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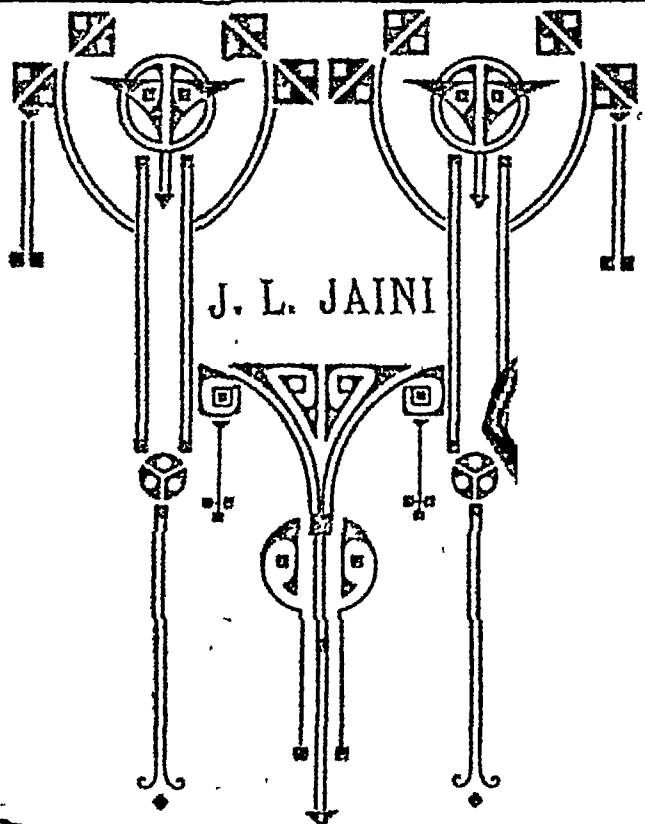
THE JAINA LAW



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JAINA LAW

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Text with Translation and Appendix containing Full Text of an important Judgment in a Jaina Case by the Original Side of the High Court of Judicature, Indore.

BY

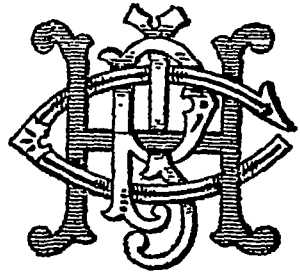
J. L. JAINI, M.A.,

BARRISTER-AT-LAW, JUDGE OF THE HIGH COURT OF JUDICATURE, INDORE STATE; PRESIDENT OF THE ALL-INDIA JAINA ASSOCIATION; LATE EDITOR OF THE "JAINA GAZETTE"; AUTHOR OF "HINDU LAW", "OUTLINES OF JAINISM," &c. &c.

"धर्मः सुखस्य हेतुः"

"Law is the cause of happiness."

—Sri Gunabhadracharya



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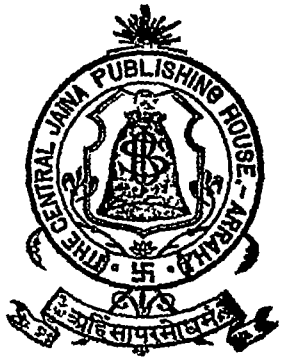

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AS A SMALL TOKEN OF ADMIRATION AND GRATITUDE

BY THE AUTHOR.

PUBLISHER'S NOTE.

This book removes a longfelt want. The Jainas are a very important, rich and influential community. Many and costly are the cases which they have to fight in Law Courts. But from the lowest Munsiff's Court in India to the most august Judicial Committee of the Privy Council at Whitehall—all the Courts are hampered by the lack of a book which should give the ancient and authoritative law texts of the important Jaina people. The absence of a Jaina Law book has had curious results. In theory, some queer and absurd propositions of Law and History have crept into the law books and law reports, *e.g.*, that the Jainas are Hindu dissenters and that they have no law of their own, etc. In practice, pure havoc has been played with Jaina rights and customs. Both these have been the playthings of chance, arbitrary findings and ignorant misrepresentations, alike from high and low. Mr. Justice Jaini in this book makes an earnest effort to set right all these matters.

We publish this book in all confidence that it will be of invaluable help to all students of Law and History and also a boon to the legal practitioners and the litigant public, whose rights have anything to do with Jaina Law.

As appendix B to this Book we are publishing Full Text of the judgment in a Jaina case given by the Original Side of the High Court of Judicature at Indore. We firmly believe this will greatly enhance the value of this Book.

ARRAH : D. P. JAINI.

November 15, 1916.

PREFACE.

JAINA LAW.

As an individual's life is many-sided, so that of an aggregate of individuals has many aspects. The life of a nation or a community has its physical, material, moral and spiritual sides. Law is an essential constituent of the whole life of a community. Law being based on the most primary human instincts and being always a child of necessity, is a very sure index of the condition of the community. On one side, Law looks upon the material affairs of a people; on the other, it is linked with the most common moral maxims which govern its corporate existence. The Jainas, if they are not now, have been a united body of men and women, at least in the Past. They had a law of their own. It is not altogether lost. It is buried in the mass of our literature and traditions; but it is there all right. Our basic differences from our neighbours made it compulsory that we should evolve a system of jurisprudence, which

should be in cordial harmony with the essential theological and moral teachings of Jainism. Our law grew out of this inner necessity of our corporate life. No doubt, in many things our legal system will take its color from the legal notions of our neighbours; even as in dress and many external things, we unconsciously imitate our neighbours. But the spirit of our Law remained as distinct from that of the Laws of Brahmans and others, as Jainism is different from the religion of the Vedas, Upanishadas and Puranas. Well, in accordance with the conclusions of Montesquieu, our climatic circumstances being the same, Jaina jurisprudence would run on lines similar to those of Hindu jurisprudence. But the fundamental divergence between Hindu and Jaina theology would work out most important differences in the principles and details of the two systems. Does not our belief or disbelief in a God, in a Creator of the Universe, in Souls, etc., affect most materially the rules that regulate our affairs in the family, in society, and in the world at large? All the departments of Law—Family Law, Law of Property, Law of Succession, Law of Obligations and Procedure—are affected by any peculiar views that are accepted by the law-givers or by the people who are governed by these laws.

Two great principles of Jainism may roughly be

long drawn-out litigation is as uncertain as the awards of the invisible Fortune. This is in more or less ordinary cases. But when a plaintiff or defendant has to prove a general or special usage, the difficulties grow a thousand-fold. So arduous the task becomes that it is certainly beyond the power of poor men. Therefore, unless the parties are rich, a poor Jaina's rights, in accordance with well-known Jaina customs, which differ from Hindu law, are sure to remain unenforced. The custom also loses its force year after year, till time kills it in the end. Such a state of affairs must be a matter of regret to any community. To an ancient and important community like that of the Jainas, it is intolerable. Jainas all over India keenly feel this implied insult to their religion and philosophy, and injury to their material and moral interests. Some one had to start an amelioration of this condition of affairs. I have made a beginning by presenting to the public a bare translation of one of the most authoritative Jaina Law Books. A world of work yet awaits doing at the hands of Jaina Pandits and Lawyers. Other unavoidable and multifarious engagements prevented my considering the Jaina Law Text in the spirit of a commentator, but being persuaded chiefly by the wishes of my friend, Kumar Devendra Prasad of Arrah,

I overcame my hesitation to allow the *Bhadrabahu Samhita* to appear just now. However, I am confident that, even in its present form, the book will remove a real want and be of use to people interested in the study or application of Jaina Law. I am aware of four most important works of Jaina Law : *Bhadrabahu Samhita*, *Arhanniti*, *Vardhamana Niti*, *Indranandi Samhita*. The first is translated here. The texts of the second and the third are available in print. The text of the fourth, I have obtained through the kindness of Pandit Fatch Chandji of Delhi which is printed here as Appendix *A*.

J. L. JAINI.

HIGH COURT :

Indore, November, 1916.

JAINA LAW WORKS.

IN PREPARATION.

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OF

SRI HEMCHANDRA ACHARYA

ENGLISH TRANSLATION BY

PURAN CHANDRA NAHAR, M.A., B.L.,

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BY

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EDITED *(with preliminary note)* BY

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President: Jaina Literature Society, London

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TABLE OF CONTENTS.

Dr. Brajendra Nath Seal, M.A., Ph.D., King George V. Professor of Philosophy, Calcutta University—"It is an excellent handbook of Jainism, full, lucid, correct."

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BHADRABAHU-SAM

OR

THE JAINA LAW OF INHERITANCE AND PARTITION.

INTRODUCTORY.

Before proceeding to the text and translation of *Bhadrabáhu-Saṃhitâ*, a few words by way of introduction will not be out of place.

Date and sources of the book.

Everything that is authoritative in Jaina teachings and scriptures is ultimately due to Lord Mahâvîra, the last Jaina Tîrthaṅkara, who flourished in the sixth century B.C., in Bihâr. After having practised austerities and preached, for a number of years, the way to conquer pain and matter, and attain liberation and beautitude, he attained Nirvâna in 527 B.C., at Pâvâpurî, near Behar, in the modern province of Bihâr and Orissâ. His teachings, however, have not reached us in their perfect condition and directly. Lord Mahâvîra himself, though omniscient and master of all learning, did not write or even compose anything himself. The Unspeakable Whole

Truth simply issued from him as an illuminating vibration and broke forth in enlightenment and peace, for the benefit of all around him, according to their individual needs, ambitions and capacity, of the mind and of the soul.

On the Lord's ascension to Nirvâna (final liberation), the great glory descended on the shoulders of his great disciples, the *Gaṇadharas*. Of these, only three attained omniscience. But these also did not write anything. It may be noted that the art of writing had been known to Indians for a few centuries before the Nirvâna of Lord Mahâvîra. The Buddha also had about this time impressed the world with his new solution of the world's old doubts and difficulties; but the art of writing was only a novel curiosity not yet employed in many things. After the three *Gaṇadharas*, the last of whom died in 465 B.C., the Jaina tradition was in the keeping of the highly trained memories of five *Srutakevalins*, who account for one century among themselves, *i.e.*, down to 365 B.C. Then, for 521 years, *i.e.*, down to 156 A.D., the Jaina tradition passed through the heads of a series of teachers, each of whom was less competent as to the matter and memory of it than his predecessor.* It may

*For more details, see the present Translator's *Outlines of Jainism* (*Cambridge University Press*, 1916) and *Tattvarthasutra*; and the *Indian Antiquary*.

be said that the Gaṇadharas had arranged the body of the Jaina teaching in 12 parts, called the Twelve Aṅgas, the Twelfth Aṅga being sub-divided into (1) 14 Pûrvas, (2) Parikramas, (3) Sûtra, (4) Prathamânuyoga and (5) Chûlikas. The main course of their scriptural history is admitted by all Jainas; but there is a slight difference between the Śvetâmbara and Digambara Jainas. The Śvetâmbaras say that the Sacred Books were reduced to writing in 454 A.D. at the Council of Vallabhî, near Bhâvanagar, under Devarddhîgaṇa; whereas the Digambaras put this date after 49 Vikrama Samvat or 8 B.C. But the distinction is immaterial for our present purposes.

The original book, of which the *Bhadrabâhu Saṃhitâ* forms a chapter, is the *Upâsakdhyâyana Aṅga*, one of the twelve *Aṅgas* referred to above. This Aṅga, like most Jaina ancient books, is unavailable. But Bhadrabâhu, according to Jaina tradition, was a contemporary of Chandragupta, of whom he was the revered preceptor also.* Thus Bhadrabâhu, the author or compiler of these Ślokas, flourished about 340 B.C., at least about 365 B.C. (He was the last of the Śrutakevalins). The tradition of the Jaina Lord, as given in the following

* *Cf.* the historical evidences given in the Hindi Magazine *Jaina Siddhânta Bhâskara*, published by Devakumar's Central Jaina Oriental Library of Arrah, Vol. I., No. 1, for July to September, 1912, pages 11 and following.

book must, therefore, be almost as old as Lord Mahâvîra himself, and therefore not only of very hoary antiquity, but also of unparalleled authority.

The author of the book.

The author of the book, Bhadrabâhu Śvâmi, is a figure that towers high and heroic in the dim darkness of Jaina history. He flourished about 365 B.C.—162 years after Lord Mahâvira's Nirvâna. Chandragupta dreamt 16 dreams, the last one being a dreadful serpent with 12 hoods. On being referred to his spiritual *guru*, Bhadrabâhu, it was interpreted into a dire famine of 12 years. These famines were not quite unknown to the neighbourhood of Pâtaliputra (modern Patnâ), the capital of the great Mauryan Empire.* Sometime after this, Bhadrabâhu went to beg alms in the city, but a child was crying so lustily that he did not get a hearing even after 12 calls. Reading in this the sure advent of the famine, and fearing that it would be impossible for Jaina ascetics to live in accordance with the scriptures, Bhadrabâhu started for the South of India, with a large number of his ascetic-disciples. Chandragupta also, being repelled by the sinful world, made his kingdom over to his son, Simhasena, *alias* Bindusâra, became a Jaina ascetic under the

* See *Buddhist India*, by T. W. Rhys Davids, 1903 (London : T. Fisher Unwin), pp. 49-50.

name of Prabhâ Chandra, and accompanied Bhadrabâhu. Near a beautiful hill, *Kata-vapra*, in Northern Carnatic, Bhadrabâhu felt that his end was near. Therefore he sent his disciples on to further south, to the countries Cholâ and Pândya, and himself stayed on there with Chandragupta Muni, who served his *guru* in a most devoted fashion, till the end came and the last ceremonies were performed. Even after this, Chandragupta remained devoted to the memory of the *guru* and constantly worshipped his foot-impressions in that spiritual retirement from the world.*

The object of the book.

The book consists of 12,000 Ślokas. Its copy is preserved in Jhâlarâpâtana. I have translated only the chapters on Inheritance and Partition. The book is written to determine quarrels among members of the same family. Quarrels lead to passionate and hostile feelings, and Jainism aims at the suppression and eradication of these, chiefly of Anger, Pride, Deceit and Greed (*Krodha, Mâna, Mâya, Lobhâ*), as they imprison the soul in matter and retard its evolution on to freedom and liberation from mundane misery. (See Ślokas 3 and 116 below).

General characteristics.

A few general characteristics of Jaina Law, as laid down in the *Saṃhitâ*, may be noted here.

* This is also from the *Bhâskara, loc. cit.*

I.

Law and morality and religion are still mixed up. This is a feature common to all systems of law in their earliest stages. "It has been observed that the point of view of a '*jus quod populus sibi ipse constituit*' is still quite foreign to the primitive law of the Aryan nations (the *dharma* of the Indians, the *themis* of the Greeks, the *fas* of the Romans), their laws are closely interwoven with their religion and their moral code, they are bound up with the belief in the gods, which belongs to the Aryan gentes, the belief, namely, that the gods shield what is right and punish what is wrong." [Leist, *Altarisches Jus Gentium* (1889) pp. 3, 4]. Sir William Anson also notes of a State in its early stages: "In proportion as its power is weak, its sphere is wide; religious observance and moral action, as well as the maintenence of order and the performance of promises, are its concern. The laws of the people of Israel cover every department of life, diet, cleanliness, domestic relations, religious observances and many rules of general conduct which are observed in more highly organised communities as matters of habitual morality." [*Law and Custom of the Constitution, Part I, Parliament*, Third Edition, at p. 4]. So Walter Bagehot, in *Physics and Politics* (pp. 25-26): "In early times the quantity of government is much more important

than its quality. The primary condition is the identity—not the union, but the sameness—of what we now call Church and State."

So in the *Saṃhitâ* we notice that domestic peace is a result of meritorious Karmas (Śloka 2), and domestic discord is due to decline of meritorious *Karmas* (Śloka 3). The brothers are enjoined to live separately for the increase of *dharma* (Ślokas 11-12-13): here one may notice a sly half-an-eye to the interests of the many disciples of the great Bhadrabâhu. The gods of the well-populated Jaina pantheon also are kept fairly busy, for the man who takes back a gift is sent to hell (Śloka 66). The son's widow should serve her mother-in-law (Śloka 75), a rather heavy duty when one takes into account the mother's treatment of the son's wife as an ever-growing sharer in the son's affection and attentions. The favourite *bête-noire* of Jainism, Deceit, is punished with forfeiture (Śloka 105). The ceremonies of adoption are semi-religious (Śloka 43).

II.

There is a kind of *patria potestas*, but not of the rigid Roman type, with its relentless *jus vitae necisque* (the power of life and death). Even the *patria potestas* was very much modified by an injunction to apply sweet persuasion or to appeal to the family council and the public officials rather than take

the law into one's own hands (Ślokas 50-2). We see the gradual rise of the idea of Kant: Freedom and Personality are by birth. Parents cannot *make* children, because they are persons *endowed with freedom*, and cannot be things. Parents have only *possession* of children, not *property* in them. [Kant: *Philosophy of Law*. English translation by Hastie.]

Yet the son is considered to be his *parents'* property, it would seem, not exclusively or mainly the father's (Ślokas 39, 40, 42, 43.) The giver and the taker *and the wives* of both take part in the giving and taking of a boy in adoption. The interests of an adopted boy are well-guarded. And there is a curious provision in Śloka 92 (giving the adopted son a fourth part on a partition, on the birth of natural son, to his adoptive father) reminiscent of the *Quarta Antonina* of Roman Law, though this latter refers to adrogation and not to adoption, and to unjust emancipation and not to the birth of a subsequent child to the adopter [*Institutes of Justinian*, Book I, Title 11, para. 3.]

III.

No testamentary power is recognised.

IV.

A feature of great importance and at once giving a very great antiquity to the *Saṃhitā* is the recognition of Intermarriages. The *varṇa*-system, as

distinguished from the caste-system, is recognised. The *varṇa*-system approaches the well-known class-system of modern European societies more than the caste system. The *varṇa*-system is elastic and would seem to be based on occupation more than on birth. Jaina Brâhmans, Kṣatriyas and Vaiśyas are recognised, and, in fact, they are found even to-day in Southern India. These Brâhmans, etc., would probably make up the *varṇas*, Brâhman, etc., with the Hindus of the corresponding class. The caste-system is more identified with prohibitions as to interdining, etc., etc., and is certainly a later evolution or degeneration of the *varṇa*-system.

V.

In procedure, a curious thing is noticeable. A widow, who has been cheated by a dishonest servant, *e.g.*, must ask for reparation in a gentle way (Śloka 69). And then also the king is hardly to punish the cheat: the poor widow is to dismiss the rogue with the consent of the king's officers. (Śloka 70.)

VI.

A woman has a high, though naturally a subordinate, position in the family. In all important juristic acts she is the necessary co-actor with the husband, *e.g.*, in matters of adoption (Ślokas 39, 40, 42, 43.) She succeeds to the husband's property in preference to his mother (Śloka 74). She has

her *Stridhana* (Ślokas 83 to 87), which, on no account, can be taken by anyone (Śloka 88). In the matter of adoption, her powers are co-extensive with those of the husband alive (Ślokas 39, 40, 42, 43) or dead (Śloka 73). As a widow, when the son dies in his parents' lifetime, her position is not intolerable; and, considering the conception of a woman's position even under the Roman Law, the restrictions are really mild (Ślokas 111-115).

Only in one place the modern champion of woman's rights may shrink back aghast, in Śloka 13, where, in illustrating moveable property, the ascetic Bhadrabâhu gives "silver, gold, ornaments, clothes, cattle, *women*, etc." But in the bad, old days, slavery in some form or other did exist, and the "women" meant are most likely servants and *dâsîs* attached to the house.

Before I have done with the introductory remarks, a dictum acted upon by all the courts of law may be considered. I mean the dictum that Jainas are *primâ facie* governed by Hindu Law. To a certain extent the tacit assumption underlying this doctrine is that Jainas form a part of the non-descript agglomeration of families and races and fragments of families and races who have been born or domiciled in India during many millenniums of history, and that at some point of time or other, the Jainas, like a ripe but rebellious fruit, fell away and

detached themselves from the original stock. This is the judicial shibboleth met with in the Law Reports and acted upon as the surest touchstone of justice where Jaina rights are concerned.

For ages schoolboys have been taught: "Jainism is a compromise between Hinduism and Buddhism." Thus, by implication, Jainism would be subsequent to both. Even learned text-writers have fallen into and repeated the error. *E.g.*, Golâp Chandra Sarkâr Sâstri, in *Hindu Law of Adoption* (T.L.L. for 1888) Edition 1891, at p. 452. The same author repeats that Jainas may be called Hindu dissenters, that Jaina Yatis are Digambaras who follow Mahâvîra, and Śvetâmbaras who follow Pârśvanâth; and that Jainism originated in the N.-W.P.

But all these statements are entirely wrong. Jainism is not a compromise between Hinduism and Buddhism. It is far otherwise. Dr. Thomas (quoted in J. H. Nelson's *Scientific Study of Hindu Law*, 1881, at pages 91-2) is making a statement along the lines of history and Jaina tradition. The learned Doctor holds Buddhism to be an off-shoot of Jainism, and proceeds: "It is sufficient to observe that the history of the Jaina religion, when constructed, must be of prime importance to the student of Hindu Law, because it will show *beyond all possibility of doubt* that Jainists are not Hindus and cannot legally be subjected to the Hindu

(*i.e.*, Sanskrit) Law." (The italics are mine). Thanks to the labours of Orientalists like Dr. H. Jacobi, Dr. R. Hoernle, Prof. Guérinot, Dr. Barnett, Dr. L. Suali, Drs. Burgess and Bühler, Dr. Johannes Hoertel and others, the historicity of Lord Mahâvîra and Pârasvanâth and the independent and ancient origin and growth of Jainism are thoroughly established, and it is not necessary to attack the dead theory of the "compromise" now.*

As to Jainas being Hindu dissenters, and, *therefore*, governable by Hindu Law, we are not told the date of this secession. But History recognises that Lord Mahâvîra was till 527 B C.; that Lord Mahâvîra was preceded by Lord Pârśvanâth, who was born in 876 B.C. and attained liberation in 776 B.C. Jaina tradition, too, says the same. Jainism then claims that there were 22 more Tîrthaṅkaras before Pârśvanâth, the one immediately preceding him being Neminâth in Gujrât, near Mount Girnâr, in Jûnâgadh. Lord Neminâth was a contemporary of Kṛiṣṇa and Arjuna,† the heroes of Mahâbhârata. The date of the Mahâbhârata is given at the lowest count at about 1200 B. C. Therefore, Lord Nemi-

*See the translator's *Outlines of Jainism* on the antiquity of Jainism.

† Some Hindu astrologers calculate from astronomical date that Krishna was born in 3,200 B.C. This would make the age of Neminath about 5,000 years. See *Bhagvad Gita* by M. W. Burway.

nâth must be about that time at the latest. Not insisting upon the Jaina tradition in its entirety at present (and it must be said in passing that there is nothing to discredit it as a matter of necessity), the 21 Tîrthaṅkaras before Lord Neminâth must have covered at least a few millenniums; and, perhaps according to the claim advanced by Mr. B. G. Tilak in *Our Arctic Home in the Vedas*, the first Lord of the Jainas may be found in the then Arctics about 8000 to 10000 B.C.! Where did, then, the secession take place? Where and when the Jainas one morning rose up and dissented from the Hindus? The fact is that the Riṣabha of the Yajur Veda (see references in the *Jaina Gazette*, Vol. III, No. 5 for August 1906) and of the Hindu *Bhâgvat* (Skandha 2, Adhyâya 7) is, as is there admitted, the real founder of Jainism, and Jainism certainly has a longer history than is consistent with its being a creed of dissenters from Hinduism.

The inter-relation between Śvetâmbaras and Digambaras is again needlessly misunderstood. It is said the former *yatis* follow Lord Pârśvanâth and the latter Lord Mahâvîra. Even a child, with the most superficial acquaintance with modern Jainas anywhere, would perceive the absurdity of this. The distinction is not between *yatis* or ascetics only. It is wider. All the Jainas—monks and laymen—are either Digambara or Śvetambâra. And *both*

follow Lord Pârśvanâth and Lord Mahâvîra. Both derive their common creed—98 per cent. of the doctrine is identical in the two sects—from Lord Mahâvira. The distinction is due to a few minor differences* in the mode of worship, in images, etc.

Jainism originated in the N.-W. Provinces! This is a very misleading half-truth. It casts doubt on the historicity of Lord Mahāvīra, who admittedly flourished and attained liberation in Bihār. The truth is that Jainism did originate, in this cycle of time, under Lord Riṣabha or Âdinâth, who lived and taught people the arts of defending themselves against wild beasts, and of agriculture, etc., untold years ago, in Ajodhyâ, in what was the "N.-W. Provinces" in 1891 and is now the "United Provinces of Agra and Oudh." But Jainism in its modern form takes its rise in the life and teachings of Lord Mahāvīra, who was the last of the Tīrthaṅkaras and who was born at Vaisāli in 599 B. C., and attained Nirvāna at Pavāpurī in 527 B. C.

The doctrine of a Hindu origin for Jainism and the Jainas is thus with no historical support whatsoever. Hasty assumptions in the teeth of all the sacred and secular traditions of the Jainas account for this accumulated error. Yet it is not without a struggle that the doctrine established itself in courts

*84 of these differences are given in the *Jaina Gazette*, Volume IX, Nos. 6 to 9 for June to September, 1913.

of law. Even in the earliest text-books a sort of note of warning against the error is sounded. A crude statement is made in an old book, *Lord's Display*, 1630. Jaina priests of Surat are considered a part of the Brahman body, *though Sudras by caste*. In other words, they are non-Brahmanic Brahmans. What this means is already explained above (page 9). J. H. Nelson and Dr. Thomas have been mentioned already. Steele, in his *Hindoo Castes*, says: Jainas have books of their own.

In 1781, the British Parliament, with reference to the Supreme Court at Calcutta provided that "inheritance and succession to lands, rents and goods, and all matters of contract and dealing between parties, shall be determined in the case of Mahomedans by the laws and usages of Mahomedans, and in the case of Gentus by the laws and usages of Gentus, and when only one of the parties shall be a Mahomedan or Gentu, by the laws and usages of the defendant" (Statute 21, George III, c. 70, section 17).

Sir William Jones, writing on 19th March, 1788, says:—

"Nothing could be more obviously just than to determine private contests according to those laws, which the parties themselves had ever considered as the rules of their conduct and engagements in civil life. Nor could anything be wiser than, by a

legislative act to assure the Hindu and Musalman subjects of Great Britain that the private laws, which they severally hold sacred and a violation of which they would have thought the most grievous oppression, should not be superseded by a new system, of which they could have no knowledge and which they must have considered as imposed on them by a spirit of rigor and intolerance" [Quoted in preface to *Digest of Hindu Law* by Colebrooke (17 December 1796, Mirzapur), p. v-vi].

The Statute 21, G. III, c. 70, laid down for the Calcutta Courts that the law applicable should be the law of the parties or that of the defendant. For Madras and Bombay similar rules were made (37 G. III., c. 142). By an elementary principle of analogy, in the spirit of Sir William Jones's *dictum*, a similar provision would apply to Jainas. Indeed, no such express enactment is passed by the Government, but the Courts tacitly recognise the justice of this. Their difficulty has always been to discover the Jaina Law. And as none was forthcoming, the conclusion was irresistible that it was non-existent. Two causes fed this error. One was the pious horror (not yet quite defunct) of the Jainas at their books being handled or read by non-Jainas. The other was the self-seeking propensity of human nature. It is almost always in the interests of one party to a litigation to assert that he is bound by

Hindu Law, although a Jaina, as it is for the other party to own the binding authority of the law and custom of the Jainas.

The life of the error would have extra protection from a kind of mimicry in social matters: the Jainas, and at least Agarvāla Hindu Vaiṣnavas, have a common descent, common customs, of course inter-dining and even frequent inter-marriages. The ladies fairly often worship both the Hindu and Jaina Gods, and a sort of practical compromise is effected in every life. Now the Agarvāla Vaiṣhnavas *are* undoubtedly governed by Hindu Law; and the error of concluding from this that the Agarvāla *Jainas* are also similarly governed, would not be quite patent on the face of it.

But in almost every important Jaina case that has been contested, the claims of Jaina law and custom as overriding the rules of Hindu Law have been advanced and more or less considered. A hurried glance at the case-law will not be without interest.

An old case is *Gobinda Nath Roy* v. *Gulab Chand* (1833), 5 Sel. Rep., S. D. A., Cal. 276. Here Jaina law triumphed. It was *held* that a Jaina widow could adopt a son, without the sanction of her husband. This was a Murshidabad case, and the decision was apparently based upon the *Vyavastha* of the Pandits who said: "According to Jain Shastras 'a sonless widow may adopt a son, just as may

her husband, for the performance of rites. The sanction of her husband or the direction of the *yatis* or priests is not essential.'" Another question was raised (but left undecided) as to the widow's right under the Jaina Law to alienate or give away her property after the adoption. The claim of Jaina Law was asserted and upheld in this case.

In 1863, a case was fought in Shahabad (Bihār), *sub nomine Chandan Koer* v. *Padmanath Koer*. In this, a Jaina joint brother succeeded by survivorship to his brother. The widow of the deceased brother claimed to succeed by Jaina custom. The case was compromised. But the point is that the existence and the authority of Jaina Law as distinct from Hindu Law were asserted.

In *Mahabeer Pershad* v. *Musammat Kundun Koer* (29 June 1867), 8 W. R. 116, it was laid down that the Jainas are governed by the Hindu Law of inheritance applicable in that part of the country in which the property is situate. We submit, with all deference, that this decision involves a two-fold error. It deprives Jainas of a right to be governed by their own law. And it makes their position worse than that of Hindus. Thus, a Mitakshara Hindu of Benares, acquiring land in Bengal would be governed by the Mitakshara Law; whereas under the decision in 8 W. R. 116, a Jaina from

Benares in the same circumstances would come under the Dāyabhāga of Jimūtavāhana.

In 1873 there was a case of Marwari Jainas of Ahmednagar—*Bhagwan Das Tejmal* v. *Rajmal*, 10 B. H. C. R. 241. A man died, leaving a widow. The widow also died. Then the relations and *panches* claimed to adopt a son to the man. It was *held* that the custom was not proved. "When amongst Hindus (and Jains are Hindu dissenters) some custom different from the normal Hindu Law and usage of the country in which the property is located and the parties reside, is alleged to exist, the burden of establishing its antiquity and invariability is placed on the party averring its existence, and it should be proved by clear and unambiguous evidence above suspicion."

In 1878, in *Sheo Sing Rai* v. *Dakho*, 1 A. 688, a Meerut case, a sonless Jaina widow was *held* to take "an absolute interest at least in the self-acquired property of her husband;" also to adopt, without the permission of the husband or his kinsmen. It was held that she could validly adopt a daughter's son. This was certainly a triumph of Jaina Law; but, on the ground of special custom, proved by evidence of the community. The following may be noticed, however.

The High Court say, at p. 700:—"The Jainas have no written law of inheritance. Their law

on the subject can be ascertained only by investigating the customs which prevail among them." In the Privy Council, Sir Montague E. Smith said : The Courts would not deny "to the large and wealthy communities existing among the Jainas, the privilege of being governed by their own peculiar laws and customs, when these laws and customs were, by sufficient evidence capable of being ascertained and defined ; and were not open to objection on grounds of public policy or otherwise."

In the same year, in *Chotay Lal* v. *Chunnoo Lal*, 4 C. 744, the question was whether a Jaina daughter took a limited estate, like a Hindu widow, or an absolute estate. It was *held* that, in the absence of proof of special custom, varying the ordinary Hindu Law of Inheritance, that law must be applied to Jainas. At p. 751 Sir M. E. Smith says : "Neither side appears to have gone into evidence as to the custom of the Jainas, or to show that the rule of inheritance amongst the sect of Jainas... was different from the ordinary law." The implication is that the Jaina Law, if any, would have been applicable if it were known, but none was produced in the particular case.

In 1879, in a case, *Bimal Das* v. *Shikhar Chand* (unreported), a Jaina custom was set up by which a husband claimed to succeed to the wife in pro-

perty inherited by her from her father. It was held that the custom was not proved.

In 1880, in *Bachebi* v. *Makhan*, 3 A 55, a custom was set up that a Jaina widow could make a gift of her husband's property. The custom was held not proved. The case was from Mainpuri, and the parties were Bindala Jainas, who are found in Mainpuri, Etah and Farrukhabad districts. The property was *ancestral*, and thus the decision was not against *Sheo Singh Rai* v. *Dakho*, 1 A. 688.

In 1886, *Lakhmi Chand* v. *Gatto Bai*, 8 A. 319, laid down that a Jaina widow can make a second adoption to her husband after the death of the first adopted boy. It was an Aligarh case, and, again, based on special custom and not on Jaina Law.

In 1889, *Manik Chand Golecha* v. *Jagat Settani Pran Kumari Bibi and others*, 17 C. 518, the custom of adopting, without the husband's permission. among Jaina Oswala widows, was held to be tribal, as it prevailed in Jaipur, Jodhpur, etc., not only among Jaina, but Vaiṣṇava widows also. A curious remark is made at p. 526: "It has been proved in this case that the Saraogis are merely a sect of the Jains." Perhaps it was not known to the Court that *Saraogi* is only a corruption of *Srâvaka*, a Jaina layman.

It was *held* also that change from Jainism to Hinduism did not affect a Jaina's personal rights or status.

In 1892, in *Peria Ammani* v. *Krishna Sami*, 16 M. 182, a Jaina widow of Tanjore was held not to have proved her power to adopt without her husband's permission. Best, J., said: "The parties to the suit were natives of Southern India, whose ancestors were converted to Jainism," and on this ground the case was distinguished from *Rithcurn Lalla* v. *Soojun Mull Lallah*, 9 Mad. Jur. 21. The same Judge held: "If a Jaina widow succeeds to her husband's property absolutely and has the right to dispose of it as she likes, the adoption of a son to herself, who may succeed to such property, would be valid."

In 1894, in *Shimbhu Nath* v. *Gyan Chand*, 16 A. 379 (a Saharanpur case), it was *held* that an Agarvala Jaina widow could alienate her husband's non-ancestral property, but that she had no such power over ancestral property.

In 1897, in *Mandit Koer* v. *Phool Chand*, 2 C.W.N. 154 (a Barh case), a custom for a Jaina sonless widow to take absolute interest in her husband's property was *held* not to be proved.

In 1899, in *Harnabh Pershad* v. *Mandil Das*, 27 C. 379, the homogeneity of the Jainas was recognised by holding that Jaina customs of one place were relevant as evidence of the existence of the same custom amongst Jainas of other places. It was rightly held that "Jaina" meant "Saraogi."

Held also that a Jaina widow can adopt without husband's permission; and, being childless, she acquires an absolute right in her husband's separate property.

But a glaring half-truth stares one in the face in an *obiter dictum*, at page 394: "It may be conceded that their ceremonies in many respects approximate pretty closely to those of the orthodox Hindus, although this is not confined to Arrah itself. The reason is pretty obvious. *The Jainas have no written Shastras and no priests of their own.* Brahmans are called in to officiate at their ceremonies, and it is only natural that they should perform the ceremonies with which they are best acquainted." (The italics are mine to indicate the plausible error).

In the same year, the Bombay High Court, in *Amabai* v. *Gobind*, 23 B. 257, repeated the error that Jainas are Hindu dissenters and governed by Hindu Law.

In 1907, in *Manohar Lal* v. *Banarsi Das*, 29 A. 495, the High Court at Allahabad have again repeated the same stereotyped error in an adoption case from Meerut. It was not necessary for purposes of that case, but the learned Judges (Stanley, C.J., and Burkitt, J.) thought fit to go into the origin and history of the Jaina sect. One cannot help pointing out a few of the more glaring

mistakes. At page 497 we read: "Founder of Jainism was Mahâvîra;" and yet the Jaina sects are at each other's throats for the possession of Pareshnath Hill in Hazaribagh as being the place of Nirvana of Pârâsvanâth, predecessor of Lord Mahâvîra! At page 498 we are told: "Brâhmans were their priests," which is misleading, without adding "Jaina Brâhmans only," as in Southern India. At page 499: Mahâvîra discarded clothes, and therefore arose Śwetâmbaras and Digambaras. This is entirely wrong: the real explanation is the famine in Northern India which drove the great Bhadrabâhu to the South and the schism was a consequence of this. "Aṅgas and Pûrvas are denied by the Digambaras" (page 499). Of course, this tremendously ignores the elements of the Digambara Jaina traditions. But it must be admitted that a few correct remarks are also made, though they are not given that weight and consideration in the judgment which is their due, *e. g.*, the Jainas reject the Vedas of the Brahmans (Sir Monier Williams); Jainas ought to be excluded from the category of the Hindus, (*per* Sir Guru Das Banerji, ex-Judge, Calcutta High Court). Jainas cannot agree with the following *résumé* of their history: there were no restrictions to begin with, then Jainas dissented from Hindus. Then Brahmins laid down restrictive

rules for Hindus . . . . And Jainas are not bound by these (p. 514 *et seq.*) In this case, it was *held* that a married man can be adopted by a Jaina widow.

In 1908, in *Asharfi Koer* v. *Rup Chand*, 30 A 197 (a Saharanpur case), the judgment, in 29 A 495, was practically bodily incorporated, and the same Bench *held* that by Jaina custom a widow can adopt a married man, that she can give a son in adoption with Sapinda's consent, and that a widow can adopt without her husband's permission. This judgment was not upset by the Privy Council, in *Rup Chand* v. *Jambu Persad*, 32 A. (1910), p. 247. The parties were Jaina Agarvâlas. Here also the "Dissenters" view finds expression. Their Lordships say at page 252: "So far as the pure law applicable to the case was concerned there was nothing in doubt. There was no longer any question that by the general Hindu law applicable to the twice-born classes, a boy could not be adopted after his marriage, and there was no doubt that the Agarwala Jains belonged to one of the twice-born classes."

So the theory that Jainas are Hindu dissenters or simply Hindus, has become quite established, and the principle of *stare decisis* makes its dislodgment difficult, though by no means impossible. What I want to impress here is this

that in almost all the cases noted above, the parties and the Court claimed and felt that Jainas were not governed by Hindu Law ; but, as in ordinary cases, where the law is silent, the Courts decide in accordance with "justice, equity and good conscience" and the compendious phrase means the judges' understanding of English Law, so in Jaina cases, Jaina Law not being non-existent but being unexhibited in the Court, the Judges identify the "justice, equity and good conscience" of the case with principles of Hindu Law. But an error, however venerable by age, remains an error still. And, apart from whether the Jainas should or shall try to have justice done to their old rules of law by having them recognised and acted upon by courts of law, the true facts of the case must be disclosed.

But it may well be asked : after all, what is the practical loss to the Jainas, if they are governed by Hindu Law ? And why should they have submitted to it for about a century, if it was really repugnant to their instinct and to their religious and historical traditions ? The answer to the last question is : that the Jainas have been ignorant and scattered so far, and that by improved communications between the most distant parts of India, it is only lately that they have begun to realise their common needs, common history and the features that unmistakeably

distinguish their lives and ideals from those of their Hindu brethren? As to the first question, it is enough here to remark that Jaina Law differs from Hindu Law just where it would be expected to—namely, in the root principles of it. The Jaina and Hindu conceptions of the universe and of man's life here below are essentially distinct, and a body of Law, which governs the external human conduct of a man as an individual and as a member of an organised society, necessarily takes its color from the religious belief and the philosophical depth and intensity and clearness of the Theology and Metaphysics to which the society subscribes. There are four principles or bed rock pillars on which Jainism claims to rest. The first is *Ahiṃsâ*, hurt no living being on any account. The second is: the soul's capacity to evolve is unlimited; in fact, it reaches to the stage of god-hood itself. The third is: the universe is eternal, uncreated. In it, it is the duty of man to evolve the soul to its highest pinnacle of power and purity; and that, therefore, the soul itself is responsible for the *entire* pain and pleasure with which life bristles. There is no god to create or destroy the world; nor to punish or forgive you. The fourth is: *Dayâ*, compassion—to the best of your capacity, serve others, *i. e.*, help them in the onward and upward progress of their souls.

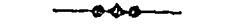
These four principles, hurt none (*Ahiṃsâ*), serve all (*Dayâ*), Divinity of Man and Eternity of the universe,—in their inner meaning and eternal application—constitute Truth, according to Jainism. The principles on which Jaina rules of Law are based, are derived from considerations which themselves are guided by these ultimate principles of faith and conduct. And, as being drawn from the very heart of things in the Light of Eternity, these four may be claimed to be the basic principles of universal jurisprudence. Jaina Theology and Metaphysics thus do a splendid service to Jaina Jurisprudence in giving it the one central idea—*dharma*, embodying Truth and Duty in one—which the ideal jurist is for ever seeking in the soul of the rules of positive law. Starting from this clear point of view, the evolution of Jaina law can proceed along the sure lines of Logic. Whatever does not follow from or is inconsistent with the above four doctrines, cannot be the law of Jainas. And if the analysis of the rules of law actually held by our courts as governing Hindus is carried deep enough and far enough, it would be found that at least a few principles of these rules are irreconcileably opposed to Jaina Law. For example, the rules relating to adoption. A son is needed by a Hindu to save his soul from the tortures of hell (*put*, whence the name *putra*, one who saves from hell). Among Jainas, man

alone is responsible for his actions, and once performed, these actions (*Karmas*) must bear fruit, and no one can intervene to deflect the incidence of this fruition. Thus the object of adoption cannot be to get a son to help one in crossing hell. Bhadrabâhu reverts to this aspect of sonfulness in Slokas 7, 8 and 9, Other points may be noted by scholars of both Hindu and Jaina systems of Law.

Just one liberty I have taken with the English language in translating the text. *Aputra* is translated as "sonless." But there is no corresponding simple equivalent for *putrî*, a person having a son. *Putra* is of frequent occurrence, and it is inelegant and awkward to translate it as "a person having a son," or "with a son," etc. Therefore, I propose to translate it as "sonful." Apart from its novelty, nothing can be said against it. It is expressive and short, and very convenient. We have "sinless" and "sinful;" we have "sonless,"—why not "sonful?"

THE JAINA LAW OF INHEITARNCE AND PARTITION.

श्रीभद्रबाहुसंहितान्तर्गतो दायभागः ।



INTRODUCTORY.—उत्थानिका ।

संसृतौ पुत्रसद्भावो भवेदानन्दकारकः ।
यदभावे वृथा जन्म गृह्यते दत्तकी नरैः ॥ १ ॥

In the world, the existence of a son is such a source of happiness that, in the absence of a son, one's birth is fruitless, and a son is taken in adoption by men.

बहवो भ्रातरो यस्य यदि स्युरेकमानसाः ।
महत्पुण्यप्रभावोऽयमिति प्रोक्तं महर्षिभिः ॥ २ ॥

If a man has many brothers, and if they are of one mind, it is due to his great *punya* (religious merit). So the great *Risis* (ascetics) have said!

पुण्ये न्यूने भ्रातरस्ते द्रुह्यन्ति धनलोभतः ।
आपत्तौ तन्निवृत्यर्थं दायभागो निरूप्यते ॥ ३ ॥

Because of the decline in religious merit, those many brothers for greed of wealth entertain hostile feelings. To remove this trouble, this Law of Partition is undertaken.

प्रारंभ ।

BEGINNING OF THE BOOK.

पित्रोरूर्द्ध्वं भ्रातरस्ते समेत्य वसु पैतृकम् ।
विभजेरन् समं सर्वे जीवतो पितुरिच्छया ॥ ४ ॥

On the death of father and mother, all those brothers get together the patrimony and divide it equally among themselves. But during the life-time of the father (the brothers take only), according to the desire of the father.

ज्येष्ठ एव हि गृह्णीयात्पित्र्यं धनमशेषतः ।
अन्ये तदनुसारित्वं भजेयुः पितरं यथा ॥ ५ ॥

The eldest son alone takes the remaining property of the father. The other brothers, looking, upon him (the eldest son) as a father, should live, in accordance with his wishes.

***प्रथमोत्पन्नपुत्रेण पुत्री भवति मानवः ।**
पुनर्भवन्तु कतिचित्सर्वस्याधिपतिर्महान् ॥ ६ ॥

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* ज्येष्ठेन जातमात्रेण पुत्री भवति मानवः ।
(मनुस्मृती अ० ९, श्लो० ६,)

पूर्वजेन तु पुत्रेण अपुत्रः पुत्रवान् भवेत् ।
(आर्हन्नीती ६० पृष्ठे)

By the birth of the first-born son a man becomes *putrî*, *i.e.*, sonful or a man having a son ; and how many soever may be born afterwards, the first-born remains the head of them all.

यस्मिन् जाते पितुर्जन्म सफलं धर्मजे सुते ।
पापित्वमन्यथालोका वदन्ति महदद्भुतम् ॥ ७ ॥

By the birth of the धर्म (religious, *i. e.*, begotten as a duty) son (*i e.*, the first son) the world calls a man's life fruitful otherwise he is called sinful. This is very surprising.

पुत्रेण स्यात्पुण्यवत्त्वमपुत्रः पापयुग्भवेत् ।
पुत्रवन्तोत्र दृश्यन्ते पामराः कणयाचकाः ॥ ८ ॥

दृष्टास्तीर्थकृतोऽपुत्रा पञ्च कल्याणभागिनः ।
देवेन्द्रपूज्यपादाब्जा लोकत्रयविलोकिनः ॥ ९ ॥

Men by having sons become religiously meritorious; and by being sonless, sinful. In this world, many with sons are seen in a low position and begging for grains. And sonless *Tirthaṇkaras* (the Jaina men-gods) are found to attain the Five Great Acquisitions, * their lotus-feet are worshipable by the god of gods, and they are possessed of insight into the three worlds.

* The *panchakalyâṇâ*'s are: Human Conception (*garbha*), Human Birth (*janma*), Austerities (*tapa*), Omniscience (*kevala jñâna*) and Salvation (*mokṣa*).

*ज्येष्ठोऽविभक्तभ्रातॄन् वै पितेव परिपालयेत् ।
तेऽपि तं भ्रातरं ज्यैष्ठं जानीयुः पितृवत्सदा ॥१० ॥

It is the duty of the eldest brother to protect like a father his undivided younger brothers. And these younger brothers also should always look upon the eldest brother as a father.

यद्यपि भ्रातृणामेकचित्तत्वं पुण्यप्रभावस्तथापि । धर्मवृद्धये पृथग्भवनमपि श्रेयाज्यम् । मुनीनामाहारदानादिना सर्वेषां पुण्यभागित्वात् । भोगभूमिजन्मरूपफलप्राप्तिः स्यात्तदेवाह ।

Although it is an effect of religious merit that brothers should be of one mind, yet it is desirable to live separately, for the increase of *dharmma* (religion or piety). For the merit arising from feeding ascetics, from charity, etc. (on partition), shall accrue to each brother separately, and which merit is rewarded in the form of birth in *bhoga-bhûmi* (the land of enjoyment, where men do nothing and get all they want from wishing-trees).

विभक्ता भ्रातरो भिन्नास्तिष्ठन्तु सपरिच्छदाः ।
दानपूजादिना पुण्यं वृद्धिः संजायतेतराम् ॥ ११ ॥

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* पितेव पालयेत्पुत्रान्ज्येष्ठो भ्रातॄन्यवीयसः ।
पुत्रवच्चापि वर्त्तेरन्ज्येष्ठे भ्रातरि धर्मतः ॥
(मनुस्मृतौ० अ० ९ श्लो० ८ ।)

विभक्तानविभक्तान्वै भ्रातॄन्ज्येष्ठः पितेव सः ॥
पालयेत्तेऽपि तं ज्येष्ठं सेवन्ते पितरं यथा ।
(आर्हन्नीतौ, ६० पृष्ठे)

Divided brothers live separately each with his own family; for religious merit is increased much by charity, worship, etc.

तद्द्रव्यं द्विविधं प्रोक्तं स्थावरं जङ्गमं तथा ।
स्थानादि स्थावरं प्रोक्तं यदन्यत्र न गम्यते ॥ १२ ॥

The wealth (that is partitioned) is of two kinds: स्थावर (immoveable) and जङ्गम (moveable). That property which cannot go from place to place, for example, land, etc., is called *sthâvara*.

जङ्गमं रौप्यगाङ्गेयभूषावस्त्राणि गोधनम् ।
यदन्यत्र परेणापि नीयते स्त्र्यादिकं तथा ॥ १३ ॥

And that which can be taken from place to place is *jangama* (moveable), *e.g.*, silver, gold, ornaments, clothes, cattle, women, etc.

*स्थावरं न विभागार्हं नैव कार्या विकल्पना ।
स्थास्याम्यत्र चतुष्पादे वात्र त्वं तिष्ठ मद्गृहे ॥ १४ ॥

Sthavara (immoveable property) is not subject to partition, and even such a desire should not be entertained. "In this fourth part of the house, I shall live, you live in that part"—thus (the brothers should) arrange.

सर्वेऽपि भ्रातरो ज्येष्ठ[illegible]ds, काज्जङ्गमा तथा ।
किञ्चिदंशं च ज्येष्ठाय द[illegible]ld, कुर्युः समांशकम् ॥ १५ ॥

All brothers from the moveable property that is to be partitioned should give some portion to the eldest brother, and then divide the remainder equally with him.

गोधनं तु समं भक्त्वा गृह्णीयुस्ते निजेच्छया ।
कश्चिद्धर्तुं न शक्तश्चेदन्यो गृह्णात्यसंशयम् ॥ १६ ॥

Cattle, etc., being equally divided should be taken (by the brothers), according to the desire of each one. But if some one is unable to take his share, the others can undoubtedly appropriate it.

भ्रातॄणाम् यदि कन्या स्यादेका वह्वयः सहोदरैः ।
स्वांशात्सर्वैस्तुरीयांशमेकीकृत्य विवाह्यते ॥ १७ ॥

If the brothers have one or more uterine sisters, a fourth part of the share of each brother should be collected and the girls married.

ऊढायास्तु न भागोऽस्ति किञ्चिद्भ्रातृसमक्षतः ।
विवाहकाले यत्पित्रा दत्तं तस्यास्तदेव हि ॥ १८ ॥

The share of a married daughter in the property of the father, in the presence of her brothers, is nothing. Whatever the father gave her at the time of marriage, that only belongs to her.

सहोदरैर्निजाम्बाया भागस्सम उदाहृतः ।
साधिको व्यवहारार्थं मृतौ सर्वैशभागिनः ॥ १९ ॥

Their mother is also said to be entitled to an equal share with the brothers (her sons). She is entitled to a slightly larger share for meeting the

ordinary social expenses (vyavahârârtha). And on her death, all share it.

एककाले युगोत्पत्तौ पूर्वजस्य हि ज्येष्ठता ।
विभागसमये प्रोक्तं प्राधान्यं तस्य सूरिभिः ॥ २०॥

Of the twin-born sons, the son that is produced first is said to be the first-born or the eldest. And the wise have considered him to be entitled to the privileges of the first born at the time of partition.

यदि पूर्वं सुता जाता पश्चात्पुत्रश्च जायते ।
तत्र पुत्रस्य ज्येष्ठत्वं न कन्याया जिनागमे ॥ २१ ॥

If a daughter is born first, and a son is born afterwards, then also the son is eldest born and not the daughter, according to the Jaina scriptures (*jinâgama*).

***यस्यैकपुत्री निष्पन्ना परं सन्तत्यभावतः ।**
सा तत्सुतो वाधिपतिः पितृद्रव्यस्य सर्वतः ॥ २२ ॥

If a man has only a daughter, and other male issue (*santâna*) is non-existent, that daughter and her son become the sole owners of the wealth of her father.

वक्ष्यमाणानिदानानामभावे पुत्रिका मता ।
दाये वा पिण्डदाने च पुत्रैर्दौहित्रकाः समाः ॥ २३ ॥

In the absence of the aforesaid dispositions

* यस्यैकायां तु कन्यायां जातायां नान्यसन्ततिः ।
प्राप्तां तस्य चाधिपत्यं सुतायास्तत्सुतस्य च ॥
(अर्हन्नीतेः ६४ पृष्ठे)

(rules), a daughter is like a son. For purposes of partition (*dâyabhâga*) and oblation ceremonies (*pindadâna*), the daughter's sons are like the sons.

आत्मा वै जायते पुत्रः पुत्रेण दुहिता समा ।
तस्यामात्मनि तिष्ठंत्यां कथमन्यो धनं हरेत् ॥ २४ ॥

The son is born as one's own self. The daughter is like a son. Then, in the presence of that daughter, like one's own self, how can another take the wealth ?

ऊढानूढाऽथवा कन्या मातृद्रव्यस्य भागिनी ।
अपुत्रपितृद्रव्यस्याधिपो दौहित्रिको भवेत् ॥ २५ ॥

The mother's property goes to the daughter, whether she be married or unmarried. And of the property of a sonless father, the daughter's son becomes the owner.

न विशेषोस्ति लोकेस्मिन् पौत्रा दौहित्र्योः स्मृतः ।
पितरोरेकत्र सम्बन्धाज्जातयोरेकदेहतः ॥ २६ ॥

In this world there is no difference between one's daughter's sons or a son, both of whom are born of the same union and of the same two bodies of a man and his wife).

ऊढपुत्र्यां परेतायामपुत्रायां च तत्पतिः ।
स स्त्रीधनस्य द्रव्यस्याधिपतिस्तत्पतिः सदा ॥ २७ ॥

A married daughter dying and being without a son, her husband alone always is the owner of her *stridhana*, her property.

तयोरभावे तत्पुत्रो दत्तको गोत्रियः पतिः ।
पितृद्रव्याधिपः स्याद्वै गुणवान् पितृभक्तिमान् ॥ २८॥

In the absence of these two (husband and wife), a son, or adopted son of the family, devoted to the father, full of merits, becomes owner of the property of the father.

ब्राह्मणक्षत्रियविशां ब्राह्मणेन विवाहिताः ।
कन्यासञ्जातपुत्राणां विभागोयं बुधैः स्मृतः ॥२९॥

The sons born of a Brahman, Kṣatriya, or Vaiśya girl married to a Brahman, have their shares thus laid down by the wise.

पितृद्रव्यं जंगमं वा स्थावरं गोधनं तथा ।
विभज्य दशधा सर्वं गृह्णीयुः सर्व एकतः ॥३०॥

Of the father's immoveable and moveable property, and cattle, etc., ten equal shares have to be made. Each brother should take thus:

विप्राजस्तुर्यभागान्वै त्रीन्भागान् क्षत्रियसुतः ।
द्वौ भागो वैश्यजो गृह्यादेकं धर्मे नियोजयेत् ॥३१॥

Four shares should be taken by the sons of the Brahman mother; three by that of the Kṣatriya, two by that of the Vaiśya mother; and one should be given for religious purposes.

यद्गेहे दास्यदास्यादिः पालनीयो यवीयसा ।
सर्वे मिलित्वा वा कुर्युरन्नांशुकनिबन्धनम् ॥३२॥

The male and female-servants (or slaves) in the

house should be maintained by the younger brother, or all brothers united should make arrangement for food and clothes for them.

क्षत्रियस्य सवर्णाजोऽर्द्धभागी वैश्यजोऽङ्घवः ।
तूर्याशभागी शूद्राजः पितृदत्तांशुकादिभृत् ॥३३॥

Sons by a Kṣatriya father, born of a wife of the same *varṇa* (*i.e.*, a Kṣatriya woman) get one-half of the father's property, and the sons of a Vaiśya wife get one-fourth of the same. The sons of a Sudra wife take only what the father has given them, as clothes, etc.

वैश्यस्य हि सवर्णाजः सर्वस्वामी भवेत्सुतः ।
शूद्रापुत्रोऽन्नवासार्हं इति वर्णत्रये विधिः ॥३४॥

The sons of a Vaiśya father by a wife of the same *varṇa* (*i.e.*, a Vaiśya wife) become owners of all his property. His sons by a Sudra wife are entitled only to food and clothes. This is the rule of (inheritance among) the three *varṇas* (Brahman, Kṣatriya and Vaiśya).

शूद्रस्यैकसवर्णाजा एकी द्वौ वाऽधिका अपि ।
समांशभागिनः सर्वे शतपुत्रा भवन्त्यपि ॥३५॥

The sons of a Sudra father by a Sudra wife, whether they are one, two or more, or even a hundred, become owners of equal shares.

एक पितृजभ्रातॄणां पुत्रश्चैकस्य जायते ।
तेन पुत्रेण ते सर्वे बुधैः पुत्रिण ईरिताः ॥३६॥

If, of brothers born of the same father, one has a son, all the brothers are considered to be sonful (with a son), because of that son. So it is said by the wise.

कस्यचिद्बहुपत्नीषु ह्येका प्रजनयेत्सुतम् ।
तेन पुत्रेण महिलाः पुत्रवत्यः स्मृता बुधैः ॥३७॥

If of a man's many wives, one becomes the mother of a son, all his wives are considered to be sonful with (a son), because of that son. So it is said by the wise.

तासां मृतौ सर्वधनं गृह्णीयात्सुत एव हि ।
एको भगिन्यभावे चेत्कन्यैकस्याः पतिर्वसोः ॥३८॥

All these wives dying, that son undoubtedly takes the property of them all. When even one sister (of his mother, *i.e.*, her co-wives) does not remain, the son of that (mother) takes the property of the husband.

औरसेऽसति पितृभ्यां ग्राह्यो वै दत्तकः सुतः ।
सोऽप्यौरस इव प्रीत्या सेवां पित्रोः करोत्यसौ ॥३९॥

Not having a son of their bodies, the parents should take a son in adoption. For the adopted son also, like a son of the body, serves the parents affectionately.

अपुत्रो मानवः स्त्री वा गृह्णीयाद्दत्तपुत्रकम् ।
पूर्वं तन्मातृपित्रादेः ससाक्षि लेखनं स्फुटम् ॥४०॥

A sonless man or woman takes a son in adop-

tion. First, they take a writing before witnesses (*sasakṣi*) from the mother and father of the son (to be taken in adoption).

स्वकीयभ्रातृज्ञातीयजनसाक्षियुतं मिथः ।
कारयित्वा राजमुद्राङ्कितं भूपाधिकारिभिः ॥४१॥
कारयेत्पुनराहूय नरनारीः कुटुम्बिकाः ।
वादित्रनृत्यगानादि मङ्गलाचारपूर्वकम् ॥४२॥

Having the writing attested by one's relations and people of brotherhood; having it sealed by the King's officers with the royal seal; they invite the men and women of their family and have music, dancing and singing, along with auspicious introductory prayer.

द्वारोद्घाटनसत्कर्म कुर्वन्ति श्रीजिनालये ।
घृतकुम्भं स्वस्तिकं च जिनाग्रे स्थापयेद् गुरुम् ॥४३॥

In a Jaina temple they perform the auspicious ceremony of *dvârôdhghâtana* (opening the door) and other good deeds (charity, etc.); and place a pitcher of *ghee* and *svāstika*, and instal the *guru* (preceptor) before the image of the god.

उत्तरीयमधोवस्त्रं दत्त्वा व्याघुट्य मन्दिरम् ।
स्वंसमागत्य नृस्त्रीभ्यस्ताम्बूलं श्रीफलादिकम् ॥४४॥
स्त्रीभ्यश्च कञ्चुकीर्देयात्कुङ्कुमालक्तपूर्विकाः ।
अशनं कारयित्वा वै जातकर्मक्रियां चरेत् ॥४५॥

Having given head-cloth and waist-cloth (*uttarîya* and *adho bastra*) (for use in worship) in the

temple and having tinkled the sacred bell, they return to their home and give betel-leaves and *sreephala* (the bilva fruit), etc., previously sprinkled with saffron, to men and women and to servants. Having feasted all, they perform the birth ceremony.

परैर्भ्रात्रादिभिर्नीतं मुकुटं श्रीफलादिकम् ।
एकद्वित्रिचतुरोपि मुद्रा रक्षेत्पिता शिशोः ॥४६॥

The father of the boy should accept and keep the diadems (literally, "crown," *mukuta*, but here "cap"), *sreephala*, etc., and one, two, three or four coins (*mudrâ*) brought by the brotherhood and others.

व्यवहारानुसारेण दानं ग्रहणमेव च ।
एतत्कर्मणि संजातेऽयं पुत्रोऽस्येति कथ्यते ॥४७॥

When giving and taking has taken place according to these rites and ceremonies, then the boy is said to be the son of this man (the adoptive father).

तदैव राज्यकर्मादिव्यापारेषु प्रधानताम् ।
प्राप्नोति भूमिग्रामादिवास्तुष्वधिकृतिं पराम् ॥४८॥

And it is then alone that in works of estate and trade the son gets recognition, and becomes entitled to land, villages and other things.

स्वामित्वं च तदा लोकव्यवहारे च मान्यताम् ।
तत्संस्कारे कृते चैव पुत्रिणौ पितरौ स्मृता ॥४९॥

And then he (the adopted son) obtains ownership and respect in the world, on this *saṃsakâra* (the birth ceremony being performed), and the mother and father are considered to be sonful (*puttriṇa*).

दत्तकः प्रतिकूलः स्यात् पितृभ्यां प्राग्मृदूक्तितः ।
बोधयेत्तं पुनर्दर्पात् तादृशो जनकस्त्वरम् ॥ ५० ॥
तत्पित्रादीन् तदुद्धान्तं ज्ञापयित्वा प्रबोधयेत् ।
भूयोपि तादृशश्चैव बन्धुभूपाधिकारिणाम् ॥ ५१ ॥
आज्ञामादायगृहतो निष्काश्योह्यर्भकस्त्वरम् ।
न तन्नियोगं भूपाद्याः शृण्वन्ति हि कदाचन ॥ ५२ ॥

If the adopted son goes beyond the control of the parents, he should be counselled by the parents in persuasive language. Then, with the same object, he should promptly be threatened by the father. Then his fault should be disclosed to his (natural) parents, and they should counsel him. If he does not improve, the adoptive father should obtain the acquiescence of his relations and the King's officers, and expel the boy from the house. The King, then, cannot listen to any petition of his rights by the expelled boy.

दत्तपुत्रं गृहीत्वा या स्वाधिकारं प्रदाय च ।
जंगमे स्थावरे वापि स्थातुं स्वं धर्मवर्त्मनि ॥ ५३ ॥

A woman, adopting a boy, and making over all authority to him, puts him in possession of all

the moveable and immoveable property, in order to devote herself to her religious practices.

पुनः सेा दत्तको काललब्धिं प्राप्य मृतेा यदि ।
भर्तृद्रव्यादि यत्नेन रक्षयेत् स्तैन्यकर्मतः ॥ ५४ ॥

And if by chance this boy dies, efforts should be made to protect from theft the property of the husband.

न तत्पदे कुमारेान्यः स्थापनीयेा भवेत्पुनः ।
प्रेतेऽनूढे न पुत्रस्याज्ञास्ति श्रीजिनशासने ॥ ५५ ॥

But in his place a new boy cannot be installed. The Jaina scriptures do not allow this, (even) if the son dies unmarried.

सुतासुतेा सुतात्मीयभागिनेयेभ्य इच्छया ।
देयाद्धर्मेऽथ जामात्रेऽन्यस्मै वा ज्ञातिभेाजने ॥ ५६ ॥

That property (left by the deceased adopted boy) goes to the daughter's son, daughter's issue or to sister's son ; or to son-in-law, or may be given to some one else, or employed in feasting the community or in other religious purposes.

स्वयं निजास्पदे पुत्रं स्थापयेच्चेन्मृतप्रजाः ।
युक्तं परमनूढ़स्य पदे स्थापयितुं न हि ॥ ५७ ॥

If the son is dead, it is permissible to instal a son in one's own place ; but a new boy may not be installed in the place of the unmarried (deceased) one.

पित्रोः सत्वे न शक्तः स्यात् स्थावरं जंगमं तथा ।
विविक्रियं गृहीतुं वा कर्तुं पैतामहं च सः ॥ ५८ ॥

In the life-time of the parents, he (the adopted son) has no power to hold or sell the moveable and immoveable property of the father and mother and of the grand-father.

पैतामहक्रमायाते द्रव्येऽनधिकृतिः स्मृता ।
श्वशुरस्य निजे कृत्ये व्ययं कर्तुं च सर्वथा ॥ ५९ ॥

In property acquired by the father-in-law or descended from his ancestors, the son's widow is said to have no right to meet her personal expenses whatsoever.

सुताज्ञया विना भक्ते-ऽभक्ते तु धर्मकर्मणि ।
मैत्रज्ञातिव्रतादौ तु व्यव्यं कुर्याद्यथोचितम् ॥ ६० ॥

One can meet one's proper expenses for social, communal or religious purposes from joint property or from property partitioned, without the consent of the son.

तन्मृतौ तु स्त्रियश्चापि व्ययं कर्तुमशक्तिता ।
भोजनांशुकमात्रं तु गृह्णीयाद् वित्तमासतः ॥ ६१ ॥

On his death, his widow is powerless to alienate the property; she can have an allowance for food and clothes only in proportion to the estate.

सर्वद्रव्याधिकारस्तु व्यवहारे सुतस्य वै ।
न व्ययीकरणे रिक्थस्य हि मातृसमक्षकम् ॥ ६२ ॥

The son has full control over the property for purposes of trade; but in the presence of the mother he has no power to spend the moveable property.

सुते प्रेते सुतवधू-र्भर्तृसर्वस्वहारिणी ।
श्वश्रूवा सह कियत्कालं माध्यस्थेन हि स्थीयते ॥ ६३ ॥

On the son's death, his widow inherits all his property; she should, however, for some time live respectfully with her mother-in-law.

रक्षन्ती शयनं भर्तुः पालयन्ती कुटुम्बकम् ।
स्वधर्मनिरता पुत्रं भर्तृस्थाने नियोजयेत् ॥ ६४ ॥

Preserving the husband's bed, protecting the family and fixed in her religion, she should instal her son in the place of her husband.

न तत्र श्वश्रूर्यत्किञ्चिद्वदेदनधिकारतः ।
नापि पित्रादिलोकानामधिकारोस्ति सर्वथा ॥ ६५ ॥

The mother-in-law of the widow has no right to obstruct her in installing her son in the estate of her husband. Nor her father and mother have any such power.

दत्तं चतुर्विधं द्रव्यं नैव गृह्णन्ति चोत्तमाः ।
अन्यथा सकुटुम्बास्ते प्रयान्ति नरकं ततः ॥ ६६ ॥

Good people do not take back the four kinds of property that has been given. Otherwise they go to hell with their families.

बहुपुत्रयुते प्रेते भ्रातृषु क्लीबतादियुक् ।
स्याच्चेत्सर्वे समान्भागान्न दद्युः पैतृकाद्धनात् ॥ ६७ ॥

When a man dies, leaving many sons, and any of the brothers be affected by impotency, etc., then there should not be an equal division to all out of the property of the father.

पंगुरुन्मत्तक्लीबान्धखलकुब्जजडास्तथा ।
एतेपि भ्रातृभिः पोष्या न च पुत्रांशभागिनः ॥ ६८ ॥

Those who are lame, lunatic, impotent, blind, vicious, hunch-backed, and idiotic should be looked after by their brothers, but they are not entitled to a son's share (in patrimony).

मृतवच्चाधिकारीशो बोधितव्यो मृदूक्तितः ।
न मन्येत पुरा भूयोऽमात्यादिभ्यः प्रबोधयेत् ॥ ६९ ॥
भूयेापि तादृशः स्याच्चेदमात्याज्ञानुसारतः ।
पुरातनो नूतनो वा निष्कास्यो गृहतः स्फुटम् ॥ ७० ॥

The manager shall be counselled by the widow in persuasive language (sweet words). If he does not listen to the advice, he should in the first instance be counselled through the King, and his officers, etc. If he does the same again, then, with the consent of the officers of the king, he should, whether old or new, be publicly expelled from the house.

रक्षणीयं प्रयत्नेन भर्त्रेव स्वं कुलस्त्रियः ।
कार्यतेन्यजनैर्येाग्यैर्व्यवहारःकुलागतः ॥ ७१ ॥

The widow, descended from a good family, should exert herself and preserve the property even as her husband did. And, in accordance with the family traditions, should have her business taken care of by other proper persons.

कुर्यात् कुटुम्बनिर्वाहं तन्मिषेण च सर्वथा ।
येन लोके प्रशंसा स्याद्धनवृद्धिश्च जायते ॥ ७२ ॥

Similarly, she should support the family and relations, so as to obtain the good opinion of the world and an increase of wealth.

ग्राह्यः सद्गोत्रजः पुत्रः भर्त्रा इव कुलस्त्रिया ।
भर्तृस्थाने नियोक्तव्यो न श्वश्र्वा स्वपतेः पदे ॥ ७३ ॥

The good lady may, like her husband, take to herself a son of a good *gotra* (lineage) and instal him in the estate of her husband. This with regard to her (widows') husband's estate cannot be done by her mother-in-law.

शक्ता पुत्रवधूरेव व्ययं कर्तुं च सर्वथा ।
न श्वश्वाश्चाधिकारोत्र जैनशास्त्रानुसारतः ॥ ७४ ॥

The widow of the son has power to spend all. According to the Jaina scriptures, her mother-in-law does not have this right.

कुर्यात्पुत्रवधूः सेवां श्वश्वोः पतिरिव स्वयम् ।
सापि धर्मं व्ययं त्विच्छेद्यात्पुत्रवधूर्वसु ॥ ७५ ॥

The son's widow should serve the mother-in-law as her husband did. And if the mother-in-law

desires to spend in religious matters, the son's widow should give her funds for that purpose.

औरसो दत्तको मुख्यौ क्रीतसौतसहोदराः ।
तथैवोपनतश्चैव इमे गौणा जिनागमे ॥ ७६ ॥

(Of sons) *aurasa*, *dattaka* are primary; and *kreeta*, *sauta*, *sahodara* and *upnata* are secondary in Jaina scriptures.

दायादाः, पिण्डदाश्चैव, इतरेऽनधिकारिणः ।
औरसः स्वस्त्रिया जातः, प्रीत्या दत्तश्च दत्तकः ॥ ७७ ॥

And these are entitled to get the inheritance and to offer oblations. The others beyond these are not entitled. *Aurasa* is the son born of one's own wife. *Dattaka* is the son given and taken with affection (in adoption).

द्रव्यं दत्वा गृहीतोयः सः क्रीतः प्रोच्यते बुधैः ।
सौतश्च पुत्रतनुजो लघुभ्राता सहोदरः ॥ ७८ ॥

Kreeta is the son taken by giving money. So have the wise men said. *Sauta* is the son of the son's body (*i. e.*, the grandson by a son.) *Sahodara* is the name of a younger brother (by the same mother.)

मातृ-पितृपरित्यक्तो दुःखितोस्मितरां तव ।
पुत्रो भवामीति वदन् विज्ञैरुपनतः स्मृतः ॥ ७९ ॥

Upnata. A son who, abandoned by his mother and father, and wandering about in distress (comes

and), says "I am a son," is considered an *upnata* son by the learned.

मृतपित्रादिकः पुत्रः समः कृत्रिम ईरितः ।
पुत्रभेदा इमे प्रोक्ता मुख्यगौणेतरादिकाः ॥ ८० ॥

Kritrima is the son whose father, etc., (and mother), are dead and who is like a son. In this way, the differences among primary, secondary and other sons are given.

तत्राद्यौ हि स्मृतौ मुख्यौ गौणाः क्रीतादयस्त्रयः ।
तथैवोपनताद्यश्च पुत्रकल्पा न पिण्डदाः ॥ ८१ ॥

Of these, the first two (*i. e., aurasa and dattaka*) are primary ; and the three, beginning with *kreeta*, (*i.e., krita, sauta, sahodara*) are secondary ; and *upnata* and *kritrima* are reckoned as sons, but cannot offer oblations.

मुक्त्युपायोद्यतश्चैकोऽविभक्तेषु च भ्रातृषु ।
स्त्रीधनं तु परित्यज्य विभजेरन् समं धनम् ॥ ८२ ॥

If before partition one of the brothers is determined to follow the path of salvation, then, leaving aside the woman's property, *stridhan*, the property should be equally divided.

विवाहकाले पितृभ्यां दत्तं यद्भूषणादिकम् ।
तदध्यग्निकृतं प्रोक्तमग्निब्राह्मणसाक्षिकम् ॥ ८३ ॥

At the time of marriage, ornaments, etc., given by the parents are called *Adhyagni krita stridhana*, as given in the presence of fire and Brahmans.

यत्कन्यया पितुर्गेहादानीतं भूषणादिकम् ।
अध्याहवनिकं प्रोक्तं पितृभ्रातृसमक्षकम् ॥ ८४ ॥

Whatever ornaments, etc., the girl brings from her father's house, is called *Adhyâhavanika strî-dhana*, as offered in the presence of her father and brother.

प्रीत्या यद्दीयते भूषा श्वश्वा वा श्वशुरेण वा ।
मुखेक्षणाङ्घ्रिग्रहणे प्रीतिदानं स्मृतं बुधैः ॥ ८५ ॥

Whatever is given affectionately as clothes, etc., by the girls' father-in-law or mother-in-law, on the ceremony of seeing the face or sprinkling the (feet with) water, is called *Pitridâna strîdhana* by the wise.

आनीतमूढकन्याभिर्द्रव्यभूषांशुकादिकम् ।
पितृभ्रातृपतिभ्यश्च स्मृतमौदयिकं बुधैः ॥ ८६ ॥

Whatever is received by the married girl, such as things, ornaments, clothes, etc., from the parents, brothers or husband, is called *Audayika strîdhana* by the wise.

परिक्रमणकाले यद्धेमरत्नांशुकादिकम् ।
दम्पतीकुलवामाभिरन्वाधेयं स्मृतं बुधैः ॥ ८७ ॥

Whatever is given at the time of marriage-ceremony as gold, jewels, clothes, etc., to the girl, by her own or her husband's women relatives, is called *Anvâdheya stridhana* by the wise.

एवं पञ्चविधं प्रोक्तं स्त्रीधनं सर्वसम्मतम् ।
न केनापि कदा ग्राह्यं दुर्भिक्षाऽऽपद्वृषाहते ॥ ८८ ॥

These five kinds of property have been called *stridhana*. It should not be taken by anyone, except in time of famine, acute distress, or for religious purposes.

पैतामहधनात्किञ्चिद्दातुं वाञ्छति सप्रजाः ।
भगिनीभागिनेयादिभ्यः पुत्रस्तं निषेधति ॥ ८९ ॥

If a man desires to give out of ancestral property anything to his sister or to her son, etc., his son can object to the gift.

विना पुत्रानुमत्या वै दातुं शक्तो न वै पिता ।
मृते पितरि पुत्रस्तु ददत्केन निरुध्यते ॥ ९० ॥

Without the consent of the son, the father undoubtedly has no power to give anything. On the death of the father, who can obstruct the son giving away the property.

गृहीते दत्तके पुत्रो धर्मपत्न्यां प्रजायते ।
स एवोष्णीषबन्धस्य योग्यः स्याद्दत्तकस्तु सः ॥ ९१ ॥
चतुर्थांशं प्रदाप्यैव भिन्नः कार्योऽन्यसाक्षितः ।
प्रागेवोष्णीषबन्धे तु जातोपि समभाग्भवेत् ॥ ९२ ॥

After having adopted a boy, if a son is born of one's lawful wife, this son alone is worthy of turban-binding ceremony (symbolical of title to succession). And a fourth part being given to the adopted son,

he should be separated from the family without witnesses. But if the turban-binding ceremony has been performed (on the adopted son) before the birth of the son, the partition should be in equal shares.

पतेरप्रजसो मृत्यौ तद्द्रव्याधिपतिर्वधूः ।
दुहितृप्रेमतः पुत्रं न गृह्णीयात्कदाचन ॥ ९३ ॥
न ज्येष्ठदेवरसुता दायभागाधिकारिणः ।
तन्मृतौ तत्सुता मुख्या सर्वद्रव्याधिकारिणी ॥ ९४ ॥

On the husband dying without son, the widow becomes the owner of the property ; she should not, out of affection for her daughter, take a son in adoption. The sons of her husband's elder or younger brother have no right in the inheritance. On her death, her daughter becomes chiefly the owner of all property.

तन्मृतौ तत्पतिः स्वामी तन्मृतौ तत्सुतादिकाः ।
न पितृभ्रातृतज्जानामधिकारोत्र सर्वथा ॥ ९५ ॥

On the death of that daughter, her husband becomes owner ; on his death, his issue, etc. But his father and brothers and their descendants, etc., have no right in it whatsoever.

प्रेते पितरि यत्किञ्चिद्धनं ज्येष्ठकरागतम् ।
विद्याध्ययन-शीलानां भागस्तत्र यवीयसाम् ॥ ९६ ॥

On the death of the father, whatever property comes into the hands of the elder son, his younger

brothers, engaged in the acquisition of learning, have a right to a share in it.

अविद्यानां तु भ्रातृणां व्यापारेण धनार्जनम् ।
पैत्र्यं धनं परित्यज्याऽन्यत्र सर्वे समांशिनः ॥ ९७ ॥

The illiterate brothers should make money by trade; and, keeping the father's wealth apart, in the remainder all share equally.

पितृद्रव्यं न गृह्णीयात्पुत्रेष्वेक उपार्जयेत् ।
भुजाभ्यां यन्न भाज्यं स्यादागतं गुणवत्तया ॥ ९८ ॥

The father's estate acquired by his merit is not divisible among the sons. Only one, and not all, should possess it; and he should improve it, by his hand.

पत्यांगनायै यद्दत्तमलङ्कारादि वा धनम् ।
तद्विभाज्यं न दायादैः प्रान्ते नरकभीरुभिः ॥ ९९ ॥

Whatever ornaments or money are given to the wife by the husband, should not be partitioned by the co-sharers, for fear of going to hell, after death.

येन यत्स्वं खनेर्लब्धं विद्यया लब्धमेव च ।
मैत्रं स्त्रीपक्षलोकाच्चागतं तद्भज्यते न कैः ॥ १०० ॥

Whatever a man has acquired by digging (treasure trove), by learning, from friends, from his wife's relatives, cannot be partitioned by anyone.

बहु पुत्रेष्वशक्तेषु प्रेते पितरि यद्धनम् ।
येन प्राप्तं स्वशक्त्या नो तत्र स्याद्भागकल्पना ॥ १०१ ॥

If a man dies leaving many minor sons, the self-acquired property of any of these is not liable to partition.

पित्रा सर्वे यथाद्रव्यं विभक्तास्ते निजेच्छया ।
एकत्रीकृत्य तद्द्रव्यं सह कुर्वन्ति जीविकाम् ॥ १०२ ॥
विभजेरन् पुनर्द्रव्यं समांशैर्भ्रातरः स्वयम् ।
न तत्र ज्येष्ठांगस्यापि भागः स्याद्विषमो यतः ॥ १०३ ॥

When the sons have been separated by the father with due (shares from the) property, and the sons themselves unite their funds and earn a common livelihood from it—in this property, on a re-partition, the brothers themselves should arrange their equal shares, and the eldest brother takes no additional share in it.

जाते विभागे बहुषु पुत्रेष्वेको मृतो यदि ।
विभजेरन् समं रिक्थं सभगिन्यः सहोदराः ॥ १०४ ॥

After a partition among several sons, if one of them dies, on partition of his unobstructed property, his brothers and sisters take in equal shares.

निन्हुते लोभतो ज्येष्ठो द्रव्यं भ्रातॄन् यवीयसः ।
वञ्चते राजदण्ड्यः स्यात् स भागार्हो न जातुचित् ॥ १०५ ॥

If, being full of greed, the eldest brother conceals the property from the younger brothers and cheats them, he deserves to be punished by the King, and he cannot get even his own share.

द्यूतादि-व्यसना-सक्ताः सर्वे ते भ्रातरो धनम् ।
न प्राप्नुवन्ति दण्ड्याश्च प्रत्युतो धर्मविच्युताः ॥ १०६ ॥

All the brothers who forsake their religion and duty, and become addicted to gambling and other vices, cannot get property, but are liable to punishment.

विभागोत्तरजातस्तु पित्र्यमेव लभेद्धनम् ।
तदल्पं चेद्विवाहं तु कारयन्ति सहोदराः ॥ १०७ ॥

If a son is born after partition, he can take only his father's property. But if it be too small, then his brothers should have him married.

पुत्रस्याप्रजसो द्रव्यं गृह्णीयात्तद्वधूः स्वयम् ।
तस्यामपि मृतायां तु सुतमाता धनं हरेत् ॥ १०८ ॥

If the son dies sonless, the property is taken by his wife herself. On her death, the mother of the son takes the property.

ऋणं दत्वाऽवशिष्टं तु विभजेरन् यथाविधि ।
अन्यथोपार्ज्यते द्रव्यं पितृपुत्रैः ससाहसैः ॥ १०९ ॥

After having paid the debts, the balance should be partitioned according to rules. Otherwise, the father and sons should all set about diligently to earn.

कूपालंकारवासांसि न विभाज्यानि कोविदैः ।
गोधनं विषमं चैव मन्त्रिदूतपुरोहिताः ॥ ११० ॥

A well, ornaments, clothes, cattle, pit, secretary,

messenger, and priests are not partitioned by the learned.

पुत्रश्चेज्जीवतोः पित्रोर्मृतस्तन्महिला वसौ ।
पैतामहे नाधिकृता भर्तृवच्च पतिव्रता ॥ १११ ॥

भर्तृमञ्चक-रक्षायां नियता धर्मतत्परा ।
सुतं याचेत श्वश्रूं हि विनया-नतमस्तका ॥११२॥

If a son dies in the life-time of his parents, his chaste wife has no right, like him, in the grandfather's property. But preserving the husband's bed, fixed in her religion, the widow should, with head bowed down, beg the mother-in-law for a son.

स्वभर्तृद्रव्यं श्वशुरश्वश्रूभ्यां स्वकरे यदा ।
स्थापितं चेन्न शक्ताप्तुं पतिदत्तेऽधिकारिणी ॥ ११३ ॥

If the husband's property is placed in the hands of the father-in-law and mother-in-law, the widow cannot claim it; she can only take what the late husband gave her.

प्राप्नुयाद्विधवा पुत्रं चेद्गृह्णीयात्तदाज्ञया ।
तद्वंशजं च स्वलघुं सर्वलक्षणसंयुतम् ॥ ११४ ॥

If the widow with this permission, takes a boy in adoption, she must take one of the same family, younger than herself and possessed of all qualities.

जिनोत्सवे प्रतिष्ठादौ सौहृदे धर्मकर्मणि ।
कुटुम्बपालने शक्ता नान्यथा साधिकारिणी ॥ ११५ ॥

In the Jaina sacred procession, in the image installation ceremony, and in similar religious deeds, and in the bringing up of the family, the widow has power to spend. But in nothing else she has the power to spend.

इति संक्षेपतः प्रोक्तो दायभागविधिर्मया ।
पासकाध्ययनात्सारमुद्धृत्य क्लेशहानये ॥ ११६ ॥
एवं पठित्वा राज्यादिकर्म यो वा करिष्यति ।
लोके प्राप्स्यति सत्कीर्तिं परत्राऽप्स्यति सद्गतिम् ॥११७॥

Thus, briefly, the rules of Inheritance and Partition have been narrated by me substantially from the *Upasakadhyayana*, in order to remove troubles and quarrels. Having read this, if one performs public (kingly) duties, one will get praise and reverence in this and a good *gati* (condition of existence) in the next world.

THE END.

APPENDIX A.

श्रीइन्द्रनन्दि-जिनसंहिता मूल ।

पणमिय वीर जिणेंदं णाउण पुराकयं महाधम्मं ।
सउवासुल्झयणंगं दायविभागं समासदो वोत्थे ॥१॥
पुत्तो पित्तधणेहिं ववहारे जंजहाय कप्पेई ।
पोतो दायविभागो अप्पडि वंहोस पडिवंहो ॥ २ ॥
जीवदु भत्ता जं धणु णिय भज्जं संपडुव संदिण्णं ।
भुंजीद थावरं विणु जहेत्थु सातस्स भोयरिहि ॥ ३ ॥
रयण धण धण्ण जाई सवस्स हवे पहू पिदा मुक्खो ।
थावर धणस्स सवस्स इत्थि पिदा पिदामहाणावि ॥ ४ ॥
संदे पितामहे जे थावर वत्थूण कोवि संदिट्ठुं ।
जं आ भरणं वत्थं जहेत्थु तं विभायरिहा ॥ ५ ॥
पुत्ताभावेपि पिदा उवज्जियं जं धणं त्वविक्केदुं ।
सक्को णोवि यदुपदंवा थावर धणं तहा णेयं ॥ ६ ॥
जादा वा वि अजादा वाला अणाणिणो वा पिसुणा वा ।
इत्थं कुडुंबवग्गो जत्तायां धम्म किचम्मि तजणे ॥ ७ ॥

एयो विवक्कियं वा कुज्जादाणंहि थावर सुवत्थु ।
प्रादा पिदा हु भावय जेट्ठं भाय गदुगं पुणो अण्णो ॥ ८ ॥
सव्वे सम सग्गा हुय तेणहं कलहो नसं होई ।
मादा सु दक्षयाबा बिग्गा भागं सु भाय णमितं ॥ ९ ॥
गिण्हादि लंवडोविहु वुत्थो रुग्गोरु गयछहो कामी ।
दूदो वेसासत्तो गिण्हइ भायं जहोचियं तत्थ ॥ १० ॥
अलय सव्व समंसा समंसिया अंगणाहु संकुज्जा ।
जणये णणो विभाऊ अहम्मदे कज्जये कयाकुत्थ ॥ ११ ॥
जइचेदु करिज्ज तहा अपमाणं होइसव्वत्थ ।
सत्त विसणा सेवी विसयी कुट्ठो हु वाहि उ विमुहो ॥ १२ ॥
गुरु मत्थय बिमुहो बिय अहियारी णेव रारि सो होइ ।
जिट्ठो गिण्हेइ धणं जं बिहुणिय जणय तज्जणय जण्णं ॥१३॥
रक्खेइ तं कुडंबो जह पितरौ तह समग्गाई ।
उठाहु जादुहिदरो णिय णिय मायं स धणस्स भायरिहा ॥१४॥
तह भावे तस्स सुया तह भावे णिय सु उ बावि ।
अविभत्त बिभत्त धणो मुक्खे सा होइ भामिणी तत्थ ॥ १५ ॥
भत्तरि णट्ठे बिमदे बायाइ सुरुग्ग गहले वा ।
खेतं वत्थु धणं वा धणु दुपय चदुपयंचावि ॥ १६ ॥
जेट्ठा भायरिहा सा सा या कुटुंब सुपालेई ।
पुत्तो कुडुंबजो वा मज्जोला हु सुसंकिउ बणणो ॥ १७ ॥

तहवि अभावे देाहिद तस्स अहावे हि गोदीय ।.
तस्स अहावे देउरसु सतवरिस प्प माणयं णेयं ॥ १८ ॥
वूढं वा अव्वूढं गिण्हीया पंचजण सक्खी ।
जेा एगुद्धरेहिय कमदो भूमीहु पुव्व णट्ठाई ॥ १९ ॥
तुरियं भायं दिण्णय लहदिय अण्णोहु सव्वस्स ।
णिय जणय धणं जं विहु णियबदव मघादए इतं दव्वं ॥२०॥
दाया देउ ण दिज्जई विज्जालद्ध धणं जंहि ।
जइ दिण्ण धणं जं विहु भूसण वत्थादि यं च जं अण्णं ॥२१॥
गिण्हेदि ण दायादा पडंति णरये ण हा चावि ।
णियकारिय कूवाइय भूसण वत्थुय धणोवि ॥ २२ ॥
णिय एवहि होई यहू अण्णेये तस्स दायदा णेावि ।
पेायाहु पितदव्वं णिय यं चउ वज्जियं तहा णेयं ॥ २३ ॥
णिय पिउमहे जे दव्वे भाउजण णीछिया सुहवे ।
धण्णं जं अविहतं तहेव तं समंसमं णेयं ॥ २४ ॥
धाई णिवंट्ठावर सामित दुण्ह तत्थ सरसम्मि ।
जादे सुदे विमाउ णेउहि सवण्णणिय बहु सरिसेा ॥ २५ ॥
पुव्वं पच्छाजादे विभत्त जेा सव्व संगाही ।
जीविदु पिच्च धणोवि हु जम्हि जहा तहादिण्णं ॥ २६ ॥
णेह बिसादेा तत्थहु गिण्ह जहुणाबरेण एतत्थ ।
पंचत्तगये जणये माया समभाइणी हवे तत्थ ॥ २७ ॥

भाया भयणी देाबिय संभज्जा दाय भाग दो सरिसा ।
भायरि सु पहाडेबिय लहु भायर भायणी हु संरक्खा ॥ २८ ॥
दत्ता दाण विसेसं भइणीउ पारिणे दव्वा ।
दो पुत्ता पय सुदा धणं बिभज्जंति हा तहाभाये ॥ २९ ॥
सेसं जेट्ठो लादिहु जहा रिणं णेा तहा गिण्हे ।
सुद्दादु बंभजाजे चउ तिय दुगुणप्प भाइणेा णेया ॥ ३० ॥
खत्तिय सुद्दा णेया तिय दुगुणाप्प भाइणो णेया ।
सुद्दजु सुद्दा दुगुदुग भायरिहा वैस्स सुद्दजा इक्कं ॥३१॥
तिय वणिजाज जादोविहु सुद्दो वित्तं ण लहइ सव्वत्थ ।
उरस णिय पयणीउ दत्तो भाइज्ज देाहिया पुत्तो ॥ ३२ ॥
गोदज वा खेतुब्भव पुत्तारा देहु दायादा ।
कणणीणेापच्छणणेाऽपच्छणणेा वाणो पुणब्भवेाथुत्तो ॥ ३३ ॥
ते पुत्ता पुत्तकप्पा दायदा पिंडदा णेव ।
सुद्दाउ दासी बिहु जादो णिय जणाय इच्छिया भागी ॥३४॥
पित्तु गये परलेाये अद्धं अद्धं सहणाडुते सव्वे ।
दायादा केके बिहु पढमं भज्जा तदेा दु पुत्तोहि ॥ ३५ ॥
पच्छादुं भायराये पच्छातह तस्सुदा णेया ।
पच्छा तहा स पिंडा तहा सु पुत्ती तहा सुतज्जोय ॥ ३६ ॥
अणणो इकोवि बंधुवि सुग्गोयजेा जाइ जेा हु दव्वेण ।
तस्सवि लेायपमाणं रायपमाणं हवेइ जं पत्तं ॥ ३७ ॥

दत्ते तम्मि ण कलहो सुणिच्छदो धम्मसूरिहिं णिच्चं ।
दिण्णम परायपत्ते ससरिकयं णो हवेइ कलहोय ॥३८॥
सव्वं सव्वस मदं जहा तहा दाय भायम्मि ।
सव्वेसिं हि अहावे पुहूणिवो वित्त वंभ विणा ॥३९॥
वंभस्स जं धणं विहु तस्सहु भज्जाहि विंभणा अण्णे ।
जिट्ठे गयेहु भायरि तहय कणिट्ठे विभत्त स दव्वे ॥४०॥
सोय रवंधु वग्गो गेण्हदु तेसिं धणं कमसो ।
पडिदो पंगू वहिरो उम्मत्तो संद कुज्ज अंधोय ॥४१॥
विसई जडोय कोही गूंगो रुग्गोय पयडूलो ।
विसणी अभक्खभोई एदेसिं भाग जुग्गदा णत्थि ॥४२॥
भुत्ति वसण जणिता परंदु जस्सा विकस्सावि ।
मंतो सहाइ सुद्धा एदेसिं भाग जोगदा अत्थि ॥४३॥
एदेसिं वि सुदा अवि दुहिदा जो सव्व गुण सुद्धोय ।
होइहु भाय सु जुग्गा णियधम्मरदा जणाहु सव्वेसिं ॥४४॥
जहकालं जहखेतं जहाविहिं तेसिं समभाऊ ।
विचरीया णिव्वस्सा पडिउलाये तहेव वोढव्वा ॥४५॥
पुव्वव हू तहा सुद कमसो भायस्स भाइणो होई ।
इत्थिय धणं खु दिण्णं पाणीगहणस्स काल ये सव्वं ॥४६॥
माया पिया भयिण्णा पिच्चसुसायेहिं संदिण्णं ।
भूसण वत्थ हयादिय सव्वं खलु जाण इत्थिधणं ॥४७॥

तम्हि धणम्हिय भाउ णहि एयस्सावि दायस्स ।
सप्पयाइ णिःप्पयाईहिं हवे विसेसेाय मादुये समयं ॥४८॥
तज्जासुय भइणिसुया ण कोवि तस्सा णिबारउ होई ।
जो सुदभाइ भतिज्जउ सक्खी किय जं परस्सु धण दिण्णं ॥४९॥
तस्सहि कैाउ णिसिद्धा ण होइ किमु वा बिसेसेण ।
साक्खी बिणाय दिण्णं ण धणं तस्सावि होइ णिबियदो ॥५०॥
जादे दिग्घबिवादे तस्सेव धणं धुवं होई ।
एवं दायबिभायं जहागमं मुणिवरेहिं णिदिट्ठं ॥५१॥
तं खु ववहारादो इयलेायभवंहि णादव्वं ।
धम्मो दुविहेा सावय आयारेा धम्म पुव्व वेा पढमं ॥५२॥
दुदिउ बउ पजुत्तो मूलं पाक्खिगमउ सैाचेा ।
भरहे केासलदेसे साकेये रिसह देव जिणणाहेा ॥५३॥
जादेा तेणेउ कम्मवि भूमे रयणा समुदिट्ठा ।
तस्स सुदेण य चक्क पवट्ठिणा भरहराय संगेण ॥५४॥
आयार दाण दंडा दायबिभाया समुदिट्ठा ।
वसुणंदि इंदणंदिहि रचिया सा संहिदा पमाणाहु ॥५५॥

APPENDIX B.

FULL TEXT

OF THE

JUDGMENT OF THE JAINA CASE PASSED BY THE ORIGINAL SIDE OF THE HIGH COURT OF INDORE.

CIVIL ORIGINAL CASE No. 6 OF 1914

IN HIS HIGHNESS THE MAHARAJA HOLKAR'S SADAR COURT,* INDORE.

Before—

JAGMANDER LAL JAINI ESQR., M.A., BAR-AT-LAW,
SECOND, JUDGE.

1. Somchandsa, son of Motisa Porwad, of Burwaha; died 2nd January 1915; 2. Bapusa, son of Somchandsa; 3. Anupchandsa; & 4. Lakhmichandsa, sons of Somchandsa, minors by guardian Bapusa, brought on record, *vide* proceedings, dated 21st January 1915 ... ... Plaintiffs.

versus

1. Motilalsa, son of Punasa (dead); 2. Mangilalsa, son of Motilalsa of Burwaha; 3. Tejkaransa, son of Ratansa of Khandwa ... ... Defendants.

CLAIM for possession of property worth Rs. 14,000.

Mr. V. G. Pant Vaidya, pleader for the plaintiffs.

Mr. Y. V. Bhandarkar, pleader for the defendants.

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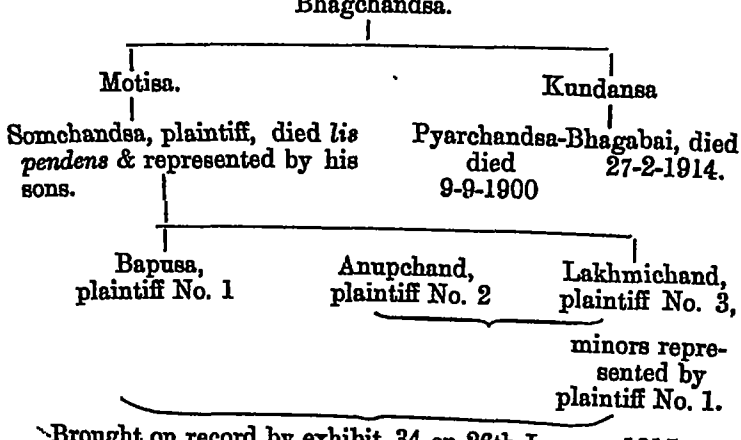
* Now it is called H.H. Maharaja Holkar's High Court of Judicature.

JUDGMENT.

One Bhagabai, widow of one Pyarchandsa, of Burwaha, made a will (exhibit C) on the 19th September 1913, and had it registered on 10th February 1914. By this will she gave away the property in dispute partly to certain charitable purposes and partly to her husband's sisters and brother. For the charitable purposes she appointed three persons as executors of the will, *viz.* 1 Motilalsa (defendant No. 1), who died *lis pendens* (*vide* proceedings of 13th November 1914), 2. Mangilalsa, son of Motilalsa (defendant No. 2), and 3. Tejkaransa, son of Ratansa, of Khandwa (defendant No. 3). Pyarchandsa, the husband of the testatrix, died on 9th September 1900. The widow, Bhagabai, breathed her last on 27th February 1914. In the will she expresses herself as being childless and as making the charitable gifts in pursuance of her old desire of मृत पती की आत्मा के कल्याण के, *i. e.*, for the welfare of the soul of her deceased husband. She wanted to carry out the object in her life-time; but death cut her resolutions short. All this is admitted; as also the following pedigree giving the relationship between the parties.



Brought on record by exhibit 34 on 26th January 1915.

2. Is the will made by the deceased Bhagabai valid and legal, and could Bhagabai dispose of the property belonging to her by the will?

3. What other relief is the plaintiff entitled to?

4. Whether the residential house and shop mentioned in the will (Exhibit C) of Bhagabai were her husband's self acquired or ancestral property?

Findings.

Issue No. 1.—Out of the schedule, Exhibit A, I find that the following properties are in the possession of the defendants:—

	Rs.	a.	p.	
House No. 4 ...	3,000	0	0	
House No. 5 ...	200	0	0	
Hay Stack Yard ...	50	0	0	
Field	277	13	0	
Another field ...	72	13	0	
Uncultivated land ...	15	0	0	
Dues to be recovered ...	6,000	0	0	
One pair of gold bands on bangles valued at ...	40	0	0	By the defendants in Exhibit 10/4 and at Rs. 125 by the plaintiff in Exhibit A.
Safe worth ...	25	0	0	

Issue No. 2.—The will of Bhagabai is quite valid and legal.

Issue No. 3.—The plaintiff as next reversioner is entitled to the following properties:—

1 Pair of gold bands for the bangles.

1 Safe.

Issue No. 4.—The house and shop are ancestral. The additions to them are not.

The above findings are based upon the following considerations :—

Reasons.

Finding No. 1.—All the items of property mentioned in the finding are admitted by the defendants to be in their possession, except the last item, *i. e.*, safe, worth Rs. 25. It has come out in the evidence of the defendant Mangilal when he was examined by the plaintiff as one of the plaintiff's witnesses (Exhibit 25).

As to the remaining items alleged by the plaintiff to be in the possession of the defendants, the defendants say that houses Nos. 1, 2, and 3 are not in their possession, but that they have been disposed of as follows :—

House No. 1 is given to Siddhawar Koot Temple.

House No. 2 is given to the 2 sisters of Pyarchandsa.

House No. 3 is given to Tilokchandsa. (See Exhibit 10 and Exhibit C).

That this is so is not controverted or rebutted by evidence by the plaintiff. Nay, his own witnesses, Bhikasa and Mangilal, (Exhibits 20 and 25 respectively) depose that the houses are not in the possession of the defendants. The plaintiff himself (Somchandsa) was examined as his own witness on 23rd October 1914. My learned predecessor, Mr. Kamodia, who recorded his evidence, has left a note on the record worded as follows :—

" This witness is an unreliable witness. This witness does not tell the truth. He states things which he does not know himself."

These are serious remarks ; but I do not see any reason to differ from them in view of the findings at which I have arrived after a full consideration of the evidence and Law in the case.

As to house No. 6 :—

This also is not in the possession of the defendants, as

alleged by the plaintiff. The plaintiff produces no evidence to show the defendants' possession of this house. The defendant Mangilal as plaintiff's witness (Exhibit 25) deposes as follows :—

एक पड़ावपर का हमालपुरे में का मकान भागाबाई पास गिरवे था। उसने रुपये लेकर मकान गिरवे रखनेवाले को दे दिया।

The plaintiff does not rebut this at all. Then the witness speaks of the 3 houses mentioned above as the houses Nos. 1, 2, and 3; and then he deposes as to all these 4 houses as follows—

मृत्युपत्र में लिखे हुवे इस्टेट में से ऊपर लिखे हुवे चार घर छोड़कर बाकी की इस्टेट हम तीनो प्रतिवादी को भागाबाई दे गयी।

So this house No. 6 also has not been proved to be in the possession of the defendants.

Coming to the next item of property, the factum of the possession of which is disputed by the parties, I have to consider the 12 ornaments in Schedule (Exhibit A). Of the items, one alone is admitted by the defendants to be in their possession. It is a pair of gold bands on bangles which the defendants value at Rs. 40 and admit to be in their possession, whereas the plaintiff values it at Rs. 125 (See Exhibits 10/4, and A). The ornaments are not mentioned in the will at all; therefore, if they can be proved to be in the possession of the defendants, they must be made over to the plaintiff. But there is no evidence that any of the ornaments, except the gold bands for bangles, are at all in the possession of the defendants: and I must hold that the defendants do not have possession of them and, consequently, are not liable to deliver them to the plaintiff. But the gold bands of which they are admittedly in possession, are not given away by the will. As to them, the deceased died intestate. To them the plaintiff is entitled

as next reversioner. Therefore, I find that the defendants do make them over to the plaintiff.

As to the safe worth Rs. 25, the defendants do not admit that they are in possesson of it. But there is some evidence (See plaintiff's witness 3, Mangilal, Exhibit 25) that the safe is with them. The defendants do not rebut this; and I therefore hold that the defendants are not entitled to retain possession of it, but must make it over to the plaintiff.

As to the cattle and cloth, there is no evidence that they are in the possession of the defendants, and I must exonerate the defendants from any liability with regard to them.

As to the utensils and wooden box, the defendants allege that they are not in their possession, but that they were given in charity to the Siddhawar Koot Temple by the deceased Bhagabai in her life-time. The plaintiff does not prove that the defendants hold these goods, and I cannot saddle them with any liability with regard to them.

This disposes of the Schedule of the plaintiff filed with the plaint. My finding in brief is this.

All the property which is proved to be in the possession of the defendants under the will, is to remain with them, in view of my finding on the 2nd issue; whereas all the property which is not disposed by the will, but which is found to be in the possession of the defendants, *viz.*, the gold bands and the safe, must be made over to the plaintiff.

Finding No. 2:—The most important and the only point seriously disputed in the case is as to the validity of the will. This is a will made by a widow, and disposes of the self-acquired and ancestral property of her deceased husband. The deceased lady was a Jaina by persuasion and a Porwad by caste. Her husband died childless. The question is: Can a Jaina childless widow of the Porwad sect make a valid will disposing of practically the whole of her husband's estate?

The plaintiff's contention is that Bhagabai had only a Hindu widow's estate and therefore the will is null and void. As to the law, he contended that, Jainas being Hindu dissenters, the parties are governed by Hindu Law and Bhagabai had only a Hindu widow's estate. As to the defendants' evidence, he took objection, which can be classified as follows :—(1) that custom of one Jaina sect may not prevail in another sect; (2) the quantity and quality of evidence adduced are not enough to prove custom, because.

(i) Only six instances are given;

(ii) The oldest of them is 10 years old;

(iii) In the instances given the reversioners did not dispute the gifts made by the widows;

(iv) The Jaina Law Books cited do not give an absolute Estate to the widow;

(3) The Jaina Law Books are no authority, because they have never been cited in courts in British India; and (4) That in any case, a Jaina widow has no absolute powers over ancestral property.

He referred me to the following authorities :—

I. L. R.	3	Allahabad	55
"	16	"	379
"	30	"	197
"	4	Calcutta	744, in support of his first group of objections.

Mayne's Hindu Law, page 58 (7th Edition),

14 Moore's Indian Appeal page 585, in support of his 2nd group of objections.

I. L. R. 1 Allahabad 688 in support of his 4th objection.

All these authorities are considered below :—

The defendants naturally disputed all these arguments for the plaintiff. They contended that the Jainas were governed

by Jaina Law, where they had it and proved it. That the Jaina Law was the same for all Jainas ; that under the Jaina Law, a Jaina childless widow could validly will away all her husband's property, self-acquired or ancestral ; that the evidence adduced by them was enough to prove this custom ; that the Jaina Law Books cited were binding authorities and proved all their contentions. The defendants referred me to, and filed before me, two cases :—

(1) Original civil suit, No. 3 of 1309 Fasli, in Sadar Court.

(2) Civil Regular Appeal, No. 98 of 1877, before the Commissioner of Jabalpur.

This part of my judgment I propose to devote to the following points, in their serial order :—

(1) Jaina Law.

(2) Customary Law in general.

(3) The Custom or usage in this particular case. Under this heading I shall consider the plaintiff's objections to the defendant's evidence, as given above.

1. *Jaina Law* :—The learned counsel for the plaintiff referred to Civil Regular Appeal No. 3 of 1912 of this Court. The case was one of adoption. The parties were Porwad Jainas. The suit was dismissed as premature. But there was an *obiter dictum* that the Jainas were governed by Hindu Law. I agree with this contention of the plaintiff. The Jainas are governed by Hindu Law in the absence of proof of Special Law or Custom. Now, in every Jaina case, one of the parties stands to lose his cause if the Jaina Law is applied to him. Therefore, self-interest dictates to him the policy of taking the line of least resistance. That line is to plead that Hindu Law and that alone governs all Jainas and him. If his adversary is not rich and active enough to undertake all the troubles and

expenses which are so gallingly involved in proving special custom, the pleading of Hindu Law means sure victory for the repudiator of Jaina Law. This, to my mind, is the key to understand the career of the claim that the Jainas have a Law of their own and must be governed by it. The Jainas are a numerous and wealthy, though a sporadic community, found in all parts of the world, but located mostly on the Indian continent. The dictum which I am considering crops up in almost every important and well contested Jaina case in all the courts of Native States and British India up to the Judicial Committee of the Privy Council of His most Gracious Majesty the King and Emperor of India. Therefore, I do not think any apology is necessary for considering at full length *the dictum that Jainas are primâ facie governed by Hindu Law.* To a certain extent the tacit assumption underlying this doctrine is that Jainas form a part of the non-descript agglomeration of families and races and fragments of families and races who have been born or domiciled in India during many millenniums of history, and that at some point of time or other, the Jainas, like a ripe but rebellious fruit, fell away and detached themselves from the original stock. This is the judicial shibboleth met with in the Law Reports and acted upon as the surest touchstone of justice where Jaina rights are concerned.

For ages, schoolboys have been taught: "Jainism is a compromise between Hinduism and Buddhism." Thus, by implication, Jainism would be subsequent to both. Even learned text-writers have fallen into and repeated the error, e. g., Golap Chandra Sarkar Sastri, in *Hindu Law of adoption* (T. L. L. for 1888), edition 1891, at page 452. The same author repeats that Jainas may be called Hindu dissenters, that Jaina Yatis are Digambaras who follow Mahavira, and Svetambaras who follow Parsvanath; and that Jainism originated in the N.-W. P.

But all these statements are entirely wrong. Jainism is not a compromise between Hinduism and Buddhism. It is far otherwise. Dr. Thomas (quoted in J. H. Nelson's *Scientific Study of Hindu Law*, 1881, at pages 91-2) is making a statement along the lines of History and Jaina tradition. The learned Doctor holds Buddhism to be an off-shoot of Jainism, and proceeds: "It is sufficient to observe that the history of the Jaina religion, when constructed must be of prime importance to the student of Hindu Law, because it will show *beyond all possibility of doubt that Jainists* are not Hindus and *cannot legally be subjected to the Hindu* (*i. e., Sanskirt*) *Law.*" (The italics are mine). Thanks to the labour of Orientalists, Dr. H. Jacobi, Dr. Hoernle, Prof. Guerinot, Dr. Burnett, Dr. L. Suali, Drs Burgess and Buhler, Dr. Johannes Hoertel and others, the historicity of Lord Mahavira and Parsvanath and the independent and ancient origin and growth of Jainism are thoroughly established, and it is not necesssary to attack the dead theory of the "compromise" now.

As to Jainas being Hindu dissenters, and therefore governable by Hindu Law, we are not told the date of this secession But History recognises that Lord Mahavira was till 527 B. C., that Parasvanath was till 776 B. C., on the earth. This is Jaina tradition too. Jainism then claims that there were 22 more Tirthankaras before Parasvanath, the one immediately preceding him being Neminath in Gujrat, near Mount Girnar, in Junagadh. Lord Neminath was a contemporary of Krishna and Arjuna the heroes of Mahabharata. The date of Mahabharata is given, at the lowest count, at about 1200 B.C. Therefore, Lord Neminath must be about that time at the latest. Not insisting upon the Jaina tradition in its entirety at present (and it must be said in passing that there is nothing to discredit it as a matter of necessity), the 21 Tirthankaras before Lord Neminath must have covered at least a

few millenniums and, perhaps, according to the claim advanced by Mr. B. G. Tilak, in 'Our Artic Home in the Vedas,' the first Lord of the Jainas may be found in the then Arctics about 8,000 to 10,000 B. C; where did, then, the secession take place? Where and when the Jainas one morning rose up and dissented from the Hindus? The fact is that the Rishabha of the Yajur Veda (see reference in *The Jaina Gazette*, Vol. III, No. 5, for August 1906,) and the Hindu *Bhâgwat* (Skandha 2, Adhyaya 7) is perhaps identical with the real founder of Jainism. In any case, Jainism certainly has a longer history than is consistent with its being a creed of dissenters from Hinduism.

The inter-relation between Svetambaras and Digambaras is again needlessly misunderstood. It is said the former Yatis follow Lord Parsvanath and the latter Lord Mahavira. Even a child, with the most superficial acquaintance with modern Jainas anywhere, would perceive the absurdity of this. The distinction is not between Yatis or Ascetics only. It is wider. All the Jainas—monks and laymen—are either Digambara or Svetambara. And both follow Lord Parsvanath and Lord Mahavira. Both derive their common creed—98 per cent of the doctrine is idential in the two sects from Lord Mahavira. The distinction is due to a few minor differences in the mode of worship, in images, &c.

"Jainism originated in N.-W. Provinces." This is a very misleading half-truth. It casts doubt on the historicity of Lord Mahavira, who admittedly flourished and attained salvation in Bihar. The truth is that Jainism did originate under Lord Rishabh or Adinath, who lived and taught people the arts of defending themselves against wild beasts, and of agriculture, &c., untold number of years ago, in Ajodhya, in what was the N. W. Provinces in 1891, and is now the "United Provinces of Agra and Oudh." But Jainism, in its modern form, takes its rise in the life and teachings of Lord

Mahavira, the last of the Tirthankaras, who was born at Vaisali in 599 B. C. and attained Nirvana at Pavapuri in 527 B. C.

The doctrine of a Hindu origin for Jainism and the Jainas is thus with no historical support whatsoever. Hasty assumptions, in the teeth of all the sacred and secular traditions of the Jainas, account for this accumulated error. Yet it is not without a struggle that the doctrine established itself in Courts of Law. Even in the eartiest text-books, a sort of note of warning ageinst the error is sounded. A crude Statement is made in an old book, *Lord's Display, 1630.* Jaina priests of Surat are considered a part of the Brahmin Body, though Shudras by caste. In other words, they are non-Brahmanic Brahmins. What this means is this :—Jainism recognises the *varna* rather than the Caste System. The *varna* system approaches the well-known class system of modern European societies more than the caste-system. The *varna*-system is elastic, and would seem to be based on occupation more than on birth. Jaina Brahmanas, Kshatriyas and Vaishyas are recognised, and, in fact, they are found even to-day in Southern India. These Brahmanas, etc, would probably make up the *varnas* Brahman, etc., with the Hindus of the corresponding class. The caste system is more identified with prohibitions as to interdining, etc., &c., and is certainly a later evolution or degeneration of the *varna* system. J. H. Nelson and Dr. Thomas have been mentioned already. Steele, in his *Hindu Castes*, says: "Jainas have books of their own."

In 1781, the British Parliament, with reference to the Supreme Court at Calcutta, provided, that "inheritance and succession to lands, rents and goods, and all matters of contract and dealing between party and party, shall be determined in the case of Mahomadans by the Laws and Usages of Mahomadans, and, in the case of Gentus, by the laws and usages of the Gentus, and when only one of the parties shall be a

Mahomadan or Gentu, by the laws and usages of the defendant." (Statute 21 George III cl. 70, section 17) Sir William Jones, writing on 19th March 1788, says :—

"Nothing could be more obviously just than to determine private contests according to those laws, which the parties themselves had ever considered as the rules of their conduct and engagements in civil life. Nor could anything be wiser than, by a legislative act, to assure the Hindu and Musalman subjects of Great Britain that the private laws which they severally hold sacred and a violation of which they would have thought the most grievous oppression should not be superseded by a new system, of which they could have no knowledge and which they must have considered as imposed on them by a spirit of rigor and intolerance." (Quoted in preface to *Digest of Hindu Law* by Colebrook (17th December 1796, Mirzapur) P. V. and VI.)

The Statute 21 G. III C. 70 laid down for the Calcutta Courts that the law applicable should be the law of the parties or that of the defendant. For Madras and Bombay similar rules were made. (37 G. III c. 142). By an elementary principle of analogy, in the spirit of Sir Williams Jones's dictum, a similar provision would apply to Jainas. Indeed, no such express enactment is passed by the Government, but the Courts tacitly recognised the justice of this. Their difficulty has always been to discover the Jaina Law. And, as none was forthcoming, the conclusion was irrerestible that it was non-existent. Two causes fed this error. One was the pious horror (not yet quite defunct) of the Jainas at their books being handled or read by non-Jainas. The other was the self-seeking propensity of human nature. It is almost always in the interest of one party to a litigation to assert that he is bound by Hindu Law, although a Jaina, as it is for the other party to own the binding authority of the law and custom of the Jainas.

The life of the error would have extra protection from a kind of mimicry in social matters : the Jainas, and at least Agarwala Hindu Vaishnavas, have a common descent, common customs, of course interdining, and even frequent intermarriages. The ladies fairly often worship both the Hindu and Jaina Gods, and a sort of practical compromise is effected in every-day life ; now the Agarwal Vaishnavas are undoubtedly governed by Hindu Law, and the error of concluding from this that the Agarwala Jainas are also similarly governed, would not be detected at once.

But in almost every important Jaina case that has been litigated, the claims of Jaina Law and custom, as over-riding the rules of Hindu Law, have been advanced and more or less considered. A hurried glance at the case-law will not be without interest.

An old case is *Govindnath Roy* v. *Gulab Chand* (1833), 5 Sel. Rep. S. D. A., Cal. 276. Here Jaina Law triumphed. It was held that a Jaina widow could adopt a son without the sanction of her husband. This was a Moorshidabad case, and the decision was apparently based upon the Vyavastha of the Pandits who said : " According to Jaina Shastras, a sonless widow may adopt a son, just as may her husband for the performance of rites. The sanction of her husband or the direction of the Yatis or priests is not essential." Another question was raised (but left undecided) as to the widow's right under the Jaina Law to alienate or give away her property after the adoption. The claim of Jaina Law was asserted and upheld in this case.

In 1863, a case was fought in Shahabad (Bihar) subnomine Chandan Koer v. Padmanath Koer. In this, a Jaina joint brother succeeded by survivorship to his brother The widow of the deceased brother claimed to succeed by Jaina custom. The case was compromised. But the point is that the exist-

ence and the authority of Jaina Law, as distinct from Hindu Law were asserted

In *Mahabir Prasad* v. *Musammat Kundan Koer* (29th June, 1867) 8 W. R. 116, it was laid down that the Jainas are governed by the Hindu Law of inheritance applicable in that part of the country in which the property is situate. I submit, with all deference, that this decision involves a two-fold error. It deprives Jainas of a right to be governed by their own law. And it makes their position worse than that of Hindus. Thus a Mitakshara Hindu of Banares acquiring land in Bengal would be governed by the Mitakshara Law; whereas, under the decision in 8 W. R. 116, a Jaina from Benares in the same circumstances would come under the Dayabhaga of Jimutavahana.

In 1873, there was a case of Marwari Jainas of Ahmednagar, *Bhagwandas Tejmal* v. *Rajmal*, 10 B. H. C. R. 241. A man had died, leaving a widow. The widow also died. Then the relations and Panchas claimed to adopt a son to the man. It was held that the custom was not proved. "When amongst Hindus (and the Jainas are Hindu dissenters) some custom different from the normal Hindu Law and usage of the country in which the property is located and the parties reside, is alleged to exist, the burden of establishing its antiquity and invariability is placed on the party averring its existence, and it should be proved by clear and unambiguous evidence above suspicion."

In 1878, in *Sheo Singh Rai* v. *Dakho*, 1 A 688, a Meerut case, a sonless Jaina widow was held to take "an absolute interest at least in the self-acquired property of her husband," also to adopt without the permission of the husband or his kinsmen. It was held that she could validly adopt a daughter's son. This was certainly a triumph of Jaina Law; but, on the ground of special custom, proved by evidence of the community. The following may be noticed, however.

The High Court say at page 700 :—" The Jainas have no written law of inheritance. Their law on the subject can be ascertained only by investigating the customs which prevail among them." In the Privy Council, Sir Montague E. Smith said :—The Courts would not deny " to the large and wealthy communities existing among the Jainas, the privilege of being governed by their own peculiar laws and customs, when these laws and customs were, by sufficient evidence, capable of being ascertained and defined and were not open to objection on grounds of public policy or otherwise."

In the same year, in *Chotay Lal* v. *Chunoo Lal* 4, C 744, the question was whether a Jaina daughter took a limited estate like a Hindu widow or an absolute estate. It was held that, in the absence of proof of special custom varying the ordinary Hindu Law of inheritance, that law must be applied to Jainas. At page 751, Sir M. E. Smith says :—" Neither side appears to have gone into evidence as to the customs of the Jainas or to show that the rule of inheritance among the sect of Jainas was different from the ordinary law." The implication is that the Jaina Law, if any, would have been applicable only if it were known, but none was produced in the particular case.

In 1879, in a case, *Bhimal Das* v. *Shikhar Chand* (unreported), a Jaina custom was set up by which a husband claimed to succeed to the wife in property inherited by her from her father. It was held that the custom was not proved.

In 1880, in *Bachebi* v. *Makhan*, 3 A 55, a custom was set up hat a Jaina widow can make a gift of her husband's property. 'he custom was held not proved. The case was from Mainpuri, Etah and Farrukhabad districts. The property was ancestral, and thus the decision was not against *Sheo Singh Rai* v. *Dakho*, 1 A 688.

In 1886, *Lakhmi Chand* v. *Gatto Bai*, 8 A. 319, laid down

that a Jaina widow can make a second adoption to her husband, after the death of the first adopted boy. It was an Aligarh case and, again, based on special custom, and not on Jaina Law.

In 1889, *Manik Chand Golecha* v. *Jagat Settani Pran Kumari Bibi and others*, 17 C. 518, the custom of adopting, without the husband's permission, among Jaina Oswala widows was held to be tribal, as it prevailed in Jaipur, Jodhpur, &c., not only among Jaina but Vaishnava widows also. A curious remark is made at p. 526:—"It has been proved in this case that the Saraogis are nearly a sect of the Jainas." Perhaps it was not known to the Court that Saraogi is only a corruption of Shravaka, a Jaina Layman.

It was held also that change from Jainism to Hinduism did not affect a Jaina's personal rights or status.

In 1892, in *Peria Ammani* v. *Krishna Sami*, 16 M. 182, a Jaina widow of Tanjore was held not to have proved her power to adopt without her husband's permission. Best, J. said: "The parties to the suit were natives of Southern India whose ancestors were converted to Jainism," and on this ground the case was distinguished from *Rithcurn Lala v. Soojun Mull Lallah*, 9 Mad. Jur. 21. The same Judge held:—"if a Jaina widow succeeds to her husband's property absolutely and has the right to dispose of it as she likes, the adoption of a son to herself who may succeed to such property would be valid."

In 1894, in *Shambhunath* v. *Gyan Chand*, 16 A. 379 (a Saharanpur case), it was held that an Agarwal Jaina widow could alienate her husband's non-ancestral property, but that she has no such power over ancestral property.

In 1897, in *Mandit Koer* v. *Phool Chand*, 2 C. W. N. 154 (a Barh case), a custom for a Jaina sonless widow to take absolute interest in husband's property was held not to be proved.

In 1899, in *Harnabh Pershad* v. *Mandil Das*, 27 C. 379, the

homogeneity of the Jainas was recognised by holding that Jaina customs of one place were relevant as evidence of existence of the same custom amongst Jainas of other places It was rightly held that "Jaina" meant "Saraogi." Held also that a Jaina widow can adopt without her husband's permission; and being childless she acquires an absolute right in her husband's separate property.

But a glaring half-truth again stares one in the face in an *obiter dictum* at page 394: "It may be conceded that their ceremonies in many respects approximate pretty closely to those of the orthodox Hindus, although this is not confined to Arrah itself. The reason is pretty obvious. *The Jainas have no written Shastras and no priests of their own.* The Brahmans are called in to officiate at their ceremonies, and it is only natural that they should perform the ceremonies with which they are best acquainted." (I have italicised the words to indicate the plausible error.)

In the same year the Bombay High Court, in *Amabai* v. *Gobind*, 23 B. 257, repeated the error that Jainas are Hindu dissenters and governed by Hindu Law.

In 1907 in *Manohar Lal* v. *Banarsi Das*, 29 A. 495, the High Court at Allahabad have again repeated the same stereotyped errors in an adoption case from Meerut. It was not necessary for purposes of that case, but the Judges (Stanley, C. J. and Burkitt, J.) thought fit to go into the origin and History of the Jaina sect. One cannot help pointing out a few of the more glaring mistakes. At page 497 we read: "Founder of Jainism was Mahavira;" and yet the Jaina sects are at each other's throats for the possession of Parsvanath Hill in Hazaribagh District, in Behar, as being the place of Nirvana of Lord Parsvanath, the predecessor of Lord Mahavira. At page 498 we are told, "Brahmans were their priests," which is misleading without adding "Jaina Brahmans only," as in

Southern India. At page 499: "Mahavira discarded clothes and therefore arose Svetambaras and Digambaras." This is entirely wrong. The real explanation is the famine in Northern India in Chandragupta's time which drove the great Bhadrabahu to the South and the Schism was a consequence of this. "Angas and Purvas are denied by the Digambaras" (page 499). Of course this tremendously ignores the elements of the Digambara Jaina tradition. But it must be admitted that a few correct remarks are also made, though they are not given that weight and consideration in the judgment which is their due, *e.g.*, the Jainas reject the Vedas of the Brahmins (Sir Monier Williams); Jainas ought to be excluded from the category of the Hindus (Sir Guru Das Banerji, Ex-Judge of the Calcutta High Court.) But the Jainas cannot agree with the following resume of their history; there were no restrictions to begin with. Then Jainas dissented from Hindus. Then Brahmins laid down restrictive rules for Hindus And Jainas are not bound by these (page 514, et seq). In this case it was held that a married man can be adopted by a Jaina widow.

In 1908, in *Asharfi Koer* v. *Rup Chand*, 30 A. 197 (a Saharanpur case), the judgment in 29 A 495 was practically bodily incorporated and the same bench held that by Jaina custom a widow can adopt a married man, that she can give a son in adoption with the Sapindas' consent, and that a Jaina widow can adopt without her husband's permission.

This judgment was not upset by the Privy Council in *Rup Chand* v. *Jambu Parsad*, 32 A. (1910), p. 247. The parties were Jaina Agarwalas. Here also the "Dissenters" view finds expression. Their Lordships say at page 252: "So far as the pure law applicable to the case was concerned, there was nothing in doubt. There was no longer any question that, by the general Hindu Law applicable to the twice-born classes, a

boy could not be adopted after his marriage, and there was no doubt that the Agarwala Jaina belonged to one of the twice-born classes."

So the theory that Jainas are Hindu dissenters or simply Hindus has become quite established, and the principle of *stare decisis* makes its dislodgment difficult, though by no means impossible. What I want to impress here is this, that, in almost all the cases noted above, the parties and the court claimed and felt that Jainas were not governed by Hindu Law; but, as in ordinary cases, where the law is silent, the courts decide in accordance with "justice, equity and good conscience," and the compendious phrase means the Judges' understanding of English Law; so in Jaina cases, Jaina Law not being exhibited in the Court, the Judges identify the "justice, equity and good conscience" of the case with principles of Hindu Law. But an error, however venerable by age, remains an error still. And, apart from whether the Jainas should or shall try to have justice done to their old rules of law by having them recognised and acted upon by Courts of law, the true facts of the case must be disclosed.

But it may well be asked: after all, what is the practical loss to the Jainas, if they are governed by Hindu Law? And why have they submitted to it for about a century, if it was really repugnant to their instinct and their religious and historical traditions? The answer to the last question is: that the Jainas have been ignorant and scattered so far, and that by improved communication between the most distant parts of India, it is only lately that they have begun to realise their common needs, common history and the features that unmistakeably distinguish their lives and ideals from those of their Hindu brethren? As to the first question, it is enough here to remark that Jaina Law differs from Hindu Law just where it would be expected to, namely, in the root-principles of it.

The Jaina and Hindu conceptions of the universe and of man's life here below are essentially distinct; and a body of Law, which governs the external human conduct of a man as an individual and as a member of an organised society, necessarily takes its color from the religious belief and the philosophical depth and intensity and clearness of the Theology and Metaphysics to which the society subscribes. There are four principles or bed-rock pillars on which Jainism claims to rest. The first is Ahinsâ, hurt no living being on any account. The second is, the soul's capacity to evolve is unlimited, in fact, it reaches to the stage of godhood itself. The third is, the universe is eternal, uncreated. In it, it is the duty of man to evolve the soul to its highest pinnacle of power and purity; and that, therefore, the soul itself is responsible for the entire pain and pleasure with which life bristles. There is no God to create or destroy the world, nor to punish or forgive you. The fourth is: Dayâ, compassion. To the best of your capacity serve others, *i. e.*, help them in the onward and upward progress of their souls.

These four principles, hurt none (Ahinsâ), serve all (Dayâ), Divinity of man and Eternity of the Universe, in their inner meaning and eternal application, constitute Truth, according to Jainism. The principles on which rules of Jaina Laws are based, are derived from considerations which themselves are guided by these ultimate principles of faith and conduct. And being drawn from the very heart of things in the Light of Eternity, these four may be claimed to be the basic principles of universal jurisprudence. Jaina Theology and Metaphysics thus do splendid service to Jaina jurisprudence in giving it the one central idea—*Dharma*, embodying truth and duty in one which the ideal jurist is for ever seeking in the soul of the rules of positive law. Starting from this clear point of view, the evolution of Jaina Law can proceed along the sure lines of

Logic. Whatever does not follow from or is inconsistent with the above four doctrines, cannot be the law of Jainas. And if the analysis of the rules of law actually administered by our Court as governig Hindus is carried deep enough, it would be found that at least a few principles of these rules are irreconcilably opposed to Jaina Law. For example, the rules relating to adoption. A son is needed by a Hindu to save his soul from the tortures of hell : पुत्र (hell), whence the name (son, one who helps in crossing the hell). Among Jainas man alone is responsible for his actions ; and once performed, these actions (Karmas) must bear fruit, and no one can intervene to deflect the incidence of this fruition. Thus the object of adoption cannot be to get a son to help one in crossing hell. Bhadrabâhu reverts to this aspect of sonfulness in Slokas 7, 8 and 9 of his Samhita.

In connection with this, I cannot refrain from quoting from Mayne's classical treatise on *Hindu Law and Usage* :—

"In Western and Northern India, the differences between the written and the unwritten Law were too palpable to be passed over. Accordingly, in many important cases in Borradaile's Reports, we find that the Court did not merely ask the opinion of the Pandits, but took the evidence of the heads of the castes concerned as to their actual usage. The collections of laws and customs of the Hindu Castes made by Mr. Steele under the orders of Government, was another step in the same direction. It is probable that the laxity, which has been remarked as the characteristic of Hindu law in the Bombay Presidencey, would be found equally to exist in many other districts, if the Courts had taken the trouble to look for it. In quite recent times the Courts of the N.-W. Provinces and of the Punjab have acted on the same principles of taking nothing for granted. The result has been the discovery that, while the actual usages existing in these districts are

remarkably similar to those which are declared in the Mitakshara and the kindred works, there is complete absence of those religious principles, which are so prominent in Brahmanical Law. Consequently, the usages themselves have diverged exactly at the points where they might have been expected to do so *. *Absente causa abest et lex.*"

From all this it is quite apparent that the dictum that Jainas are governed by Hindu Law, is more dead than alive; and the reasons adduced in support of it are the children of ignorance and idleness. People who believe in the probability of this dictum are just those who do not want to know or recognise Jaina Law, of which there is plenty both in the ancient Jaina libraries and in the traditional usages of the Jaina people themselves.

Even in the suit before me no less than 3 very old, highly respected and authoritative treatises have been cited. From what I observe in the case. I am sure that the parties were neither rich nor active enough to bring before the Court all the Law books and witnesses of custom which would have been such a welcome aid to me in going more exhaustively into the questions of Jaina Law. But, for the particular purposes of the present case, the evidence on the record is quite sufficient and clear; and, after giving it my deepest consideration, I could not but come to the conclusions at which I have arrived.

2. *Customary Law in general*:—In customary law, apart from the origin of the custom or usage, two questions have often arisen :—

(1) As to when the custom should be considered to become law, and therefore binding.

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* See Punjab customs, 5, 11, 78. Sheo Singh Rai *v.* Musammat Dakho, 6 N. W. P. 382; affd. 5 I. A. 87 S. C. 1 All. 688 Chotelal *v.* Chunno Lall, 6 I. A. 15. Sc.. 4 Cal. 744.

(2) As to the character of proof by which the custom should be properly considered to have been established.

Of course, custom is always really as important as positive law itself. It is always enumerated as a sanctified source of law; *e.g.*, the *Institution of Manu*, II, 6, give the approved usages of the people as a source of Law, and in I, 108, the same author says that "Immemorial usage is transcendent Law."

In an old English book, *Doctor and Student*, i 4, it is said that the Law of England is grounded on diverse particular custom. In his *Institutes*, I ii 9, Justinian says: "*Diuturni mores consensu utentium comprobati legem imitantur.*" Ancient customs, when approved by consent of those who follow them, are like statutes (Moyle's translation). In England itself, the Common Law or the custom of the realm has no less a force than statute law itself. In a word, it is common knowledge that custom is an universal source of law and the most ancient of all such sources.

The first of the points raised by me above is phrased by Dr. Holland in his *Jurisprudence*, as follows :—

"At what moment does a custom become Law?"

Dr. Holland's answer to the question is at variance with the view of Austin; but it is the most acceptable and reasonable answer.

"The state, through its delegates, the Judges, undoubtedly grants recognition as law to such customs as come up to a certain standard of general reception and usefulness. To these the Courts give operation, not merely prospectively from the date of such recognition, but also retrospectively."

Thus it is not necessary for a custom to be subjected to judicial decision and confirmation. It can have an existence even in the eye of Law without having come before a Court at all. Its validity and binding force are independent of any interpretation or consideration by the judiciary.

As to the proof of customs, the remarks of the Courts in the *Oorcad case* are pertinent. The High Court at Madras (Shiva Nanja *v.* Mutnu Ramlinga, 3 Mad. H. Ct. R. P. 75-77) said "What the law requires before an alleged custom can receive the recognition of the Court and so acquire legal force, is satisfactory proof of usage, so long and invariably acted upon in practice as to show that it has, by common consent, been submitted to as the established governing rule of the particular family, class, or district or country; and the course of practice upon which the custom rests must not be left in doubt, but be proved with certainty."

In affirming the above, the Privy Council said :—

"Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular districts and families in India, but it is of the assence of special usages, modifyng the ordinary Law of succession, that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends" (14 Moore's Indian Appeals, p. 585).

The evidence of custom would thus appear to be necessary to establish three points :—

(1) That the custom must be definite or certain;

(2) That it must be ancient and continuous;

(3) That it must be reasonable (See Stephen's Commentaries, Vol. I., pp. 26-29).

In other words, the evidence must show the custom to be ancient and invariable, continuous and uniform, reasonable and not immoral, certain and definite, and cumpulsory and consistent.

This evidence may relate to acts of the kind; acquiescence in

these acts; decisions of Courts, statements of experienced and competent persons of their belief, that such acts were legal and valid. (See 7 Mad. H. Ct R. 250 and 254). As to the antiquity of customs, Grey, C. J., of the Supreme Court of Calcutta, on the 21st of November 1831, remarked:—

"I admit that a usage for 20 years may raise a presumption in the absence of direct evidence of a usage existing beyond the period of legal memory."

Mr. S. Roy, in his *Customs and Customary Law in British India*, remarks, at p. 29, as to this:—

"It should be noted that this rule of immemorial antiquity is to be restricted to custom only, and not to *usage*. As we have already stated, a usage may be of quite recent growth, yet, if established, will be valid."

The same learned author, at p. 6, sums up the distinction as follows:—

"Custom" and "Usage" are not synonymous. In fact, there is great difference between them. *Custom* carries with it an idea of great antiquity. One of the essential points of a *valid* custom is that it must uniformly exist from time immemorial. No such antiquity is necessary to prove a *usage*. A usage may be of far recent growth, and yet may be proved to be valid. The essential condition regarding its validity is that it must have "fructuated into maturity" and that it must not be *growing*. A usage may grow up within a very short period, but a custom must have a halo of ages and centuries," uniformity and consistency attached to it, in order to be recognised as such. Usage may be defined to be a uniform practice among a people or class with respect to certain matters or things.

Even in these days of codes and statutes, there is still growing up *pari passu*, a body of unwritten laws, or customs and usages, in every sphere of human activity which commands all the reverence and obedience of a king-made law. Just look at

the English constitution. A series of political changes have been made without any legislative enactment whatever. A whole code of political maxims has grown up without any aid of the legislature."

So an usage may be described as a custom in the making. All the atributes of definiteness, certainty, freedom from immorality and illegality must necessarily characterise a valid usage as much as a valid custom. But a custom must be hoary and immemorial. Whereas an usage need not be equally time-honoured. This distinction, from the nature of things, would affect the quantum and character of the evidence which would be held to be sufficient to establish a custom or an usage. In the famous *Ramnad case, Collector of Madura* v. *Mattu Ram Linga* (12 M. I. A. 397, at p. 436). The Privy Council say :—The duty of an European Judge, who is under the obligation to administer Hindu Law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage."

Mr. Roy, at p. 29 of his *Customs and Customary Law*, says :—

" It should be noted that this rule of immemorial antiquity is to be restricted to custom only and not to usage. As we have already stated a usage may be of quite recent growth ; yet, if established, will be valid."

This position is unusually fortified by the remark of that learned Judge. Mr. Justice West, in I. L. R., 4 Bom. 545, at p. 561, that: "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 opera-

tion of the statute. A change in the popular conviction may, without inconsistency, be followed by a change in the course of the decisions by which the Legislature intended to reflect them."

Mr. S. Roy further tells us at page 30 of his *Customs*, &c.

"It should be noted that it is as much a Court's duty to abrogate or veto a bad, immoral or illegal custom as to sanction or ratify a good one. No doubt, a Court is bound to give recognition to any custom or usage proved to its satisfaction; still it possesses a very wide discretion in not recognising a custom which is prejudicial to public interests or repugnant to public morality or in conflict with the express law of the country;"

To sum up the consideration of Customary Law in general. Custom or usage must be proved to be definite, uniform and harmony with public morality and Law. In the case of custom, it must be of immemorial antiquity also; but as an usage, it may be only of recent growth.

3 The custom or usage in this particular case—

The first mention of the custom or usage is in the written statement of the Defendants (Ex. $\frac{1}{2}$O). Bhagabai, a Jain widow was not governed by the strict, provisions of the Hindu Law. She and her husband lived separate from Somchandsa and she, as the childless Jaina widow of a separate co-parcener, had fullest powers to dispose of the property by will in the hands of the Defendants."

So the custom or the usage set up may be enunciated as follows:—

A childless Jain widow of a separate co-parcener has full testamentary powers to dispose of her husband's property.

We have to see if this has been established by the evidence, oral and documentary, produced before me. Here I must consider the plaintiff's objections to the case of the Defendants.

The very first objection taken is that the custom of one sect of Jainas may not prevail in another sect. In connection with this, reference was made to *Bachebi* v. *Makhanlal*; (I. L. R., 3 *All 55*). *This was a case of Bindala Jainas of* Mainpuri. That sect, we are told in the judgment at page 59, "is small in numbers and confined to the districts of Mainpuri, Etah and Farrukhabad." It was held in that case that the evidence produced was inadequate to establish the rights, claimed for the widow, of making an unlimited gift of ancestral property inherited from her husband. The argument adduced by the learned pleader for the plaintiff cuts both ways. He says that the custom of one sect may not prevail in another sect of the Jainas. If this is so, the case in I. L. R 3 All., page 55, has no application to the present case at all, the parties in this case being Porwads and in 3 All. Bindala Jainas. But his argument is untenable. All the Jainas are governed by one law. The law books to which they owe and profess allegience are the same. The spiritual precepts which form the backbone of their moral and mundane conduct spring from the same theological and metaphysical beliefs and considerations.

A very good explanation of the case in point can be given. The Bindala Jainas, confined as they are reported to have been to 3 small districts of upper India, may not have been in that frequent and extensive touch with their confreres elsewhere which would have made them cognisant of the wider modes of life of Jainas elsewhere. As a fact, the Districts to which the Bindala Jainas are alloted, are by no means the most important centres of Jainas or Jainism. Delhi in the Punjab, Saharanpur, Meerut, Muttra and Benares in the U. P., Arrah, Bhagalpur, Chappra and Patna in Bihar, Calcutta and Murshidabad in Bengal, and Bombay, Surat and Ahmedabad in Bombay Presidency, are the modern strongholds

of the Jaina community and their creed. Another consideration which induces me not to attach great value to the judgment in the I. L. R. 3 All. 55, is that this case was brought somewhere in the seventies of the last century The Jaina community was certainly in a more backward and disorganised condition then than it is now. The Bharatvarshya Digambara Jaina Mahasabha which is registered and organised representative of all the Jainas of the Digambara sect in India, had not yet come into existence. Jainism itself was almost entirely ignored. It was grossly misunderstood and misrepresented even by people who might have been expected to know better. Learned *savants*, like Mr. Bath of Paris, held Jainism to be an offshoot of Buddhism and much later in date than the gospel of the Buddha. The personality and the very historicity of Lord Mahavira, the last Tirthankara of the Jainas, was denied. It was considered to be an error and a heresy to hold that Lord Mahavira existed at all. A historian of the repute of Sir Roper Lethbridge taught our schoolboys in his *History of India* that Jainism was a compromise between Brahmanism and Buddhism and that it took its birth in India somewhere in the 9th century, about the time of the great Vedantist, Shankaracharya. It was not until 1884 that a redoubtable scholar, Dr. H. Jacobi, took up the cudgels on behalf of this much-maligned and misrepresented creed and proved, according to the most modern methods of critical research in History and Antiquity, that Lord Mahavira was an independent and actual prophet of the Jainas, that Jainism was older than Buddhism, that the Jainas of the pre-Budhistic days went under the name of the Nigganthas or Nirgranthas, and that Lord Mahavira was preceded by Lord Parsvanath (after whom the greatest sacred hill of the Jainas in Hazaribag, in Bihar, is called), who attained Nirvana or salvation in 776 B. C. The conservative scepticism of scholars still prevented them from accepting all these results of historical research, till by dint of

persistent studies in the ancient Literature, both religious and secular, of the Jainas, Drs Weber, Jacobi, Bendall, Hoernle and many others proved again and again all the above results beyond any doubt or hesitation. So it cannot be surprising that the parties at the date of *Bachebi's suit* did not have the knowledge or means to cite their own books or to understand how their laws and customs really stood. Even at the present day it is exceedingly difficult for Jainas to adduce very satisfactory evidence of their customs. The community still suffers from lack of organization and from profound and almost universal ignorance of its spiritual principles and worldly rights, according to Law and custom. I have allowed much space to this matter of a socio-religious type, because, without a full consideration of this semi-obscure background, it is impossible to have a clear perspective of the Jaina rights and practices and of the causes why they were so long submerged in non-recognition and why they were only partially and infrequently set up and so exceedingly unwillingly assented to. What wonder then that the widow's champions in *Bachebi's case* could not bring forward sufficient evidence to outweigh the few Bindalas whom the plaintiff set up to say that a Jaina widow had no right to make testamentary donation of her husband's property? Even then the defendant in the suit, in I. L. R. 3 All, p. 55, did produce witnesses who deposed to the greater powers of a Jaina widow compared with her Hindu sister; but the court refused to act upon this testimony, as these witnesses were not of the same sect. At the most, the decision in Bachebi's case can only indicate that there may be a falling back of one small part of Jainas from the general practice of the community or that there may be a custom within a custom followed by a small number of Jainas isolated from the rest of their brethren, I. L. R. 16 All., p. 379; I. L. R. 30 All., p. 197 and I. L. R. 4 Cal., p. 744, have been referred to as supporting the plaintiff's

proposition. But they do not do so. They simply lay down that, in the absence of proof of custom, Hindu Law applies to Jainas. This position is generally admitted, and I have discussed it at length in an earlier part of the judgment. The plaintiff's contention is further refuted by *Harnabh* v. *Mandil*, I. L. R. 27 Cal. 379, which laid down that there was no material difference in the custom of the Agarwala, Choreewal, Khanderwal and Oswal sects of the Jainas; and that there was nothing to differentiate the Jainas of Arrah from the Jainas elsewhere. Commenting on this, Mr. S. Roy, in his *Custom and Customary Law*, says, at page 142:—

"It should be noted that Judicial Decisions recognizing the existence of a disputed custom amongst the Jainas of one place, are very relevant as evidence of the existence of the same custom amongst the Jainas of another place."

So there would seem to be no presumption of any difference as to custom between the Jainas of different sects or different localities. The Jainas are governed by the same Law, whoever or wherever they may be, unless the contrary is established by evidence. The plaintiff in the present case has adduced no evidence to rebut the defendants' proof of the custom set up in their written statement.

The next objection taken by the plaintiff is to the quantity and quality of the defendants' evidence being enough to prove the custom alleged. He referred me to 14 M. I. A. P. 585 and to Mayne's *Hindu Law and Usage*, p. 58. There the quantity and character of the proof necessary to establish a custom are discussed. I have already dealt with these in my remarks under Customary Law in general.

The plaintiff contends that only 6 instances are proved by the defendants in this case. This is inaccurate. There are no less than 23 instances on the record. They are from Burwaha, Sanawad, Dhangaon, Khandwa, Indore, Dhar and other places.

These instances relate to the gifts of their husband's properties by the widows. The evidence of the instances may be summed up as follows:—

1. The first instance is that of Rambhabai of Khandwa. She gave her one Chasma house in charity. The plaintiff's witness No. 1, Bhikasa, Ex. 20, himself admitted in his cross-examination that "amongst us, a widow without issue has full power of disposal. She can give her husband's property as she is hereself the owner. One Rambhabai, widow, without issue, has given one Chasma to a temple. Besarbai of Burwaha is also disposing of her husband's property in charity."

2. The second instance is that of Besarbai of Burwaha:— Bhikasa (plaintiff' witness No. 1 (Ex. 20) says:—

"Besarbai of Burwaha is also disposing of her husband's property in charity."

Rai Bahadur Seth Hukumchand, defendant's witness No. 3 (Ex. 49), says:—

"Besarbai of Burwaha, widow of Dewasa Ghanashamsa's son. She has given Rs. 25,000 for a girls' school, only 6 months ago. She has given more money in Jaina charity."

Mangilal (plaintiff's witness No. 3, Ex. 25) says:—

"Besarbai of Burwaha has spent Rs. 8,000 in Sidhawar Koot temple."

3 and 4. Motibai and Sitabai:—

Mangilal (plaintiff's witness No. 3, Ex 25) says:

"Motibai and Seetabai of Burwaha have given silver throne to the Jaina Mandir, Burwaha."

5. Widow of Ramasa:—

Mangilal (plaintiff's witness No. 3 (Ex. 25) says:—

"The widow of Ramasa of Burwaha has given a silver trav. worth Rs. 300. to the Jaina Mandir at Burwaha."

6 & 7. Dagdusa's wife and mother :—

(1) Somchandsa plaintiff and plaintiff's witness No. 2 (Ex. 26) says :—

" Dagdusa's mother and wife have sold away their house at Khandwa and presented a silver throne out of the sale-proceeds. There are nearer heirs to Dagdusa and with the consent of the heir of Dagdusa, the house was sold."

(2) Pomdusa (defendants' witness No. 8, Ex. 71) says :—

" Mother of Dagdusa (deceased) gave her property to the temple at Khandwa. Relations have not objected yet. This gift was made about a year ago."

8. Chunnilal, Gadiya's father's sister :—

Balchand, defendants' witness No. 2 (Ex. 44), says :—

" Then there is the case of the father's sister of Chunnilal Gadiya who gave her property to her nephew, Chunnilal."

Rai Bahadur Kalyanmal (defendants' witness No. 1, Ex. 43) says :—

" There was the widow, a relation of Chunnilal Gadia, who gave away her husband's property to one of her nephews, on the husband's or the brother's side. I do not know if any of her husband's relations were in existence."

9. Fattaji Pannalal's widow :—

Rai Bahadur Seth Hukumchand (defendants' witness No. 3) (Ex. 49) says :—

" Among Terapanthis, Fattaji Pannalal's widow gave all her husband's property to a temple."

Rai Bahadur Kalyanmal (defendants' witness No. 1) (Ex. 43) says :—

" Then there was the widow of Pannalal Fatehchand. She gave away her property to the Jaina temple, and, at her free will, to some relations, who were not the reversioners. The reversioners objected ; but the community decided that the Jaina widow could make the gift of her husband's property,

without any check. I was not present in the panchas, but I have reliable knowledge of it as a member of the community."

Kavarlal (Defendants' witness No. 6, Ex. 59) says :—

"Widow of Fattaji Pannalal gave her property, moveable or immoveable, to Panchas for charity and temple, etc. No relations or reversioners were alive."

10. Tejpal Lala's widow :—

(1) Rai Bahadur Seth Hukumchand (Ex. 49) says :—

"Tejpal Lala's widow has given her whole property in charity. No objection was made by any one."

(2) Balchand (defendant's witness No. 2, Ex. 44) says :—

"The widow of one Tejpal Lala, belonging to our Gota, gave away all her property to a Jaina Temple."

(3) Balabux (defendant's witness No. 7, Ex. 60) says :—

"Another woman, whose husband's name I don't know, gave her property to a temple of the Marwaris. She lives near Gorakund and belongs to Marwari Gota. It is a matter of 5 or 7 years ago."

(NOTE :—This instance may come under No. 11 below).

11. Dhirajmal (defendants' witness No. 5, Ex. 58) says :—

"The widow of Tejkaran Vaidya gave her cash and utensils to Marwari Temple."

12. Widow of Javarmal :—

Balchand (defendants' witness No. 2, Ex. 44) says :—

"The widow of Javarmal, of the Firm of Chimanram Javarmal, was sued by her husband's relations, and it was decided by the Hon'ble the Sudder Court that the widow was proprietress and could freely aliene her husband's property."

Rai Bahadur Seth Hukumchand (defendants' witness No. 3, Ex. 49) says :—

"Chimanram Javarmal. Javarmal's widow was adjudged as full owner by the Courts, the Indore Sudder Court, in a case brought against her by Chogalalji and Tansukhji, the

headman, of the Todawala Gota. This was about 10 years ago."

13. Dhannibai of Dhar :—

(1) Dhirajmal (defendants' witness No. 5, Ex. 58) says :—

"Dhannibai of Dhar gave her house property and cash to the Panchaiti Temple. She is of Terapanthi Gota."

(2) Kavarlal (defendants' witness No. 6, Ex. 59) says :—

"Ratanji Tarachand's widow gave her land and cash to Panchas for Temple, &c. There were relations. They took no objection to the gift. This is Dhannibai of Dhar."

(3) Balabux (defendants' witness No. 7, Ex. 60) says :—

"Dhannibai gave her whole property to temple, including a house."

14. Widow of Magniram :—

Dhirajmal (defendants' witness No. 5, Ex. 58) says :—

"The widow of Magniram Kantival gave her cash to Lashkari Gota Temple."

15. Pannalal Bakaliwal's widow :—

Kavarlal (defendants' witness No. 6, Ex. 59) says :—

"Pannalal Bakaliwal's widow gave cash, &c., to Panchas, for Temple, &c. No relations or reversioners were in existence at the date of the gift. I make this statement from the usage our people. We are all Jainas, and it is the usage of all Jainas, Porwads included."

16. Widow of Pannalal Badjatiya :—

Dhirajmal (defendants' witness No. 5, Ex. 58) says :—

"Widow of Pannalal Badjatiya gave her house property, &c., to Terapanchi Temple."

17. Widow of Kuwarji Sah of Sanawad :—

Pomdusa (defendants' witness No. 8, Exhibit 71) says :—

"Widow of Kuwarjisa of Sanawad. She gave her house, &c., to a temple and to her daughters. The reversioners were alive ; they did not object."

18. Widow of Shambhusa of Dhangaon :—

Pomdosa (defendants' witness No. 8, Exhibit 71) says :—

"She gave her estate to temple and charity. His brothers, &c, were alive. I don't remember if they objected."

19. Widow of Dasharathasa Babaji :—

Pomdusa (defendants' witness No. 8, Exhibit 71) says :—

"Widow of Dasharathasa Babaji. She also gave her property to temple at Sanawad. There were reversioners. I don't know if they objected."

20. Bhilibai of Sanawad :—

Pomdusa (defendants' witness No. 8, Exhibit 71) says :—

"One Bhilibai of Sanawad. Her three Chasmas house and her ornaments were given away to temple by her. There were relations; but I don't remember if they objected. I was about 10 years old then."

21. Lady at Bhampura (Burwaha) :—

Pomdusa (defendants' witness No. 8, Exhibit 71) says :—

"Widow of Ghasiram gave her estate to her brother, who performed the cremation ceremonies. The kith and kin of Ghasiram raised no objection."

To these 21 instances must be added the two instances which are the subject-matter of the judgments in Civil Original Suit No. 3 of 1309 Fasli, in Sudder Court, Indore; and in Civil Regular Appeal No. 98 of 1877 before the Commissioner of Jabalpur.

22. Original Civil Suit No. 3 of 1309 Fasli, Sudder Court, Indore,—A Jaina widow, Motabai, who was defendant in this suit, was held to be the exclusive owner of her husband's property. The learned Chief Justice in his judgment remarks: "It must be noted that the parties are Jainas or Saraogis, and they are not governed by the Hindu Law in matters of adoption or the widow's right to adopt, as also in matters of succession and inheritance. There is no such estate known

among them as a widow's estate, with restrictions as to powers of adoption, alienation, or waste. She is an heir to her husband to the fullest extent, or, in other words, she requires no permission of her husband to adopt, and no ceremonies of any kind for the purpose need be performed, except such as her pleasure or whim may dictate to give publicity to the event, and she can do what she pleases with the estate which has descended to her; *vide* I. L. R., 1 All., page 688; I. L. R. 27 Cal., page 379. Two remarks must be made as to the above. One is that the learned Chief Justice expressly holds that the Jainas are not governed by Hindu Law in matters of succession and inheritence and that a Jaina widow has the fullest rights over her property. The second is that additional weight and sanctity attach to the pronouncement, as the Chief Justice (Mr. Pyarelal, Barrister-at-law) is himself a Jaina of the Meerut district and an old and revered leader of the community.

23. In Civil Regular Appeal No. 98 of 1877, before Commissioner of Jabalpure, the parties were Porwads, like the parties before me. The judgment in that case contains the following:—

"A Commission has now been issued by the Lower Court, under which enquiries have been made from the Porwad Jainas of Saugor, Jhansi and Banda. Some Damoh witnesses produced by the plaintiff were also examined. These last excepted, all the evidence is against the plaintiff. They all agree that a Jaina Porwad widow, being childless, can alienate immoveable (property) for religious purposes."

All these cases amply and satisfactorily prove at least an usage that a childless Jaina widow has rights over her husband's property.

The second objection of the plaintiff is that the oldest of the instances is only 10 years old.

This, again, is not quite correct. The instance mentioned in the case which was decided by the Sudder Court on 18th January 1902, must be at least 15 years old, if not more. The other case which was decided by the Commissioner of Jabalpur in 1877 must relate to transactions which took place a little earlier. So that the instance must be at least 40 years old (but, we must not forget, that the usage proved here is at least 40 years old) would be readily accepted by me as sufficient foundation for declaring the Law to be in accordance with that usage. But in the present case there is very strong and almost conclusive testimony of old and authoritative Jaina Books which I cannot but act upon. And it is this testimony of ancient and recognized Jaina Rishis which has led me not to issue a large number of commissions to different Jaina centres which I otherwise might have felt called upon to issue in the interest of Law and Justice. These Jaina Law Books are dealt with below.

The third objection by the plaintiff is that, in the instance proved by the defendants, the reversioners did not dispute the gifts by the widows. The implication is that the illegality of the widows' donations was condoned by the reversioners, or that the reversioners expressly or impliedly consented to the alienations. The reversioners would certainly see no wisdom in objecting to the gift of the widow when she was acting within her rights, according to law and usage. But in one or two instances the plaintiff's learned pleader brought it out in cross-examination that the reversioners did dispute the widow's alienation. But then it transpired that in all cases the reversioners had to eat humble pie and the widow's full powers were recognised.

The fourth objection to the proof of custom was that the Jaina Law Books, which are cited, do not give an absolute estate to the widow. It would be convenient to consider this with the next point in the argument for the plaintiff, *viz.*, that

Jaina Law Books are no authority, because they never have been cited in Courts of British India. This is rather a pointless argument. Strictly, on a point of principle, it is as reasonable to exclude a witness of custom on the ground that he had never appeared before a Court of Law where that custom has been in dispute. It would seem that the existence and authority of separate Jaina Law Books were recognised so far back as 1833, in *Govindnath Roy* v. *Gulabchand*, 5 Sel. Rep. S D. A. Cal., page 276: "According to *Jaina Sastras*, a sonless widow may adopt a son, just as her husband," &c., in any case the virginity of their citation can certainly be no objection either to the admissibility or relevancy or weight and authority of the sacred Law Books of the Jainas. Because a helpful light has been withdrawn so far from the Courts of Justice in British India, is absolutely no reason why we should refuse to see in that light if it is offered to us. Not even the remotest suggestion, much less any express allegation, is made against the genuine character of the books cited or against the authentic antiquity of their authors. There is reliable and unbiassed evidence of leaders of the Jaina community which shows in what an undisputed and universally supreme position these books are held by all Jainas. These books are *Vardhamâna Nîti*, *Arhana-Nîti* and *Bhadrabâhu Samhitâ*.

I shall take up these books one by one and discuss, first, its age and authorship, and, secondly, the text which the book lays down for the decision of a case like the present one.*

Vardhamâna Nîti—It was written about Samvat 1068, *i.e.*, 1011 A. D. The author was an Acharya, Amitgati, who lived in the time of Raja Munja. He was the pupil of Madhavasena,

*This account is based upon the 4th report of operations in search of Sanskrit Manuscripts in the Bombay Circle, April 1886 to March 1892, by Professor Peterson, Extra No. at Page 9.

Arhana Niti—This is the work of the great and well known Jaina author, Shri Hem Chandra Charya. He was born in Samvat 1145 and died in Samvat 1229, *i e.*, he lived from 1088 to 1172 A. D. He was Pontiff of the Suri sect from 1166 to 1229. He was born in Anahilla in Gujrat. He was the author of Panchâṅga Vyâkaraṇa, Pramâna Shastra, Pramâna Mimansa, Chchandolankriti, Chhanda Chudamanim Grahavarta Vichara, Kavyanushasana Dvasraya Mahakavya, Vitaraga Stotra. His other works are mentioned in Prof. Peterson's report referred to above. From page CXLI, I take the following: "Hemchandra was pupil of Deochandra of the Vajrashakha. For all that is known of this famous teacher, the student must be referred to Bühler. Uber Das Lebesdes Jaina Monches Hemchandra." What follows there is a conspectus of the references to this Hemchandra in the three reports. He was the author of—

(A) Sabdanusasana, called Sidh Hemchandra (*i.e.* composed by Hemchandra by the request of Sidh Raja). For copies, see index of books. For a discreption of the work and the literature that grew round it, see Weber, 11, pages 208 to 254.

(B) An Abhidhan Chintamani or Namala 3, App. pp. 53 and 109, with a commentary by the author. 3 App. pp. 109 and 154.

(C) Anekratha Sangraha, with a commentary by the author's pupil, Mahendrasuri, I p. 51 ; App. p. 89.

(D) Dvashrayamaha Kavya. 3 p. 19 ; App. p. 322 (with a commentary by the author). See Keilhorn's Palm Leaf Mass. Report, p. 15.

(E) The Treshast Salaka Purusha Charitra, with the appendix called Parishishtha Parvana. For copies, see index of books. For an account of the book, see preface to Jacobi's edition (in the Bibliotheca-Indica) of Parishistha Parvan.

(F) The Yoga Shastra—For copies, see index of books, with a commentary by the author.

(G) The Syádvad Manjari—A hymn in praise of Vardhmâna, in 32 verses, which Hemchandra modelled after the earlier work of the kind by Sidhsena Divakar. 3, App, p. 206. See Weber II, p. 940.

Referred to as the pupil of Devachandra. 1 App., p. 5, is the Bandhu of Pradumna Suri. 3 App., p. 209.

The authority of Hemchandra as Jaina Acharya and writer of distinction and weight is thoroughly established. His *Arhana Nity* is a well-known work, which is recognized and revered by Jainas all over India. The defendants rely upon Shlokas 52, 73, 114 and 124 of Arhana Nity.

भ्रष्टे नष्टेच विक्षिप्ते पतौ प्रव्रजिते मृते ॥
तस्य निश्शेष वित्तस्याधिपा स्याद्वर वर्णिनी ॥ ५२ ॥

If the husband has become outcaste, if he has run away, if he has become lunatic, or if he has become an ascetic, or is dead, his good wife becomes the owner of all his property (Shloka 52).

पत्नी पुत्रश्च भ्रातृव्याः सपिण्डश्च दुहितृजः ॥
बंधुजो गोत्रजश्च स्वस्वामी स्यादुतरोत्तरं ॥ ७३ ॥

On the death of husband, his wife succeeds to his estate; in the absence of his wife, his son; in the absence of his son, his nephew, *i.e.*, his brother's son; in the absence of nephew, his Sapindas; in the absence of any of the Sapindas, his daughter's son; in the absence of daughter's son, Bandhujas; in the absence of a Bandhuja, a person belonging to the same Gotra: in this way, in the absence of one, the next person succeeds to the estate in the given order (Shloka 73).

अनपत्ये मृते पत्यौ सर्वस्य स्वामिनी वधू ॥
सापि दत्तमनादाय स्वपुत्री प्रेमपाशतः ॥ ११४ ॥
ज्येष्ठादि पुत्र दायादा भावे पंचत्व मागता ॥
चेत्तदा स्वामिनी पुत्री भवेत्सर्व धनस्यच ॥ ११५ ॥

If a husband dies without leaving issue (अनपत्य 'without santâna) behind him, his wife becomes the owner of all his property also; if the widow has no male relations consisting of sons of her husband's elder or younger brothers and has a daughter whom she loves dearly, if such a widow dies without adopting a boy, then her daughter succeeds to the estate of her deceased husband (Shlokas 114 and 115).

विधवाहि विभक्ता चेत्व्ययं कुर्यात् यथेच्छया ॥
प्रतिषेद्धान कोऽप्यत्र दायादश्च कथंचन ॥ १२४ ॥

If a widow is separate (vibhakta), she can, according to her desire, spend her own property; neither her Dayadas, *i.e.*, her heirs, near or remote, nor any one else has power to prevent her (from spending money) (Shloka 124).

Bhadrabâhu Samhitâ:—This is the oldest of the Jaina Law books, so far known to us. It was written in the 4th Century B. C. The original book of which the Bhadrabâhu Samhita forms a chapter is the *Upasakadhyayana Anga*, one of the twelve *Angas* of the Jainas. This Anga, like most Jaina ancient books, is unavailable. But Bhadrabahu, according to Jaina tradition and the latest Oriental research, was a contemporary of Chandragupta, of whom he was the revered preceptor also*. Thus Bhadrabahu, the author or compiler of these

* Cf. the historical evidence given in the Hindi Magazine, *Jaina Siddhanta Bhaskara* edited by Seth Padmarajaji (of No. 9, Jugmohan-Mullick street, Calcutta). Vol. 1, No. 1, for July to September 1912, pages 11 and the following.

shlokas, flourished about 340 B. C., at least before 365 B. C., (he was the last of the Srutikevalins). The tradition of the Jaina Lord, as given in the *Bhadrabahu Samhita*, must therefore be almost as old as Lord Mahavira himself, and therefore not only of very hoary antiquity, but of unparalleled authority also.

The author of the book, Bhadrabahu Swami, is a figure that towers high and heroic in the dim darkness of Jaina history. He flourished about 365 B. C. (162 years after Lord Mahavira's Nirvana). Chandragupta dreamt 16 dreams, the last one being a dreadful serpent with 12 hoods. On being referred to his spiritual Guru, Bhadrabahu, it was interpreted into a dire* famine of 12 years. These famines were not quite unknown to the neighbourhood of Pataliputra (modern Patna) the capital of the great Mauryan Empire.† Sometime after this, Bhadrabâhu went to beg alms in the city; but a child was crying so lustily that he did not get a hearing after 12 calls. Reading in this the sure advent of the famine, and fearing that it would be impossible for Jaina ascetics to live in accordance with the scriptures, Bhadrabahu started for the South of India, with a large number of his ascetic-disciples. Chandragupta also, being repelled by the sinful world, made his kingdom over to his son, Singhasena, *alias* Bindusara, became a Jaina ascetic under the name of Prabhachandra, and accompanied Bhadrabahu. Near a beautiful hill, *Kata-Vapra*, in Northern Carnatic, Bhadrabahu felt that his end was near. Therefore he sent his disciples on to further south to the countries, Chola and Pandya, and himself stayed on there with Chandragupta Muni, who served the *Guru* in a most devoted fashion, till the end came and the last

* Dr. Hoernle suggests 310 B. C. as the date of this famine. See Mrs. Sinclair Stevenson's 'Heart of Jainism' p. 701 of 1915.

† Buddhist India, by T. W. Rhys Davids, 1903, (London. Fisher Unwin, pp. 40-50.

ceremonies were performed. Even after this, Chandragupta remained devoted to the memory of the *Guru* and constantly worshipped his foot-impressions in that spiritual retirement from the world.

Bhadrabahu Samhita—is written to determine quarrels among members of the same family. *Quarrels lead to passionate* and hostile feelings, and Jainism aims at the suppression and eradication of these, chiefly of anger, pride, deceit and greed (क्रोध, मान, माया, लोभ) as they imprison soul in matter and retard its evolution on to freedom and liberation from mundane misery (See Shlokas 3 and 118).

The Shlokas relied upon by the defendants are Nos. 66 and 110.

They and their translation are given below :—

रक्षंती शयनं भर्तुः पालयंती कुटुंबकं ॥
स्वधर्मनिरता पुत्रं भर्तृस्थाने नियोजयेत् ॥ ६६ ॥

Preserving the husband's bed, protecting the family, and fixed in her religion, she should instal her son in the place of her husband (Shloka 66)

पुत्रस्या प्रजसो द्रव्यं गृण्हीयात्तद्वधूः स्वयं ॥
तस्यामपि मृतायांतु सुतमाता धनं हरेत॥ ११० ॥

If the son dies sonless the property is taken by his wife herself ; on her death, the mother of the son takes the property (Shloka 110).

The high position which a woman is given in the Jaina Law books is evident even from a cursory perusal of the books. Her social religious status is on the same level as that of her husband. In Law she has a very high position in the family. In all important juristic acts she is the necessary coactor with the husband, *e. g.*, in matters of adoption (*Bhadrabahu Samhita*, Shlokas 41, 42, 44 and 45) she succeeds to

the husband's property in preference to his mother (Shloka 76). She has her Stridhan (Shlokas 85 to 89) which on no account can be taken by any one (Shloka 90). In the matter of adoption, her powers are co-extensive with those of the husband alive (Shlokas 41, 42, 44 and 45) or dead (Shloka 75.) As a widow, when a son dies in his parents' lifetime, her position is not intolerable; and, considering the conception of a woman's position even under the Roman Law, the restrictions are really mild (Shlokas 113-117).

Only in one place the modern champion of woman's rights may shrink back aghast, in Shloka 15, where, in illustrating moveable property, the ascetic Bhadrabahu gives "silver, gold, ornaments, clothes, cattle, *women*, etc.," But in the bad old days, slavery in some form or other did exist, and the "women" meant are most likely servants and *Dasis* attached to the house.

The Jaina Law books cited put it beyond doubt that a Jaina childless widow has an absolute and unrestricted power of enjoyment and disposition of her husband's property. Indeed, it would seem that there is a slight suggestion of giving a widow, as an heir, a preferential position even to that of a son, *e. g.*, (see *Vardhamana Niti*, Shlokas 11 and 12) Shloka 14 makes a chaste widow the fullest owner of her husband's property. *Arhana Niti* is even more explicit as to the unlimited rights of the widow. Shloka 52 makes her full owner of her husband's property. Shloka 53 which is not cited by the pleader for the defendants, has a significant wording. It runs :—

कुटुम्बपालने शक्ता ज्येष्ठायाच कुलांगना ।
पुत्रस्य सत्वेऽसत्वे च भर्तृवत्साधिकारिणी ॥ ५३ ॥

"A lady of good family, senior and capable of looking after the family, *whether there is a son or not*, has full powers, like her husband."

The words पुत्रस्य सत्वेऽसत्वे, whether there is a son or not, seem to indicate that a Jaina widow's rights are not limited to the estate of a sonless man.

The language of Shloka 14 of *Vardhamana Niti* has the same significant phrase. The Shloka is given above at page 58. It says :—

If the lady is good, she shall become the owner of all the property of her deceased husband; and, *whether there is a son or not*, she shall have full powers like her husband." The words italicised are represented in the original by सति पुत्रे चवासति, nearly the same phrase as in Shloka 53 of *Arhana Niti*.

Bhadrabahu Samhita also, in Shloka 4, says :—

पित्रोरूर्द्धं भ्रातरस्ते समेत्य वसु पैत्रिकम् ॥
विभजे रन् समं सर्वं जीविते पितुरिच्छया ॥ ४ ॥

"On the death of *father and mother*, all these brothers get together the patrimony and divide it equally among themselves. But during the lifetime of the father (the brothers take only) according to the desire of the father."

The phrase employed is पित्रोरूर्ध्वं, after the *father and mother*. Both the parents stand between the पैत्रिक or family property and the sons taking it, indicating that the widow is as heir prior to the sons. The latter part of the Law that during the lifetime of the father, the brothers take only what the father gives, is reminiscent of the atmosphere of *Patria potestas* and the *Peculiam* of Roman Law. But to turn back to the position of the widow as heir.

The prioritiy of a widow to the son as an heir to her husband is a very remarkable divergence from the Hindu Law on the point. The *Mitakshra* lays down the law as follows :—

पत्नी दुहितरश्चैव पितरौ भ्रातरस्तथा ॥
तत्सुता गोत्रजा बन्धुशिष्यसब्रह्मचारिणः ॥

एषामभावे पूर्वस्य धनभागुत्तरोत्तरः ।
स्वर्यातस्य हृपुत्रस्य सर्व वर्णेष्वयं विधिः ।
वानप्रस्थ यति ब्रह्मचारिणा मृक्थभागिनः ।
क्रमेणाचार्य सच्छिष्य धर्म्म भ्रात्रे कतीर्थिनः ॥
देशांतरगते प्रेते द्रव्यं दायादबांधवाः ।
ज्ञातयो वा हरेयुस्तदा गतास्तैर्विना नृपः ॥
याज्ञवल्क्यः ॥ २।१३५, १३७, २६४ ॥

"The law-fully wedded wife and the daugthers also, both parents, brothers likewise, and their sons, gentiles, cognates, a pupil, and a fellow-student, on failure of the first among them, the next in order is the heir to the estate of one who departed for heaven, leaveng no male issue. This rule extends to all classes.

The heirs to the property of a hermit, of an ascetic, and of a student in theology are in order (that is in the inverse order)—the preceptor, a virtuous pupil and a spiritual brother belonging to the same hermitage.

The wealth of a (trader) dying abroad, shall be taken by his Dayadas (*i.e.*, his lineal descendants), Bandhavas (*i.e.*, relations on the mother's side, beginning with the maternal uncle), agnates, or his partners who may have returned; and, failing these, by the king.—Yajnavalkya. 11. 135-137, 264.

This law is for succession to the estate of a *sonless* man. The Hindu son as such, is taken all at once and without any dispute or hesitation to be the heir to his deceased father in preference to his widowed mother. Why this great divergence betwen the Hindu and Jaina Law? I have ventured to generalise above (at page 27) that " Jaina Law differs from Hindu Law just where it would be expected to—namely, in the

root-principles of it." The present is a case in point. The Hindus and the Jainas have an essentially different outlook on their life in this world and in the next. For the Hindu, the world is God-created, God-governed; and Karmas, only a rule of nature laid down by this God. For the Jainas the world is self-existent, uncreated, eternal; and the Law of Karma merely the inevitable and absolutely indispensable law of cause and effect which governs both the domains of matter and spirit. Religious intermediation is repugnant to the Jaina concepation of the Universe. On the other hand, it is the glorious breath of Hindu spirituality, where there is a God to be propitiated, to be prayed to, and to be looked up to. To consider a lower level of thought and practice, the Hindu follows his dead in their post-mortem condition and provides for their comforts in the world of the dead by sacrifices and rites performed in the world of the living. The *Pindadana* is the soul of the law of Hindu inheritance. There the Jainas part company with their Hindu brethren. The dead take their own destiny with them, and the living cannot affect the course of that destiny. The *Rig Veda*, Hindu prays to the God of fire to give him sons, (*Rig Veda* M. 7, S. 4, 10); he is born burdened with a debt to the manes, which is discharged only by the birth of a son; hence the unlimited jubilation on the birth of the first son (*Taittiriya Samhita*, VI 3, 10, 5); for him the world of men is conquered only by a son and not by other work (*Satapatha Brahmana* 14, 4, 3, 24 25.) So Manu (IX 106) tells us: "On the birth of the first son, a man is freed from the debts to the manes; that (son), therefore, is worthy (to receive) the whole estate." Over against this great, spiritual and mundane indispensibility of the son for Hindu Law, there is the rigid and unemotional doctrine of Jaina Law. The sage *Bhadrabahu* is surprised at these statements of Hindu Law. He says: "By

the birth of the *Dharmaj* (begotten as a duty) son (*i. e.*, the first son), the world calls a man's life fruitful, otherwise he is called sinful. This is very surprising. Men by having sons become religiously meritorious; and by being sonless, sinful. In this world, many men with sons are seen in a low position and begging for grains. And sonless *Tirthankaras* (the Jaina men-gods) are found to attain the five great acquisitions (Human conception, Human birth, Renunciation, Omniscience and Liberation), their lotus-feet are adorable by the gods of gods, and they are possessed of inlight into the three worlds." This knocks away the spiritual basis, upon which the high position of the first son rests in Hindu theory. Thus the first son, as such, has no exclusive or first right of succession in Jaina Law. *Cessante Ratione legis cessat lex ispa.*

But all this is really by the way. These interesting comparisons between Hindu and Jaina Law need not detain me much. The point which I have to decide on the law and evidence in this case is not whether a widow is a preferential heir to her own son, but rather the power of a Jaina childless widow of a separated coparcener, to make a gift of her property by will. But the difference between the Hindu and Jaina points of view at which I glanced above, gives us an insight into the psychology of the two systems of jurisprudence, which gives the key to the divergences between the two.

It may not be inapposite to give just a brief glance at the limited estate which a Hindu widow is supposed to inherit. Mayne's history of this estate, is of course, classical. He holds that originally woman did not inherit at all (Manu ix, 185, 212, 217; Apastambha, Vasistha and Narada). He lays down the genesis of her estate in her right to maintenance by her husband's heirs, provided she was chaste. She also had a right to her husband's separate property. Then, a part of the property was set aside for her maintenance, and

the whole estate was given to her if it was small. Later, even a large estate was given, if the reversioners were well-to-do and the family high, so that the widow should be able to maintain the husband's status in society. To this Mayne adds the influence of *Niyoga*, by which the widow could raise issue to her dead husband. Reversioners naturally disliked the bringing in of a strange male heir into the family; therefore they compromised to give the widow a life-estate on condition of her chastity and consequent impossibility of bringing in a stranger heir into the family, *Hindu Law* (8th Edition), page 731 et seq.

This account is not accepted universally. For example, Mr. J. C. Ghose disputes Mayne's saying that there is "little to be found on the subject in the Hindu writings." Mr. G. C. Sircar says:—"Katyayana is the only authority for curtailing woman's rights in property inherited by them," and that text also refers only to *Stridhana*. He refers to 2 texts of *Vrihaspati*, one laying down that the widow could not take immoveable property, and the other allowing her to take immoveables as well as moveables. (*Hindu Law* by J. C. Ghose, pp. 234-235). As to the woman's incapacity to hold or inherit property, it can be traced back to Baudhayana in the Sutra period. The practice in the Vedic age was certainly different. Yajnavalkya's wives got their husband's property. According to Vijnanesvara, a woman may acquire property by the very same right modes which are open to a man, and her inheritance is also her *Stridhana*. The Mitakshara is quite clear: "also property which she may have acquired by inheritance, purchase, partition, seizure, or finding, are denominated by Manu and the rest *woman's property*." But there is no doubt that the rights of Hindu females are very much curtailed by the decisions of Courts of Law, and the spirit of the old Hindu Law-givers is very much disregarded in these decisions. Yet, even the Privy

Council has held a daughter to take an absolute estate in Bombay, where the Mitakashara applies. And, on the whole, as is well-known in the Bombay Presidency, women have better rights than their Indian sisters elsewhere.

So, it is neither strange in principle nor unknown in practice for Hindu ladies to take more than a life—or, to be accurate, more than a Hindu widow's, estate. The Jaina Law books are clear and emphatic and re-iterant that a Jaina widow has powers over her deceased lord's estate, even as he had himself. There is no mention of any kind of restriction upon a childless widow's powers of use, enjoyment or alienation ; nor is there any hint anywhere of a distinction between ancestral and self-acquired property as the subject-matter of the widow's inheritance. Shloka 73 of *Arhana Niti* gives her a position prior even to that of a son. Shloka 114 refers to the full proprietory capacity of a childless widow, and Shloka 124 recognises the absolute disposing powers of the widow of a separated co-parcener. And *Bhadrabahu Samhita* Sloka 66, invests the widow, even where she has children, with the high function of installing the son in the husband's place. It would seem to refer to a case where a son is a minor and the widow succeeds to her deceased husband ; and, then, when the son attains the years of discretion, the mother instals him in the place of the husband. It is in this light that I am inclined to interpret the evidence of Rai Bahadar Seth Hukumchand (Ex. 49), who desposed as follows :—

"But the husband's property in the first instance descends to and is vested in the wife during the minority of the son. As soon as the son attains majority, *i.e.*, completes his 16th year, the proprietorship *ipso facto* shifts from the widow mother of the son. I know of no instance where a son succeeded the mother on his attaining majority. There have

been cases in which widows gifted away their husbands' property to charity or otherwise."

Thus there is a consensus of authority among the Jaina Law books going so far back in time as the 4th Century B. C.—which period is at least one century older than the great *Lex Hortensia* (286 B. C.) of the Romans—that at least a childless Jaina widow has the fullest rights over her deceased husband's property.

The statement of Law in the Jaina books is thus corroborated by an unprejudiced consideration of Hindu Law. It is supported by judicial decisions also. Only three of the decisions which seem to be directly in point may be considered. The earliest, of course, is the case of Musammat Dakho, in I. L., R. 1 All., p. 688. At page 704 we read :—

"A Jaina sonless widow takes an absolute interest, at least in the self-acquired property of her husband."

The cautious qualification implied in the use of the phrase "at least" is not surprising. Four pages earlier, we read :—

"The Jainas have no written law of inheritance. Their law on the subject can be ascertained only by investigating the customs which prevail among them."

The Law books cited before me were unfortunately not produced before the Allahabad High Court. Otherwise, they would have never said. "The Jainas have no written Law of inheritance." And, without much fear of merely expressing a speculative opinion, I think, that the qualifying words "at least" might not have been used by their Lordships in their finding as to the rights of a Jaina sonless widow, if they had had the advantage of having before them the ancient and authoritative Jaina Law books, which are produced before me. But the case of Musammat Dakho is a certain and early authority that the estate of a Jaina childless widow is different and more than that of a Hindu widow. The question is merely

a question of interpreting the basis of the decision in the Allahabad Case in the light of the Jaina Law books, and of applying that interpretation to the facts of the case before me. I have discussed the texts at length above, and I do not see any reason to limit the absolute estate of a Jaina widow to the self-acquired property of her husband, if he died a separate coparcener.

The remaining two precedents which I follow and which fortify and compel the view of Jaina widow's rights which I have taken, are:—

(1) Original Civil Suit, No. 3 of 1309 Fasli, of our own Sudder Court, Indore, and

(2) Civil Regular Appeal, No. 98 of 1877, in the Court of the Commissioner of Jabalpore.

The Original Civil Suit No. 3 of 1309 Fasli, (Exhibit 82/1) was decided by the Sudder Court, about 12 years ago. In quite clear language, in that decision, the Sudder Court lays it down that the "Jainas or Saraogis, and they are not governed by the Hindu Law in matters of adoption or the widow's right to adopt, as also in matters of succession and inheritance. There is no such estate known among them as a widow's estate, with restrictions as to powers of adoption, alienation or waste.... She can do what she pleases with the estate which has descended to her." I am bound to follow this Sudder Court decision, which is strongly supported by the Jaina Law books produced, and also by the evidence on the record of the practice among the community itself.

The last case that I shall consider is the Appeal before the Commissioner of Jabalpore so far back as 1877. A Jaina widow had alienated her husband's ancestral property. A suit was brought to set aside the alienation, on the ground of her incompetency to make a gift of the ancestral property. She was also a Porwad, like the testatrix in the suit before me.

The case was heard very carefully and, at length, by the learned Commissioner. The Court issued commissions for witnesses in various parts of Central India where the Porwads are mainly found. And, on a full consideration of the evidence, the Commissioner found that "A Jaina Porwar widow being childless, can alienate immoveable property for religious purposes" (vide Exhibit 83).

This last case is of special use, as it is almost on all fours with the material points in the case before me.

To sum up. The Jainas are governed by Hindu Law, if they can neither produce any Law of their own, nor allege and prove a special custom overriding the provisions of ordinary Hindu Law as applicable to the twice-born Hindus. Where such a Law is produced, or such an usage set up and established by a Jaina, Hindu Law is excluded and the Jaina is governed by his own law or usage. See *per* Sir M. E. Smith, in the Privy Council judgment, at page 751 of I. L. R. 4 Cal.: "Neither side appears to have gone into evidence as to the customs of the Jainas, or to show that the rule of inheritance amongst the sect of Jainas was different from the ordinary Law," the implication being that Jaina Law, if any is produced, would govern the Jainas. In the case before me, the defendants have done both. They have produced ancient and authoritative Jaina Law books, which are quite clear on the point in issue before me. They have also given evidence of instances and respectable witnesses to prove that the law as laid down in the books is ractised by the Jainas in their every day life. No doubt is cast on the genuineness or authority of the three Jaina Law books, 2 of which date back to the 11th and 12th centuries A. D and one of them to the age of the great Mauryan Chandragupta in the 4th Century B. C. These Law books give an absolute estate to a Jaina widow. There can be no mistaking the meaning of the Jaina Law on this point. The

evidence of the defendants, oral and documentary, relates to no less than 23 instances of Jaina widows making gifts of their husbands' property and the gifts being valid. The oldest of the instances is abo 40 years old. This is quite enough o establish an usage in a small scattered section of the Jaina community. Even Hindu widows can spend their estates on religious and charitable purpcses. A Jaina widow like Bhagabai could certainly do that. But the powers given to her by the ancient and revered Law of her community are much wider and are not limited either to charitable purposes or to the self-acquired property of her husband. The doctrine of the Jaina books is sound in principle also. It differs from the Hindu Law books just where you would expect it to. The reasons—the spiritual efficacy and need of a son and other male relations to save the soul of the deceased from the post-mortem troubles in the next world—do not obtain among the Jainas, and the widow may have even greater rights than her own sons. But it is not necessary to go into that wider issue in this case; and judicial conservatism and caution make me averse to pronounce any opinion on that as a matter of juristic speculation. The earlier history of Hindu Law, or at least practice of Hindu sages, does not seem nugatory of a woman's right being more extensive than the restricted Hindu widow's estate allows them. This lends some support to the position taken up by the Jaina books.

The argument by the learned pleader for the plaintiffs as to the ancestral character of the property, making it inalienable by the widow, does not hold water. This is practically the only issue in the case. It is not and cannot to-day be seriously disputed that a Jaina childless widow has absolute rights over the self-acquired property of her deceased lord and master. It is only the ancestral property of a separated Jaina coparcener, as to which some doubt may be said to have existed. This

doubt, to my mind, was a child of ignorance of Jaina Sastras, and of lack of acquaintance with Jaina customs and usage. The Jaina Law books and the practice of the Jaina community leave no doubt that the ancestral character of the property does not in any way limit the absolute rights of enjoyment and alienation which the widow of a separated Jaina coparcener has over his property.

Taking this view of the Jaina Law texts and the practice of Jainas as established by the oral and documentary evidence on the record, I repeat my finding that the will of Bhagabai is quite valid and legal.

Finding No. 3. As the lady died intestate with respect to certain items of her property, viz., one pair of gold bands for bangles and one safe, which are in the possession of the defendants and admitted by them or proved against them, I find that the plaintiff as next reversioner is entitled to the following properties :—

1 pair of gold bands for the bangles.

1 safe.

I order these two items to be made over to the plaintiff by the defendants.

The last point taken up by the learned pleader for the plaintiff was that some property in dispute was ancestral property, and, as such, beyond the powers of alienation of the Jaina widow testatrix. This point was taken up no less than one full week after arguments had been finished before me, and I had reserved the case for judgment. The original issues were settled on 15-8-14; and the case before me closed on 22-4-1915; and the new point raised on 29-4-15. I would have certainly rejected the prayer for an issue at such a more than late stage of the proceedings. But in the interests of substantial justice, and to obviate the necessity of a remand in case this judgment is appealed against, I

overruled the recorded and emphatic protest of Mr. Bhandarkar, the learned pleader for the defendants, and, under section 149 of the Civil Procedure Code, allowed the following issue :—

Whether the residential house and shop mentioned in the will (Ex. C) of Bhagabai, were her husband's self-acquired or ancestral property ?

I allowed the plaintiffs to adduce further evidence on this point. This they did on 3-5-15. The parties admitted that there had been a partition of the family about Samvat 1948. The defendants admitted that the main part of the house and the shop were ancestral, but that the testatrix's husband made additions to them. This last part being disputed by the plaintiffs, I examined their witnesses Nos. 6, 7 and 8 (Exs. 77, 78 and 79) Sitaram Bapuji (plaintiffs' witness No. 6, Ex. 77) says : " He made the additions with his own money from the shop, from his self-acquired income, and also from the money which he got on the partition." Ramzan Beg (plaintiff's witness No. 7 Ex. 78) says: " The well and the *Karchana* were built by Pyarchand with his own money and the share he got on partition. Gopal (plaintiff's witness No. 8, Ex. 79) says : Pyarchand built a new well and a *Karchana*. The well is worth Rs. 40 or 50, the *Karchana* is about the same." All these witnesses speak to the late husband of Bhagabai having spent his own money on the additions. The last witness cannot but be biassed against the lady. He says: " She obtained a decree against me for Rs. 200, about 1½ year ago. I have not paid it yet." The other two witnesses (Nos. 6 and 7) both say that Pyarchand spent his own self-acquired income on the additions, along with what he got on the partition. On their own evidence the plaintiffs prove the defendants' statement that the additions were made with Pyarchand's own money. The defendants' witness Mangilal

(defendants' witness No. 11, Ex. 80), says: The site of the *Karchana* is worth Rs. 300, the well about Rs. 75, the wall about Rs. 75 and the *Karchana* Rs. 40 or 50. In re-examination he raised the value of the site to Rs. 400. Defendants' witness No. 12, Bhikasa (Ex. 81), says: "Before the partition, Pyarchand had a separate private business of his own in which he made money." I think Mangilal is slightly exaggerating the value of the well. I find that the site of the *Karchana* is proved to be worth Rs. 300, the well worth Rs. 50 and the *Karchana* itself Rs 45, and that these additions are not proved to have been made by Pyarchand with ancestral *funds*. With the exception of these additions, the residential house and the shop are ancestral property.

The rest of the property in dispute has been neither alleged nor proved to be ancestral. It is the *self-acquired property* of the testatrix's husband, to which, as a childless Jaina widow, she is absolutely entitled (See *Sheosingh Rai* v. *Dahho*, I. L. R. 1 Allahabad, page 688).

So practically the whole claim of the plaintiff is reduced to a contention, as to whether Bhagabai, the deceased Jaina childless widow, could make a valid testamentary disposition of these two items of property which are mainly ancestral. By the will (Ex. C) this property is directed to be sold and the sale-proceeds to be invested in various charitable purposes, *e. g.*, to support a Jaina Saraswati Bhavan at Arrah, and founding a Jaina Boarding House for students, in memory of her husband. If the testatrix were governed by pure Hindu Law, the following principles laid down in *Collector of Masulipatam* vs. *Cavaly Venkata*, 8 M. I. A., at p. 551, by their Lordships of the Privy Council, "for religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that possesses for purely worldly

purposes." Thus even as a Jaina widow, governed by Hindu Law, the testatrix could dispose of the property as she did. But her alienation finds further support in the fact that her will was made on 19-9-1913 and the opening ceremony of the Boarding house took place publicly before 500 Jainas or more, on 26-2-1914, about 6 months after. The plaintiff, Somchandsa, was there, he did not object to the gift or ceremony then. He stated to the Court as follows:—

"I did not protest before those who had assembled on the occasion. I cannot explain why I did not protest then."

His own words are:—

"मुहुर्त के वख़त जात वालों के सामने मैंने बाई के धरम करने के बाबत कोई तकरार करी नहीं. तकरार क्यों वही करी नहीं इसका जवाब मैं नहीं दे सक्ता."

This silence of his is significant, and implies consent. At least, it implies that species of consent which is designated acquiescence. And their Lordships of the Privy Council say (*Loc-cit*): "It may be taken as established that an alienation by her, which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred." A sort of consent is proved here. The character of legal necessity, as a charitable purpose, is indisputable and undisputed. The Hindu Law itself would sanction a disposition like this. But, in view of my findings on the Law and Usage governing the case, the ancestral character of this part of the property makes no difference to the widow's rights of alienation.

One word in conclusion may be relevant. The Jaina Law books, on which reliance is based in this judgment, are the accepted authorities on their Law by leading Jainas *vide* the depositions of Rai Bahadur Danavira Seth Hukumchand, President of the Bharatavarsya Digambara Jaina Sabha, Rai

Bahadur Danavira Seth Kalyanmal of Indore, and others. To ignore the clear meaning and authority of the Jaina Law books will be to deny to the Jaina community the undoubted right of being governed by their own laws. General ignorance of Jaina Law and Jaina tradition among law-givers and law-administrators is no justification for me to ignore the express texts of Jaina Law books and usage of the Jainas and to trample upon the rights of a considerable people in the State. It would be doing injustice to a very important and numerous portion of His Highness the Maharaja Holkar's subjects. No State ever contemplates this. Even in conquered Colonies, where a system of civilised law already exists, this continues in force until altered. *Campbell* vs. *Hall*, 1774, 20 St. Tr. P. 323. And there is no law of any kind anywhere *which abrogates Jaina Law, or divests it of its authority.* Indeed, as to India, Sir William Jones said in 1788:—

"Nothing could be more obviously just than to determine private contests according to those laws which the parties themselves had ever considered as the rules of their conduct and engagements in civil life. Nor could anything be wiser than, by a legislative act, to assure the Hindu and Muselman subjects of Great Britain that the private laws, which they severally hold sacred and a violation of which they would have thought the most grevious oppression, should not be superseded by a new system, of which they could have no knowledge and which they must have considered as imposed on them by a spirit of rigour and intolerance (Quoted in preface to Digest of Hindu Law by Colebrooks (17th December 1796, p. v-vi).

This sums up the position so justly that I make no apology for repeating this classical passage. On the ground of policy and *stare decisis* also, the course I have adopted is the only possible course. Ignoring the authority of the Jaina law texts,

and imposing Hindu Law upon Jainas, even when they have an express law of their own, would be not only unjust but unwise, and it would unsettle many and many a charitable and otherwise settled gifts and wills made by Jaina widows of their husbands' worldly goods. It may cause an unusual multiplicity, of suits, a disturbance of many an ancient trust and charity, and great dissatisfaction in the community of having been deprived of the right of being governed by their own laws. Thus policy, principle, precedent and practice of the community all constrain me to admit the authority of the sacred law books of the Jaina community and to give effect to their mandates, especially when they are fortified by evidence of usage, in my adjudication of the case before me.

Therefore the Court's order is:

I decree the plaintiff's suit to the extent of one pair of gold bands for bangles and one safe, and order delivery of them or payment of their value by the defendants to the plaintiff. I declare the will (Ex. C.) of the deceased Bhagabai to be valid and legal. I dismiss the suit of the plaintiff, with the exception of the two items decreed above. Costs to be paid by the parties proportionately to the parts of the claim dismissed and decreed. For the purposes of the decree, the safe is worth Rs. 25 and the gold bands, if not delivered in specie, are to be worth Rs. 125.

(Sd.) J. L. JAINI.

16th August, 1915.

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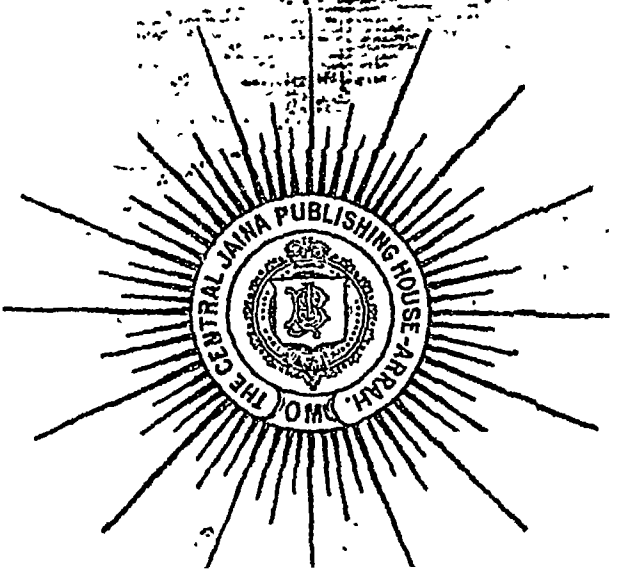

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