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contract and dealing between party and party;" see the proviso of s. 17 of 21 Geo. III, c. 70.

The law as laid down in the Full Bench case referred to when applied to a contract of tenancy, is not inconsistent with anything in the Contract Act (IX of 1872), and therefore is unaffected by it, s. 1.

Upon the first issue, therefore, I find that the rights of the parties are governed by the Hindu law as laid down in the case just mentioned. The remaining issues will have to be tried.

Attorney for the plaintiff: Baboo Mohendronath Bonnerjee.

Attorneys for the defendant: Messrs. Ghose and Bose.

Before Mr. Justice Wilson.

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KALLY CHURN SHAW AND ANOTHER v. DUKHIE BIBEE
 AND ANOTHER.

Hindu Law—Custom—Marriage of Widow—Sagai Marriage—Limitation Act (XV of 1877), sched. ii, arts. 89, 90, 120, 144.*

A man, who is a member of the Hulwace caste, may contract a marriage in the *sagai* form with a widow, even if he has a wife living, provided, in the latter case, that he is a childless man.†

Quære.—Whether a married woman may not contract a *sagai* marriage, notwithstanding that her husband is living, if the panchayat has examined the case, and reported that her husband is unable to support her?

In the year 1857 *A* died, leaving a son, the plaintiff *B*, and the defendants *C* and *D*, his widows, him surviving. *C* took possession of all *A*'s property. The plaintiff *B* was the son of *D*, and shortly after *A*'s death, *D* gave birth to another son, the plaintiff *E*. In 1865, *D* instituted a suit against *C*, and *B* and *E*, alleging that *A* had left a will. In this suit, *C* claimed to be the heiress of *A*. No decree was made in the suit, which was compromised. In November 1877, *B* and *E* entered into possession of a shop, which had belonged to their father, and which had been managed, during their minority, by the defendant *C*. In 1879, the plaintiffs instituted the present suit, claiming to recover from *C* the property of *A* come to her hands.

* See Dalton's Descriptive Ethnology of Bengal, p. 138.

† Cf. *Radaik Ghoserain v. Dudaik Pershad Singh*, Marsh., 644.

Held, that so far as the immoveable property was concerned, the case fell either under art. 120 or art. 144 of Act XV of 1877, sched. ii; and as to the moveable property, under arts. 89 or 90 of the same Act.

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THE plaintiffs in this suit claimed, as the heirs of one Doorga Shaw, to recover certain property from the defendant Dukhee Bibee, his widow. It appeared that Doorga Shaw died in August or September 1857, leaving the elder plaintiff, and the defendants Dukhee Bibee and Poornomasi Bibee, his widows, him surviving; and that the defendant Dukhee Bibee, as the elder widow, took possession of all Doorga Shaw's property, and that such property was still in her possession. The plaintiffs were the sons of Poornomasi Bibee. The defendant Dukhee Bibee, on being applied to for an account of the property of Doorga Shaw come to her hands, contended, that no valid marriage had been celebrated between Doorga Shaw and the defendant Poornomasi Bibee, and that the plaintiffs were, therefore, illegitimate. It appeared that the defendant Poornomasi, at the time of her marriage with Doorga Shaw, was a widow, and that she was married to him according to a form of marriage, known as the *sagai* marriage, which obtains among the Hulwae caste. Evidence was given to show that a man belonging to this caste may marry a widow even if he has a wife living, provided that he is childless; and that the issue of such marriage is legitimate, and it was proved that Doorga Shaw, at the time of his marriage with Poornomasi, had no children.

At the date of Doorga Shaw's death the eldest plaintiff was ten months of age, the youngest plaintiff was not born until seven months afterwards. In 1865, disputes arose between the defendants, who, up to that time, had been residing together; and the defendant Poornomasi Bibee, in the same year, instituted a suit against the defendant Dukhee Bibee and the present plaintiffs, alleging that Doorga Shaw had left a will, and praying that such will might be established. The defendant Dukhee Bibee, in her written statement, alleged that Doorga Shaw had died intestate, and claimed to be his heiress. This suit was compromised upon the terms, that so long as the family pro-

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perty remained in the hands of the defendant Dukhee Bibee, she should pay the defendant Poornomasi Bibee an annuity of Rs. 15 per mensem, and that Poornomasi Bibee should live in the family dwelling-house. The plaintiffs were maintained at the expense of Doorga Shaw's estate, and in November 1877 they were placed by the defendant Dukhee Bibee in charge of a shop which had belonged to Doorga Shaw, and which had been carried on by the defendant Dukhee Bibee. The plaintiffs, in February 1879, called upon the defendant Dukhee Bibee for an account, which, on the 6th of February, she refused to give; and therefore they instituted the present suit, praying for an account of the moveable and immoveable property, which was of Doorga Shaw, come to the hands of the defendant Dukhee Bibee, and for a declaration that they were absolutely entitled to such property.

Mr. *Bonnerjee* and Mr. *T. A. Apear* for the plaintiffs.

Mr. *Kennedy* and Mr. *Sale* for the defendants.

Mr. *Apear*.—It is a sufficient and valid marriage, if there is an agreement to marry made before respectable persons, and if cohabitation follows upon such agreement. Such a form of marriage as this may be sanctioned by custom: *Narain Dhara v. Rakkhal Gain* (1). [WILSON, J.—The custom is only as to the form. Custom cannot make a valid marriage. Is there any authority to show that, among Hindus, a customary form of marriage may be proved, which is not known to Hindu law?] If it is shown that, by the custom of the caste or district, any other form than the usual one is considered as constituting a marriage, then the adoption of that form with the intention of thereby completing the marriage union, is sufficient: *Mayne on Hindu Law and Usage*, p. 79; *Menu*, Vol. III, § 35; *Gatha Ram Mistree v. Moolita Kochin Ateah Dimoonee* (2); *Rajhumar Nobodip Chundro Deb Barmun v. Rajah Bir Chundra Manihya Bahadoor* (3). In the last case a very simple form of marriage

(1) I. L. R., 1 Calc., 1. (2) 14 B. L. R., 298. (3) 25 W. R., 404—414.

was found to be customary, and was recognized by the Court. No marriage between Hindus is invalid by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage, notwithstanding any custom and any interpretation of Hindu law to the contrary: Act XV of 1856, s. 1. It has been decided that women married according to this particular form, are, so far the legal wives of their husbands as to justify the punishment of persons committing adultery with them: *Bissuram Koiree v. The Empress* (1).

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Mr. *Kennedy*.—The suit is barred by limitation. On Doorga Shaw's death, the defendant Dukhee Bibee was alone in possession, and she set up an absolute adverse title in her defence to the suit instituted by Poornomasi in 1865. Her title was recognized in the compromise, and the whole of Doorga Shaw's property was made over to her. The learned counsel also contended that the alleged marriage, according to the *sagai* form, had not been proved.

Mr. *Apear*, in reply on the question of limitation, said, that he did not contend that the plaintiffs were entitled to any account prior to November 1877, when the plaintiffs were put into possession of the shop.

The judgment of the Court was delivered by

WILSON, J.—This is a suit brought by the plaintiffs, claiming to be heirs of one Doorga Shaw, and asking to recover, as against the defendant (Dukhee Bibee), the property which they allege formed part of the estate of Doorga Shaw, and for accounts. They claim as sons of Doorga Shaw, by what they call a *sagai* marriage.

The first question to consider is, whether, among the caste to which the plaintiffs' mother belongs, a marriage such as that which has taken place is a valid marriage so as to make the children legitimate.

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The *sagai* marriage is not unknown. It has been before the Court on a former occasion. A *sagai* marriage, very similar to the one in this case, came before a Division Bench of this Court in the case of *Bissuram Koiree v. The Empress* (1), and the marriage was held to be a good marriage so far as to render a person who had intercourse with a woman so married liable for adultery.

The evidence shews that the *sagai* marriage is common among the Hulvae caste whose home is in Benares, and who have a large settlement in Calcutta. It has been proved that a man of this caste may take a widow in marriage. I think it is further proved that if a marriage is entered into without payment of the fine, the subsequent payment of the fine by the husband is sufficient, and further by taking the woman home as his *sagai* wife.

It is further proved that the custom allows a man who has a wife living to contract a *sagai* marriage if he is a childless man. It is further alleged that such a marriage may be contracted with a woman who has a husband living. Some stated it broadly, other witnesses limited it strictly; and the latter are, I think, right. They said a married woman may contract a *sagai* marriage notwithstanding her husband is living, provided the punchayet has examined and reported that her husband is unable to support her.

It is not necessary to determine whether, in the case of a married woman, the custom is good in law; but in the case of a widow I see nothing objectionable to it on principle. (His Lordship then considered the evidence as to the marriage, and continued.)

The remaining question is, what account are they entitled to. That depends on the Statute of Limitation.

I don't think the case falls under art. 123 for this reason. The ground of the plaintiffs' claim is not a legacy or a share of a residue or a distributive share. This suit is in no way founded on that. The suit is to recover property which they say is theirs.

(1) 3 C. L. R., 410.

So far as the immoveable property is concerned, I think it falls under art. 144. If not under that, I think it must fall under art. 120.

As to the moveable property, the case falls perhaps under art. 89 or 90, which deals with suits by principals against agents for moveable property received by the latter and not accounted for, and suits against agents for neglect or misconduct.

If the case, so far as the moveables are concerned, is not governed by either of those articles, it then falls under art. 120. It is necessary to look at the facts to see whether they are such as to bar the suit. The material facts seem to be these. The deceased died in 1857. He left one infant son, the other son was born afterwards. The widows would be entitled to maintenance, the sons would take the property as heirs. It seems to me most natural that the actual control of the property should be in the hands of the elder widow, and so it continued. Then whatever interval there may have been from the death of Doorga to the latest period, the younger widow remained with the elder widow. Then, from the time when they went to reside in the house to the quarrel in 1865, all the parties lived and messed together. The quarrel was in 1865. A suit was brought by the younger widow.

The younger widow set up a will, and the elder widow set up title as heiress.

Probably neither party was confident in her case, and it ended in a compromise.

The substance of the compromise is this. It is stated that the following arrangement had been come to through the intervention of certain persons, and the substance of that agreement was shortly this: an arrangement was made with respect to the mode in which the family property was to be divided, but then it was to continue so long as the management remained in the hands of the elder widow. The property was managed by the elder widow Dukhee on behalf of the family generally. The plaintiffs have had all their wants supplied out of the proceeds of the family property. I am satisfied this was the case till Aughran last year. The fact remains that, for some time

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past, when the sons came of age, when they could manage the business, the shop has been in their hands. A quarrel took place between the plaintiffs and the defendant. From that time, if either art. 144 or 120 applies, and the possession became adverse from that time, the cause of action accrued and limitation began to run. If art. 120 be applicable, the limitation began from Anghran last year.

If arts. 89 and 90 apply, then from the time when the defendant set up title in herself the limitation began. The agency terminated, and then also limitation would run from Anghran. It seems to me the suit is not barred by limitation. Mr. Apar has not contended that the account should go beyond that period.

The plaintiffs are entitled to a decree to this effect.

They are entitled as heirs of Doorga Shaw to such part of the estate of Doorga Shaw, or the proceeds of it, as was in the hands of the defendant Dukhee on the last day of Anghran last year, and to an account of such property so in her hands, and of the rents received therefrom and dealings therewith.

I will make no decree as to the costs at present; the accounts will have to be taken, and after that is done, I will make my order as to the costs.

Plaintiffs are entitled, as above, subject to the defendants' right of residence in the house.

Attorney for the plaintiff: Baboo *Kally Nath Mitter*.

Attorney for the defendant: Baboo *Gonesh Chunder Chunder*.