Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Rajah Vurmah Valia v. *Ravi Vurmah Mutha, from the High Court of Judicature at Madras; delivered December* 1*st*, 1876.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THIS is an appeal by the person who has been throughout the argument called the Cherakel Raja against a decree of the Civil Court of Tellicherry and a decree of the High Court of Madras, both dismissing his suit. The Rajah claims to be the assignee of the Uraima right, or right of management, of the Tracharamana pagoda and its subordinate chetroms, under an assignment from the persons known as the Urallers of that religious foundation. The early history of the foundation seems to be lost; no trustworthy account of its origin is to be found in the evidence taken on the remand by the High Court. The nature of the existing institution, however, is shown pretty clearly upon the proceedings. It appears that the so-called pagoda is not a pagoda in the ordinary sense of the word, but a mere platform in the middle of the forest, upon which, once in every year, certain ceremonies take place in honour of a particular idol; that to this annual festival a large number of persons resort; that considerable presents and offerings are made there by the worshippers; and that the festival is a matter of general interest to the Hindoo inhabitants of

40688. 150.—1/77. Wt. 6305.

that part of the country. It also appears that the property of the trust consists partly of a large landed estate, and partly of jewels of considerable value, which were kept in a place called the Karimpana Goprum. The Rajah having obtained from the Urallers the assignment contained in Exhibit E, succeeded in getting into possession of the whole or greater portion of the landed property; but his right to the custody of the jewels was disputed by the Defendants to this suit and others; who actively resisted his attempt to remove them from their ordinary place of custody. There being a real or supposed risk of a breach of the peace, the usual reference to the magistrate took place. Whilst that was pending, the Rajah asserted that the Goprum had been broken open and some of the jewels abstracted. However that may be, it is certain that the persons accused of having robbed the Goprum were acquitted of any criminal offence; that the jewels which they were said to have stolen were placed in the hands of the magistrate, who passed an order forbidding the Rajah to remove the property, or any portion of it, from its usual place of security in the Goprum until he had the authority of the Civil Court for so doing; and directing that the keys of the room which contained the jewels should remain in the hands of the person who is the third Defendant on this record. Upon this the Cherakel Rajah brought the present suit.

It seems to their Lordships that there was some little confusion and misconception in the Indian Courts as to the nature of the suit. The Civil Judge speaks of it as a suit for specific performance. Again, Mr. Justice Holloway, in the second ground of his judgment on the appeal, seems to draw a distinction between the jewels and the other property belonging to the

institution, and to express an opinion that in order to dispose of the Plaintiff's claim, it was sufficient to say that the jewels having been devoted to the service of an idol, were *extra commercium*, and could not pass under the assignment. The suit is clearly not one for specific performance. It is not brought against the other parties to the contract, the Urallers, but against persons, strangers to the contract, who are disputing the right of the Plaintiff under his assignment to take possession of a portion of the property belonging to the pagoda.

Again, if it be conceded that the assignment has legally transferred all the rights of the Urallers to the Rajah, and that the Urallers had an unqualified right to the custody of these jewels, and the power of removing them to any place they pleased, and of keeping them there, it would hardly be an answer to the suit to say that the jewels, being devoted to an idol, were *extra commercium*. The suit seems to their Lordships to be in the nature of an action for detinue, brought to recover jewels, the right to the custody of which the Rajah says has passed to him by virtue of the assignment, wherein the Plaintiff has to make out his title to the goods, which by an apt plea has been put in issue.

The parties having put in their written statements, certain issues were settled in the cause.

Of these their Lordships have only to deal with the first and second. The first is, was the deed of assignment valid? the second, has the Plaintiff thereby acquired all the rights of the Urallers?

It is to be observed, however, that this second issue covers something more than the broad and general question whether the Urallers were legally competent to transfer the property of this pagoda to an individual upon the trusts upon which they themselves held it. If this question

be decided as the Courts in India have decided it, there is of course an end of the Plaintiff's case. But if it were decided in his favour, a further question would arise, viz., whether, according to the constitution of this particular institution, the concurrence of the Kottayam Rajah or that of some of the ministerial officers of the institution, and in particular of the third Defendant, was not necessary in order to validate the assignment. Upon these and other questions relating to the rights and powers of the Defendants, which are more distinctly raised by the subsequent issues, Mr. Mayne has not as yet addressed their Lordships; and the conclusion to which their Lordhips have come renders it unnecessary to discuss them. They propose therefore to consider only the broad and general question decided by the Indian Courts, viz., whether the Urallers were legally competent to transfer their Uraima right, by the Exhibit E.

It is admitted that according to the constitution of the institution the Urallers for the time being were to be the Karnavens or chief members of four different Tarwads. It was, therefore, presumably the intention of the founder that the Uraima right should be exercised by four persons representing four distinct families.

The first question is, whether, independently of custom, persons holding such a trust are capable of transferring it at their own will. No authority has been laid before their Lordships to establish this proposition; principle and reason seem to be strongly opposed to such a power, and particularly to such an exercise of it as has taken place in this instance. The unknown founder may be supposed to have established this species of corporation with the distinct object of securing the due performance of the worship and the due administration of the property by the instrumentality and at

the discretion of four persons capable of deliberating and bound to deliberate together; he may also have considered it essential that those four persons should be the heads of particular families resident in a particular district, open to the public opinion of that district, and having that sort of family interest in the maintenance of this religious worship which would insure its due performance. It seems very unreasonable to suppose that the founder of such a corporation ever intended to empower the four trustees of his creation at their mere will to transfer their office and its duties, with all the property of the trust, to a single individual who might act according to his sole discretion, and might have no connection with the families from which the trustees were to be taken. Such a transferee might be a powerful man, as probably this Cherakel Rajah is, and therefore the less amenable to public opinion, the less capable of being reached by the Courts, and the more likely to deal with the institution with a high hand. Mr. Mayne almost admitted that the broad principle *delegatus non potest delegare* would *primâ facie* apply to such a case. He argued, however, that the decisions of the Court of Chancery, of which some have been cited in the judgment of the Civil Judge, are of no authority upon a question arising between Hindoos touching a Hindoo religious foundation; and he relied on various cases decided in India, as favouring, if they do not directly affirm, the propositions which the Appellant has to establish. In their Lordships' opinion, the authorities cited by him do little or nothing to advance the Appellant's case. In the first the decision was against the particular transfer in question. The authority relied upon was a mere expression of opinion on the part of certain pundits, founded on the text of the Dayabhaga (a treatise not necessarily of

authority except in Bengal), that a certain deed of gift executed by the owner of lands in Bengal would carry Dewutter lands with the obligation of keeping up the worship of the idol. The next case which was cited from the Bengal S. D. A. Reports for 1850 really has no application to the present; or, if it has any, is inconsistent with the Appellant's contention. The Court then said, "But a further objection arises as to the Plaintiff's claim, viz., that were the deed established, "and were it shown that it was the intention "of the donor to transfer to the donee his rights "of office as well as personal rights, and also "the duties incumbent on the office of Mohunt, "there has been no public acknowledgment of "the Plaintiff by the assembly of Mohunts and "others in due form, as is proved on the Record "to be customary on the death of one Mohunt "and the appointment of his successor." In that case, therefore, evidence of what the constitution of the foundation was had been given; the transfer which was insisted upon was shown to be inconsistent with that constitution, and was treated as invalid.

Again, the preponderance of the authorities in Madras appears to be against the present contention. The first case, cited from the first volume of Madras High Court Reports, decided that the assignment in question was not valid, because all the Urallers had not joined in it.

It cannot be inferred from such a ruling that there was any implied decision, or even, as Mr. Mayne would put it, a dictum in favour of the proposition that an assignment executed by all the Urallers of any foundation of this kind would operate as an effectual transfer of their trust. The Court merely decided on one patent defect of title, without considering whether, if that defect had not existed, the title could have been supported.

The next case was that before Messrs. Innes and Collette. That is to some extent in favour of Mr. Mayne's view, though it related to a charitable and not to a religious foundation, and we have not clearly before us what the facts were as to that foundation. That the broad distinction which the Civil Judge takes between a religious and a charitable foundation can be supported, their Lordships are not prepared to say. Then came the decision of Mr. Justice Holloway when he was a Judge of Calicut, which is set out at page 396 of this Record. It is said that the High Court afterwards remanded this cause for the trial of certain issues as to the alleged rights of the Plaintiff, who, it may be observed, was the same person as the Plaintiff in the present case. Some of those rights, however, were different from that now asserted. The Plaintiff did not there claim, as here, only under an assignment from certain Urallers. He also set up superior rights to those of the Urallers, claiming a power to remove as well as a power to appoint them. It is not shown to their Lordships' satisfaction that Mr. Justice Holloway's general position in that case was finally or conclusively overruled by the High Court.

This being the state of the authorities, their Lordships are of opinion that there is no authority binding even on the Court of Madras which is inconsistent with the judgments under appeal; that the general principle affirmed by those judgments is correct; and consequently that the Urallers had no power under what may be termed the common law of India to transfer their Uraima right to the Plaintiff, the Chereka] Rajah.

But it is said that in India, and particularly in that part of India in which this pagoda is situated, custom must prevail against the general law. That such would be the consequence of

a well proved and established custom their Lordships do not deny. In the present case, however, the Civil Judge has distinctly found against the existence of the custom; and although the High Court has not dealt at large with the evidence given in the cause, Mr. Justice Kindersley, at all events, seems to have treated the alleged custom as not established. If the two Courts had clearly concurred in a finding that the custom had not been established, their Lordships would have applied their ordinary rule in such cases; but there being some slight doubt about the effect of the second judgment, they have allowed Mr. Mayne to draw their attention to the evidence. After hearing that evidence they feel bound to say that it is wholly insufficient to induce them to overrule the finding of the Civil Judge. It appears to them that no general custom such as that contended for can be established by such very vague and loose evidence. They would further observe that they have grave doubts whether any such general custom can, in cases like the present, be set up and proved in that way. They conceive that when, owing to the absence of documentary or other direct evidence of the nature of the foundation and the rights, duties, and powers of the trustees, it becomes necessary to refer to usage, the custom to be proved must be one which regulates the particular institution. This seems to have been decided in the case of *Greedharee Doss* v. *Nundokissore Doss Mohunt*, which is reported in the 11th Moore's Indian Appeals. That came before this Board, on appeal from a decision of the High Court of Bengal, when Sir Barnes Peacock was Chief Justice; and in the Chief Justice's judgment, which was afterwards affirmed by this Board, there is this passage: "Numerous cases "have been cited to show what was the usage, "but the law to be laid down by this Court

" must be as to what is the usage of each " Mohuntee. We apprehend that if a person " endows a college or religious institution, " the endower has a right to lay down the " rule of succession; but when no such rule has " been laid down, it must be proved by evidence " what is the usage, in order to carry out the " intention of the original endower. Each case " must be governed by the usage of the particular " Mohuntee." And their Lordships on the Appeal said, "It is to be observed that the only law as to " these Mohuntees and their offices, functions, and " duties, is to be found in custom and practice, " which is to be proved by testimony; and no " evidence has been adduced before their Lord- " ships to show that any appointment has ever " been made in reversion on any former " occasion." That seems to their Lordships to point, though perhaps less distinctly than the passage in Chief Justice Peacock's judgment, to the necessity of proof of the custom of the particular Mohuntee. The same principle was recently affirmed by this Board, in the case of the *Rameswarem Pagoda*, reported in 1 Law Reports, Indian Appeals, page 209. At page 228 their Lordships observe: "But the constitution and rules " of religious brotherhoods attached to Hindoo " temples are by no means uniform in their " character, and the important principle to " be observed by the Courts is to ascertain, if " that be possible, the special laws and usages " governing the particular community whose " affairs become the subject of litigation, and to " be guided by them. That principle was laid " down by this Committee in an appeal involv- " ing the succession to the office of mohunt of " a richly endowed mutt in Rajgunge, in these " terms." And the judgment then cites the passage, from the 11th Moore's Indian Appeals which has been just read, and proceeds to consider the evidence of usage as to the particular pagoda.

Their Lordships are of opinion that no custom which can qualify the general principle of law has been established in this case; and they desire to add that if the custom set up was one to sanction not merely the transfer of a trusteeship, but as in this case the sale of a trusteeship for the pecuniary advantage of the trustee, they would be disposed to hold that that circumstance alone would justify a decision that the custom was bad in law.

Upon these grounds their Lordships are of opinion that no case has been made for interfering with the decrees under appeal; and they must humbly advise Her Majesty to affirm those decrees and to dismiss this Appeal.

The Respondents not having appeared there will be no order as to costs.