilization, the spread of a new order of ideas, has caused this class to sink to comparative obscurity. No cases, it may be said, of naikin's inheritance, resting on an alleged special law of the class, now come before the Mofussil Courts. In the few cases of succession to *murlis* and *jogatins* that were submitted to the shastris those learned men applied no other law, thought no law applicable, but that which bore upon a loose or degraded woman of the caste to which the deceased had belonged by birth (4). A *murli* is, in theory at least, dedicated to Khandoba, and her irregularities might be veiled under a religious sanction, similar to that by which temple dancers make the indulgence of lust a mode or incident of worship; but it could not be maintained in the present day that the legal convictions of the people give jural [555] efficacy to special rules of any class of harlots in the parts of this Presidency lying beyond the island of Bombay. There is, indeed, no definite class of the kind, united in the expression and observance of a common corporate will, although individual looseness of behaviour may be as common as ever. Its constitution answering to no essential permanent need of society, it lost its place as a class soon after the general disposition to admit its pretensions died out.

(1) Reg. XVIII of 1827, s. 38, cl. 28. (2) See now Act X of 1877, s. 539.
(3) Steele's Law of Castes (ed. 1868), 163, 169, 181, 200, 227; Strange's Manual, Adoption, para 99.
(4) West and Buhler (2nd ed.), 228, Q. 2; 233, Q. 7.

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The only case in the Bombay reports, so far as I am aware which goes to support a special law of inheritance amongst the class of courtesans, as such, is that of *Shida* v. *Sunshidapa* (1). Of two sisters Putawa and Lingawa, Putawa was married, and had a daughter Urchee. Lingawa adopted the calling of a harlot. Afterwards she married and died leaving a son Sunshidapa, born before her marriage. On the death of Putawa and her daughter Urchee, some land, which they had held, was claimed by Sunshidapa and by Shida, the nephew of Putawa's deceased husband. The Sadar Court, finding that Lingawa's nika had been a valid marriage, say that thereby "she abandons the profession of kasbin, and the peculiarities of inheritance among kasbins can, consequently, no longer attach to her issue." The learned Judges seemed to have thought that, by becoming a harlot, Lingawa acquired for her illegitimate son rights of succession to members of her family, of which by her subsequent marriage she deprived him; but, on the principle laid down by the Court itself, Putawa could not be regarded as a courtesan. It does not appear that Urchee was a courtesan; and how the rules of succession amongst courtesans could apply to the property of these women, is not at all obvious. The award of the property to Shida was, no doubt, correct; but the suggestion, if really intended, that, but for his mother's marriage, Sunshidapa might have set up a right, through her, to the property of her sister or her niece, seems wholly unwarranted. It is hardly conceivable that, except through some momentary confusion of thought, the learned Judges should have supposed that a loose aggregate of kasbins could make laws, not only for themselves, but for the devolution of other people's property in supersession of the ordinary [556] law. It is the ordinary law which, in the case cited from Morley's Digest, p. 186, is applied to the succession to a prostitute mother, and in the case at Vol. I, p. 340 (258*a*) of the same compilation, the claim of a distant relative is rejected in favour of the woman in possession, not as the adopted daughter of the deceased harlot, but as her niece. In the present case the question is, not whether the naikins could make a law affecting other people's property or inheritance, but whether they could give special laws to themselves as distinguished from practices of merely voluntary observance, and I am of opinion that they could not. By its charter of the 8th August, 1823, cl. 29, which still governs this Court (2), the late Supreme Court of Bombay was directed, as to cases of inheritance and succession amongst Gentus, to be governed "by the laws and usages of the Gentus." The tacit sanction of the sovereign is supposed by Austin to be essential to the binding force of custom. He was anticipated by Hobbes—Leviathan, Part II, ch. 26; *De Corpore Politico*, Part II, ch. 10; Dominion, ch. 15. Here the tacit sanction of allowance is superseded by express approval. 'Usages' in the charter obviously means the usages received as binding; and how these are regarded by the Hindus themselves, is considered at some length in the case of *Bhau Nanaji* v. *Sundrabai* (3). The dedication of *murlis*, as the shastri says at West and Buhler (2nd Ed.), 154, is not an institution provided for by the sacred writings of the Hindus. The companies of temple women are equally unprovided for. They may, at one time, have been thought not so repugnant to the essential principles of the Vedic Code (4) as to prevent their recognition as a source of law for themselves; but peculiar divergences from the

(1) Morris' Rep, Pt. I, 137.
(2) Letters Patent of 1862, cl. 18, and Letters Patent of 1865, cl. 19.
(3) 11 B.H.C.R. 249 (266).
(4) See Muir, Sanskrit Texts, v. 264-265.

general rule are, as Jagannath lays down (1), to be got rid of, if possible. In *Abraham* v. *Abraham* (2) the Privy Council say that "customs and usages as to dealing with property, unless their continuance is enjoined by law, as they are adopted voluntarily, may be changed or lost by desuetude," and [557] though "race and blood are independent of volition, usage is not." This volition, the free exercise of which is here conceded to individuals, even to the changing of the law to which they are subject by a change of the religious class to which they attach themselves, must much more be allowed to the community in which they are included, and whose convictions, as to what may be allowed and what should be enforced, form the grounds and limits of all subordinate usages of castes, classes and families. Now it is certain, I think, that the popular sentiment would no longer give validity to a usage of such manifestly evil tendency as that which devotes children, while still infants, to a life of infamy. In the case of courtesans unconnected with a temple, notwithstanding the social patronage, which they receive from individuals, the whole constitution of the class would, I am satisfied, be regarded by the great mass of the Hindu community in the present day as essentially vicious. The laws or rules by which such an association endeavours to make itself and its mischievous influence perpetual, would be deemed directly opposed to "the law of God" and the usage itself, therefore, not as valid and coercive like a law, but as essentially invalid on account of its contradiction of the law. A contrary opinion, if shown to have been held and acted on in a time gone by, would unhesitatingly be referred to error, and a practice founded on error and misconception does not by repetition become a customary law (3). To say that usage is the rule, does not necessarily limit us to that sole sense of the word "usage" which shuts out all amelioration. The practices of an abandoned class, are, no doubt, a usage in the sense of a tolerably uniform series of acts; but they do not, therefore, spring from a consciousness of compulsion; rather from mere habit, imitation and ignorance, of which, indeed, we have evidence in this case. Such usage is not a law (4), for over it presides the higher usage of the community at large from whose approval it must have derived any [558] conceivable original validity (5), and in opposition to which it cannot subsist. That higher usage stands to it in the relation of a *jus publicum* in the wider sense to a *jus privatum*, and as the community comes to recognize certain principles as essential to the common welfare, it will no longer lend its sanction to sectional practices at variance with the principles thus recognized. It is only according to the standards of the Hindu law that a usage has coercive force amongst Hindus; and what the Hindu law is, must, for the purposes of secular justice, depend on the general sense of the Hindu community (6).

(1) See *Bhau Nanaji* v. *Sundrabai*, 11 B.H.C R. 249 (267). So Coke Lit., 141 *a* "*Malus usus abolendus est.*"—Bl. Com., Introd., iii.

(2) 9 M.I.A. 195.

(3) *Consuetudo contra rationem introducta potius usurpati quam consuetudo appellare debis.*—Co. Lit., 113 *a*. *Quin in consuetudinibus non diurnitas temporis sed soliditas rationie est consideranda.*—Co. Lit., 141 *a*; Savigny Syst, 25. *Quod non ratione introductum sed errore primum deinde consuetudine obtentum est in aliis similibus non obtinet.*—Dig. I, 3, 39.

(4) Comp. *Colebrooke in 2 Str. H.L., p. 181.*

(5) Yajn. 1, 7; Manu, II, 12.

(6) "This custom cannot be intended to have a reasonable commencement, because it cannot be intended that all the people of England could, if they would, consent to it."...Lord Raymond *arguendo* in *Mayor of Winton* v. *Wilks*, 2 Ld. Raym, at p. 1131.

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In the case of *Khojas and Memons* (1), Sir E. Perry, while he recognizes the necessity of a secular sanction to a religious law in order to give it secular validity, yet lays down that this element of the law must be drawn directly from the sovereign power through legislation or else through the judgment of a Court. He was not, apparently, struck by the difficulty of endowing the judgment of a Court, which has authority only to pronounce on the law existing, with a creative power to make that law which was not so before. Nor has he dwelt on the distinction between the constitutive part of a law and the sanction by which the relations thus determined are enforced(2). In England, as a most distinguished Judge has said, "the whole of the rules of equity and nine-tenths of the rules of common law have, in fact, been made by the Judges" (3); but still in a new state of circumstances, the Court is entitled to inquire into the principles of the rules. The principle must be referred to some standard other than its own mere statement or implication; Judges in England, always, in theory at any rate, declare the law: they decline to make the law, and we are brought back to this point, that in the transition from positive morality to positive law the [559] Judge, as a witness and as an expositor, in many cases first gives a clear definition of the rule as to which the opinion of the community has arrived at the requisite degree of maturity; while the sanction of the State applicable to the enforcement of every ascertained legal relation is brought to bear on any particular instance as it is pronounced on by the Courts. Sir E. Perry says that a custom which conforms to certain rules, is "entitled" to receive the sanction of a Court of law. In what sense "entitled"? Not in that of being, as the Court thinks, expedient, for the learned Judge (p. 339) rejects public policy as a ground of judgment, except under conditions as uncertain, at least, as public policy itself. The custom can be entitled to recognition as a law, only in virtue of some power outside the Court which has given it validity, and this must be the autonomy of the people in matters not withdrawn from their plastic power by positive legislation and the principles implied in its enactments. The executive power, being in these days placed in the hands of the Government, awaits a judicial determination of whether an alleged unwritten law really exists; but the function of the Court is to ascertain, to compare, to explain and ratify, not to create; as the function of the executive is to enforce, not to criticize.

The history of the English law illustrates the true capacity of custom or usage, as a source of law, in a striking manner. On the one hand, we find it laid down that a custom is not invalid merely because it is contrary to a rule of the common law (4), while, on the other, it is said that "if that custom be against any known rule or principle of law, it cannot stand, however great its antiquity (5). The apparent contradiction is explained by a consideration of the different scope and purpose of different parts of the general law, and of the rejection of desuetude as affecting English statutes. A custom cannot prevail against a recognized general interest of the community (6), more especially when this

(1) Morl. Dig. 431, see p. 441=Perry's Oriental Cases, p. 110.
(2) See Puff. Leg. Nat., Bk. I, ch. vi.
(3) Mellish, L J., in *Allen* v. *Jackson*, 1 Ch. D. 399 at p. 405.
(4) Co. Lit., 133*a*, anon 3 Salk. 112; Tindal, C.J., *Tyson* v. *Smith*, 9 A. & E. at p. 421.
(5) *Per* Abbott, C.J., in *R.* v. *Joliffe*, 2 B. & C. at p. 59. See *Beckwith* v. *Harding*, 1 B. & A. 508.
(6) Case of Tanistry, Davys's Rep. at p. 32.

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has been guarded by an explicit law; but as to the merely regulative [560] or subsidiary laws, "wherein the State has no immediate interest of its own," a divergence is not impossible (1). At what point this general interest arises, or is considered to arise, is determined by the Courts as the authorized expositors of the imperative will of the sovereign and the community, and varies at each stage of the national development. In delivering the judgment of the Exchequer Chamber in *Goodwin* v. *Robarts* (2). Cockburn, C.J., refers to *Williams* v. *Williams* (3), wherein it was decided that the custom of merchants was part of the common law. Then, after discussing a series of cases by which the negotiability given to various instruments by usage had been ratified, he says at p. 352: "Usage adopted by the Courts having been thus the origin of the whole of the so-called law merchant as to negotiable securities, what is there to prevent our acting upon the principle acted upon by our predecessors and followed in the precedents they have left to us? Why is it be said that a new usage which has sprung up under altered circumstances, is to be less admissible than the usages of past times? Why is the door now to be shut to the admission and adoption of usage in a matter altogether of cognate character as though the law had been finally stereotyped and settled by some positive and peremptory enactment?" In *Crouch* v. *The Credit Foncier of England* (4) it was held that a recent custom could not have the effect of making an instrument negotiable which was not already so, "because it formed no part of the ancient law merchant." On this it is observed (5). "For the reasons we have already given, we cannot concur in thinking the latter ground conclusive. While we quite agree that the greater or less time during which a custom has existed, may be material in determining how far it has generally prevailed, we cannot think that, if a usage is once shown to be universal, it is the less entitled to prevail, because it may not have formed part of the law merchant as previoulsy recognized and adopted by the Courts. It is obvious that such reasoning would have been fatal to the negotiability of foreign bonds, which are of comparatively modern origin, [561] and yet, according to *Gorgier* v. *Mieville* (6), are to be treated as negotiable. We think the judgment in *Crouch* v. *The Credit Foncier* (4) may well be supported on the ground that in that case there was substantially no proof whatever of general usage. We cannot concur in thinking that if proof of general usage had been established it would have been a sufficient ground for refusing to give effect to it, that it did not form part of what is called the ancient law merchant." This judgment was upheld in the House of Lords (7), and in the recent case of *The Merchant Banking Company* v. *The Phœnix Bessemer Steel Company* (8) the same principle is recognized.

It is plain, therefore, that usage generates the law, as a sense of fitness becomes a sense of necessity and obligation, and that the Courts have merely to apply the proper tests. In England, however, what the Courts have definitely propounded, becomes, by that very process, a part of the common law,—that is, of the law deriving its force from the custom of the realm or of the whole community (9), and, so, a decision

(1) Sav. Syst. I, Appx. 2; Gesch. Rom. R. ch. iii, p. 129.
(2) L. R. 10 Ex. 337. (3) Carth. 269. (4) L. R. 8 Q.B. 374.
(5) L. R. 10 Ex. 355. (6) 3 B. & C. 45. (7) L. R. 1 Ap. Ca. 476.
(8) 5 Ch. D. 205, 215.
(9) See *per* Brett, J., in *Nugent* v. *Smith*, 1 C.P.D. at p. 23; Coke Lit., 110 b.; and Bl. Com., Introd. iii.

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cannot be overcome by a custom, at least, until it has been undermined by contrary decisions expressing the changed opinion of society and of the authorized interpreters of its convictions on the same subject. Legislation, therefore, is necessary, in general, to get rid of an obstructive ruling. But in India it is usage, as such to which the Courts are commanded to give effect. That the usage need not be immemorial if generally accepted, the cases, I have referred to, sufficiently establish. The Privy Council have, in fact, determined that a custom may be adopted and abandoned (1). Its recognition, at a particular stage, as a usage by the Courts, cannot prevent this action of the class or community. A judgment in accordance with a usage as existing, does not imply, of necessity either that it always has existed or that it always must exist, so as to limit the operation of the statute. A change in the popular convictions may, without inconsistency be followed by a change in the course of the decisions by which the Legislature intended to reflect them.

[562] If this view be correct, the path of progress is by no means barred by the accident of a decision being taken on a particular point of Hindu law at an early stage in the growth of opinion. Sir H. Maine, indeed, says that "usage once recorded upon evidence given immediately, becomes written and fixed law. Nor is it any longer obeyed as usage. It is henceforth obeyed as the law administered by a British Court," and has thus really become a command of the sovereign (2). This is so in England in virtue of a custom of the realm against which a subordinate custom cannot contend; but it is usage, as usage, which the Courts must enforce in India. If the usage, not having assigned a stereotyping effect to judicial recognition, is variable at the will of the community, it must be enforced in its slowly changing phases, or else the behest of the sovereign will eventually be defeated by a first act of obedience. Sir H. Maine says: "There would be little evil in the British Government giving to native custom a constraining force which it never had in purely native society if popular opinion could be brought to approve the gradual amelioration of the custom (3)." There seems, in reality, nothing to prevent this precise process from taking place. The command to be governed by usage, is ill obeyed by an extinction of usage to the extent of every adjudication which recognizes it. Such a petrifying process would, in fact, be fatal to social progress, and thus opposed to public policy in the highest sense of that expression. In the *City of London's case* (4) the statutes which confirmed the customs of the city, were held to give efficacy to a custom by which those which were found inconvenient or defective might be amended; and, similarly, the charter which sanctions the usages of Gentus, extends to a usage of amendment when amendment is felt to be needed. "*Remedium congruum bonæ fidei et rationi consonum, pro communi utilitate civium*(5)." As the mind of the community becomes enlightened, its legal convictions will change, and this will constitute a change in its common law as that law must from time to time be recognized and recorded in the Courts. The usage of individuals or of a class cannot, in opposition to the general conviction, on which rests its own validity, rank higher than a practice without binding force. Thus the levying of fees, **[563]** by members of a trade, on a beginner, which seems to have been recognized as a valid

(1) *Abraham*, v. *Abraham*, 9 M.I.A. 195; *Raja Rajkishen Sing* v. *Ramjoy Surma Muzoomdar*, 1 C. 186.
(2) Village Communities by Sir H. D. Maine, p. 72.
(3) *Ibid.* 73.
(4) 8 Rep. 121 *b*.
(5) *Ibid.*

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custom in the early part of this century (1) may by this time have quite lost its character of compulsoriness through the wide views of personal freedom and the different conceptions of the general good which have grown up under the British Government. It would be hard to say that the custom, having been once recognized, is stereotyped for ever. In the case against the *Hamburg Company* (2), North, C.J., says: "We can overrule a custom, though it be one of the customs of the City of London that are confirmed by Act of Parliament, if it be against natural reason." If the Courts have such authority, they may follow maturing reason in discarding a usage which has become abhorrent to the moral sense, though once or oftener allowed in past decisions.

In the case of *Anandrav Ganpat and others* v. *Bapuji Gangadar and others* (3) Sir M. Sausse, C.J., expressed a grave doubt whether any recognition ought to be extended to an essentially immoral class, like the naikins. He was disposed to think that administration granted to an adopted daughter as representative according, apparently, to a special custom, had been an improvident act of the Court. On this, in a subsequent judgment, Couch, J., remarks: "I cannot but think that, if the adoption is recognized by the law, the right of the adopted daughter to inherit must follow from it as in the other cases (4)," and then the learned Judge quotes from Lumsden's Manual of Hindu Law, as a probably correct statement of the law, "that dancing girls.....are.....allowed to make adoption themselves for transmission of their property, and this must be of a daughter, as descent from a female is in the female line." The view of Sir M. Sausse, as I understand it, was rather that, albeit this vicious class had to some extent been recognized by usage, a higher law now required that it should no longer be recognized as capable of making any peculiar rules for its members, whether of adoption or inheritance. The question of the essential immorality of the [564] kasbins' calling, as affecting their civil rights, had already been dealt with by the Sadar Court in *Satao Kasbin* v. *Hurreeram* (5). There a courtesan mother sued for the wages of her daughter as a concubine. The Shastri, when consulted, said that the sum stipulated, was recoverable; but the Court says that "the subject of the contract... being of so direct an immoral tendency, and being bad in itself, the Court considers, notwithstanding the provisions of the Hindu law to the contrary, that an action on such a contract cannot and is not to be maintained in the Civil Court." The District Judge had even fined the mother for bringing the action. This the Sadar Court remitted, but on grounds which, according to the law to which they were subject (6), were not less conclusive against the validity of their own decision. Concubinage is, according to modern Christian notions, highly immoral; yet a concubine has been held entitled to maintenance (7). The true ground on which to have placed the judgment of the Sadar Court, was that as general custom had once recognized the *status* and the calling of the kasbin, so now it refused to recognize any such profession as having the same claims to aid and support from the Law Courts as ordinary trades

(1) 1 B. 595, 432. Comp. *Mayor of York* v. *Welbank*, 4 B. & Ald. 438; *Chamberlain of London's Case*, 5 Rep. 126.
(2) 1 Mod. 212.
(3) Not reported but referred to in *Nanee Tara Naikins* v. *Allarakhia Soomar*, *infra*, 4 B. 573.
(4) *Nanee Tara Naikin* v. *Allarakhia Soomar*, see *infra*, 4 B. 573.
(5) Bellasis' Rep. 1.
(6) Reg. 4 of 1827, 26.
(7) West and Buhler, 141 (2nd ed.).

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by which society benefits. This may, possibly, not have been true as regards Poona in 1835, but it would be true now—so far true that no respectable member of Hindu society would gainsay it. At such a stage of progress the time has come for a definite statement of the new point reached, and the Courts are bound to facilitate the birth and the reception of a new and more perfect offspring of the general conviction.

Still more, however, are the Courts bound to give effect to the declared purposes of the Legislature. The Indian Penal Code (Act XLV of 1860) ss. 372 and 373, prescribes severe punishment for those who dispose of or receive a girl under sixteen for purposes of prostitution. Its provisions were applied to the case of a dedication of a young girl, by the *sej* ceremony, to the service of a temple in the district of Ratnagiri. The prisoner had, like the defendant in this case, accepted the girl as an infant from the natural mother in a kind of adoption, and retained possession of her after the *sej* ceremony; but the learned Judges thought that the dedication of the girl constituted a disposal for purposes **[565]** of probable, if not inevitable, prostitution, and upheld the conviction and sentence. A similar decision was pronounced in a like case, about the same time, by the High Court of Madras (*Ex parte Padmavati* (1), and has since been followed, *Reg.* v. *Arunachellan* (2). It is pretty certain that the system of temple dancers is thus doomed to early extinction. Their very existence and the constitution of the class, as it is now organized, imply a violation of the law. Girls must be dedicated, in general, before they attain sixteen years of age, so that recruits of vice cannot be had competent to exercise a free choice as to their own career, their dedication by others is a crime. Whether, in such circumstances, the endowments enjoyed by such guilds of women ought to be recognized and protected by the law, without a reform of their essential constitution, is a question with which I have not to deal. Their mutual contracts would no longer be enforced as having an object, and resting on a consideration which every Court must now regard as immoral (Indian Contract Act, IX of 1872, s. 23); and being not only casually or incidentally but directly opposed by their constitution to the Penal Code, an essentially public law, it would seem to follow that, as corporate or quasi-corporate bodies they ought not to be deemed the subjects of special rights and competencies (3).

The cases of marriage which were mentioned as illustrating the inefficacy, as custom, of a reprehensible practice, present to my mind considerable difficulty. In the case of *Hyde* v. *Hyde* (4) Lord Penzance points out the different conceptions of the matrimonial union held by different communities, and the impossibility of applying a law based on Christian ideas to any but a Christian connection. "The matrimonial law," he says, "is correspondent to the rights and obligations which the contract of marriage has, by the common understanding of the parties, created." It does not, to me, seem quite accurate to rest the rights and obligations, which the law strictly defines independently of the will of the parties, on their "understanding." It **[565]** should rather be said that the understanding is controlled by the law; but this being recognized, it is true that "there are no conjugal duties but those which are expressed or implied

(1) 5 M.H.C.R. 415. (2) 1 M. 164.

(3) *Memores esse juris consultos decet, quod leges non verbis solum, sed etiam rationibus de quibus constiterit, præcipiant subditis idque potissium ex declarata legislatoris voluntate.—Observationes De Jure Non Scripto*, by J. C. Kall, p. 51.

(4) L. R. 1 P. & D. 130.

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in the contract of marriage"—implied, that is, by being annexed to it by law. So in *Ardesir Cursetji* v. *Perozbai* (1), the Privy Council say: "The parties themselves could have contracted for the discharge of no other duties and obligations than such as from time out of mind were incident to their own caste." In *Moonshee Buzloo Rahim* v. *Shumsoonnissa Begum* (2), their Lordships say that the rights and duties of the contracting parties can be ascertained only by reference to their particular law. As the persons married are in India, usually infants, their will can have no influence on the rights and duties which the law assigns to them in their new *status*. Their parents or guardians only can contract for them within the space which their law leaves open to individual volition.

In the early cases reported by Borradaile (3) the Sadar Court followed the caste law of the parties in cases in which it was opposed both to European notions and to the law of the Shastras. As to the latter deviation, the Shastri says: "Though these (customs) do not in this instance agree with our Shastra, yet the Shastra also commands that the local usages of caste shall be respected (4)." In *Hurka Shankar* v. *Raiji* (5) the Court seems to have ordered the restoration of a wife according to the Shastra, because the caste had not pronounced a decision for or against a divorce. In *Kasee Dhollubh* v. *Ruttonbai* (6) a divorce was granted to a woman, in opposition to the Shastra, on the ground approved by caste custom, that her husband was dissolute and depraved. He had been punished for drunkenness and theft. In *Muhashunkur Koshall* v. *Mt. Oottum* (7), a caste custom was proved disallowing two wives, without special reason, unless both assented; and, though this was opposed to the Shastra (8), the husband was commanded, at the suit of the first wife, to repudiate the second. On his refusal, a divorce was pronounced between him and the first wife.

The Sadar Court had in these cases acted pretty consistently on the principle, approved by the Shastras at 2 Bor. Rep. 104, 105, [567] of giving precedence to caste usage over the Shastra, which itself recognized such usage within certain limits as constituting an exceptional law (9). In *Dyaram Doollubh* v. *Baee Umba* (10) it was held that caste custom prevented a first wife from obtaining a divorce from a husband who had married a second. The Shastras here agreed with a caste custom. In *Baee Rutton* v. *Lalla Munuohar* (11), a step-father of a deceased bridegroom sued to recover the ornaments given to his bride; but here, though, according to caste usage, the suit was properly brought, it was ruled that "on such points" caste usage must give way to the written law. Why "on such a point," if not on all points, is left to conjecture.

The nature of the marriage connexion, the rights and duties arising from engagements relating to it, had hitherto been regarded as subject to caste law. They could not be withdrawn from it, except by an exercise, in some sense, of the legislative power withdrawing the authority formerly conceded to the castes; but as this authority, in the matter of subordinate legislature, had been constituted, so it might be restricted, or its commands superseded by an exercise of the silent autonomy of the Hindu community allowed by the positive imperial law. Whether, in the present case, this

(1) 6 M. I.A. 348 (390). (2) 11 M.I A. 610. (3) 1 Bor. 65.
(4) *Ibid.* 72. (5) *Ibid.* 391. (6) 1 *Ibid.* 452.
(7) 2 Bor. 572. (8) *Ibid.* 574.
(9) Vyav. Mayu, ch. i, pl. 13. Comp. Bl. Comp. Introd. iii.
(10) Bellasis' Rep. 36. (11) *Ibid.* 86.

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repeal of the sectional law by the general will had really occurred, is another matter. Possibly, the question had not presented itself in this form to the Court.

In the report of this Court the question was put, in the case of *Reg.* v. *Karsan Goja* (1), of whether the prisoner charged with bigamy honestly believed that Bai Rupa, whom he had married without her first husband's consent, had become his wife. It was found that he did not; but a second series of questions brought out the answers (1) that the woman might contract marriage with another man without her first husband's consent; (2) that the prior consent of the caste was not necessary; it might be given or withheld after the *natra*. Hereupon it was held that such a caste custom as that set up, even it be proved to exist, is invalid, as being entirely opposed to the spirit of the Hindu law. The conviction was accordingly upheld. The belief of Karsan Goja, resting on a misapprehension of the law, would not, according to s. 79 of the Indian Penal Code, be a ground of exculpation; [568] but as the caste custom could not avail, even as a ground of honest belief, the second set of questions was, perhaps, somewhat irrelevant. The learned Judges were possibly influenced by a sentiment afterwards abandoned as untenable, such as that embodied in the exception of the Roman law: "*ita demum non nocere* (*juris errorem*) *si ea persona sit quæ ignorare propter rusti citatem jus suum possit* (2). In *Reg.* v. *Manohar*,(3) it appeared that a husband had sued the prisoner to recover his wife. Instead of this relief he had been awarded damages, which he accepted, though not till after the *natra* with the prisoner. The Court say: "After the decree had given an option to the woman to return to her husband or to pay him money, she remarried. It cannot be held that accused and the woman did not believe that the latter was at liberty to remarry. We cannot uphold the conviction of adultery." It is opposed to the Shastras, that a woman should be married or unmarried according to the payment or non-payment of money by her paramour. It must have been some caste custom, which in this case made the law whereby the adulterous wife or her keeper might optionally purchase her divorce. Belief in a law which did not exist, could not be urged as an excuse, any more than in the previous case.

In *Khemkhor* v. *Umiashankar* (4), a wife had left her husband and gone through the marriage ceremony with another man. The Judge of the Small Cause Court at Ahmedabad pronounced her a concubine, because "her marriage was not celebrated in accordance with the custom of her caste." As a concubine, however, she was adjudged entitled to maintenance by her keeper's son, though, as she had violated the law in the course she had taken, it could not, perhaps, be consistent with legal principle to allow her thereby to acquire legal rights, at any rate if the Indian Penal Code was in force when her illicit connexion was formed. Those who join in a crime cannot thereby acquire rights against each other, and the sons born of an adulterous connexion, have not the rights of an heir as those born of an ordinary concubine have, amongst Sudras (*Rahi* v. *Govind* (5)), by a caste law formally recognized in the Shastras. The caste law was enquired into in the case [569] (not reported) *Reg.* v. *Dahee and others* (6); and as it appeared doubtful whether, according to the custom of the Sonars, a woman could leave her husband and contract a

(1) 2 B. H.C. R. 117. (2) Dig., 49, 142. (3) 5 B. H. C. R. C.C. 17.
(4) 10 B. H. C. R. 381. (5) 1 B. 97.
(6) Decided on 22nd November 1871, not reported.

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valid marriage with another, the convictions were reversed. As a matter of law, the second marriage either was or was not valid, and a reversal of the conviction ought to have implied that it was valid ; but this was not, probably, the intention of the learned Judges.

Lastly, in the case of *Reg.* v. *Sambhu Raghu* (1), it is said "the Court does not recognize the authority of the caste to declare a marriage void, or to give permission to a woman to remarry"(2). "The wife in this case, and the appellant who performed the ceremony of remarriage, probably acted in a *bona fide* belief that the consent of the caste made the second marriage valid; but though that circumstance may be taken into account in mitigation of punishment, it does not constitute a defence to a charge under s. 494 of the Indian Penal Code, or under that section combined with s. 109 of the Code." Here "honest belief" of an erroneous proposition of law, is finally discarded as a ground of legal exculpation ; but, at the same time, the authority of the caste, which in such matters is judicial whenever it is legislative, seems to be set aside, or made subject to the general Hindu law. It was not, of course, intended to depart from the principle laid down by the Penal Code, and to apply to marriage, amongst the castes of India, the ideas either of the substantive, or of the adjective law of Christian countries.

There is, perhaps, some room for doubt, whether in framing the provisions of the Indian Penal Code as to offences relating to marriage, the conditions of life and the nature of the matrimonial relations amongst the lower castes were very distinctly kept in view by the Indian Legislature. But, in so far as the series of cases are instructive, the lesson they teach, is that of the gradual subjugation of the sectional rules to the general law of the Hindu community. The Courts have advanced more quickly than the inert mass of the lower strata of society ; but there is no reason to suppose that the active and intelligent minds, who represent and create opinion, have not gone forward with the decisions [570] towards an enlightened uniformity, on the basis of the obviously purer and more progressive elements of the Hindu system (3).

If the Courts, however, have not, in this, transgressed their proper province, there can be little question of the propriety of their aiding the community to preserve its higher customary law by freeing it gradually from those portions of which Hindu opinion has grown conscious as mischievous and degrading.

According to the evidence adduced in this case, every naikin must needs be a harlot. She is taken as a child. She is taught lascivious arts, forbidden marriage, but wedded to a dagger by rites of corrupt significance, and then at the moment of aptitude sold to some epicure in licentiousness. Her livelihood thenceforth depends on her zeal and skill in her base profession. Dancing and singing are subsidiary accomplishments (4), but they are only subsidiary to simple harlotry. As the naikin herself wanes in attractiveness, she must adopt a daughter, if nature has not provided her with one ; and as a severance is strongly opposed to the class sentiment, the worn-out harlot recoups herself for the past by inflicting a like wrong on a new victim. Thus the evil system is perpetuated from

(1) 1 B. 347. (2) Comp. *Moola* v. *Nundy*, 4 N.W.P.R. 109.

(3) *Quum etiam hoc officium ei incumbat, ut ad meliora evehat atque impellat cives languidiores et manu quasi ducat, ut prospiciatur, quomodo sensim sensimque ad finem civitatis efficiendum quam proxime accedatur.—Observationes De Jure Non Scripto*, by J. C. Kall, p. 78.

(4) So. Juvenal, Sat. XI, 162.

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one generation to another, and it may be that, as long as a coarse sensualism prevails amongst a wealthy class, the means of inflaming and gratifying their libidinous tastes will not be wanting; but to recognize an evil which cannot be wholly suppressed without too great attendant dangers, is something entirely different from countenancing and fostering the evil. The naikin class, like other classes, would fain adopt rules favouring the organization of the class, as such, and furthering its proper end. To such an organization the law, which regards the end as baneful, can lend no aid. A mere practice has in itself no binding force; and the Courts formulating the decision of society must refuse to allow to the naikins a legislative power which as individuals they cannot possess (1). To the child once given over to the harlot's life, no effectual relief can be brought; but no rights [571] can arise to the woman who trains her to be a social pest, and none to the young naikin herself, who, being free in law to renounce her calling, continues to pursue it by choice.

I have thus far dealt with the present case on the same principles on which I should deal with one concerning an association of Thugs (2) or card-sharpers. The central purpose of such a class, the reason of its existence vitiates all its peculiar rules, albeit, as individuals, its members are not deprived of their ordinary rights as subjects of the State. But, even though adoption by naikins could be recognized by the law as conferring rights in some way analogous to those enjoyed by adopted sons, yet the evidence in this case goes to prove that the existence of a natural-born daughter shuts out the adopted from succession, and in this case there are natural-born daughters. The so-called adoption is, in fact, only a stage in the ceremonies by which the girl is dedicated to prostitution. In the case before me it took place several years after the plaintiff had been taken for nurture and training by the defendant, and after the birth of daughters to the latter. The existence of these daughters would bar an adoption according to the authority approved by Couch, J., in the judgment already referred to (3). Supposing that the custom were such in a legal sense, not only would its operation have to be recognized when it imitates the ordinary law, but its failure to operate at the point where it gives way to the ordinary law (4) or where the imitation ceases. The custom itself, or the imitation of the custom, would exclude the plaintiff from inheritance.

The evidence shows, further, that by the so-called custom, a young naikin, who quits her senior, no matter for what reason, forfeits all heritable rights to the property of her mistress or mother. Here the plaintiff admittedly abandoned the house of the defendant. The custom would have to be remoulded by the Court in order to sustain her claim, and this is a part that the Court cannot perform. If it is a valid custom, the same force [572] which makes it so, makes it valid all through; it cannot be recognized in part and rejected in part, any more than an Act of the Legislature.

But, even if a right of inheritance could be allowed as growing out of this vile apprenticeship, that is distinct from a right to call for partition.

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(1) See 8 M.I.A. 400, and *Crouch* v. *Credit Foncier of England*, L.R. 8 Q.B. 374.

(2) Diod. Siculus tells a story of an association of thieves in Egypt with a regular organization and special laws.—Lib. I, c. 80.

(3) Strange's Manual, Adoption, art. 99.

(4) See *Neelkisto* v. *Beerchunder*, 12 M.I.A. 523. *Arthur* v. *Bokenham*, 11 Mod. 161. "It is a general rule that customs are not to be enlarged beyond the usage."

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Here even the analogy of ordinary daughters fails; for, though daughters succeed to their mother's property, they cannot call for a partition during her life. It is a right peculiar to the son and grandson as joint owners, by birth, with their fathers of the ancestral estate. The adopted son replaces a natural-born son for reasons in no way applicable to an adopted daughter, and though analogy or imitation has allowed adoption in the case of Sudras as amongst the higher castes, there is nothing to show that the custom has gone further. An adoption by a woman presupposes a husband, to whom she adopts as his representative, and a naikin can have no husband. Supposing the power to create a custom could be conceded to the naikins, they might, no doubt, give to their adoptive daughters a special *status* as to partition as well as to inheritance; but in such cases, as the Chief Justice has said, "we expect satisfactory evidence of instances, in which the custom has prevailed before we accept it" (1), and here the evidence of any such practice even fails. The evidence is, in truth, all the other way. Repeated and authentic instances are necessary to show that a custom has been really adopted, and here there are none. I am asked to give the force of custom to a practice to which no rational being can attach coercive force—to extend the custom, by analogy, to cases that it has not embraced (2)—to cut down its operation in one direction, and in another to give it a wholly new development. All these operations are beyond my competence, and being necessary to sustain the claim I must reject it.

Attorney for the plaintiff.—Mr. *A. Turner.*

Attorney for the defendant.—Mr. *H. W. Payne.*

"When the people find any act, good and beneficial, adapted and agreeable to their nature and disposition, they use and practice it from time to time. Thus by frequent iteration and multiplication of the act **[573]** a custom is constituted, and being used for a time obtains the force of law." Case of Tanistry, Sir. J. Davy's Rep. at p. 32. Here the elements of a customary law, in the inner sense of fitness and the outward manifestation of this in practice, are dearly set forth; but still the acts might be recognized as only convenient or as mere courtesies. There is a transition, at a particular point, from "ought to be done" to "ought to be enforced," and it is this transition that the tribunals have to discern and to ratify, while they define precisely the nature and limits of the right and duty hitherto dimly conceived by the people.

4 B. 573 N.

THE following is the judgment delivered by Mr. Justice Couch in the case of *Nanee Tara Naikin* v. *Allarakhia Soomar* referred to in the above case. The suit was heard on the 24th September, 1864:—

15th November, 1864. COUCH, J.—The question in this suit arises upon the will of Tara Naikin Mangesh Karin, who died at Bombay about the 11th of April, 1849, leaving two adopted daughters her surviving, one of whom is the plaintiff, and the other since died, leaving a son who is the second defendant, and the first defendant is the surviving executor named in her will, and to whom probate was granted on the 19th November, 1850. The will and a codicil thereto were, respectively, dated the 26th and 27th of March, 1849. The material parts of the will, as regards the present question, are the following:—

"At present there are some debts due by me to people; a memorandum of them I have prepared, and left under my signature. After my death my executors are to discharge them in accordance therewith, either my estate in Kumar Tukda or my estate in the new *vadi* at the corner. One of these two estates is to be sold, and these

(1) *Gopal* v. *Hanmant*, 3 Bom. 297; and see *Sakharam* v. *Sitabai*; *Ibid.*, p. 353; and *Ramalakshmi* v. *Sivanantha*, 14 M. I. A. 576; so 14 M. I. A. 576:—

(2) See *Arthur* v. *Bokkenham*, 11 Mod. 161.

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debts to be discharged, and the remainder is to be kept in proper order and made over to my daughters when they arrive at years of discretion. After the payment of the debts due to the different people, the religious and charitable expenses and the other outlays, as above written, out of the balance which shall remain, the marriage of my younger daughter Nanee is to be performed, and the balance which shall remain, belongs to my daughters Luxmee and Nanee. The girls above named, are the two heiresses to this estate, but they are mutual heiresses to one another should any thing happen to either. The superintendence of this estate is to be carried on by Atmaram Gopal Hallea himself in the same manner as it has been hitherto; and should any thing require to be done hereafter, the two girls are to obtain the concurrence of Hallea, and then do it. I have nominated, in all, three persons as my executors. They are to act under the advice of Jagganath Shankarshet and to take care of the estate; and when my daughters arrive at years of discretion, *viz.*, twenty-one years, they are to make the whole over to heir charge."

[574] In determining the construction of the will I must look to the intention of the testatrix; nor does there appear to be any difference between Hindu law and English law as to materials from which the intention is to be collected. Primarily, the words of the will are to be considered as conveying the expression of the testatrix's wishes; but the meaning attached to them may be affected by surrounding circumstances, including the law of the country under which the will is made and its dispositions are to be carried out: *Sreemutty Soorjemoney Dossee* v. *Denobundoo Mullick* (1).

In the present case this is Hindu law, and any rules of construction founded upon peculiarities of English law must be excluded. The rule, that a devise to two or more persons simply makes them joint tenants, is not founded upon any peculiarity of the law of real property in England, but is applicable to personal property (*Webster* v. *Webster* (2), *Crooke* v. *De Vandes* (3)); and there is, apparently, nothing in Hindu law or the nature of Hindu property to prevent its application to a Hindu will. The testatrix has said: "The balance which shall remain, belongs to my daughters Luxumee and Nanee. The girls above named are the two heiresses to this estate." Looking to the context and the other provisions in the will, these words cannot be considered as intended to be only declaratory of the rights of the daughters, and must be construed as a simple bequest, to the two, of the residue in joint tenancy, and there is not in any part of the will any expression importing a division, or that they were to take by shares, by which a tenancy in common would have been created. On the contrary, the language of the testatrix in other parts of the will, points to an enjoyment of property by the two daughters, and to the survivor taking the whole upon the death of either of them. Indeed that this was the construction to be put upon the words of the will, was hardly disputed by the learned counsel who appeared for the defendant, the son of the deceased daughter; but he contended that by Hindu law the two daughters would take by descent, and that where by a Hindu will the property is given to persons who would be heirs, there cannot be joint tenancy, but it is one of Hindu parcenary. But I see no reason for holding that where a testator, who is by Hindu law capable of disposing of property by will, thinks fit to leave it to the persons who are his heirs as joint tenants, he may not do so, as a testator may, under the English law, devise lands to his daughters who are his co-heiresses, and they will take by purchase as joint tenants and not as co-parceners by descent: VI Ed.; Eliz. 431; *Swaine* v. *Burton* (4). It is admitted that the testatrix was a courtesan, and I was referred to the judgment in the case of *Anandrav Ganpat* v. *Bapu Gangadhar* (5), in which the Hindu law of inheritance in such cases was very fully considered by this Court. The Chief Justice in **[575]** delivering the judgment says: "It appears, from a case in the appendix to 2 Strange's Hindu law, p. 269, that there was, in 1805, a tribe of dancing women, called chunna, who had a recognized independent position, as such, in the Madras Presidency; and the Sadar Court case, referred to at the Bar in Morley's Digest, Inheritance, p. 258, appeared to treat a case of dancing girls and prostitutes as then (1844) existing in Bengal. The case in Morris' Bombay Reports for 1851, p. 147, also appears to recognize in the district of Dharwar, in this Presidency, a custom, amongst kasbins or prostitutes, for daughters to inherit their mother's property in preference to sons. The reference to Mr. Steel's Summary also shows that, in parts of the Deccan, the profession of dancing girls existed in 1829 with analogous customs as to inheritance. The Sadar case in Morley, however, appears to have been based upon a claim of customary inheritance through adoption amongst courtesans, but that claim would seem to have been negatived, as the decree was in favour of the female in possession, and upon the ground that as niece she was nearer of kin to the deceased

(1) 9 M.I.A. 123.
(2) P. Wms. 347.
(3) 9 Ves. 204.
(4) 15 Ves. 365.
(5) Not reported. See Grady's Hindu Law (ed. 1868) at p. 305.

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than the claimant. No male heir appears to have intervened. The case in Morris, at most, recognized the custom of property descending from a courtesan mother to her courtesan daughters. There was a precedent, also referred to at the Ecclesiastical side of this Court in 1856, in which administration of the goods of a deceased courtesan was granted to an applicant claiming as courtesan daughter by adoption. That order was made *ex parte* and I think improvidently." It would, therefore, seem, although it was not necessary to decide the point, that the Court was of opinion that the adopted daughter of a courtesan was not entitled to inherit. Although I fully concur with the Court in its opinion against any extension of the principle, and its regret that the Court should ever have given a legal *status* to the immoral profession of prostitution by having recognized a separate code of law for dancing girls and courtesans, I cannot but think that the adoption is recognized by the law, and the right of the adopted daughter to inherit must follow from it as in other cases. In Strange's Manual of Hindu Law, Adoption, s. 104, it is said that dancing girls form an exception in Hindu community. They do not marry, but live in professional concubinage, which does not degrade them from caste if not carried on with an out-caste. Having no husbands, adoption cannot be made in that channel. They are, consequently, allowed to make adoption themselves for transmission of their property, and this must be of a daughter, as a descent from a female is in the female line. To adopt, the dancing girls must be daughterless. It is immaterial whether she have a son or not. Probably this may be taken to be a correct statement of the law, and that, when it becomes necessary to decide the point, the Court would not feel itself justified by considerations of public policy in allowing the adoption to be legal and, at the same time, not giving its legal effect to it. In the present case it is not necessary to decide it, whether the adopted daughters could or could not take by descent. The testatrix having power to make a will, and there being no provision in Hindu law by [576] which exercise of her power is to be regulated (*Sonaton Bysack* v *Sreemutty Juggutsoondree Dossee* (1)) restraining her from doing what, from the language she has used, appears to have been her intention, *viz.*, giving her property to them as joint tenants, I think that intention should be carried into effect. The decree will, therefore, declare, that, in the event which has happened, the plaintiff is entitled to the whole of the testatrix's estate, and direct an enquiry by the Commissioner, whether the plaintiff has attained the age of twenty-one years, and, if not, when she will attain that age, and for taking the usual accounts, reserving further directions and costs. [This case is also referred to in 4 B. 545.]

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4 B. 576=5 Ind. Jur. 482.

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Before Mr. Justice West.

MUNCHERSHAW BEZONJI (*Plaintiff*) *v.* THE NEW DHURUMSEY SPINNING AND WEAVING COMPANY (*Defendants*).*

[12th August, 1880.]

Evidence—Indian Evidence Act (I of 1872), ss. 34, 129, 145—Privileged communication—Case for counsel—Production—Inspection—Suit for wrongful dismissal—Evidence in justification must be confined to matters set forth in written statement—Practice—Supplemental written statement, time of filing—Evidence affecting credit—Civil Procedure Code (X of 1877), ss. 110 and 130—Previous statements made in writing, used to contradict a witness—Books regularly kept in course of business, what are.

In a suit for wrongful dismissal in which the defendants pleaded justification by reason of the plaintiff's misconduct, *held*

(1) That the defendants at the hearing could not give evidence of a transaction involving instances of misconduct not set forth in their written statement. They should either have filed a supplemental written statement before the hearing, or have furnished the plaintiff with particulars of the misconduct in question, and intimated to him their intention of relying on the transaction as going to establish the general allegation of misconduct.

(2) That although the transaction in question could not be made the subject-matter of an ancillary issue, and evidence of it, as such, could not [577] be

* Suit No. 428 of 1879.

(1) 8 M. I. A. 66.