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is a full and specific record of the division previously come to by mutual consent; that, whether the property was actually divided or undivided property, the family was divided, the brothers become capable of contracting and did contract, and that the right to sue upon the contract clearly survived to the defendant, who must have recovered; that she has, therefore, a perfectly valid defence to this action.

The decree of the Lower Court must, therefore, be reversed, and the original suit dismissed with costs.

Suit dismissed.

APPELLATE JURISDICTION (*a*)

Regular Appeal No. 61 *of* 1865.

TARA CHAND..... .....*Appellant.*

REEB RAM.....*Respondent.*

The doctrine of Hindu Law that outcasts are incapable of inheritance has no bearing upon the case of the members of new families which have sprung from persons so degraded.

The question of the origin and binding force of customary law discussed and the authorities upon the subject cited and commented upon.

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THIS was a regular appeal from the decree of J. H. Goldie, the Civil Judge of Tinnevelly, in Original Suit No. 1 of 1864.

The suit was instituted for the recovery of one-fifth share of family property, consisting of real and personal property, valued at Rupees 34,978-0-1 together with the subsequent profits of the property, and was brought by the respondent in this appeal against his father the present appellant, and 8 others, of whom the 2nd, 3rd and 4th defendants were plaintiff's infant brothers.

The plaintiff alleged that the 1st defendant had wasted the family property by living extravagantly, and by alienating portions of it, and that he was entitled under the Hindu Law to one-fifth share, of the family property.

(*a*) Present : Frere and Holloway, JJ.

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The 1st defendant urged that the common ancestor of the family was a European, a Mr. Hughes; that the property left by him descended by will; that the family property subsequently has always descended by will, and that the plaintiff therefore was only entitled to the share of the family property which the 1st defendant might leave him by his will, that he could have no claim to any portion of the family property whilst the 1st defendant was living, and that the Privy Council had decided on the 2nd August 1861, that the family of the said Mr. Hughes was not governed by Hindu Law. There were several other allegations made by 1st defendant, principally concerning the amount of family property in his possession.

The 2nd defendant supported the 1st defendant's answer to the plaint. The 3rd and 4th defendants were *ex-parte*,

The other defendants claimed, on various titles, portions of the property alleged by the plaintiff to be family property.

There were 13 issues settled between the parties, two of Law, and the rest issues of fact.

The decision of the Civil Judge on the 1st issue namely whether the parties to the suit are governed by Hindu Law was as follows:—The first issue of law requiring to be decided is, whether the parties to the suit are governed by Hindu Law, and this point the Court considers must be decided in the affirmative. The history of the family of the parties engaged in this suit has previously formed the subject of enquiry in this Court in Original Suit No. 3 of 1852, and is fully set forth in a judgment of the Privy Council, dated the 2nd August 1861, from which it appears that the parties are descended from Mr. G. A. Hughes, an Englishman who resided in this district, and had five illegitimate children by two native women. The evidence of the 1st defendant's witnesses clearly proves that the 1st defendant's family adhere to the customs of the Hindu religion, and are always considered Hindus, but that they bequeath their property by will; this circumstance, however, cannot deprive them of their liability to the Hindu Law. The judgment of the Privy Council has expressly determined that the descend-

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ants of Mr. Hughes are Hindus, and that they are governed by Hindu Law ; and it therefore follows that the rights of the parties to the family property now in dispute must be guided by the Hindu Law of Inheritance. The late Sadr Court in appeal Suit No. 13 of 1858 has also decided that the family of the parties is subject to Hindu Law.

The 1st defendant appealed from the decision of the Court of First Instance.

Mayne and *Miller*, for the appellant, the 1st defendant.

Mr. Advocate General, for the respondent, the plaintiff.

The Court delivered the following

JUDGMENT:—This suit was brought by plaintiff, son of first defendant, for a fifth share of the property which he alleged to be ancestral.

The first defendant answered that the ancestral property referred to was derived from Hughes, an Englishman, who was the first defendant's grandfather; that Rám Sing, defendant's father, had also disposed of his property by will, and that the members of the family had also so disposed of it, and that plaintiff would only be entitled to so much as first defendant might leave him by will. Some allegations as to the badness of plaintiff's character were abandoned and properly abandoned on the appeal.

The Civil Judge deciding on the authority of the Privy Council and of the late Sadr Court that the parties were Hindus, decreed a share to the plaintiff, somewhat modifying the amount claimed.

The first defendant appealed on the main grounds, (1) that plaintiff was in Hindu law incapable of inheriting ; (2) that a valid custom of bequeathing property by will had been established, and that this ousted the plaintiff of any right under Hindu law to demand a partition ; that, at all events, it barred any claim to a partition now, even if it should be thought that there existed any right of inheritance ; (3) that the property was from the mode of its acquisition self-acquired, and as to this point complaint was made of the rejection by the Civil Judge of the will of Rám Sing.

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As to the amount at which the property was assessed by the Civil Judge, objection was made to the principle upon which the value of the produce of the Coffee estate had been determined and the non-allowance, at all events of two sums of money which defendant had paid under two decrees of Court, on account of Rám Sing, the Civil Judge having rejected the decrees when tendered in evidence.

It was conceded in the argument that the Hindu law applied to these persons, and indeed the contrary contention would have been impossible after the decision of the Privy Council in *Maina Bhai v.* (*Uttaram* VIII Mo. I. Ap. 400)and of this Court at II H. C. 196, both decisions upon the status of members of this very family. It was contended, however, that although the Hindu law applied to them, it applied to their disadvantage, inasmuch as it declared them as outcasts incapable of inheritance.

The *Vyavahara Mayukha*(Sec. XI. Cl.I)and the *Dayabhaga* (Chap. V, 10, 11, 12)were particularly referred to, as showing the outcast and his sons not only incapable of inheriting, but even excluded from the right to food and raiment which is to be given to other excluded persons ; and also as proving that the stigma extended to the offspring. Section X of the second chapter of the *Mitakshara* embodies substantially the same doctrine. The passages from the *Dayabhaga* and those from the *Mitakshara* occur in chapters treating of exclusion from inheritance. The theory of the *Dayabhaga* is that all wealth arises from partition, and the whole treatise is upon inheritance in a Hindu family. It is manifest therefore,that the only bearing of these passages is upon the question of a man's title after degradation to the property of a family still retaining caste; they have no bearing whatever upon the of the case members of new families which have sprung from persons so degraded. The *Mitakshara* too is treating of the exclusion from the inheritance of that property, which, according to the theory of the author, accrues to the Hindu by birth, and it would be very singular if the civil death, which follows upon the degradation from caste in the view of these writers, did not destroy the right of inheritance to property in a family ; to which on the theory of Hindu law the outcast was as one dead. Equally

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logical is the conclusion that the children of the outcast, born after his degradation, are incapable of inheriting. That reasoning, however, has no bearing whatever upon the present case. It is abundantly clear that these persons follow the Hindu religion and Hindu customs, and in the pleadings there is no attempt to deny that, save for the alleged special custom, the Hindu law would apply to them.

It is unnecessary, therefore to consider, whether by any agreement or determination of the members of this, family they could by any possibility have established a right to be exempted from the provisions of Hindu law, which *ex vi termini* applied to them at the moment at which it was established that they were Hindus of Southern India by race, by creed, and by habits.

It was argued, however, that this property is really the self-acquired property of the father, because he took it under his father's will and not by inheritance. It is strange that the defendant has not himself attempted the present contention, but doubtless he is entitled to avail himself of it, if well founded in point of law. The attempt was to assimilate this to the doctrines of English law, before the statute, as to the heir taking by purchase where the will gave a different estate to that which the law would have given.

It was strongly objected for the appellant that Rám Sing's will from which this would be apparent, was improperly rejected by the Lower Court. In strictness this complaint was not properly open to the appellants, for they gave no evidence whatever that the document which they produced was Rám Sing's will. We will however for the purposes of the present discussion assume that document proved, and inasmuch as the three brothers would have taken the estate as a joint family, by the will a division is made in which the members of the family seem to have acquiesced. According to the doctrine of the law of England before the statute, each would undoubtedly have taken as a purchaser.(*a*) The question however is, whether there is such a resemblance between the English law of testamentary disposition

(*a*) Shelf. Real Property Stat. 449.

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and that applicable to these parties, as to render the doctrines of the English law any guide upon the matter. In England absolute freedom of testamentary disposition is now established. In this country we have now largely innovated upon the Hindu law, but it has never been contended that a man having male issue can by will disinherit them. It is by no means clear upon the authorities that he can, even by gift *inter vivos*, deprive them of their right to share even in his self-acquired real property, and we apprehend that it is perfectly clear that such male issue would be absolutely entitled to it at his death. It may indeed be said that the power of devising has been introduced by analogy to the power of giving, but this by no means involves as a logical consequence, that a man may devise whatever he may give. This has never been decided and it is sufficient in the present case to say, that the legal anomaly, introduced by express decision, has never been pushed to this extent. If it were necessary to discuss the question it would not be difficult to show most important distinction between giving and devising, and the impossibility of a devise fulfilling the requisites of the Hindu doctrine of gift. We can see no ground whatever for doubting that the property which came to 1st defendant from his father is, as he himself treats it, ancestral property. It seems to us that there is no reason whatever in the contention that its quality was changed by his choosing to accept it, apparently under the terms of his father's will. Still less ground would there be for the contention that his acquiescence in that mode of receiving it would vest in himself a larger estate than he would have taken by descent. On what principle can he be conceived capable, by any act of his, of depriving his children of a right given to them by the doctrines of the *Mitakshara* at the very moment of their birth? The argument, therefore, that this property is unsusceptible of partition, because self-acquired, seems to us to fail entirely.

We pass now to the contention that there is in this family a customary law, which we are bound to respect, that property is to pass by will and not by any other mode. Evidence was adduced that this family, springing from connection between Hughes and a Hindu mother, has actually

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devised ; but one of the witnesses adduced has said that if there was no will it would go by descent, and another of them says that where there are heirs they do not bequeath, where there are not, they do. This witness, however, went on to show that they have bequeathed though there were children. The oral evidence, therefore, as to the alleged custom does not prove much. The case really stands upon the fact that there have been bequests. It was said that *Manu* (Cap. VIII, sec. 41) declares law established by custom of more weight in the Hindu law than in other systems, inasmuch as it extends that law to particular families. The King, however, is to uphold the rules of families, " so far as they are not repugnant to the law of God." If it is considered that the institutes of *Manu* profess to be based entirely upon revelation, this passage ought to be taken to mean that particular customs not repugnant to the law should be upheld.

The question of the origin and binding force of customary law is one which has divided the great jurists of the last generation. Mr. Mayne quoted Mr. Lindley's translation of Thibaut. Mr. Austin, as is well known, has, in perfect consistency with his definition of law, altogether denied that customary law has any inherent force as substantive law, and contended that it is in truth a species of judiciary law (Aust. I. 148 and II. 229), and that this judiciary law obtains its force by virtue of powers, really legislative, which with the tacit sanction of the supreme authority have been exercised by tribunals. Nearly every opinion contained in the short passage of Thibaut, has been the subject of a warm controversy, the more remarkable, as Muhlenbruch observes, in as much as by positive legislation its binding force has been almost abolished. The theory of Savigny is that the real basis of all positive law is to be found in the general consciousness of a people. This basis being invisible, it is to be discovered by the external acts which manifest its usages, manners, and customs. The use of the phrase customary law is deluding, inasmuch as it would lead to the supposition that the first solution of a question of law was purely accidental, and that the same

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question was subsequently resolved in the same manner, because it was so resolved before.

Thibaut, in the general language used by him, seems to concede to each class of persons a power of establishing a law by their own will, but the restrictions which he afterwards imposes really narrow this power very materially, and in the practical result of his doctrines he will not be found very discordant from Savigny. After a very full discussion of the doctrines of the Roman law upon the subject, he thus lays down the principles of Modern Jurists as to customary law, (Sec. 29). The acts of individuals are not the foundation of law but the signs of the existence of a common idea of law. The acts required for the establishment of customary law, ought to be plural, uniform, and constant. They may be judicial decisions, but these are not indispensable for its establishment, although some have thought otherwise. The authors of the acts must have performed them with the consciousness that they spring from a legal necessity. From the canon law the continental jurists, as well as our own, have imported the qualification that the custom must not be unreasonable. These principles of course have reference to the doctrines of the Roman law, and to their application in the country of which they form the common law, and there is nothing unnatural in their application to Rome, in which the decisions of the Roman people were in fact law, whether upon Mr. Austin's theory or on that of his opponents. The important observation of Savigny is, that usages, and customs are only evidence of law. 'Custom is, for the people that has established it, a mirror in which that people may recognize itself,' says Huchta. The authors, who deal with this subject, are all discussing customary law as applicable to a whole community or a large section of it. They would never have conceived it possible for a customary law, antagonistic to the general law, to be established by evidence of the acts of a single family, confessedly subject to that general law. There are now three generations of this family, and we entertain as little doubt upon principle as upon authority, that no evidence of their acts

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or opinions could establish what would not be a law, but an anomaly.

The Abraham case (*a*) is almost the antithesis of this. The Hindu law being based upon the Hindu religion and inextricably interwoven with it, the throwing off of the religion prevented the law being obligatory, and left it to the parties themselves to determine whether they would be bound by it or by another law, prevailing by custom among the class to which their conversion and still more their altered habits assimilated them.

Even if we were disposed to follow the doctrine of Thibaut, that the acts of the parties are capable of making law, and that, on proof of conduct amounting to a mutual agreement to adopt particular customs, a customary law will be established, from which the persons or classes of persons, expressly, or tacitly parties to such agreements, will not be at liberty to dissent, we should consider the evidence in this case wholly insufficient to establish such a custom. Assuming that each member of the family during the single generation after the acquirement of the property, has made a will, we should be wholly at a loss to see a case, which, on the principles of the jurists who follow the school of Thibaut, or indeed upon any principles of jurisprudence, would establish such a binding law. The Privy Council have observed incidentally that, in their opinion there does not exist in any persons the power of making laws of inheritance for themselves.

This is the case of persons decided to be Hindus, following the Hindu religion and the Hindu customs, subject to the Hindu law of inheritance, and it is, as we think, clearly not open to them to reject any part of it. We are therefore of opinion that the Hindu law of partition does apply to this family and that partition may therefore be enforced. We see no no reason whatever to dissent from the judgment of the Civil Judge as to the property being ancestral. It was for the first defendant in possession of ancestral property, as he confesses himself to be, to show that his acquisitions had not been made by its aid. He has not done so, and his allegation that he was unable to produce his accounts,

(*a*) IX. Mo. I. A. 195.

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because they had been destroyed by white ants, renders it pretty clear that he could not produce such proof.

Little was however said in the argument as to the principle on which the account ought to be taken, and we have reserved to the parties liberty to apply to this Court upon that matter.

Appeal dismissed.

[The Judgment of the Court as to the principle on which the account ought to be taken in this suit, will appear in the next part of these Reports.]

APPELLATE JURISDICTION (*a*)

Special Appeal No. 481 *of* 1864.

ELLAIYA .....*Appellant.*

LATE COLLECTOR OF SALEM.....*Respondent.*

In a suit against a Collector for an illegal seizure and subsequent usurpation of plaintiff's shares in an Agraharam village for non-payment of tirvai due from other tenants of the village, and to recover the increased tirvai imposed by the Collector.

Held, that the plaintiff's right to enjoy his share of the village lands under the original patta was not legally determined by resumption, and that, continuing liable only to the fixed rent, the plaintiff is entitled to the return of the amount paid under compulsion, in excess of such rent, at the date of the suit.

Held also, that the facts of pattas having been issued separately to each tenant, stating the share of land occupied, without defining the holding by boundaries, and the proportionate amount of assessment which the cultivator is to pay for it, though affording cogent evidence of the distinct liability of each for the amount of tirvai stated in his patta and no more, is not conclusive evidence of such individual liability.

Regulation XXVII of 1802 considered.

1866. *February* 5. *S. A. No* 481 *of* 1864.

THIS was a special appeal against the decree of the Civil Court of Chittur, in Regular Appeal No. 108 of 1861, on the file of the Civil Court of Salem, confirming the Decree of the Sub-Court of Salem in Original Suit No. 31 of 1856.

The suit was brought by Ellaiya (the special appellant) against the Collector of Salem, to recover rent levied from the plaintiff in excess of the permanent jodikay patta granted to him by Government.

(*a*) Present Scotland, C. J. and Innes, J.